

Citation: *R. v. Smarch*, 2003 YKTC 63

Date: 20030804
Docket: 03-0031
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

R e g i n a

v.

Shayne Wesley Smarch

Appearances:
Narissa Somji
Elaine Cairns

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] Shayne Smarch is charged with the offence of breaking and entering a dwelling house and committing therein the indictable offence of theft, contrary to s. 348(1)(b) of the *Criminal Code*. The alleged circumstances of the offence are not complicated. The evidence presented by Crown is largely circumstantial and raises some more difficult issues.

[2] On April 9, 2003, Hazel Barrett left her residence at #4-2 Thompson Road in the City of Whitehorse, Yukon Territory at approximately 11:00 a.m. She locked both her front and back doors. She returned at approximately 2:00 p.m. that same day. Ms. Barrett found the front door unlocked. Upon entering, she discovered a number of plastic grocery bags, which had been stored under the kitchen sink, scattered on the floor in her hall and kitchen. Several cupboard doors were open or ajar. Ms. Barrett's bedroom, upstairs, had also been entered and some cupboards or drawers had been opened. She noted that the back door

had been forcefully opened and the lock was broken. Ms. Barrett reported a stereo and two speakers and a movie camera to be missing. In addition, an undetermined amount of change had been taken from a coin bank in her bedroom.

[3] Ms. Barrett went downstairs immediately and called "911". As she was speaking to the telecomns operator and standing by the window, she observed a person walking on the sidewalk towards her residence. This individual was wearing a baseball cap and a navy blue jacket. Ms. Barrett then heard someone enter her house. Still speaking on the telephone to telecomns, she went into the front hallway and confronted the individual she had seen walking towards her house moments earlier. Ms. Barrett looked directly at his face and made eye contact. He was standing about 20 feet away. She acknowledged she was only able to observe him for seconds, a "fleeting glimpse". He immediately turned and fled.

[4] Ms. Barrett described the intruder to the police as 18 to 19 years old, native and about 5 feet, 4 inches tall (although she was not certain about his height). He had a normal build and she did not notice any special facial features.

[5] On April 17, 2003, Constable Buxton-Carr showed Ms. Barrett a police photo line-up of eight individuals that were computer generated based on the description given by Ms. Barrett. Although Constable Buxton-Carr had learned earlier that same day that Mr. Smarch was a suspect in the case, the line-up was prepared without that knowledge. All the photographs were on one page, rather than on separate pages. After nine seconds (timed by Constable Buxton-Carr's watch), Ms. Barrett identified the photograph of the defendant, Mr. Smarch. She wrote the following comment: "I think it is him without cap". After Ms. Barrett made the selection, and was leaving, she stated, "he wore a hat at the time of the offence and none of the other suspects were the culprit".

[6] Constable Buxton-Carr attended the scene minutes after Mr. Barrett's "911" call. The Constable described Ms. Barrett as shaken and nervous but able to speak clearly. Ms. Barrett showed him around the house and he made the same observations recounted by Ms. Barrett in her evidence. It was evident to Constable Buxton-Carr that entry to the house had been gained by kicking-in the back door. The doorframe was broken and the deadbolt was dislodged and lying on the porch in a locked position. He could see a herringbone shoe pattern on the door. Because the dirt on the shoe-print had not yet dried, he believed that the door had been kicked-in recently.

[7] Constable Giczi also attended the call to Ms. Barrett's residence and took a number of photographs that were entered as evidence. He also noted the herringbone footwear pattern on the back door. Constable Giczi observed a set of footprints in the snow leaving the back of Ms. Barrett's porch. Although the footprint trail was clear and there was only one set of tracks, the tracks were only partials because of the snow falling back in on them. Nevertheless, he was able to observe that the partial tracks displayed a similar herringbone pattern that he observed on Ms. Barrett's back door.

[8] Constable Giczi was able to follow the footprints behind Units #5 and #6, across a footpath leading from Hamilton Boulevard and into the woods on the other side. About twenty feet into the woods, he discovered a black garbage bag which contained Ms. Barrett's stereo and one speaker. He estimated the distance from Ms. Barrett's back door to the garbage bag to be at most 80 feet.

[9] From the garbage bag, Constable Giczi was able to follow the tracks back to Thompson Road heading back into the direction of Ms. Barrett's house. He was also able to observe a similar set of footprints leading from the front of Ms. Barrett's house between Units #5 and #6, leading to her back porch. The location of the tracks followed by Constable Giczi are set out on a diagram prepared by him and entered as Exhibit #6.

[10] The stereo and speaker located by Constable Giczi in the woods were in a black garbage bag with a white liner. Ms. Barrett had stopped using that kind of bag about a month earlier and she was not certain whether there were any left. Her garbage bags as well as grocery bags were stored under the kitchen sink.

