

Citation: *R. v. Hamilton, et al.*, 2010 YKTC 15

Date: 20100217
Docket: 08-00548
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

Douglas Hamilton and Carolyn Johnson and Lorraine Foubister

Appearances:

K. C. Komosky

E. J. Horembala

Gordon Coffin

Counsel for Crown

Counsel for Douglas Hamilton & Carolyn Johnson

Counsel for Lorraine Foubister

RULING ON *VOIR DIRE*

Overview

[1] Douglas Hamilton, Carolyn Johnson and Lorraine Foubister are charged with having committed offences contrary to ss. 7 and 5(1) of the *Controlled Drugs and Substances Act* ("CDSA"). Mr. Hamilton is further charged with having committed offences contrary to ss. 86(1) and 91(1) of the *Criminal Code of Canada*.

[2] The validity of the issuance of a search warrant for the search of the defendants' property has been challenged. As such, the evidence at trial to date has been provided within a *voir dire*.

[3] This is an application by defense counsel for Mr. Hamilton and Ms. Johnson, to be allowed to call a civilian witness to testify on the *voir dire*. Crown counsel is opposed to the application.

[4] In a previous written decision, 2010 YKTC 6, I allowed an application by defence counsel to cross-examine Cst. Greer. In a subsequent oral decision I allowed cross-examination of Mr. Peterson, who initially contacted the RCMP to express concerns about Mr. Hamilton's whereabouts.

[5] In the written decision, I set out the underlying circumstances and legal principles and I will not repeat these here.

Nature of the Witness' Expected Testimony

[6] Defence counsel's application is premised on the expectation that this civilian witness possesses information that will bear directly on whether exigent circumstances existed for Cst. Greer to have conducted a warrantless entry and search of the residence and shed on the defendants' property.

[7] The crux of the expected evidence is that this civilian witness will state that she lives next door to the defendants. She came home on October 10, 2008 at approximately 5:00 p.m., which was prior to the warrantless entry conducted at 5:50 p.m. There may be some uncertainty as to the exact time she arrived home and it is not clear as to whether her testimony will allow for a finding that it was clearly before the warrantless entry was made.

[8] Upon arriving home she observed a marked police cruiser in the defendants' driveway. Two individuals whom she believed to be police officers were seated in the police cruiser.

[9] She drove within metres of the police cruiser and was in a position to have been observed by the two individuals inside it. It is unclear whether she will testify as to whether she was, in fact, seen by the individuals in the police cruiser. No-one from the RCMP spoke to her at or about that time.

[10] Later that evening, at approximately 8:30 to 9:00 p.m., two police officers came to her door and asked her whether she had seen Mr. Hamilton. She did not know where he was but will testify that she assumed he was out hunting because he had been out hunting approximately one to two weeks earlier and his RV and quads were still gone.

Position of Counsel

[11] Defense counsel submits that this evidence is relevant to the issue of the reasonableness of Cst. Greer's belief that exigent circumstances existed such as to justify the warrantless entry. In particular, the evidence of this civilian witness will show that Cst. Greer did not make reasonable efforts to exhaust other possibilities to explain Mr. Hamilton's absence before taking the extreme step of entering into his residence and shed without a warrant.

[12] Defense counsel for Ms. Foubister points out that this civilian witness' evidence has potential relevance as to the choice faced by Cst. Greer and the reasonableness of his decision; to either go into the residence without a warrant or to speak to a neighbour first.

[13] Crown counsel submits that there is no potential for this witness' evidence to be relevant and, in particular that even if she testifies as expected, there was no obligation on Cst. Greer to knock on the neighbours' doors before deciding to enter into the residence. This is true even if Cst. Greer had observed this particular neighbour drive by and enter into her home before he decided to make the warrantless entry into the defendants' residence and shed.

Conclusion

[14] In order for defence counsel to successfully challenge the validity of the search warrant, they must be able to challenge the decision by Cst. Greer to conduct a warrantless entry and search of the residence and shed based upon his belief that exigent circumstances existed.

[15] In order to reach a conclusion on whether exigent circumstances did in fact exist, an examination must be conducted of the relevant information available to Cst. Greer at the time he made his decision. It was for this reason that I allowed for both Cst. Greer and Mr. Peterson to be cross-examined.

[16] I agree with Crown counsel that the proposed civilian witness in this case is, generally speaking, somewhat removed from the issues that are of relevance in determining the existence of exigent circumstances. In particular, I consider her expected testimony as to events that occurred after the warrantless entry and search was made to not be of sufficient relevance, in light of the other evidence already available, to have allowed defense counsel's application to be granted, standing alone.

[17] However, I find that her expected testimony as to what may have occurred prior to the warrantless entry is sufficiently capable of being relevant to the existence of exigent circumstances to grant defense counsel's application. I say this notwithstanding the uncertainty as to whether her testimony will establish that she arrived home prior to the warrantless entry, or whether she was seen at the time by any police officers. Crown counsel will, of course, be entitled to cross-examine the witness.

[18] Based upon some submissions of defence counsel as to other potential issues unrelated to the existence of exigent circumstances, which may subsequently be brought forward, in the interests of expediency I will not limit this

witness' testimony to only events that occurred prior to the warrantless entry. I expect that the entirety of her testimony will be brief, and that allowing her to testify as to all the events she was aware of on October 10, 2008 in regard to this matter will not unduly complicate the trial process, but could potentially simplify it.

COZENS T.C.J.