Citation: *R.* v. *Fotheringham*, 2014 YKTC 32

Date: 20140704
Docket: 12-00448A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

DANIEL ADAM FOTHERINGHAM

Appearances:
Keith Parkkari — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

RULING ON APPLICATION

[1] COZENS T.C.J. (Oral): Daniel Fotheringham is charged with offences contrary to ss. 253(1)(a) and 253(1)(b) of the *Criminal Code* for having care and control of a motor vehicle while impaired by alcohol and while having a blood/alcohol level in excess of the legal limit.

[2] The charges arise from events that occurred on July 12, 2012.

[3] The limited facts placed before me are that Cst. Rouleau approached Mr. Fotheringham's parked vehicle. Upon arriving at the driver's side window, he smashed it and subsequently arrested Mr. Fotheringham. There were three police officers at the scene, having arrived almost simultaneously in two vehicles.

[4] Counsel for Mr. Fotheringham has filed an Amended Notice of *Charter* Application for Exclusion of Evidence and Stay of Proceedings. Counsel has also filed two applications before the Court that relate to the issue of disclosure.

[5] The first disclosure application seeks disclosure of "any manuals, policies or procedures about the VICS ["Video In Car System"] system and its use and maintenance". Notice of this application was provided to the Public Prosecution Service of Canada ("PPSC") and to the Department of Justice ("DOJ").

[6] The second disclosure application is for ***McNeil*** disclosure in regard to:

> - The details concerning the incident in 2007 for which Cst. Rouleau received informal discipline; and
>
> - The details of the 6 public complaints (against Cst. Rouleau) in 2011 and 2012. (See ***R.*** v. ***McNeil***, 2009 SCC 3)

[7] Notice of this application was given to the PPSC only.

[8] Defence counsel submits that both of these disclosure applications relate to first party disclosure, however, out of an abundance of caution, has also included the DOJ in regard to the VICS system disclosure application in the event that this material is determined to be third party disclosure.

[9] Counsel concedes that the DOJ was not served in sufficient time to respond to the application and that, if it is determined to be necessary, the third party disclosure application could be heard at a later date.

[10] Counsel for the PPSC takes the position that this information is not disclosable as it is not relevant.

[11] With respect to the application in regard to the VICS system, counsel agreed that the issue of relevance would be argued before me. In the event that I consider this information to be relevant, then there should be a further adjournment to allow for the DOJ to be involved.

[12] With respect to the ***McNeil*** disclosure application, counsel agreed that I could determine the issue of relevance today, without the need for a further adjournment for argument.

[13] As it turns out I am unable to do so.

VICS Manuals Policies and/or Procedures

[14] On October 5, 2012, December 3, 2012 and January 3, 2013, counsel for Mr. Fotheringham requested disclosure of any VICS recordings from the scene of the arrest.

[15] On January 29, 2013 Crown counsel provided a memo from the RCMP to defence counsel that indicated that the two police car videos appeared to be compromised, and that, as a result, there was no video available.

[16] On February 15, 2013 defence counsel requested disclosure of the two compromised video recordings.

[17] On March 18, 2013 Crown counsel provided a further memo from the RCMP explaining why the VICS recordings were compromised.

[18] On January 22, 2014, after the filing on January 8, 2014 of a *Charter* application, defence counsel again requested further information regarding any audio and video recordings made at the scene.

[19] On January 29, February 19, and March 31, 2014, Crown counsel provided further disclosure from the RCMP that indicated that although the attending members had activated the VICS system and believed it was operating correctly, the recordings were compromised and there was therefore no audio and video recording of the arrest available.

[20] On April 24, 2014 Crown counsel provided defence counsel with the two compromised VICS recordings as well as a DVD of uncompromised video footage from a different police officer's cruiser that had arrived at the scene just after the first police cruiser.

[21] On April 30, 2014 defence counsel requested a further explanation for the compromised VICS recordings and on May 9, 2014, Crown counsel, after meeting with RCMP radio technician Daryl Berube and Cst. Leggett, provided a lengthy explanation as to how VICS footage is recorded and copied.

[22] In the Amended *Charter* application filed on June 5, 2014, defence counsel alleges s. 7 breaches on the basis of lost evidence, real or potential, and the "…unacceptable misconduct or negligence for the manner in which the disclosure and

the disclosure process was handled by the RCMP". As remedies, defence counsel is seeking a stay of proceedings, an exclusion of the breathalyser results or an exclusion of the police officer's observations at the roadside.

