Citation: *R.* v. *Fotheringham*, 2016 YKTC 1

Date: 2016/02/03
Docket: 12-00448A
Registry: Whitehorse

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

REGINA

v.

DANIEL ADAM FOTHERINGHAM

Appearances:
Leo Lane — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

RULING ON APPLICATION

[1] COZENS T.C.J. (Oral): Daniel Fotheringham is charged with having committed 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. The charges arise from events that occurred on July 12, 2012.

[2] Counsel for Mr. Fotheringham filed an Amended Amended Notice of *Charter* Application for Exclusion of Evidence and Stay of Proceedings on December 11, 2015. Applications for *Charter* relief had previously been filed on January 8, 2014 and June 5, 2014.

[3] The trial commenced on January 25, 2016. On January 18, 2016, counsel for Mr. Fotheringham filed an application for disclosure. Submissions on this application were made at the conclusion of the first day of trial and the trial was adjourned to February 3, 2016.

[4] This is the third disclosure application brought by counsel. Rulings on the first two applications were made in ***R.*** v. ***Fotheringham***, 2014 YKTC 32.

[5] Counsel for Mr. Fotheringham is seeking further disclosure as follows:

> Notes and reports by Cst. Rouleau on or around May 15, 2015 when Duke Beattie was arrested for Breaching his Probation, Uttering Threats to Cst. Daniel Rouleau, Cst. Jason Potter, and Meghan Potter, and Resisting Arrest by Cst. Daniel Rouleau.

[6] Counsel submits that these documents are relevant to the credibility and reliability of Cst. Rouleau at trial and therefore should be disclosed.

[7] The incident involving Mr. Beattie is unrelated to the charges against Mr. Fotheringham. The only connection is that Cst. Rouleau was involved as a police officer in both this incident and Mr. Fotheringham's.

[8] The charges against Mr. Beattie have been stayed by the Crown. Cst. Potter has subsequently pled guilty to having assaulted Mr. Beattie.

[9] Counsel for Mr. Fotheringham submits that the notes and reports made by Cst. Rouleau may show a cover-up on his part with respect to the events that transpired during the arrest of Mr. Beattie. If so, then this could have an impact upon the credibility of Cst. Rouleau when he testifies in Mr. Fotheringham's trial. Counsel has indicated

that the credibility of Cst. Rouleau is a significant issue in her defense of Mr. Fotheringham.

[10] Counsel wishes to obtain this disclosure in order to be able to determine whether the notes and reports made by Cst. Rouleau in regard to Mr. Beattie's arrest would provide information that would assist in the cross-examination of Cst. Rouleau when he testifies on February 3, 2016.

[11] The evidence at trial to date shows that Cst. Rouleau approached Mr. Fotheringham's vehicle which was parked at the side of the road. Mr. Fotheringham was in the driver's seat slumped over the console. Shortly after arriving at the driver's side window, Cst. Rouleau struck the window, causing it to break. Mr. Fotheringham was subsequently arrested for impaired driving.

[12] Counsel claims that the requested disclosure is available pursuant to the disclosure obligations set out in ***R.*** v. ***McNeil***, 2009 SCC 3. Counsel also relies on the submissions made in her Memorandum of Argument filed June 18, 2014 with respect to her earlier application for disclosure pursuant to the ***McNeil*** requirements.

[13] 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***, [1991] 3 S.C.R. 326. 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).

[14] While the distinction between materials that constitute first party versus third party records is not always clear, 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);
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> b. Any outstanding *Criminal Code* or *CDSA* charges;
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> c. Any conviction or finding of guilt under any other federal or provincial statute;
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> d. Any finding of guilt for misconduct after a hearing under the relevant statute governing police conduct;
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> e. Any current charge of misconduct for which a Notice of Hearing has been issued.

[15] 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).

[16] 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 provided to the Crown by the RCMP and ultimately the defence pursuant to ***Stinchcombe***. Alternatively, disclosure may be provided an ***O'Connor*** application for third-party records.

