Citation: *R.* v. *Craft*, 2005 YKTC 80 Date: 20051118
Docket: T.C. 05-00213
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.
RAYMOND SIDNEY CRAFT

Appearances:
Peter Chisholm Counsel for Crown
Jamie Van Wart Counsel for Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Raymond Craft is facing two charges in relation to firearms, a s. 86(1) charge for using a firearm in a careless manner and a s. 86(2) charge for failing to store a loaded firearm in accordance with the regulations.

[2] The facts provided through the sole witness, Constable Dunmall, are not complex in nature. Constable Dunmall responded to a complaint of an individual causing a ruckus at number 3 O'Brien, Mr. Craft's home. Constable Dunmall, along with an auxiliary member, attended at the residence and knocked on the side door. The door was answered by Mr. Craft.

[3] Mr. Craft is an individual with whom Constable Dunmall has had previous dealings and in her opinion he appeared to be under the influence of alcohol when he

answered the door. When Mr. Craft opened the door, the officer noted him to be wearing a belt with two hunting knives and a can of bear spray. She further noted a firearm on the kitchen table, specifically a .22 with a banana clip with ten rounds in it, but no rounds in the chamber and the bolt closed.

[4] Constable Dunmall asked Mr. Craft what he was doing with the firearm, to which he replied that he was cleaning it. As Constable Dunmall did not see any cleaning supplies in the vicinity, she again asked what he was doing. Mr. Craft then said he was going to bed. Constable Dunmall said, "You just told me you were cleaning your gun." Mr. Craft then seemed confused and said he didn't know what he was doing. Mr. Craft then stepped back and said, "Do you want to come in?" Or "Would you like to come in?" Constable Dunmall said yes.

[5] She directed the auxiliary member to secure the firearm on the table for safety reasons and she asked Mr. Craft if he had other firearms in the house. He said yes and asked if she would like to see them. When she responded affirmatively, he led her to a closet with a hollow core door and a standard handle with no locking mechanism. As the officer had safety concerns, she asked the auxiliary to ensure that he could see her. Mr. Craft opened the closet door. Inside the closet were two firearms leaning against the wall and ammunition. One firearm was a shotgun with a trigger lock and the other a .22 without a trigger lock.

[6] Constable Dunmall informed Mr. Craft that due to his state of intoxication and the unsafe storage, she would be seizing the firearms with the intention of returning them

the next day. Constable Dunmall indicated that Mr. Craft was pleasant throughout her dealings with him on the night in question.

[7] In reviewing the evidence presented, I would note that I found Constable Dunmall, though a young and relatively inexperienced officer, to be straightforward, fair and credible in giving her testimony. Her evidence was uncontradicted.

[8] Mr. Craft argues that the warrantless entry into his home was a breach of his s. 8 *Charter* right to be secure against unreasonable search and seizure. He further argues that the Crown has failed to prove that the guns seized were firearms as defined in the *Criminal Code*. Lastly, he argues that the Crown has failed to prove that the firearm located on the kitchen table was used by Mr. Craft in a careless manner.

[9] Dealing first with the s. 8 argument, the defence argues that Constable Dunmall had no legal authority to enter into and search Mr. Craft's home and that any consent provided by Mr. Craft does not meet the legal requirements for a valid consent. It is trite law to say that a warrantless search is *prima facie* unreasonable. Once it is demonstrated that a search was conducted without warrant, the burden shifts to the Crown to show on a balance of probabilities that the search was reasonable. A search pursuant to a valid consent from the homeowner would be reasonable.

[10] In *R.* v. *Wills*, [1992] O.J. No. 294 (QL), Doherty J. set out specific criteria that must be met for a valid consent. Those criteria, which have been adopted in the Yukon by his Honour Judge Lilles in *R.* v. *Taylor* are as follows:

(i) there was a consent, express or implied;

> (ii) the giver of the consent had the authority to give the consent in question;
>
> (iii) the consent was voluntary in the sense that that word was used in *Goldman, supra,* and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
>
> (iv) the giver of the consent was aware of the nature of police conduct to which he or she was being asked to consent;
>
> (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested, and
>
> (vi) the giver of the consent was aware of the potential consequences of the giving of the consent.

