
CANADA / JUDGMENT

R. v. Groves

2011 BCSC 946

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Supreme Court of British Columbia

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N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Groves,

2011 BCSC 946

Date: 20110714

Docket: 145534

Registry: Victoria

Regina

v.

Christopher Michael Groves

Before: The Honourable Madam Justice Fisher

APPLICATION FOR PRODUCTION OF POLICE COMPUTER

RECORDS FOR CROWN WITNESSES

Reasons for Judgment

Counsel for the accused:

R.C. Claus and

R.R. Drury

Counsel for the Crown:

K.A. Henders Miller

and J.R. Patterson

Counsel for Victoria Police Department

H.D. Edinger

Place and Date of Hearing:

Victoria, B.C.

July 8, 2011

Place and Date of Judgment:

Victoria, B.C.

July 14, 2011

- [1] The accused, Christopher Groves, is charged with the manslaughter of Ariana Simpson, arising from an incident on February 12, 2009, at the corner of Quadra Street and Pandora Avenue in the City of Victoria. Mr. Groves is alleged to have pushed Ms. Simpson into the path of a bus that was travelling northbound on Quadra Street. Ms. Simpson died instantly.
- [2] The area at this intersection is frequented by many of Victoria's homeless population, where groups of people congregate and there is often drug activity. The theory of the Crown is that Mr. Groves was in the area with his friend, George Westwood, who was attempting to purchase some drugs. Neither of them had any prior connection with the people who were in the area. Groves wanted to leave and called repeatedly for Westwood to leave. He was belligerent with the people around him and he insulted some of the women. There may have been a reaction to Groves after this and he moved to the sidewalk near the Quadra Street crosswalk and continued to call for Westwood. It is alleged that Simpson approached the corner and was pushed by Groves.
- [3] Many of the Crown witnesses are individuals with drug addictions and criminal records. Those who testified at the preliminary inquiry gave varying descriptions of the incident. Some of them said that the environment had been hostile against Groves and Westwood. Some saw a number of people on the corner at the time Ms. Simpson was pushed while others saw only Simpson and the male who had been yelling. Many agreed in cross-examination that there is violence in the street, street people look out for each other, and street people carry weapons.
- [4] The defence applies for disclosure of information contained in police databases that relate to the deceased, the accused, and specified Crown eyewitnesses, about criminal charges, allegations of criminal activity, associations between witnesses, and interactions with police.

- [5] The Crown has disclosed to the defence profiles of the deceased, the accused and Mr. Westwood, which were based on information that the Victoria Police Department (VPD) accessed from various police databases, and does not oppose further disclosure of the originating information. With respect to the eyewitnesses, the Crown has disclosed to the defence copies of criminal records and does not oppose further disclosure of occurrence reports related to the criminal records, as well as charges pending. However, the Crown opposes the disclosure of the further information contained in the databases in relation to the eyewitnesses.
- [6] The VPD provided affidavit evidence about the computer databases used in the investigation, the nature of the databases, and the nature and extent of the information sought by the defence. The RCMP did not appear at the hearing but also provided affidavit evidence about the nature of the records. The databases used in this case are the Police Records Management Environment ("PRIME") and to a lesser extent the Police Information Retrieval System ("PIRS"). PIRS, which is operated by the RCMP, has been replaced in British Columbia by PRIME. With respect to the eyewitnesses, the VPD and Crown accessed PRIME in the course of the investigation only to flag witnesses for interviews and to find telephone and address information.
- [7] The defence seeks disclosure within the principles in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and *R. v. McNeil*, 2009 SCC 3. Mr. Claus submitted that the Crown's disclosure obligation in this case falls under the *Stinchcombe* regime as first party records, because the records relate to findings of misconduct that could reasonably impact the case against the accused. Alternatively, if the production involves third party records under the regime in *R. v. O'Connor*, [1995] 4 S.C.R. 411, the defence says that it has met the test of "likely relevance" because the information relates to the credibility and reliability of the eye witnesses in relation to the issues at trial.
- [8] The Crown says that this disclosure application falls under the *O'Connor* regime for third party records. It also says that the defence has not met the "likely relevance" test because there must be something more than a blanket assertion about credibility to justify production to the court.

Disclosure principles

- [9] As established in *Stinchcombe*, the Crown is obligated to disclose to the defence all relevant information in its possession relating to the investigation against the accused. In this first party production context, this includes information related to matters the Crown intends to adduce in evidence as well as information that may assist the accused in exercising the right to make full answer and defence. This regime of disclosure, commonly referred to as the "fruits of the investigation", extends only to material in the possession or control of the Crown. The police have a corollary duty to disclose to the Crown all relevant material in their possession. As the court clarified in *McNeil*, all state authorities are not a single Crown entity for the purposes of disclosure.

