Citation: *R. v. Duke,* 2024 YKTC 49

Date: 20241126
Docket: 23-00645A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

TAYLOR DUKE

Appearances:
Madeleine Williams and
Arthur Ferguson — Counsel for the Crown
Jennifer Budgell — Counsel for the Defence

This decision was delivered from the Bench in the form of Oral Reasons. The Reasons have since been edited without changing the substance.

RULING ON APPLICATION

[1] CAIRNS T.C.J. (Oral): Taylor Duke is facing a 35-count Information alleging various charges under the *Criminal Code* and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. It is Mr. Duke's intention to challenge the constitutionality of the judicial authorizations issued and the admissibility of the evidence they yielded. As a preliminary matter, Mr. Duke seeks leave to cross-examine the affiants of the various Informations to Obtain ("ITOs") filed in support of the authorizations.

[2] Four authorizations were issued:

- ITO #1 - s. 492.1(2) of the *Criminal Code* - Tracking Warrant granted July 25, 2023;

- ITO #2 - s. 487 of the *Criminal Code* - Search Warrant granted August 23, 2023;

- ITO #3 - s. 487.014 of the *Criminal Code* – Production Order granted September 12, 2023; and

- ITO #4 - s. 487 of the *Criminal Code* – Search Warrant granted November 8, 2023.

[3] Leave to cross-examine is sought only in respect of three of the authorizations. As none of the evidence obtained pursuant to the Production Order granted September 12, 2023, will be relied on by the Crown in Mr. Duke's trial, leave is not sought to cross-examine the affiant of ITO #3 made in support of the Production Order.

[4] Cst. Cote is the affiant of ITO #1, filed in support of the Tracking Warrant. Cst. Kirstein is the affiant of ITOs #2 and #4, filed in support of the Search Warrants.

[5] The issue of standing in relation to the tracking warrant and the search warrant granted November 8, 2023, is conceded by the Crown. Mr. Duke's standing to challenge the Search Warrant granted August 23, 2023, in relation to the residence at 30 Takhini Meadows Drive is disputed and arguments on that issue were heard as part of this Application.

Standing - s. 487 of the *Criminal Code* - Search Warrant granted August 23, 2023

[6] Standing is merely the opportunity to argue the issue. In order to be granted standing, Mr. Duke must establish, on a balance of probabilities, that he had a reasonable expectation of privacy in the subject matter of the search, namely, the residence at 30 Takhini Meadows Drive.

[7] *R. v. Edwards*, [1996] 1 S.C.R. 128 is the governing case. A claim of an expectation of privacy in a place must be both objectively and subjectively reasonable. Simply put, without a reasonable expectation of privacy, the accused has no standing to challenge the search (*R. v. Atta*, 2022 ONCJ 589, at para. 20).

[8] The *Edwards* decision, at para. 45, provides a non-exhaustive list of criteria for consideration. In relation to the application for standing, counsel filed an Agreed Statement of Facts ("ASF"), with exhibits, which I rely on in applying the *Edwards* criteria:

(i) Presence at the time of the search;

- Mr. Duke was present at the time of the search.

(ii) Possession or control of the property or place searched;

- Mr. Duke had possession of the residence and was the sole occupant when the warrant was executed.

(iii) Ownership of the property or place;

- Mr. Duke was not the owner. He was a tenant. He had entered a lease with the property manager using a false name.

(iv) Historical use of the property or item;

- Mr. Duke used the property as his residence between mid-May 2023 and the date of his arrest in August 2023. He paid rent in cash and, on occasion, interacted with the property manager about the residence.

(v) The ability to regulate access, including the right to admit or exclude others from the place;

- As the occupant of the residence, Mr. Duke had the ability to admit or exclude others from the residence.

(vi) The existence of a subjective expectation of privacy;

- Only a modest evidentiary foundation is required to meet this element. In lieu of calling evidence, Mr. Duke can rely on the Crown's theory that he was living in the residence for the purpose of establishing his subjective expectation of privacy (*R. v. Jones*, 2017 SCC 60, at paras. 19, 20, and 22). The factors underlying the Crown's theory were put before me through the ASF. I

accept that Mr. Duke had a subjective expectation of privacy.

(vii) The objective reasonableness of the expectation.

