SUPREME COURT OF YUKON

Citation: *R v S*, 2024 YKSC 17

Date: 20240409
S.C. No. 22-01510
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

T.R.S.

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Publication of evidence, information, representations or reasons given at the show cause hearing is prohibited by court order pursuant to s. 517 of the *Criminal Code*.

Before Justice K. Wenckebach

Counsel for the Crown — Andreas Kuntz

Counsel and Agent for the Defence — Jennifer Budgell

This decision was delivered in the form of Oral Reasons on April 9, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The accused, T.S., was in a common-law relationship for several years with the complainant, S.H. The relationship ended on January 2, 2022, and S.H. moved out.

[2] On February 27, 2022, S.H. returned to Mr. S.' home. An incident arose and S.H. and the person with her were charged with break and enter, robbery, and assault.

[3] On February 28, 2022, S.H. made a report to the police that Mr. S. had committed crimes of sexual violence and uttered threats to S.H., and that he possessed child pornography. Constable Tillack was the police officer who took S.H.'s report.

[4] Subsequently, Constable Tillack filed an Information to Obtain, seeking a warrant to search both Mr. S.' and Mr. S.' mother's homes on the basis that there were reasonable and probable grounds that there would be child pornography at either Mr. S.' home or that of his mother. The warrant was issued.

[5] As a result of the search, the RCMP seized, amongst other things, electronics from Mr. S.' home, including a phone and an iPad. Constable Tillack then applied for a warrant to search the electronics, which was granted. Child pornography was found on the iPad.

[6] Mr. S. has been charged with offences of sexual violence against S.H. but not with offences related to child pornography. However, the Crown brought an application to adduce evidence at trial that there was child pornography on Mr. S.' iPad on the date it was seized. I granted that application.

[7] Mr. S. has now brought an application to exclude any evidence that was seized from the searches on the basis that his rights under s. 8 of the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the "*Charter*") were violated. Mr. S. submits that the warrants are both sub-facially and facially invalid. He argues that Constable Tillack should have included additional information about S.H. and the ITO and should not have included some of the information he did put into the ITO about

Mr. S. Once additional information is added and prejudicial and misleading information is excised, the ITO does not contain sufficient grounds for the warrant to have been issued.

[8] In addition, Mr. S. argues that the ITO is facially invalid because it does not contain information that would permit the conclusion that the RCMP had reasonable and probable grounds to find evidence of the offence of child pornography in Mr. S.' or his mother's home.

[9] The Crown does not oppose amplifying or excising the ITO as suggested by defence counsel. The Crown also concedes that if the search breached Mr. S.' s. 8 rights, the evidence obtained through the search warrant should be excluded pursuant to s. 24(2) of the *Charter*.

[10] The Crown submits, however, that even with the amplifications and excisions, the ITO contains sufficient credible information such that the issuing judge could have granted the authorization. The Crown submits that the warrant is also facially valid.

[11] Because the Crown has conceded that portions of the ITO should be amplified and excised, I need not fully analyse the issues the defence raised. I will, however, provide some comments based on the errors in the ITO to help guide local RCMP officers in writing ITOs in the future. I will then determine whether, based on S.H.'s information alone, there is sufficient reliable information to support an authorization. If necessary, I will then determine whether the warrant is facially valid.

[12] I will now turn to the problematic portions of the ITO so as to assist the RCMP with crafting future ITOs.

[13] It is well-known that a police officer must provide full and frank disclosure of the material facts in their ITO. The challenge is putting this obligation into practice. The principle that should guide police officers is that it is not for them to decide whether a fact is important enough to put in an affidavit. Rather, if a fact is relevant, it must go into the ITO.

[14] Here, it appears that Constable Tillack sought to provide a summary rather than a full accounting of information at times. Thus, the ITO did not include full details about the incident in which S.H. was charged with robbing Mr. S.' home. The details, however, were all relevant. The issuing judge should have had benefit of the full account of the incident.

[15] The police must also not include facts that are irrelevant. As an example here, the ITO included charges that were brought against Mr. S. but were stayed. Charges that do not lead to convictions are not relevant. They do, however, insinuate that the person charged did do something wrong and is therefore prejudicial.

[16] Additionally, when putting their beliefs into the ITO, the affiant should be careful to include only those beliefs that are well-founded and not based on suspicion.

[17] Finally, the ITO, in the case at bar, contains paragraphs that set out the behaviours and proclivities of people who access and possess child pornography. However, in *R v Morelli*, 2010 SCC 8 ("*Morelli*"), the Supreme Court of Canada specifically disapproved of such a practice. The Supreme Court of Canada noted that people who commit child pornography offences are not all one "type" a person. It then stated:

> [78] … the "propensities" of one type [of person who commits child pornography offences] may well differ … from

> the "propensities" of others. There is no reason to believe, on the basis of the information in the ITO, that all child pornography offenders engage in hoarding, storing, sorting, and categorizing activity. And there is nothing in the ITO that indicates which specific subset of these offenders [do] generally engage in those [behaviours].

[18] The Court went on to admonish that ITOs should not contain "broad generalizations about loosely defined classes of people".

[19] Moreover, even if the affiant can provide credible information about the behaviour of a particular class of persons, that information is only relevant if the affiant can also show that the person subject to the search is a member of that class.

