Citation: *R. v. Gillingwater*, 2006 YKTC 65

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Docket: 05–00493
Registry: Whitehorse

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

R e g i n a

v.

Stanley Gillingwater

Appearances:
Michael Cozens — Counsel for Crown
Gord Coffin — Counsel for Defence

REASONS FOR DECISION ON VOIR DIRE

[1] Stanley Gillingwater stands charged with possession of cocaine, breach of probation for failing to keep the peace, and possession of a firearm in contravention of a prohibition order. Defence provided notice alleging a section 8 *Charter* breach in relation to the warrantless search of Mr. Gillingwater's residence. The matter proceeded by way of a *voir dire* on the *Charter* issue.

Evidence on the *Voir Dire*:

[2] The Crown's evidence on the *voir dire* was led through Constable Buxton-Carr, the lead investigator on the file. Cst. Buxton-Carr testified that on October 15, 2005, at 1:26 p.m. he was advised by telecoms that the staff at the Kopper King Mini Mart had encountered a woman by the name of Lisa Smith. They described Ms. Smith as distraught and crying, and indicated that she advised them that Mr. Gillingwater had held a gun to her head. Cst. Buxton-Carr

had heard Ms. Smith's name in association with Mr. Gillingwater in the past, but did not know much of anything about her which would allow him to assess the credibility of the report made to the staff at the Mini Mart.

[3] The police attended at the Mini Mart, but Ms. Smith was no longer there, having indicated that she did not want police involvement. Ms. Smith departed on foot, and the staff at the Mini Mart believed that she had returned to Mr. Gillingwater's trailer located in the Kopper King Trailer Park which is itself located behind the complex housing the Mini Mart, although there appears to be no objective basis for this belief.

[4] The police set up surveillance on Mr. Gillingwater's trailer, with officers stationed at both the front and back. Cst. Buxton-Carr was at the front of the trailer and indicated that he could see into the residence through the living room window. He further indicated that the officers stationed at the rear were able to observe through the back door. The surveillance continued for 15 to 20 minutes, during which the officers did not see anyone in the residence nor did they see or hear anything to cause them concern.

[5] Cst. Buxton-Carr was then notified by the officers stationed at the rear, that Mr. Gillingwater had exited his residence through the back door which leads off of his bedroom. The constable went to the rear of the trailer. He believes he asked Mr. Gillingwater whether Ms. Smith was inside the trailer. He cannot recall Mr. Gillingwater's response, noting only that Mr. Gillingwater was not receptive to him. He did not ask Mr. Gillingwater any other questions relating to the investigation into the allegation of pointing of a firearm. Cst. Buxton-Carr further indicated that he would not have believed anything Mr. Gillingwater said to him in any event, as past dealings with Mr. Gillingwater have led him to believe that Mr. Gillingwater is not truthful.

[6] Cst. Buxton-Carr then made the decision to enter the residence without warrant. He did not seek Mr. Gillingwater's permission to enter nor did he have a warrant to do so. He testified that his concerns at that time were that the status

of Ms. Smith was unknown. She may have returned to the residence, and given the serious allegation, they were concerned for her safety. They also did not know if there were any other victims in the trailer. Furthermore, Cst. Buxton-Carr indicated a concern about the status of the firearm. They knew that Mr. Gillingwater did not have a firearm in his possession at that point in time; accordingly, they were concerned about the location of the unspecified firearm and whether there might be others in the trailer who had access to it and whether it might be used as a possible threat towards the police or others.

[7] Cst. Buxton-Carr noted that he had been in and at Mr. Gillingwater's trailer on quite a few occasions in the past, and knew it to be frequented by individuals hostile to the police. He determined that he and two other members would enter into the residence by way of the back door without knocking or otherwise announcing their presence to any individuals who might be in the residence, as, in his words, he did not want to give anyone who may be inside time to prepare any sort of response that could be detrimental to his safety or the safety of others in the vicinity.

[8] Mr. Gillingwater was detained outside by Corporal Hamilton who appears to have engaged him in conversation unrelated to the investigation.

[9] Cst. Buxton-Carr and two other members entered the trailer by way of the back door into Mr. Gillingwater's bedroom. They went through each room of the trailer, locating three individuals in the opposite end of the trailer, two seated at the dining room table, and a third at the front door preparing to leave. Ms. Smith was not located in the residence.