[17] In ***R.*** v. ***Fitch***, 2006 SKCA 80, the Court overturned a judicial stay of proceedings based upon a Crown failure to comply with a disclosure order that had been made, stating:

> 16 In *R. v. Chaplin*, [1995] 1 S.C.R. 727, the Supreme Court of Canada set out the procedure in the event of a dispute with respect to the Crown's obligations established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 in the context of a demand by an accused for information of whether the police had engaged in any wiretap investigations in relation to him in the preceding four years, but unrelated to the matter before the courts. Defence counsel argued that it wished to determine whether the disclosure of such wiretaps might show either that the accused had a basis for excluding "derivative" evidence, or abuse of his solicitor/client privilege. The trial judge ordered disclosure. This was held by the Supreme Court to be merely a fishing expedition, based purely on speculation that such evidence might exist.
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> 17 The Supreme Court confirmed that the Crown is under a general duty to disclose all information whether inculpatory or exculpatory except evidence that is beyond the control of the prosecution. However, where the Crown asserts that it has discharged its disclosure obligations, and the material sought does not relate to the specific charge or specific investigation and was not information the Crown relied upon in preparing its case, the defence is required to establish a basis upon which the presiding judge can consider whether the disclosure sought is potentially relevant. The purpose of this requirement is to preclude requests based upon speculation or conjecture.
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> 18 A number of other cases have also held that where disclosure is sought with respect to other investigations an accused must establish a basis for and the relevancy of the items sought. A mere allegation of state misconduct or systematic misconduct on the part of the investigating police officer is not sufficient to trigger a disclosure obligation. See, for example, *R. v. Schmidt* (2001), 151 C.C.C. (3d) 74 (B.C.C.A.) at paras. 21-24; *R. v. Paryniuk* (2002), 97 C.R.R. (2d) 151 (Ont. S.C.J.); *R. v. Hankey*, [2000] O.J. No. 5490 (Ont. S.C.J.); *R. v. Keirsted*, [2004] A.J. No. 754, 2004 ABQB 491; *R. v. Toms* [2000] O.J. No. 5612 (Ont. S.C.J.); *R. v.*

> *Leslie*, [1995] O.J. No. 658 (Ont. Ct. (Prov. Div.)); *R. v. Kim,* [2003] A.J. No. 1215, 2003 ABQB 823; *R. v. Ferrari* (2001), 210 Sask.R. 282 (Q.B.); *R. v. Pangman (W.G*.) (2000), 147 Man.R. (2d) 115 (Q.B.); *R. v. Shepherd*, [1998] O.J. No. 6427 (Ont. Ct. (Gen. Div.)); R. v. Perry (S.R.) (2001), 225 Sask.R. 1 (Prov. Ct.); and *R. v. Gingra*s (1992), 71 C.C.C. (3d) 53 (Alta. C.A.).

[18] The Court went on to state:

> 24 First of all, without comparative data, and possibly expert evidence, the bare numbers of stops, searches, uses of consent forms, or arrests could not establish any "pattern" at all. Second, it would have to be determined, in each case, whether the stop was for highway safety or other legitimate reasons. This could not be established without a mini-trial in relation to each such stop. Third, even if the information sought supported an inference that the officer's previous investigations did not comply with the requirements of the *Charter*, it would not follow that his conduct in this case was illegal. At best, it is evidence that could be used to impugn the credibility of the officer in his account of his reasons for stopping the vehicle and the way events during the stop transpired. Finally, the respondent provided no evidence at all, either to the trial judge or to this Court, to support the suggestion that the officer in question was in fact, over the time period in question, engaged in the conduct alleged. He candidly admitted to this Court that he did not know whether such evidence would emerge from the information sought.
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> 25 In short, as in *Khan*,
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> > 59 ... [t]he defence request for the documents is supported by nothing more than speculation and wishful thinking. This case falls squarely within the large body of case law prohibiting disclosure where the defence application is shown to be nothing more than a fishing expedition.
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> 26 It is our conclusion that the respondent failed to provide any foundation that could justify the production order in question and that the trial judge erred in exercising her discretion to order such production in the absence of such foundation.

[19] In ***R.*** v. ***Leslie***, [1995] O.J. No. 658 (Ont. C.J. Prov. Div.), the Court dismissed a defence disclosure application for the police notebooks of a police constable for the six

month period prior to the date that the accused was stopped by the constable and his vehicle searched.