[23] Defence counsel submits that she has retained the services of an expert in forensic video analysis and requires the VICS manuals and policies and procedures, if any, in order to understand what occurred with respect to the VICS recordings and what occurred in the disclosure process and communications regarding disclosure.

[24] Counsel submits that without this material her client is not able to make full answer and defence. She submits that there is two-fold relevance in this information: firstly, that the information from the VICS system could provide relevant information about the lead-up to the smashing of Mr. Fotheringham's window, and secondly, information as to how disclosure was handled in this case.

[25] Crown counsel submits that there is no indication that there was ever any video recorded on the VICS system from the first police cruiser on the scene. The VICS system from the second police cruiser did record video and audio of what transpired throughout the arrest from just before the officers arrived at the door of Mr. Fotheringham's vehicle.

[26] Crown counsel submits that there is no evidence that there ever was a video recording taken, other than the one from the second police cruiser. Evidence which never existed is not the same as evidence lost. (***R.*** v. ***Khan***, 2010 ONSC 3818, at paras. 12 and 13)

[27] He further submits that there is no obligation to record events in an investigation, exceptions only being when there is a deliberate avoidance of doing so, such as a police interrogation conducted after switching off the recording equipment, or when failing to record events would render the trial unfair. As there is a video and audio recording in this case, the latter does not apply.

[28] Counsel submits that in any event, the VICS from the first police cruiser on the scene would not have been particularly helpful due to the positioning of the police cruiser in relation to Mr. Fotheringham's vehicle.

[29] He submits that there is no possible relevance in these circumstances that would require disclosure of the VICS manual and any policies and procedures that may exist.

Analysis

[30] In determining this issue, I must be aware of the fact that the right to make full answer and defence goes beyond simply examining the potential relevance of this evidence in regard to its probative value on the elements of the offence. Defence counsel has brought a *Charter* application in which there is an argument about how the RCMP officers conducted themselves in regard to the use of the VICS system and subsequent disclosure.

[31] I recognize that Cst. Horbachewsky's VICS system in the second cruiser was operating and that it recorded events from before Cst. Rouleau approached Mr. Fotheringham's vehicle, and apparently from a better perspective than the VICS system in the other police cruiser would have.

[32] Defence counsel submits that the VICS system in the first police cruiser on the scene, had it been properly operating, may have recorded additional relevant information from a time prior to that of the second cruiser. This is somewhat speculative, given the apparent lack of any change in the location of Mr. Fotheringham's vehicle or himself.

[33] Defense counsel points to comments made at the end of the audio/video recording in regard to the police officers thinking Mr. Fotheringham was someone else involved in another unrelated matter, hence, I infer, this may have some relevance to the manner in which Cst. Rouleau approached the vehicle and smashed the window.

[34] As such, counsel submits that it is important to the *Charter* application to determine how the VICS system was to be operated and what policies and procedures govern the RCMP use of the VICS system. A failure by the RCMP to follow policies and procedures in maintaining and operating the VICS system could be significant in the *Charter* application.

[35] I agree. In ***R.*** v. ***Sharma***, 2014 ABPC 131, Fradsham J. ruled in a *voir dire* held in relation to an alleged s. 7 breach. The allegation was that police intentionally destroyed CCTV video evidence relevant to the charge of impaired driving. Fradsham J. distinguished between video designed to monitor, from video designed to monitor and record. Fradsham J. noted that "The police were not obligated in law to take those additional steps to preserve those images and the accused may not *ex post facto* create such an obligation through a subsequent request for 'disclosure'". (para. 134) However, in regard to the video evidence which had been recorded but was erased over 30 days

later, Fradsham J. held that Mr. Sharma's s. 7 *Charter* rights had been violated. In so holding, he noted that it would be unfair to cause the accused's application to fail because of an inability to show that the video which had been destroyed would have showed any images of him due to its panning motion.

[36] To some extent this is analogous to the current case where the Crown states that the compromised video would have been, for the most part, taken from a worse perspective.