[10] During the sweep of the trailer, the RCMP noted a 22 caliber rifle leaning against the wall in the open closet located in Mr. Gillingwater's bedroom and a plastic bag containing 21.5 grams of cocaine on the window sill next to Mr. Gillingwater's bed. Cst. Buxton-Carr maintained that the residence was not searched beyond checking each room for occupants, and that the two items were in plain view.

[11] Ms. Smith was located some 30 minutes later apparently returning to the trailer. She admitted to having used both alcohol and cocaine on that day, and denied any recollection of Mr. Gillingwater holding a gun to her head. The investigation into the allegation of pointing a firearm was ultimately dropped for want of evidence, but Mr. Gillingwater was charged with possession in relation to the firearm and cocaine located in his residence.

Issues:

[12] The primary issue on this *voir dire* is whether, by entering the residence without warrant, the police violated Mr. Gillingwater's right to be secure against unreasonable search and seizure pursuant to section 8 of the *Charter*. If the answer to that question is yes, it raises the secondary issue of whether the evidence obtained as a result of the warrantless entry ought to be excluded pursuant to section 24(2) of the *Charter*.

1. Section 8: The Law

[13] As noted by the Supreme Court of Canada in *R*. v. *Edwards,* [1996] 1 S.C.R. 128:

> "[t]here are two distinct questions which must be answered in any s. 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that privacy…Usually, the conduct of the police will only be relevant when consideration is given to this second stage." (paragraph 33)

[14] The first of these two questions is readily answered in the case at bar. The mobile home in question was known to the police to be Mr. Gillingwater's residence. There has long been a clear recognition of the importance of respecting the sanctity of one's home in Canadian law. In *R*. v. *Silveira* (1995), 97 C.C.C. (3d) 450, Mr. Justice Cory stated "[t]here is no place on earth where persons can have a greater expectation of privacy than within their "dwelling-house"." (paragraph 140)

[15] Turning then to the second question, whether the search was an unreasonable intrusion on Mr. Gillingwater's right to privacy, Cst. Buxton-Carr testified that he gave no thought to obtaining a warrant to enter Mr. Gillingwater's residence. Indeed he believed that he did not require a warrant as, in his words, they were entering the residence for reasons of safety that were so overwhelming that they superseded Mr. Gillingwater's right to privacy in his home.

[16] The law is well settled that a warrantless search is presumed to be unreasonable. Once a party has established that a search was conducted without warrant the onus shifts to the party seeking to justify the warrantless search, in this case, the Crown, to rebut, on a balance of probabilities, the presumption of unreasonableness. (*Hunter et al* v. *Southam Inc.* (1984), 14 C.C.C. (3d) 97).

[17] In *R*. v. *Collins* (1997), 33 C.C.C. (3d) 1, the Supreme Court of Canada held that "[a] search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable." (p. 12)

[18] Applying the first branch of the Collins test, authorization may be derived either from statute or common law. In *R*. v. *Dedman* (1985), 20 C.C.C. (3d) 97, the Supreme Court of Canada recognized police powers as flowing from duties imposed upon the police at common law. The Court adopted the test set out in the English Court of Appeal decision of *R*. v. *Waterfield,* [1963] 3 All E.R. 659, as being the test to determine whether an officer had common law authority for what he did. The *Waterfield* test is set out as follows:

> …whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. (p. 18)

[19] With respect to the first branch of the *Waterfield* test, the Court in *Dedman* (supra) noted "that at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property" (p. 18). With respect to the second branch of the *Waterfield* test, the Court in *Dedman* (supra) noted that where the conduct in execution of a duty interferes with the liberty rights of an individual or the property of a private person, "[t]he interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference." (p. 19)

[20] Subsequent cases have found police to have the legal authority to enter into a private dwelling without prior judicial authorization where such conduct is necessary to perform the duty to protect life. Many such cases have been in the context of 911 calls.

[21] The leading case concerning 911 calls, *R*. v. *Godoy*, [1999] 1 S.C.R. 311, involved a 911 call originating from the accused's residence which was disconnected before the caller spoke. Godoy answered the door and indicated that there was no problem, but refused the police entry. The police forcibly entered the residence and located the accused's common law spouse in the bedroom, sobbing, with considerable swelling over her right eye.