[20] Here, the ITO contained the kind of errors the Court warned against in *Morelli*. In fact, the ITO casts the generalizations even wider, describing the purported propensities not only of individuals who possess child pornography but also of those who commit "grooming and […] luring offences". Moreover, there was no evidence that Mr. S. fit into the categories described in the ITO. The descriptions of the proclivities of child pornographers were therefore both over-generalizations and irrelevant to the specific instances of the case.

[21] Constable Tillack included the impugned paragraphs after having spoken to another officer who has special expertise in investigating child pornography offences. That officer, in turn, had developed a template for ITOs that included the impugned paragraphs.

[22] *Morelli* is clear that such generalizations do not belong in ITOs. The practice of including these or similar statements should cease immediately.

[23] I should note, before moving on, that during his submissions, Crown argued that Constable Tillack acted in good faith. Having observed him testify, I agree with the

Crown that Constable Tillack was acting in good faith when drafting the ITO and acting upon it. Ultimately, however, that is not sufficient to make the ITO valid.

[24] Once the ITO has been amplified and excised, what remains is S.H.'s information. The ITO, then, rests on an informant's information. I will therefore now determine whether the ITO, based only on S.H.'s statement, provides sufficient reliable information to support the warrant.

[25] In determining whether a warrant should be issued based on the statement of an informant, the Court will assess the reliability of the information in light of the totality of the circumstances. Three criteria may assist the Court in making that determination. These are whether the information is compelling, credible, and corroborated (*R v Debot*, [1989] 2 SCR 1140 at para. 53).

[26] Mr. S.' counsel argues that S.H.'s information did not meet any of the three criteria. The Crown, on the other hand, argues that S.H.'s information was compelling and credible.

[27] In assessing whether evidence is compelling, a court will examine the specificity and detail of the information.

[28] Here, the Crown submits that the evidence is compelling because S.H. provided detailed information about the images that are consistent with the way child pornography is frequently presented. Defence counsel argues that the level of detail does not assist here because the information given does not tie the child pornography to Mr. S. Counsel submits that this only proves that S.H. herself had seen child pornography.

[29] In my opinion, both arguments have merit. The details given by S.H. does provide some basis for giving S.H.'s statement more credence. At the same time, I do not give this criterion much weight because it does not directly link Mr. S. to the offence. Thus, the strength of S.H.'s information cannot rely on the fact that it is compelling alone.

[30] Corroboration is not at issue because S.H.'s information was not independently corroborated. Thus, the warrant may only stand if there is reason to find that S.H. is credible.

[31] I do not find that S.H.'s credibility was confirmed. As defence counsel submitted, S.H. had a reason to lie to the police. The day before she spoke with the police, she was involved in a violent incident with Mr. S. and was charged with serious offences as a result.

[32] Despite this, Constable Tillack did not ask S.H. about her motive to lie. In his testimony, he agreed that it was appropriate to approach S.H.'s allegations with scepticism. He testified that when he spoke to S.H. he did not question her motivation because he was using a trauma-informed approach to the interview. During her statement, S.H. described extensive abuse by Mr. S. It was not the time to ask her pointed questions about the reason she had for coming forward. Constable Tillack testified that afterwards, he was satisfied that S.H. was credible based on her presentation and demeanour. He relied on his experience as a police officer, having interviewed many people, to conclude that S.H. was credible.

[33] Generally, it is not for the court to question how the investigating authorities have conducted their investigation. Rather, it is for the investigating authorities to decide how

to conduct their investigations and how deeply to delve into particular questions. However, there are exceptions. A court is entitled to consider evidentiary gaps. If the investigators have failed to make inquiries where they were obviously needed, this may impact the court's assessment of the ITO (*R v Le*, 2021 BCCA 52 at paras. 47-48).

[34] Here, I do not fault Constable Tillack for not questioning S.H. about her motivations while she was providing her first statement. The police are best placed to determine when and where to advance their inquiries. However, at some point, he should have investigated further. No matter how experienced a police officer, demeanour alone is not a sufficient foundation upon which to determine credibility where there are serious questions about an informant's motivations.

[35] The Crown submitted that there were also other indications that S.H. was credible. She did not speak first to police but instead reported that Mr. S. had child pornography to Family and Children's Services. As well, S.H., in her interview with Constable Tillack, discussed what prompted her to speak to police. Her explanation helps quell concerns about her motive to lie. The fact that S.H. spoke first to FCS does not help to establish that she lacked motivation to lie. As noted by defence counsel, S.H. may have been seeking any way to put Mr. S. in jeopardy, including by speaking to FCS first.

[36] The submission that S.H.'s explanation about her reasons for approaching police sufficiently addresses concerns about her credibility is problematic for two reasons.

[37] First, S.H.'s explanation was not included in the ITO. If it is not in the ITO or included as amplification, then it cannot be considered when determining if the ITO should have been issued.

[38] Second, S.H.’s reasoning still needed to be carefully examined, including through questioning. Given the nature of the concerns about her motivation, it was necessary to take other investigative steps to determine if S.H. was credible.

[39] I conclude that S.H.’s information did not provide sufficient reliable information to support an authorization of a search warrant.

[40] Given this finding, it is unnecessary to assess whether the warrant is facially valid.

[41] As the Crown has conceded that the evidence should be excluded pursuant to s. 24(2) of the *Charter* if there was a *Charter* violation, I need not consider this issue either.

[42] I therefore allow Mr. S.’ application and exclude all evidence seized through the execution of the search warrants of [redacted] and items seized from[redacted], which were issued on March 14, 2022, and March 30, 2022.

_____

WENCKEBACH J.