- It is this element that is most disputed in this Application for standing and which requires further analysis.

[9] Counsel for Mr. Duke argues that, given the factors listed above, Mr. Duke's expectation of privacy was objectively reasonable, given the totality of circumstances. Further, Mr. Duke's counsel argues that no single factor controls the analysis, and no single factor is dominating. That said, she notes that control and access have been found to be key considerations in territorial privacy claims, such as this.

[10] The Crown argues that Mr. Duke's expectation of privacy is not objectively reasonable, pointing out that Mr. Duke entered the lease under a false name, paid the rent in cash, was non-compliant with a court order requiring him to reside in British Columbia and would have been aware that there were multiple warrants for his arrest. The Crown also says that, while Mr. Duke had the physical ability to regulate or control access to the residence, he did not have the legal right to do so because he used a false name on the lease. The Crown equates these factors to the "elaborate fraud" undertaken by the accused in *R. v. Van Duong*, 2018 ONCA 115.

[11] Both the Crown and counsel for Mr. Duke provided me with case law on the issue of whether there is a reasonable expectation of privacy in situations where an

accused has unlawfully or fraudulently occupied a place. I have considered these cases in coming to my decision.

False Name

[12] Use of a false name by Mr. Duke is only one factor to consider and I am not persuaded that it alone vitiates Mr. Duke's reasonable expectation of privacy in the circumstances before me. As set out in the ASF, Mr. Duke lived at the residence between May and August 2023, he paid rent directly and interacted with the property manager. While there are likely legal consequences to entering a lease fraudulently, I do not find that Mr. Duke's objective expectation of privacy interest was vitiated.

Warrants

[13] During the hearing of this Application, the impact the outstanding warrants and Mr. Duke's non-compliance with a Release Order requiring him to reside in British Columbia had on his expectation of privacy were the subject of much argument. Having considered these arguments, I find that the existence of the warrants and non-compliance with the Release Order do not undermine the reasonableness of Mr. Duke's objective expectation of privacy at the residence. Above, I have reviewed the *Edwards* factors, which appear to require me to examine the directness or proximity of Mr. Duke's connection to the residence. Neither the warrants nor release order assist with that analysis as they are independent of Mr. Duke's connection to the residence.

[14] In my view, the existence of the warrants and the Release Order suggest an explanation for Mr. Duke's use of a false name to enter the lease. In other words, it

would not be unreasonable to infer that Mr. Duke was hoping to evade capture by the police and his use of a false name on the lease was part of that effort. However, I am not persuaded that this scenario does anything more than possibly attenuate his objective expectation of privacy in the residence.

[15] To summarize, as I understand it, the Crown's argument is that Mr. Duke had no right to reside in the residence as he had gained access through fraud – the false name. This, coupled with the existence of the warrants for his arrest, the non-compliance with the order requiring he reside in British Columbia, and payment of rent in cash, arguably present a constellation of factors that undermine the objectiveness of Mr. Duke's reasonable expectation of privacy. However, my view is that many of these factors support an argument that Mr. Duke was in hiding from police, hoping to evade arrest. In the circumstances, I am not persuaded that the warrants and apparent non-compliance with the court order undermine his expectation of privacy in the residence he leased under a false name. I note that the Crown was unable to provide me with any case law to support their position that the existence of the outstanding warrants and the failure to comply with the court order undermined or vitiated Mr. Duke's reasonable expectation of privacy in the warrant. Considering the totality of circumstances, I find that Mr. Duke had a reasonable expectation of privacy in the residence and, as a result, has standing to challenge the Search Warrant issued August 23, 2023.

Leave to Cross-Examine

[16] In seeking leave to cross-examine the affiants of the ITOs, counsel for Mr. Duke argues that the authorizations are both facially and sub-facially invalid. The proposed

areas of cross-examination for each affiant have been provided to the Court and are addressed below.

[17] Crown Counsel opposes the leave application in relation to ITO #1 on the basis that the concerns raised are facial and can be addressed through argument. In addition, it is argued that the proposed cross-examination seeks to elicit further material information and should not be permitted. In relation to ITO #2 and #4, Crown Counsel has identified areas of cross-examination it concedes and areas it opposes.