[11] Applying these criteria, defence counsel is quite right that the elements of a valid consent have not been established on the evidence before me. However, this is not a case in which Mr. Craft consented to a request from the police to enter and search. Rather, it is a situation in which entry followed an unsolicited invitation to enter extended by Mr. Craft to the police. I am satisfied that the invitation was not the result of pressure, coercion, or confusion. In my view, there is a distinction between consent to a request and an unsolicited invitation. I am not satisfied that there was a s. 8 breach on the evidence before me. The police were entitled to approach and knock on Mr. Craft's door. As noted by the Supreme Court of Canada in *R.* v. *Evans*, [1996] 1 S.C.R. 8 (QL):

> …the occupier of a residential dwelling is deemed to grant the public permission to approach and knock.

Evans makes it clear that the police are included in the definition of the public, subject to an assessment of their intention in approaching a dwelling.

[12] In this case, Constable Dunmall approached Mr. Craft's home with the intention of communicating with him regarding the disturbance complaint. Her intention was not to search for firearms. As a result, Constable Dunmall was lawfully present at Mr. Craft's door and entitled to knock. Once the door was opened and Mr. Craft extended the invitation to enter, Constable Dunmall's entry was lawful pursuant to that invitation.

[13] The question then becomes whether the invitation to enter was for limited purposes. In *R.* v. *Krall*, [2003] A.J. No. 1161 (QL), the police were investigating a report of an assault. They lawfully approached Krall's basement apartment and noted a smell of marijuana in the hallway outside of her door. When the police knocked, the accused, who was expecting a friend, called out, telling them to enter. The officers entered, asked where the marijuana was and Krall provided it to them.

[14] Allen P.C.J., found on those facts that the invitation to enter, if there was one, was for a limited purpose.

> Ms. Krall made an error relating to the persons knocking. She meant to provide her friend with the right to entry. It is doubtful her consent provided real consent for the officers to enter. At most, it provided the officers with the right to enter for the limited purpose of communicating with her. The invitation did not mean that she was consenting to their entry for the purpose of arresting her or searching her premises.

[15] In the case at bar, Mr. Craft answered the door to a uniformed officer. He knew full well who he was inviting into his home. But even if I view the invitation to enter as being for the limited purpose of communicating with Mr. Craft, I am still not satisfied that there has been a s. 8 breach. The plain view doctrine applies.

[16] In *R.* v. *Spindloe,* [2001] S.J. No. 266 (QL), the Saskatchewan Court of Appeal identified the following requirements for the application of the plain view doctrine:

> Applying the first and second tests of Collins, one must conclude that the common law, given jurisprudence on point, authorizes plain view seizures. The plain view seizure power cannot be exercised as a pretext for a planned warrantless seizure, but if the police are lawfully present in premises, they may seize property in plain view as long as there is probable cause to associate the discovered property with criminal activity. Linked as it is to the lawful presence of the police, it is a reasonable law. As was said in Askov, and approved in Neilsen, the one constant is that the presence of the police in the area where the items are seized must be lawful. Beyond that, the test is the third one articulated in Collins: the manner in which the police carry out the search and seizure must be reasonable.

[17] All requirements of the plain view doctrine are met in the case before me. As I have already found, the police lawfully approached Mr. Craft's home and lawfully entered it pursuant to his invitation. The firearm on the table was in plain view, both when the door was opened and when the police entered the kitchen. With the banana clip inserted and the ammunition co-located, there was probable cause to believe that an offence was being committed. Having done little more than secure the firearm in plain view and take steps to ascertain whether any other firearms were located in the residence for safety reasons, the actions of the officer were entirely reasonable in all of the circumstances.

[18] For these reasons, I find that there has been no s. 8 breach. With respect to the first firearm on the table, it was clearly in plain view. With respect to the other two firearms, I am of the view that Constable Dunmall's knowledge of the disturbance complaint, the fact that Mr. Craft had been consuming alcohol and the fact there was a

loaded firearm in plain view on the table, justified her entering further into the apartment to determine if there were other firearms which might pose a safety concern. In my view, her manner in pursuing that concern was entirely reasonable and appropriate in the circumstances.