[37] Fradsham J. referred to numerous cases in his decision. I note that the issue of compliance by police with policies and procedures was referenced in particular in ***R.*** v. ***Mullan***, Unreported, November 14, 2013, Alta Provincial Court, Leduc, Docket 130353956P1 (considered in paras 49-53 of *Sharma*):

> **49** In [***Mullan***], the accused was charged with operating a vehicle contrary to section 253(1)(b) of the *Criminal Code*. The accused alleged that the Crown had failed or refused to collect relevant evidence of the investigation which would allow the accused to make full answer and defence. The arresting officers failed to store video feed from an in-car video because they were too involved in the investigation to turn the recording function on. The accused argued that the police officers' actions caused evidence which was available and relevant to be lost. Further, the accused argued that by failing to turn the recording system on the police acted negligently and contrary to their training, directives, and instructions from the Crown Prosecutor's Office. The accused submitted that, as a result of this negligent action the accused argued that his defence was prejudiced and his section 7 *Charter* right breached.
>
> **50** In response, the Crown submitted that although there may be a duty on the police to use the in-car recording system there is no constitutional right or right at common law that the video camera be used to record the interaction between the accused and the police. The Crown further submitted that the evidence was not "lost" because it never existed, and was not in the Crown's possession.

51 In considering both positions the court stated the following (7,36-41/8, 1-11):

> In the case at bar the police cruiser that was being operated by Constable Gillespie and Constable Orton on March 15th, 2013 was equipped with an operating video and audio recording system. It was the failure of the police officers to activate the device which caused relevant evidence to not be preserved by recording it. There were two knowledgeable police officers present to deal with the accused and despite clear instructions that the recording system must be activated to preserve this evidence, neither police officer performed that duty. I cannot find that these officers were deliberately avoiding the recording of this evidence when the system was operational and available, but I do find these officers demonstrated unacceptable negligence in the execution of their duties.
>
> I further find that this evidence, which was not recorded, was relevant to the investigation of this crime and should have been preserved. I find that the failure to record this evidence caused this evidence to become "lost" evidence and it was lost solely because of the unacceptable negligence of both police officers, Constable Gillespie and Constable Orton when they failed to activate the care recording system.

52 The court was satisfied that the recording in the police cruiser was relevant because it would have demonstrated the accused's behavior and speech, and was available to the investigating officers. The Court was further satisfied that but for the unacceptable negligence of the police, the evidence would not be lost, and could have been recorded and preserved for disclosure. The Court found that due to this loss the accused was prejudiced as he disputed in his testimony the officer's observations of his physical behavior, and challenged the officer's reasonable grounds for making a section 254(3) *Criminal Code* breath demand.

53 The Court came to the following conclusion (14, 11-16):

> I conclude his section 7 *Charter Right* has been breached and on these facts the only remedy this court should impose is a judicial stay as in my opinion if the trial were to proceed there would be irreparable damage to the integrity of the justice system. I am satisfied that this is one of the "clearest of cases" where the prejudice to the accused's right to make full answer and defence cannot be remedied if the prosecution were to continue and I therefore direct a stay of proceedings.

[38] Again, here I am dealing only with respect to relevance of the materials sought to be disclosed, not a s. 7 application. The facts in ***Mullan*** are different with respect to the potential value of the recording in assessing the observations of the police officer that led to the officer forming the grounds for a s. 254(3) demand, observations that the accused disputed.

[39] The potential relevance is less clear in the case before me and more speculative, as was in the case of ***R.*** v. ***Stuart***, 2013 ABPC 290, where a stay was refused in a case where video recordings of the accused impaired driver were deleted pursuant to the expiration of the 60 day timeframe for keeping it.

[40] Nevertheless, the Court stated that while the detachment video was only marginally relevant and its loss minimally prejudicial to the accused, a sufficient remedy would be exclusion of evidence obtained at the detachment, something to which the Crown had already agreed. The court expressed its disapproval of the policy of destruction of videos after the expiration of 60 days as being "…a systemic destruction of evidence that may be relevant for disclosure purposes" (cited at para. 36 of ***Sharma***)

[41] The circumstances in ***Stuart*** were different in that there was video recording that was then erased. In the present case, there was apparently not any video recording from the first police cruiser's VICS, or to the extent that there was, it was somehow compromised. Therefore there is no ‘systemic’ destruction of potentially relevant evidence.

[42] What there is, however, is a loss of potentially relevant evidence, albeit perhaps of a marginally relevant nature, given that we have the video from the second cruiser's VICS.

[43] The disclosure of the VICS manual and the policies and procedures that RCMP members are to follow when utilizing the VICS system could perhaps shed some light on what occurred.

[44] As such, these materials are potentially relevant to the *Charter* arguments that counsel for Mr. Fotheringham intends to make at trial.

[45] While, in and of itself, the loss of the evidence that would have been captured by the compromised DVD's may not result in a determination that a *Charter* breach occurred and may not result in a stay of proceedings or any other remedy, I find that the circumstances are such that I conclude that the materials sought to be disclosed are relevant in assisting counsel in defending her client and advancing her argument.