[22] The Supreme Court of Canada applied the *Waterfield* test and found that the police were justified in entering the residence without a warrant as the general duty to protect life is engaged whenever a 911 call is made:

> I agree that these considerations should form the basis of analysis. In the case at bar, it was necessary for the police to enter the appellant's apartment in order to determine the nature of the distress call. There was no other reasonable alternative to ensure that the disconnected caller received the necessary assistance in a timely manner. While the appellant suggested that the police could knock on the neighbours' doors and question them, or wait in the

> apartment corridor for further signs of distress, in my view these suggestions are not only impractical but dangerous. If a 911 caller is in serious danger and is unable either to communicate with the 911 dispatcher or answer the door upon police arrival, the caller's only hope is that the police physically locate him or her within the apartment and come to his or her aid. (paragraph 18)

[23] However, the Court also made it clear that there are limitations on the police authority to enter without warrant in executing their duty to protect:

> However, I emphasize that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident's privacy or property. In *Dedman*, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. (paragraph 22)

[24] Other cases including *R*. v. *Jamieson* (2002), 166 C.C.C. (3d) 501, and *R*. v. *Brown,* 2003 BCCA 141 out of the B.C. Court of Appeal, and *R*. v. *Marx,* [2005] A.J. No. 77, out of the Alberta Provincial Court filed by the Crown have similarly held that lawful authority for a warrantless entry can derive from the police duty to protect the public in the context of a 911 call.

[25] The Crown argues that the case at bar is analogous to a 911 call. The defence suggests that while similar to a 911 situation, there is a very great difference in that the complaint here originated through a third party outside of the residence providing no ability to ascertain the credibility and reliability of the original allegation. However, I would note that not all of the 911 cases involve a call placed by the victim and originating from the residence in which the offence is alleged to have taken place.

[26] In *R*. v. *Jamieson* (supra), the police were responding to a call placed by a neighbour indicating that a man had emerged from a residence with acid burns to his face and body. In *R*. v. *Brown* (supra), the police were responding to a report of a stabbing in either room 201 or 202 of a particular hotel. The call originated from a pay phone in another hotel located across the street in circumstances where the information could not be confirmed.

[27] I fail to see how either of these situations differs substantially from the facts before me in this case. In my view, the only real difference between an allegation of potential danger or threat to safety being relayed to the police through a third party report and a 911 call is that the mere fact of a 911 call being made in and of itself connotes a potential danger or threat to safety which triggers the duty to protect without the need of the caller to articulate a danger or threat to safety, such as in the case of the disconnected 911 call in the *Godoy* (supra) case. It does not follow that the duty to protect is triggered **only** where information concerning a potential danger or threat to safety is received via a 911 call. However the report is made, it is still incumbent on the police to respond to protect the public.

[28] By analogy to the foregoing 911 cases, I am satisfied that lawful authority for a warrantless entry can derive from a third party report triggering the police duty to protect life, provided the entry is no more intrusive than is required to ensure safety.

[29] Considering the second branch of the Collins test, whether the law authorizing the search is itself reasonable, I am further satisfied that such lawful authority derived from the duty to protect is in fact reasonable. As noted in *Godoy* (supra), “Would a reasonable person expect that the police would take steps to ensure that the 911 caller was all right? I believe so…I see no other use for an emergency response system if those persons who are dispatched to the scene cannot actually respond to the individual caller.” Indeed, one would be

hard pressed to argue that it would be reasonable to impose a duty to protect on the police, but then deprive them of the necessary tools to execute that duty.

Analysis:

[30] In applying the law to the case at bar, the question for me is whether, on the facts of this case, the warrantless entry was necessary to carry out the duty to protect and whether it was reasonable, having regard to the interference with Mr. Gillingwater's right to privacy.

[31] The defence takes the position that it was not reasonable for the police to believe that the circumstances were so overwhelming that they had to enter Mr. Gillingwater's residence without a warrant.

[32] In particular, the defence argues that it was wholly unreasonable for the police to believe that Ms. Smith would have returned to Mr. Gillingwater's trailer, placing herself once again in jeopardy, if the allegation regarding the pointing of the firearm were in fact true.

[33] In considering these submissions of counsel, I must note that I was satisfied on the evidence of Cst. Buxton-Carr that he honestly believed there was a potential risk to Ms. Smith, to the police, and to other members of the public. Was his belief objectively reasonable in all of the circumstances?