[19] If I am wrong in this conclusion with respect to the other two firearms, I would note that I would not have excluded the firearms pursuant to s. 24(2) of the *Charter*, even had I found a breach of s. 8. On the issue of trial fairness, the evidence in this case is non-conscriptive, discoverable evidence, and its admission would not render the trial unfair. Furthermore, if there were a breach, in my view, it could not be considered a serious one on these circumstances. The officer responded to an unsolicited invitation to enter. The one firearm was in plain view and the officer did nothing more intrusive than was necessary to address safety concerns by securing the firearms. Clearly, there was no *mala fides* on the part of the officer. I am not satisfied that the administration of justice would be brought in to disrepute should the evidence be admitted.

[20] Turning to the second issue, the defence argues that the Crown has not proven that the guns were firearms as defined in the *Code*. In s. 2 a firearm is defined as meaning:

> …a barrelled weapon from which any shot, bullet, or other projectile can be discharged and that is capable of causing serious bodily injury, or death to a person and includes any frame or receiver of such barrelled weapon and anything that can be adapted for use as a firearm;

[21] The defence relies on *R.* v. *Covin and Covin*, [1983] 1 S.C.R. 725, in which Lamer J. held that to constitute a firearm, the Crown must prove that:

> …whatever is used on the scene of the crime must be…capable, either at the outset or through adaptation or assembly, of being loaded, fired and thereby of having the potential of causing serious bodily harm during the commission of the offence or during the flight after the commission of that main offence….

[22] In *R.* v. *Robbie,* [1989] A.J. No. 535 (QL)*,* the Alberta Court of Appeal opined that "the *Covin* case deals with what must be proved and not with the way in which it is to be proved." The court in that case held that proof that a weapon is capable of being fired can be made by direct evidence or by inference from other evidence. The accused in *Robbie*, *supra,* had relied on the weapon to intimidate his victim and after loading had spoken of his own funeral arrangements, leading to the inference that he knew it could be fired. Moreover, an experienced police officer referred to the weapon as a Winchester lever action rifle. The Court found sufficient evidence to draw the inference that the weapon met the definition of firearm.

[23] The Alberta Court of Appeal elaborated on the different means of establishing a weapon as a firearm in *R. v. Osiowy,* [1997] A.J. No. 98 (QL):

> It is clear that the Crown bears the burden of proving the weapon used during the offence fell within the definition of “firearm” set out in s. 84. There are a number of ways in which the Crown can establish this, and the cases cited above contain several of these ways. For example, the simplest way of proving it was an operable firearm is to establish that it was fired during the offence. Where it was not fired but is available for expert examination, the Crown may adduce expert evidence that at the time of the offence the weapon was operable and if fired was capable of causing bodily injury or death. Even if the weapon is not available for examination, a witness who is knowledgeable about guns may be able to satisfy the Court that the weapon used was an operable firearm. There may be other witnesses, such as the gun's owner in the Sibbeston decision, who gave evidence that the gun was operable. The judge is entitled to draw the inference that the weapon was operable, and thus within the definition of “firearm,” if sufficient evidence is presented.

[24] In *Osiowy, supra*, the Court held that the evidence was insufficient to support the inference. The victim, who knew little about guns, had glimpsed the weapon for only a short time and could not identify the type of gun. The accused did not load the weapon or otherwise use it in such a way that its operability could be inferred.

[25] In *R.* v. *Carrie*, [1998] B.C.J. No. 1535 (QL), the complainant testified that a week or so before the assault, the accused had pulled a handgun out of his pants and some bullets had fallen to the floor. She gave a fairly detailed account of the gun used in the assault including her belief that it was a .35 millimetre handgun. She indicated the gun was loaded, as the accused showed her the bullets in the "round donut sort of like a chamber thing." The B.C. Court of Appeal found the description to be sufficient to meet the definition.

[26] While it is true in the case at bar that the guns were not test-fired by the officer, nor did the Crown tender expert evidence as to operability, the afore mentioned cases make it clear that the totality of the evidence may be used to support the inference that the guns are operable. I am satisfied that there is sufficient evidence in this case upon which to draw the inference. While Constable Dunmall did state in her evidence that she was not an expert in firearms, it was clear to me that her knowledge of firearms exceeds that of the average person. She was able to identify each of the three guns; she was able to explain what needed to be done to make the weapons fireable and what was needed to be done to make the weapons safe. She had handled each of the weapons and was able to indicate that to her knowledge there were no missing components. The weapons were either loaded or stored with ammunition nearby. This evidence, in my view, supports the inference that the guns were operable.