[20] The theory of the defence regarding relevance of this information was stated to be as follows:

> 13 The Applicant asserts that Constable Leppert stopped his motor vehicle and conducted an unlawful search and seizure of the marijuana contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. The applicant seeks access to the notes to investigate other witnesses who might testify that Constable Leppert also conducted unlawful searches of them and their vehicles. If other instances of alleged improper searches were discovered, the defence proposed to ask Constable Leppert on cross-examination about these specific searches and, if improper conduct were denied, the defence would call these witnesses as part of the defence case to rebut his denials. The applicant asserts that this disclosure is relevant to the defence because it is capable of establishing a pattern of discreditable conduct by the officer in similar cases which could affect the credibility of the officer at trial on the issue of whether or not this defendant were the object of an improper search.

[21] The Court found that the defence request for disclosure was in the nature of a fishing expedition, stating:

> 17 Although an evidentiary foundation may not be a procedural prerequisite for consideration of this application, the existence of some evidentiary connection between the matter before the court and the disclosure sought is required to determine the relevance and necessity of production. As Mr. Justice Sopinka says in Chaplin, supra at para. 32
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> > Apart from its practical necessity in advancing the debate ... the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests ... Fishing expeditions and conjecture must be separated from legitimate requests for disclosure.
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> In the present case, Mr. Fishbayn has put forward a legal theory under which the material sought may be admissible at trial, but he acknowledges

> that, apart from the case of the defendant, he has no specific knowledge of prior misconduct by Constable Leppert in other cases. Indeed, the very purpose of the request for disclosure is to ascertain whether a pattern of misconduct can be established from previous cases. In my view, this is a classic example of a fishing expedition. Production of records is not to be compelled simply because the defence hopes that they might disclose something of relevance. As Taylor J.A. said in R. v. O'Connor at p. 266, "Without more, such a submission amounts to no more than a request to go fishing ... in the hope that something useful might be discovered, but without any basis being posited for believing such evidence might be found. In this regard, see R. v. Gingras (1992), 71 C.C.C. (3d) 53 at pp. 57-59 (Alta. C.A.)." Similarly, it is now a well-established principle that a bare statement that the records might impact on the credibility of the crown witness is inadequate to justify production in the absence of some evidence that relates to credibility on a particular issue in the case: R. v. Ossolin, supra, R. v. O'Connor. supra, and R. v. Barbosa (1994), 92 C.C.C. (3d) 131 (Ont. Ct. Gen. Div.). In the present case, the defence has no such evidence to offer, and merely speculates that such evidence may emerge from disclosure and investigation of prior stops and searches by Constable Leppert In my view, the defence has failed to provide a basis to satisfy this court that the request is no more than speculation and conjecture.

[22] In dismissing the application for disclosure the Court noted that the applicant "…has laid no basis to show a reasonable possibility that disclosure of Constable Leppert's notes of other stops and searches would be useful to his making full answer and defence….". (see also paras. 19 – 22)

[23] I note that both ***Fitch*** and ***Leslie*** were decided before ***McNeil***. I am satisfied, however, that for the purposes of this case the application of the disclosure obligations in ***McNeil*** does not affect my analysis.

[24] I am aware that Cst. Potter has not yet been sentenced on his guilty plea to having assaulted Mr. Beattie. There are no facts which have been agreed to or found to be true in that case as of this date. Counsel submits that she does not intend, in the trial of Mr. Fotheringham, to prove the facts as they pertain to the arrest of Mr. Beattie.

[25] As I understand counsel's submissions, she wishes to obtain the disclosure in order to determine whether Cst. Rouleau recorded anything in his notes that is inconsistent with what can be inferred from the fact that Cst. Potter has entered a guilty plea to having assaulted Mr. Beattie. Counsel wishes to have the ability to cross-examine Cst. Rouleau if there is anything in his notes and/or records that would seem to be at odds with the charges having been stayed against Mr. Beattie and the guilty plea proffered by Cst. Potter to having assaulted Mr. Beattie. Counsel would then be in a position to argue that Cst. Rouleau's credibility is suspect, and thus the reliability of his evidence in the case before me is also suspect.

[26] The argument would essentially be that Cst. Rouleau has been either untruthful or less than truthful before, albeit after the date of the offence with which Mr. Fotheringham is charged, so he cannot be believed now.

[27] Crown counsel submits that the request for disclosure is nothing more than a fishing expedition and should not be granted. He states that charges are stayed in many cases with regularity and there is nothing unusual about the circumstances of the charges being stayed against Mr. Beattie. He also points out that the incident involving Mr. Beattie is over three years after Mr. Fotheringham was charged with the offences for which he is being tried.