Law

[18] Leave must be obtained to cross-examine the affiant of an ITO and should be granted where it is necessary to enable an accused to make full answer and defence. Granting leave is a discretionary decision. In such an application, the accused must show a basis for the view that cross-examination will elicit testimony tending to discredit one of the preconditions of the authorization.

[19] In considering whether to grant an application for leave to cross-examine, the court must be mindful of the competing interests at stake, including the obligation to make effective use of limited judicial resources by avoiding unnecessary and time-consuming proceedings (*R. v. Pires; R. v. Lising*, 2005 SCC 66, at para. 24).

[20] In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, the Court expressed the test for cross-examination of an affiant as follows, at para. 88:

> …Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the

> cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.

[21] In *Pires,* at para. 69:

> …the threshold test for determining whether cross-examination should be allowed is separate and distinct from the ultimate question of whether the authorization is valid. Hence, in determining whether the threshold test has been met, the trial judge cannot decide the question simply on the basis that other parts of the affidavit would support the authorization. The focus, rather, must be on the likely effect of the proposed cross-examination and on whether there is a reasonable likelihood that it will undermine the basis of the authorization. ...

[22] Further guidance in *Pires* regarding how to approach leave applications, at para. 40:

> ...[The] leave requirement is simply a means of weeding out unnecessary proceedings on the basis that they are unlikely to assist in the determination of the relevant issues. The reason that the test will generally leave just a narrow window for cross-examination is not because the test is onerous — it is because there is just a narrow basis upon which an authorization can be set aside. Hence, in determining whether cross-examination should be permitted, counsel and the reviewing judge must remain strictly focussed on the question to be determined on a *Garofoli* review — whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted. However, if the proposed cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization. ...

[23] I am mindful that the focus of the cross-examination is not the ultimate accuracy of the information relied upon in the ITO but rather the reasonableness and honesty of the affiant's belief as to the existence of the reasonable grounds (*Pires,* at paras. 41 to 43).

[24] Both Mr. Duke and the Crown concede that there were reasonable grounds to believe an offence had been committed. As such, leave to cross-examine on that basis is not sought.

[25] As Mr. Duke seeks leave to cross-examine the affiants of more than one ITO, each will be addressed individually.

ITO #1

[26] Cst. Cote affirmed ITO #1 in support of an application for a tracking warrant under s. 492.1(2) of the *Criminal Code*, which reads*:*

> A justice or judge who is satisfied by information on oath that there are reasonable grounds to believe that an offence has been or will be committed under this or any other Act of Parliament and that tracking an individual's movement by identifying the location of a thing that is usually carried or worn by the individual will assist in the investigation of the offence may issue a warrant authorizing a peace officer or a public officer to obtain that tracking data by means of a tracking device.

[27] Mr. Duke argues that Cst. Cote's grounds were based "entirely on vague, unverified information from a confidential informant that was not compelling, not credible, and not corroborated". It is also argued that ITO #1 contains highly prejudicial information that adds nothing to the affiant's grounds for the tracking warrant. Finally, Mr. Duke argues that the affiant had no grounds to believe the cell phone, which was the subject of the tracking warrant, was "usually carried or worn" by Mr. Duke.

[28] The areas proposed by Mr. Duke for the cross-examination of Cst. Cote are:

(a) The police failure to corroborate the information provided by the confidential information (ITO #1, paras. 12 and16).

(b) Cst. Cote's understanding of the "three C's" for assessing information received from confidential informants (as outlined in *R. v. Debot,* [1989] 2 S.C.R. 1140).

(c) Cst. Cote's understanding of the statutory preconditions for the issuance of a tracking warrant under s. 492.1(2) of the *Criminal Code*.

(d) The basis for Cst. Cote's belief, if any, that the subject phone number was "usually carried or worn by" Mr. Duke.

(e) Cst. Cote's experience with and understanding of how phone numbers and cell phones are used in drug trafficking operations.

(f) The inclusion of information relating to an arson that Mr. Duke was never charged with, how it related to her grounds, and her failure to advise the issuing justice that Mr. Duke was never charged in relation to the arson (ITO #1, paras. 15 and 16).