[34] In my view it was. He was responding to an extremely serious allegation of a firearm being pointed at someone's head, an allegation relayed by someone described as distraught. At that time, he had no knowledge of either the whereabouts or the condition of Ms. Smith. I disagree with defence counsel's submission that it was unreasonable to believe that Ms. Smith would have returned to the trailer if her allegation regarding the firearm was indeed true. It is not unusual for people to make irrational decisions, particularly in stressful situations. The police had no knowledge of where else she may have gone. In such circumstances, her return to the trailer, whether this would have placed her

in danger or not, was a very real possibility, and had to be treated as such by the police.

[35] While it is true that the police did not note any disturbances during the twenty minutes of surveillance preceding entry, they did not know if Ms. Smith or others were inside the trailer injured and unable to call for assistance. Furthermore, they had reason to believe that there was a firearm in the residence and they did not know if anyone might have access to that firearm and thus pose a threat to the police or others in either the trailer or the general vicinity.

[36] In all of the circumstances, I find that Cst. Buxton-Carr had reasonable grounds to believe that there was an ongoing potential threat to the safety of the police and the public, and I am satisfied that his motive in entering the residence was to protect life and to ensure safety.

[37] Defence counsel further argues that, as the complaint was based on second hand information, it was incumbent on the police to first take steps to investigate the credibility of the allegation to determine whether it ought to be acted upon. He points to the failure of the police to inquire, in the first instance, as to the complainant's state of sobriety, and their minimal efforts to locate her or to seek additional information about her circumstances or reputation for reliability, as an indication that the police did not take all steps short of forcible entry as required by *Godoy* (supra).

[38] Similarly, defence counsel argues that, once Mr. Gillingwater was out of the trailer, the police were obliged to at least ask him what was going on and if there were other individuals in the trailer, notwithstanding Cst. Buxton-Carr's evidence that he would not have believed Mr. Gillingwater's responses in any event.

[39] Did the police take all reasonable steps short of forcible entry as required? In considering this question, it is important to consider the context in which the police were acting. While in the normal course, police are expected to exhaust

every avenue in an investigation, including taking all reasonable steps to ascertain the credibility of allegations, can the same standard be expected of the police in situations where there is potential danger? Clearly it cannot.

[40] Potentially dangerous situations invariably require immediate and decisive action to avoid potentially catastrophic consequences. It would be imprudent if not dangerous for the police to take extra time to fully investigate before acting to protect life in a potential emergency. It would be equally imprudent and potentially dangerous for the police to make snap judgments about credibility in the midst of a potential emergency, particularly when one considers that such judgments would necessarily be made on the basis of incomplete and inadequate information.

[41] In *R*. v. *Golub* (1997), 117 C.C.C. (3d) 193, a case involving a search of a residence incident to arrest where the police had reason to believe that there were potentially other individuals and a loaded firearm in the residence, the Ontario Court of Appeal noted:

> In this case, I am concerned with the police interest in protecting the safety of those at the scene of the arrest. This interest is often the most compelling concern at an arrest scene and is one which must be addressed immediately. In deciding whether the police were justified in taking steps to ensure their safety, the realities of the arrest situation must be acknowledged. Often, and this case is a good example, the atmosphere at the scene of an arrest is a volatile one and the police must expect the unexpected. The price paid if inadequate measures are taken to secure the scene of an arrest can be very high indeed. Just as it is wrong to engage in ex-post facto justifications of police conduct, it is equally wrong to ignore the realities of the situations in which police officers must make these decisions. (paragraph 44)

[42] While this case does not involve a search incident to arrest, I believe the comments of Doherty J.A. are equally applicable to the circumstances before me.

[43] With respect to the defence contention that the police had an obligation to question Mr. Gillingwater about the allegation and who if anyone was inside the

trailer before entering the trailer, I would note the comments of the Supreme Court in *Godoy* (supra):

> Given the wealth of experience the police have in such matters, it is unthinkable that they would take the word of the person who answers the door without further investigation. Without making any comment on the specific facts of this case, it takes only a modicum of common sense to realize that if a person is unable to speak to a 911 dispatcher when making a call, he or she may likewise be unable to answer the door when help arrives. Should the police take the word of the person who does answer the door, who might well be an abuser and who, if so, would no doubt pronounce that all is well inside? I think not. (paragraph 21)

[44] If it would be unthinkable for the police to rely on the responses of a suspect without further investigation to satisfy themselves personally of the safety of a complainant, it would make absolutely no sense in my mind to place on the police a positive obligation to question a suspect before investigating further and taking steps to ensure their safety and that of others.