[46] Having determined the issue of threshold relevance, the matter should now proceed to a further hearing to determine the nature of the disclosure obligation, whether first or third party, involving the DOJ.

[47] Alternatively, the Crown could simply decide to make inquiries into the existence of any manuals, policies or procedures that may exist and if they do exist, provide these to defence counsel.

[48] I would be surprised if there were not some such policies or procedures in effect that would assist police officers in utilizing the VICS system, although perhaps the

necessary information may in fact be passed down informally and by "word of mouth". That, in and of itself, could potentially raise some issues.

[49] I would assume, logically, that there is an operational manual associated with the particular VICS system being utilized in this case and that the obtaining of it and subsequent disclosure of it would not be particularly onerous or compromise any security or other relevant issues.

RCMP Discipline Records for Cst. Rouleau

[50] In a letter sent by e-mail and dated June 5, 2014, Crown counsel disclosed that Cst. Rouleau had been the subject of informal discipline in 2007 as a result of his involvement in a physical altercation in a bar while off-duty.

[51] Also disclosed was information that Cst. Rouleau had one complaint filed against him in 2011 and five in 2012. Further details were not provided.

[52] Counsel for Mr. Fotheringham submits that any examples of proven or alleged misconduct could be relevant in that they could assist in her being able to effectively cross-examine Cst. Rouleau. She asserts that they should be disclosed by the Crown pursuant to ***McNeil***.

[53] In particular, she submits that the circumstances of alleged misconduct may be relevant, regardless of whether the RCMP made a finding dismissing the complaint. Counsel submits that the allegations of misconduct may be relevant to issues such as:

a) The reliability and credibility of Cst. Rouleau at trial;

b) Cst. Rouleau's conduct concerning the smashing of the vehicle window (if there are use of force complaints);

c) Section 8 and 9 *Charter* issues (if there are unreasonable search or arrest complaints)

d) Negligence or misconduct in the handling of disclosure and exhibits; and

e) Not following RCMP policies and procedures.

[54] At a minimum, counsel submits that details of the complaints should be made available in order to assess possible relevance to decide whether to pursue full disclosure. In the absence of these details, there is no way to assess relevance.

[55] Crown counsel provided further information at the hearing about one of the complaints that resulted in official action by way of a corrective letter. This was in regard to Cst. Rouleau having laid the wrong charge. In response to this information counsel for Mr. Fotheringham indicated that no further disclosure was required regarding this complaint.

[56] The Crown also indicated that there was no action taken in regard to the other five complaints. Accordingly, he took the position that they are not relevant and declined to provide further details.

Analysis

[57] In ***McNeil****,* the Supreme Court of Canada considered when police disciplinary records should be disclosed as part of the Crown's obligations under ***R.*** v. ***Stinchcombe*** [1995], 1 S.C.R. 754. Charron J. considered that, while an accused "has no right to automatic disclosure of every aspect of a police officer's employment history, or to police disciplinary matters with no realistic bearing on the case against him or her",

any relevant disciplinary information should be disclosed to the Crown with the rest of the police file. Disciplinary material that is not part of the first party disclosure package provided by the police to the Crown may nonetheless make its way into the hands of the defence through the ***O'Connor*** regime relating to third party records (***R.*** v. ***O'Connor***, [1995] 4 S.C.R. 411).

[58] The distinction between materials that constitute first party versus third party records is not always clear, however Charron J. quotes from a report prepared by the Honourable George Ferguson, Q.C. that sets out five categories of material that, in his view, should be automatically disclosed to the Crown by the police:

a. Any conviction or finding of guilt under the *Criminal Code* or *Controlled Drugs and Substances Act* (and for which a pardon has not been granted);

b. Any outstanding *Criminal Code* or *CDSA* charges;

c. Any conviction or finding of guilt under any other federal or provincial statute;

d. Any finding of guilt for misconduct after a hearing under the relevant statute governing police conduct;

e. Any current charge of misconduct for which a Notice of Hearing has been issued.

[59] I observe that these five categories have been picked up in caselaw as ones that generally require Crown disclosure pursuant to its first party ***Stinchcombe*** obligations (see e.g. ***R.*** v. ***Perreault***, 2010 ABQB 714 and cases within, ***R.*** v. ***Schmidt***, 2012 BCPC 111, ***R.*** v. ***Boyne***, 2012 SKCA 124).

[60] Although these categories provide a useful starting point for the Crown to determine its disclosure obligations, other alleged misconduct that does not neatly fit into any of them may nevertheless be sufficiently relevant to the case at hand such that details should be disclosed to the Crown and ultimately the defence pursuant to ***Stinchcombe***.