[29] With respect to para. (a), I am not persuaded that cross-examination will assist me in determining a material issue. Whether corroboration of the confidential informant's information was required in the totality of the circumstances can be addressed through argument. I am also not persuaded that the cross-examination of Cst. Cote proposed in paras. (b), (c) and (e) has a reasonable likelihood of undermining the basis for the authorization that is not captured by the cross-examination proposed in para. (d). In my view, para. (d) relates to the statutory preconditions and is a proper

area for cross-examination. Leave is denied in relation to the areas proposed in paras. (a), (b), (c) and (e). Leave is granted in respect of para. (d).

[30] With respect to para. (f), I am mindful that leave to cross-examine is not the general rule (*R. v. Garofoli*, [1990] 2 S.C.R. 1421, at para. 89). I agree with Mr. Duke that the inclusion of information relating to the arson is concerning and, as his counsel put it, "frowned upon". Counsel for Mr. Duke argues that the affiant's credibility is in issue and cross-examination on *why* this information was included should be allowed. However, while an affiant's own credibility may be material on an application for leave to cross-examine, if the credibility issues or misleading statements do not go to the foundation of the authorization, leave to cross-examination may be denied (*Pires*, at para. 68). Similarly, as stated in *R. v. Green*, 2015 ONCA 579, at paras. 34 to 36, if the ITO contains statements that are deliberately misleading and sufficiently significant to place the credibility of the entire ITO in issue, leave to cross-examination should generally be allowed.

[31] In argument, Mr. Duke's counsel drew my attention to the decision of *R. v. Paryniuk*, 2012 ONCJ 852, where the ITO included information about numerous serious charges (without including the outcome). The inclusion of this information was called "spectacularly prejudicial" in *R. v. Paryniuk*, 2017 ONCA 87, at para. 30. In this case, I do not find that the statement in the ITO comes anywhere near meeting the level of concern identified in *Green* or *Pires*. There is no suggestion on the face of the ITO that charges were laid. In my view, the information about the alleged arson does not go to the foundation of the authorization nor is it sufficiently significant that it places the

credibility of the entire ITO in issue. Leave is denied. The impact of including this information in the ITO can be addressed in argument.

ITO #2

[32] Cst. Kirstein swore ITO #2 in support of a Warrant to Search pursuant to s.487 of the *Criminal Code*, which in relevant part reads:

> (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
>
> ...
>
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence...
>
> ...
>
> may at any time issue a warrant authorizing a peace officer…
>
> ...
>
> (d) to search the building, receptacle or place for any such thing and to seize it…

[33] Leave to cross-examine is granted in relation to the following paragraphs, each having been conceded by the Crown:

a) Cst. Kirstein's use of language identifying the phone numbers as belonging to either Taylor Duke or the co-accused Sacho Jack: ITO #2 – paras. 6, 7, 8, 17, 18, 19, 20, 21, and 23;

b) paragraph 27 regarding Cst. Kirstein's belief that individuals who commit offences with firearms do not dispose of them; and

c) paragraph 15 in relation to the omission of 3 material facts from Shane Frost's statement to police, namely:

- Mr. Frost's denial that the shooting had anything to do with drugs and money;
- Mr. Frost's denial of previous business dealings with Mr. Duke; and
- Mr. Frost's admission that he was intoxicated when he was picked up by Mr. Duke.

ITO #3

[34] Crown counsel advised that none of the evidence obtained through the Production Order granted on the basis of ITO #3 will be tendered at the accused's trial. As such, Mr. Duke is not seeking leave to cross-examine Cst. Kirstein who is the affiant of ITO #3.

[35] However, Mr. Duke has advised that he seeks to cross-examine Cst. Kirstein on the statement made at para. 31 of ITO #3 as part of the cross-examination on ITO #2. As this proposed area of cross-examination is directed at the reasonableness and honesty of Cst. Kirstein's belief at the time ITO #2 was drafted, leave is granted.

ITO #4

[36] Cst. Kirstein swore ITO #4 in support of a Warrant to Search pursuant to s. 487 of the *Criminal Code*. The relevant text of that section is set out above.