[45] Based on the information they had, the police had legitimate concerns about the safety of Ms. Smith and the location of the alleged firearm. The only way, in my view, that the police could satisfy themselves that Ms. Smith did not require assistance to ensure her safety or that the alleged firearm did not pose an ongoing threat to public safety was to attempt to locate both Ms. Smith and the firearm. As there was reason to believe that either or both may be located within the trailer, it was necessary for the police to enter the premises in their attempts to locate Ms. Smith and the alleged firearm.

[46] On balance, I am satisfied that the police took all reasonable steps before entering the residence, that their motive in entering was to ensure safety, and that the warrantless entry was necessary in this case to carry out the policy duty to protect life.

[47] In assessing the reasonableness of the warrantless entry, having regard to the privacy interest interfered with, part 2 of the *Waterfield* test, I would echo the words of the Supreme Court of Canada in *Godoy* (supra):

> A threat to life and limb more directly engages the values of dignity, integrity and autonomy underlying the right to privacy than does the interest in being free from the minimal state intrusion of police entering an apartment to investigate a potential emergency. (paragraph 23)

[48] In conclusion, while the law would not have permitted the police to enter for the purposes of investigating an offence, I conclude, on the facts of this case, that the law did permit them to enter the home to ensure safety provided the entry was no more extensive than was required to address the potential safety concerns.

[49] This brings us to the third and final branch of the Collins test: whether the manner in which the search was carried out was reasonable. The manner of the search described does not differ substantially from that described in many of the aforementioned cases. Cst. Buxton-Carr testified that he and two other members entered the trailer to locate Ms. Smith or any other individuals who might be present and to ensure they had control of the scene. They went through and checked each room in this regard. There is no suggestion on the evidence that the police used any more force or engaged in any search beyond that necessary to satisfy themselves that there was no one in the trailer who either required assistance or who posed a threat to safety. Accordingly, I am satisfied that the manner in which the search was conducted was reasonable and did not exceed what was required to ensure safety.

[50] In the result, I find that the crown has rebutted the presumption of unreasonableness on a balance of probabilities; and therefore, I am not satisfied that a violation of section 8 of the Charter has been established.

Section 24(2):

[51] If I am wrong in this conclusion, I note that I would not have excluded the evidence pursuant to section 24(2) of the *Charter* in any event. Both the drugs and the firearm are non-conscriptive evidence and their admissibility would not affect the fairness of the trial.

[52] In considering both the seriousness of the breach and the effect of exclusion on the administration of justice, I adopt the comments of the Ontario Court of Appeal in the *Golub* (supra) decision which, aside from the police effecting an actual arrest rather than just detaining the accused prior to the entry, has certain factual similarities to the case at bar. With respect to the seriousness of the breach, Doherty J.A. stated:

> The police searched the residence because they perceived a threat to their safety and the safety of others. If the search is said to be unconstitutional, it must be because that perception was unwarranted, not because that perception was not in fact held by the police. If there was a violation of s. 8, it flowed from an honestly held mistaken belief by the police that the danger inherent in the circumstances justified the entry into and the search of the home. That assessment had to be quickly made as events were unfolding. In my view, the police conduct, at worst, reveals an error in judgment and in no way indicates any disrespect for the appellant's constitutional rights. (paragraph 59)

[53] Regarding the effect of exclusion on the administration of justice, Doherty J.A. went on to say:

> The police conduct here was not heavy-handed and did not smack of a "short-cut." The police faced a situation which did not permit a delicate and reflective assessment of competing interests. Even if the police judgment was constitutionally flawed, it was honestly made and was entirely understandable in the circumstances. I think the repute of the administration of justice would suffer significant harm if important evidence was excluded because of the police error in judgment.

[54] With respect to the case at bar, I would concur with these comments and would have found that the evidence ought not be excluded pursuant to section 24(2) in any event.

RUDDY T.C.J.