[61] As well, as noted, conduct or alleged conduct that does not fall under the ***Stinchcombe*** first party disclosure regime, may still become the subject of a defence third-party ***O'Connor*** application.

[62] On the basis of what has been filed, it is not at all clear whether most of the records are relevant and subject to consideration under either ***McNeil***/***Stinchcombe*** or ***O'Connor****.*

[63] The Crown has provided limited information, indicating that Cst. Rouleau received informal discipline following an off-duty bar fight and, extremely sparsely, that he was the subject of five, unspecified, public complaints. It emerged at the hearing of this application that the sixth public complaint related to Cst. Rouleau's laying of the wrong charge against an accused, and defence counsel has already indicated that she will not be pursuing any more information about it.

[64] I accept that the disciplinary record relating to the physical altercation in a bar is relevant to issues that could arise at trial, including the officer's reliability and credibility and any use of force issues.

[65] Given Cst. Rouleau's actions in smashing out the accused's car window, there may be such an argument made. I order this record to be disclosed to defence counsel.

[66] In terms of the public complaints at issue, the Crown's June 5, 2014 letter indicates that it is written "pursuant to [its] *McNeil* disclosure obligations". It then goes on to state that the Crown was informed of the informal discipline against Cst. Rouleau in 2007 and "also informed that he was the subject of 6 public complaints made: 1 in 2011, 5 in 2012".

[67] Without any information about the general nature of the complaints and any possible proceedings, it is impossible to determine relevance. Although the Crown says that the court has sufficient information to make some kind of a determination about the likely relevance of these complaints to the accused's trial, I do not see how that is at all possible.

[68] In ***R.*** v. ***Schmidt****,* cited above, Woods J. was faced with a similar situation. The Crown had provided defence counsel with a letter stating that a key police witness had "a disciplinary record" but that, in the Crown's view, it did "not fall within the scope of *McNeil*" and would not be disclosed. Woods J. noted that this seemed to place the accused in a Catch-22 situation:

> … [Defence counsel] needs to know more in order to know whether to ask for more. The Crown won't tell her what she needs to know in order that she might make an informed decision about whether to press the Crown for more by way of a full *McNeil* disclosure application . … (para. 27).

[69] In recognition of this dilemma, the court found that it is implicit in ***McNeil*** that Crown counsel

> … must include enough information about an officer's disciplinary history to enable the accused to make … a reasoned assessment as to whether or not it is at least arguable, on a full *McNeil* application, that there is a reasonable prospect of obtaining evidence about the subject disciplinary history that is not "clearly irrelevant". Surely it cannot be the law that information which is necessary to enable defence counsel to make a reasoned assessment about whether to proceed with a *McNeil* application, or not, is itself "clearly irrelevant" and thus can properly be withheld by the Crown. (para. 31).

[70] Ultimately, Woods J. found that in order for efficient resolution of disclosure disputes, the accused must be given enough threshold information to be able to make an informed and reasoned judgment about whether to pursue the disclosure, either through a ***McNeil*/*Stinchcombe*** review of Crown discretion or through an ***O'Connor*** application for third-party records.

[71] I agree. In doing so I recognize that Woods. J. was dealing with a discipline history. Here, in large part we are dealing with a complaints history which is somewhat different. Nonetheless I consider that at a minimum there should be a summary of the nature of the complaints made and the action taken in response disclosed to defence counsel.

[72] In so finding, I am not saying that a detailed summary of complaints that the Crown deems irrelevant needs to be provided to defence. Something along the lines of the simple statement of what the complaint was about will often provide a sufficient basis for a reasoned defence decision about whether to pursue disclosure. Indeed, that

was the case with the public complaint about Cst. Rouleau laying the wrong charge – that basic information was enough to satisfy defence counsel that she did not need to pursue further disclosure.

[73] I therefore order that the Crown provide a short summary of the conduct underlying the five outstanding unspecified complaints to counsel for Mr. Fotheringham and confirmation that no action was taken.

[74] If defence wishes to receive further disclosure with regard to any of these complaints after reviewing the summaries and is unable to reach an agreement with the Crown, those disclosure issues should be brought back at the same time as the issues regarding documentation and policies about the VICS system. Without in any way prejudging the matter, it may also be that, pursuant to ***McNeil***, these issues will fall to be addressed under the ***O'Connor*** regime, so defence may want to turn her mind to third party notice to DOJ.

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COZENS T.C.J.