[37] The Crown has identified several proposed areas of cross-examination that are not contested. Using the paragraph lettering in the list of proposed questions provided by counsel for Mr. Duke, I will grant leave to cross-examine as follows:

a) Cst. Kirstein's use of language identifying the phone numbers as belonging to either Taylor Duke or the co-accused Sacho Jack:

- ITO #4 – paras. 7, 8, 9, 11, 33, 34, 35, 36, 37, 39, 43, and 73 (page 40, 1 and 2).

g) the basis for the Cst. Kirstein's belief that the video of Shane Frost's shooting may be located on the two cell phones seized from the residence;

h) the omission of certain facts from Shane Frost's statement to police: paras. 26(a), 28, and 29, namely:

- Mr. Frost's denial that the shooting had anything to do with drugs and money;
- Mr. Frost's denial of previous business dealings with Mr. Duke; and
- Mr. Frost's admission that he was intoxicated when he was picked up by Mr. Duke.

[38] Mr. Duke also advances other areas for cross-examination of Cst. Kirstein as follows:

(b) Cst. Kirstein's failure to consider the possibility that the phone number described as Mr. Duke's may never have been used by him at all, and that the phone number described as Sacho Jack's may never have been used by Mr. Jack at all.

(c) Cst. Kirstein's experience and understanding of how phone numbers and cell phones are used in drug trafficking operations.

[39] The law is clear that there is no automatic right to cross-examination and the onus is on the applicant to demonstrate an evidentiary basis for cross-examination. I note these areas of concern are not tied to any specific ITO. No evidentiary basis has been provided to ground these questions; in my view, they are speculative. I am not satisfied that cross-examination in these areas is necessary for Mr. Duke to make full answer and defence or that there is a reasonable likelihood that it would undermine the basis for the authorization. Leave is denied.

(cc) Cst. Kirstein's knowledge of the fact that the phone numbers purported to belong to Mr. Duke and Mr. Jack were provided by a confidential informant and his knowledge that police had failed to corroborate that information.

[40] I am satisfied that cross-examination on Cst. Kirstein's use of language identifying the phone numbers as belonging to either Taylor Duke or the co-accused Sacho Jack will address this issue. As leave to cross-examine is granted on those areas proposed by Mr. Duke, set out above, leave is denied on this ground.

(f) Cst. Kirstein's statement at paragraph 29 that Mr. Jack "probably" video recorded the shooting, contrasted with his statement at paragraph 67 that "Frost says he believes the shooting was video recorded."

[41] Here Mr. Duke points to an inconsistency in language used by Cst. Kirstein in the ITO. Simply pointing to inconsistencies is not sufficient to establish that cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization (*Pires*, at paras. 40 to 44; *R. v. Ambrose*, 1994 CanLII 1378 (ONCA), leave to appeal refused, [1995] S.C.C.A. No. 28, at para. 7). I have not

been persuaded that anything will be added by cross-examining Cst. Kirstein on this point. Leave is not granted.

> (i) Cst. Kirstein's inclusion of prejudicial information at paragraph 53 concerning the arrest of Tyra Benjamin for cocaine possession in Old Crow in May 2023 and his conclusory statement [at paragraph 67 b.] that the shooting of Mr. Frost may be related to the drug seizure.

[42] Mr. Duke has not established how cross-examination of Cst. Kirstein on this information would elicit testimony of probative value to the narrow issue for my consideration, that is, whether there is a reasonable likelihood that it will undermine the basis to issue the authorization. The analysis set out above in relation to ITO #1 and the arson applies here. As with the information about the arson in ITO #1, the inclusion of this information in the ITO can be addressed in argument.

> (j) The basis for Cst. Kirstein's belief that evidence dating back to July 22, 2022 would be found in the cellphones seized from the residence.
>
> (k) The basis for the various assertions listed at paragraph 73 of ITO #4.

[43] A statutory precondition for issuance of the warrant is that Cst. Kirstein has reasonable grounds to believe that evidence will be found in the place searched, in this case, the two cell phones identified in the ITO as Exhibits PE127 and PE156. Here, with respect to para. (j), given the time span of the warrant, Mr. Duke seeks to cross-examine Cst. Kirstein on the basis for his belief that evidence would be found on the cell phones dating back to July 2022. Leave to cross-examine Cst. Kirstein is granted on this issue.

[44] Paragraph (k) builds on para. (j) above. With respect to the types of evidence listed under para. 73 of ITO #4, Mr. Duke is granted leave to cross-examine

Cst. Kirstein on the basis for his belief that the things to be searched for exist at the location to be searched (Exhibits PE127 and PE156) and could afford evidence of the offences.

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CAIRNS T.C.J.