[11] Constable Giczi started training as an identification specialist on July 1, 2002, as part of a four-year training program. Although not yet qualified as an "expert" he has already had a considerable amount of experience with fingerprint evidence, including conducting comparisons, exclusions and identifications, as well as "lifting" and photographing fingerprints. Constable Giczi described, in considerable detail, how he seized the garbage bag containing the stolen stereo, identified the existence of two fingerprints on the bag, and took photographs for the purpose of comparison. He reported that he identified the prints on the bag as belonging to the defendant, Shayne Wesley Smarch (see detailed report, Exhibit #11).

[12] Sergeant Drover was accepted by the Court as an expert in fingerprint identification. He gave extensive evidence regarding the taking and analysis of fingerprints. More importantly, Sergeant Drover examined both prints found on the garbage bag and compared them to those of the defendant. He also reviewed the procedure followed by Constable Giczi. Sergeant Drover found no discrepancy or distortion on the prints from the garbage bag that could not be explained. He confirmed that the prints matched the right ring finger and the right thumbprints of Mr. Smarch. Sergeant Drover testified that the location of the prints were consistent with holding the garbage bag at the bottom with one hand and at the top with the other. Sergeant Drover also reviewed Constable Giczi's report and methods followed by him and confirmed that they were appropriate and correct.

[13] The defendant's counsel cross-examined Sergeant Drover in some detail. Through that cross-examination, she established the following:

- It is not possible to say definitely that fingerprints are unique;
- Fingerprint analysis are subject to human error and there have been examples of experts making mistakes;
- In the end result, fingerprint evidence is opinion evidence based on expertise and experience;
- When Sergeant Drover conducted his verification analysis, he already knew the result of Constable Giczi's findings;
- Fingerprints cannot be dated, ie: there is no way of telling how long the fingerprints have been on the garbage bag before the stereo was placed in it;
- The process of fumigating and fixing the prints must be done properly in order to obtain accurate results; and
- The verification process is subjective: an examiner looks for points of comparison and when he has enough (subjective), he is satisfied that the prints are identical.

Issues

[14] The defendant raises a number of issues that need to be addressed:

1. The validity of the fingerprint evidence;
2. What weight can be placed on Mr. Smarch's fingerprints on the garbage bag containing Ms. Barrett's stolen stereo and speaker; and
3. The reliability of the eyewitness identification of Mr. Smarch by Ms. Barrett.

Validity of Fingerprints

[15] The fingerprint evidence provided by Constable Giczi and Sergeant Drover was not seriously challenged. Sergeant Drover was accepted by the Court as an expert in fingerprint identification. He testified that the procedures

and analysis conducted by Constable Giczi were correct. He conducted a comparison of the two latent prints found on the garbage bag with those of the defendant and concluded they were a match. While the defendant's counsel raised some interesting points about fingerprints in general, she did not challenge the findings made by Constable Giczi and Sergeant Drover. No expert evidence was called to suggest that the methods or conclusions of these two officers were in error or inconsistent with professional practise as generally accepted in Canada.

[16] I am satisfied that the fingerprints on the garbage bag containing the stolen stereo and speaker belonging to and were made by the defendant, Shayne Wesley Smarch.

Inference From Fingerprints on the Garbage Bag

[17] A number of reported cases have determined that fingerprints found on a container or wrapping alone are insufficient to establish a finding that the accused was guilty of possession of the contents: *R. v. Kuhn* (No. 1) (1973), 15 C.C.C. (2d) 17 (Sask. C.A.); *R. v. Breau* (1987), 33 C.C.C. (3d) 354 (N.B.C.A.); *R. v. Mehrabnia*, [1993] O.J. No. 2717 (Ont. Ct. J.).

[18] The Supreme Court of Canada had occasion to consider this issue in *R. v. Lepage*, [1995] 1 S.C.R. 654. One of the issues considered was whether the trial judge was entitled to infer that the accused had possession of the drugs in a bag from the fingerprints on the bag itself. The court concluded that whether or not the inference of possession can be drawn from the presence of fingerprints on the bag is a question of fact, which depends on all the circumstances of the case and all the evidence adduced. The Court also noted that the trial judge was entitled to draw an adverse inference from the accused's failure to offer an explanation for the presence of his fingerprints on the bag, once the Crown had established a *prima facie* case. The fact that the prints were found on the outside of the bag, rather than on its contents, is merely another factor to be taken into

account, but the fact that the accused's fingerprints were on the bag was "clearly highly probable of possession of the drugs".