[27] I find that the Crown has established that the guns were firearms as defined by the *Code*. Having found the guns to be admissible and to be firearms as defined, I am satisfied that the evidence supports a conviction on Count 2. The regulations require the firearm to be stored unloaded, rendered inoperable by means of a secure locking device, and not readily accessible to ammunition unless kept securely locked. In this case, only one of the three requirements had been met. The firearm was found with a trigger lock on it, but it was also found loaded, with ammunition stored with it in an unlocked cupboard. While defence suggested that the Crown had not proven that ammunition, as defined, was found with the firearm, or in the firearm, I am satisfied that the officer's knowledge of firearms was sufficient to enable her to identify ammunition as well as the firearms. As only one of the three storage requirements was met, the charge is made out on Count 2.

[28] This leaves Count 1, alleging careless use in relation to the firearm located on the kitchen table. The defence argues that the evidence does not support an inference that Mr. Craft used the firearm. Section 86(1) creates an offence for careless use, carrying, handling, transportation, or storage of a firearm. In this case, the Crown has particularized the offence as use. As noted by Lilles J. in *R.* v. *Malcolm,* [1998] Y.J. No. 51 (QL), the method of committing an offence is not mere surplusage, where the information alleged a threat made in person but the evidence supported a threat made by a recorded message. In so finding, Lilles referred to the Supreme Court of Canada decision in *R.* v. *Saunders*, [1990] 1 S.C.R. 1020 (QL), where the accused was charged with conspiracy to import heroin but the evidence supported a conspiracy to import cocaine. Lilles quoted the following from the headnote of the *Saunders, supra,* case:

> It is a fundamental principle of criminal law that the offence as particularized must be proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin; having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence would be to undermine the purpose of providing particulars.

[29] Thus, in this case, I must accept that the Crown must prove use rather than storage, handling, carrying, or transport. While I was not provided with, nor could I locate a clear definition of “use” in any of the case law relating to careless use of firearms, those cases finding a careless use all involve active use of the firearm, such as pointing or firing. Similarly, the dictionary definitions that I reviewed all suggested active use. For instance, the *Dictionary of Canadian Law* defines “use” as “the employment of a thing to achieve a purpose.”

[30] On the facts of this case, at best, I can infer that Mr. Craft, as the only individual in the house, placed the firearm on the table. In my view, this would clearly fall within the definition of handling or carrying but falls short of using the firearm, as required by the section. I might be able to infer that Mr. Craft loaded the firearm, which might get me closer to being able to find use, but I cannot find, on the evidence before me, that if he did indeed load the firearm, he did so on the date of the offence, particularly given the fact that one of the other firearms had clearly been stored away in a loaded condition.

[31] In the result, I am not satisfied beyond a reasonable doubt that the Crown has proven that Mr. Craft "used" the firearm on the date in question, a material particular of the offence. Even if I am wrong in this conclusion, I would find that I am not satisfied that the evidence establishes a marked departure from the standard of care. Again, at

best, the evidence supports a finding that Mr. Craft, having consumed alcohol, placed the loaded firearm on the table. While such behaviour may be seen to be a marked departure where an individual is intoxicated, in this case, I am unable to make that finding. Constable Dunmall did use the word intoxicated on one or more occasion in describing Mr. Craft, but when pressed on cross-examination regarding the indicia of impairment, she said only that his behaviour was consistent with her prior dealings with him when he was under the influence of alcohol.

[32] The evidence supports a finding that Mr. Craft had been drinking but is not sufficiently clear to support the finding that he was drunk. Absent such a finding, the evidence does not support a marked departure from the standard of care as required. The offence as charged in Count 1 has not been made out and the charge is dismissed.

[33] So in the result, we have Counts 1 and 3 dismissed and a conviction on Count 2, which is the storage conviction.

_____

RUDDY T.C.J.