[28] The Collateral Facts/Issues Rule has been stated in *Watt's Manual of Criminal Evidence 2015* at p. 309 as intended to:

> …prohibit the introduction of evidence for the sole purpose of *contradicting* a witness' testimony concerning a collateral fact. The rule seeks to avoid confusion and proliferation of issues, wasting of time and introduction of

> evidence of negligible assistance to the trier of fact in determining the real issues of the case. It endeavours to ensure that the sideshow does not take over the circus. In general, matters that relate wholly and *exclusively* to the credibility of a non-accused witness are collateral, hence beyond the reach of contradictory evidence.
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> A *collateral* fact is one that is *not* connected with the *issue* in the case. It is one that the party would *not* be entitled to prove as part of its case, because it lacks relevance or connection to it. A collateral fact, in other words, is neither.

[29] As stated in ***R.*** v. ***A.R.B.*** (1998), 113 O.A.C. 286 at para. 13:

> Furthermore, the general rule is that one cannot impugn a witness' credibility by contradicting the witness on matters which are collateral even in a case where the "core" issue is credibility. As stated in Phipson, supra, at para. 12-33:
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> > A party may not, in general, impeach the credit of his opponent's witness by calling witnesses to contradict him as to matters of credit or other collateral matters, and his answers thereon will be conclusive. The rule is not absolute. The test whether a matter is collateral or not is this: "if the answer of a witness is a matter which you would be allowed on your own to prove in evidence – if it has such a connection with the issues, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him".

[30] Again, counsel for Mr. Fotheringham is not seeking disclosure in order to prove facts in relation to the incident involving Mr. Beattie, in order to challenge the credibility of Cst. Rouleau and thus the reliability of his evidence. Her desire is to examine the notes and reports of Cst. Rouleau in order to determine whether Cst. Rouleau should be cross-examined on what he stated within these, based upon the resultant stay of proceedings against Mr. Beattie and guilty plea proffered by Cst. Potter. This is without knowing what were the reasons for the stay of proceedings and what the facts are which the Crown is alleging and which Cst. Potter is agreeing to.

[31] Certainly, the disclosure that counsel is seeking in her application does not fit into the categories referred to by Charron J. There is no indication that Cst. Rouleau was subject to any disciplinary hearings as a result of his actions in the event involving Mr. Beattie. There is indication that there has been found to be any misconduct on the part of Cst. Rouleau. There is also no evidence before me to suggest that any such disciplinary or misconduct hearings have been commenced or that there is any investigation in this regard.

[32] I have no information before me that points to there being any indication that Cst. Rouleau has written anything in his notes or reports in regard to the Beattie incident that gives rise to even a suspicion that he was untruthful in what he stated therein.

[33] Charges are often stayed without any explanation being given. There are many reasons why Crown counsel may choose to stay or withdraw charges. Certainly, in my experience, police officers are not generally examined as to the content of their notes and records in unrelated proceedings where charges have been stayed or withdrawn. It appears to me that the only factor which distinguishes Cst. Rouleau's involvement in the arrest of Mr. Beattie from other such police investigations is that an officer involved in the arrest has pled guilty to having assaulted the person against whom the charges were originally laid.

[34] Does that mean that Cst. Rouleau's notes and records are likely to show that he was dishonest or less than truthful in preparing them, in particular as there has been no finding of facts in regard to the Beattie incident and Cst. Potter's or Cst. Rouleau's involvement? Defense counsel is not arguing that this is what the notes and records will

show. She concedes that she does not know what they will show. As in the previous disclosure applications, counsel is arguing that she is unable to make any assessment until she has received and reviewed the requested disclosure.

[35] I keep in mind that, as somewhat distinct from the circumstances in ***Leslie***, Cst. Rouleau has been subject to informal discipline on one occasion and was the subject of six complaints in which no action was taken.

[36] I find that, on the limited information which I have before me, this request for disclosure amounts to no more than a fishing expedition in the hope that something may turn up, without there being any basis for even a reasonable suspicion that the actions of Cst. Rouleau in the Beattie matter could provide relevant information for the purposes of making full answer and defence.

[37] This is not disclosure that falls within the ***McNeil*** regime. This said, were there, in fact, any process commenced in regard to a disciplinary or misconduct hearing arising from Cst. Rouleau's notes and reports in the Beattie incident, I would likely have found otherwise. I have not been advised that there is any such process commenced.

[38] Therefore the application is dismissed.

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COZENS T.C.J.