Other Relevant Evidence

[19] Mr. Smarch's fingerprints on the garbage bag containing the stolen stereo and speaker constitute circumstantial evidence of his possession of the stolen goods. It should be considered along with the following relevant evidence:

- Ms. Barrett left her house between 11:00 a.m. and 11:30 a.m.. The break and enter and theft must have taken place after her departure, before Ms. Barrett returned home at 2:00 p.m.. The garbage bag containing the stolen stereo was seized by Constable Giczi at 3:19 p.m.. In these circumstances, the opportunity for a person other than the thief to handle the garbage bag after the theft was limited.
- The person who walked into Ms. Barrett's house after she returned home to find her house broken into was either the perpetrator or had first hand information from the perpetrator of the break-in. Ms. Barrett had left both the front and back doors locked. The back door had been kicked-in and the front door had clearly been left unlocked by the perpetrator. The person who walked into her house knew the door was unlocked, and did not knock or ring the doorbell. When surprised by the presence of Ms. Barrett in the house, this individual turned and fled. The irresistible inference was that this person was returning to the scene to remove more of Ms. Barrett's possessions.
- The footprints showing a herringbone pattern were tracked from Ms. Barrett's back door across a pathway from Hamilton Boulevard and into the woods to where the garbage bag and contents were located and seized. The tracks continued, consistent with the stereo having been hidden for later pickup, and returned in the direction of Ms. Barrett's residence. This evidence, albeit circumstantial, is consistent

with the Crown's theory that the person who walked into Ms. Barrett's house after she returned home was the person who broke into it originally.

- The eyewitness identification evidence, including the photo line-up, is weak and would not sustain a conviction on its own. Ms. Barrett only had a fleeting glance of the intruder, although she looked him directly in the face. She described the intruder as 18 or 19 years of age and being "native". This matches Mr. Smarch's description. She also indicated that the person may have been much shorter than Mr. Smarch's height of 5 feet, 10 and one-half inches. The photo line-up was prepared, not with Mr. Smarch in mind as the suspect, but on the off chance that Ms. Barrett would recognize one of several individuals well known to the police. Most of the individuals in the photos did not look like Mr. Smarch. All the photos were on one page – it was not a sequential photo line-up. Although weak evidence, it is nevertheless evidence that should be given some weight. Ms. Barrett quickly identified Mr. Smarch as the person who looked most like the person she confronted in her home.

- Mr. Smarch's fingerprints were found on a black garbage bag with a white liner and the stolen stereo was inside the bag. Ms. Barrett said she had used that kind of bag until a month prior to the break-in, and that she was not certain whether she had any left. Her garbage bags and grocery bags were stored under the sink in the kitchen. Ms. Barrett, on her return, found a number of grocery bags strewn around her kitchen and in the hall. This evidence is consistent with the perpetrator rummaging under the sink looking for a suitable sized bag. Obviously, the smaller grocery bags were not suitable. This evidence suggests that this person was looking for a larger bag in which to carry the stolen stereo and speaker. It is consistent with the perpetrator not

bringing the garbage bag with him to the Barrett residence. It is consistent with the perpetrator searching for and finding a garbage bag under Ms. Barrett's sink. In these circumstances, there would be a very limited opportunity for Mr. Smarch's fingerprints to get on the garbage bag unless he were the perpetrator.

- Mr. Smarch's fingerprints on the garbage bag were positioned consistent with holding the bag at the bottom with one hand and at the top part of the bag with the other, according to Sergeant Drover, the fingerprint expert. This is consistent with Mr. Smarch actually carrying the garbage bag while it had something substantial in it, as opposed to some other form of contact.
- Only one set of footprints were observed leaving Ms. Barrett's back porch, into the woods and then returning towards her front door. There were similar footprints with a herringbone sole along the footpath, coming from Hamilton Boulevard to Thompson Street. This suggests only one individual was involved in the break-in. More importantly, the footprints indicate that there was limited opportunity for a second person to have incidental contact with the garbage bag containing the stereo from the point of being taken from Ms. Barrett's house to where it was hidden in the woods.

[20] The evidence in this case does not rule out the possibility that Mr. Smarch had innocently handled the garbage bag in question prior to the break-in, assuming the perpetrator brought the bag with him to Ms. Barrett's residence. It does not rule out the possibility that Mr. Smarch, wearing shoes with a similar sole pattern to that of the perpetrator, walked down the pathway from Hamilton Boulevard, encountered the perpetrator as he was carrying, and innocently handled, the garbage bag containing the stolen items.

[21] In my view, these are mere possibilities and must be considered together with all of the evidence presented.

Conclusion

[22] On the facts of this case, the presence of the accused's fingerprints on the garbage bag containing the stolen goods is clearly highly probative of the possession of its contents. Considering the time frames and the footprint evidence, there was a very limited opportunity for the accused to put his fingerprints on the garbage bag in an innocent manner after the break-in. The possibility that the accused had innocent contact with the garbage bag is very weak. The absence of an explanation from the accused explaining any such contact when faced with a strong *prima facie* case as in this case, leads me to draw an adverse inference and to discount such possibilities entirely. The eyewitness evidence, although not strong, supports the accused's involvement in the crime.

[23] The combination of the evidence of the fingerprints, the footprint track, the time frames of the offence and the discovery of the garbage bag and the eyewitness evidence satisfies me beyond a reasonable doubt that the accused, Shayne Wesley Smarch, is guilty of the offence contrary to s. 348(1)(b) of the *Code*. I reach the same result by finding Mr. Smarch in recent possession of the stolen goods, and in the absence of explanation, by applying the permissive inference of guilt of theft and break and enter.

[24] I find Mr. Smarch guilty of the offence charged.