- [10] Other than for sexual offences, applications for the production of criminal investigation files and other information involving third parties are usually governed by the procedure set out in O'Connor. It is only in certain circumstances, where the third party information is in some way related to the accused's case, that information about third party misconduct should form part of the police disclosure to the Crown. McNeil involved information about misconduct by the Crown's main police witness that was obviously relevant to and impacted the case against the accused.
- [11] The O'Connor procedure is a two-stage process which takes place before the trial judge after the appropriate notice of application has been served on the witnesses and the notice and a subpoena duces tecum have been served on the third party record holders. In this case, notice has been served on the VPD and the RCMP, but not on the individual witnesses.
- [12] Under the first stage in the O'Connor regime, the accused has the onus of satisfying the court that the documents are "likely relevant" to the proceeding. This first stage screening for likely relevance reflects the important difference between disclosure of first party and third party records and ensures the proper use of state authority to compel production. As Charron J. explained in McNeil at para. 28:

We have already seen that the presumptive duty on Crown counsel to disclose the fruits of the investigation in their possession under Stinchcombe is premised on the assumptions that the information is relevant and that it will likely comprise the case against the accused. No such assumptions can be made in respect of documents in the hands of a third party who is a stranger to the litigation. The applicant must therefore justify to the court the use of state power to compel their production -- hence the initial onus on the person seeking production to show "likely relevance". In addition, it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function.

- [13] This likely relevant threshold is significant in that the court is to play a meaningful role in screening applications for "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests". However, it is not to be onerous because an accused cannot be required to demonstrate the specific use to which he might put information that he has not seen: McNeil at para. 29.

- [14] In McNeil, Charron J. stated at para. 33 that "likely relevant" under the O'Connor regime ... means that there is a "reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (O'Connor, at para. 22 ...). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (O'Connor, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden

would put the accused, who has not seen the documents, in an impossible Catch-22 position.

[15] While an issue at trial may include evidence relating to the credibility of witnesses, the mere assertion that the contents of the records sought may be relevant to credibility is not sufficient to justify production. This stems from the judgment of L'Heureux-Dubé J. in O'Connor where she stated at para. 143:

... the applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility on a particular, material issue at trial.

[16] I will come back to this later in my reasons.

[17] If the defence establishes likely relevance, the second stage of the O'Connor regime may involve an order that the documents be produced for inspection by the court. It is at this stage that the court is to balance the competing interests at stake in the particular circumstances of the case. Some of the factors set out in O'Connor are to be considered, particularly (1) the extent to which the record is necessary for the accused to make full answer and defence, (2) the probative value of the record, and (3) the nature and extent of the reasonable expectation of privacy vested in that record.

[18] It is clear that many individuals may have privacy interests in material gathered in criminal investigative files. The information sought by the defence in this case includes unverified and unproven allegations about the Crown witnesses and others. However, if the claim of likely relevance is borne out upon inspection, the accused's right to full answer and defence will usually tip the balance in favour of disclosure. A finding of true relevance puts the third party records in the same category as first party records for disclosure purposes. Privacy interests may be met with redactions or the imposition of conditions to prevent unnecessary invasions of privacy.

The application in this case

[19] In my view, the defence application in this case falls under the O'Connor regime as the records sought were not accessed by the police or the Crown, are not part of the investigation into the death of Ms. Simpson, and do not contain information about third parties that is related to the case against the accused.

[20] This is a very different circumstance from that in McNeil. There, the accused was charged with possession of certain drugs for the purpose of trafficking. The trial judge's ultimate finding that the accused's possession was for the purpose of trafficking turned on the credibility of one police witness. That police officer had been involved in drug-related misconduct that had led to both disciplinary proceedings and criminal charges. The court held that the records relating to findings of misconduct of the officer involved in the investigation properly fell within the scope of the first party disclosure package to be provided to the Crown. Clearly, such misconduct in that context could reasonably have

impacted the case against the accused.

- [21] This case involves a number of eyewitnesses to the incident. As I outline in more detail below, the records being sought here contain information about interactions these witnesses may have had with police at other times and cannot be said to relate to "findings of misconduct". That kind of information will be contained in records relating to a witness' criminal record. Moreover, any alleged misconduct revealed in these records may have a bearing only on the general credibility of the witnesses. In my opinion, this is not the kind of impact on the case against the accused that the court contemplated in McNeil.
- [22] Because the defence sought production under the Stinchcombe regime, it has not complied with all of the procedural requirements for an O'Connor application, as none of the witnesses whose information is being sought were given notice. However, both the VPD and RCMP were given notice and submissions were made on the first stage of the O'Connor regime. For the reasons outlined below, I have determined that the defence has not met the burden of establishing likely relevance, and the application must be dismissed. Therefore, the lack of notice is not an issue that must be addressed.

The nature of the records

- [23] PIRS is the RCMP's legacy automated records management system that stores, updates and retrieves information on occurrences that have been investigated. It was used by RCMP and several municipal police departments, including the VPD. PIRS enabled the RCMP to comply with the federal Privacy Act, R.S.C., c. P-21, by providing means to electronically index personal information collected for operational reasons. This database contains information relating to police investigations, which include brief descriptions of circumstances and the type of investigation. It contains "tombstone information" such as the occurrence year, codes that reflect whether an individual is a person charged, a suspect or the subject of a complaint, birthdates, telephone numbers, addresses, descriptions of people contacted in the investigation, information about associates of parties to an investigation, and information about locations, vehicles and certain types of property related to the investigation.
- [24] The RCMP continues to maintain PIRS but all occurrences since April 1, 2008, are now opened in PRIME. Any PIRS disclosure is accompanied by a disclaimer which states that the personal information contained within it is not verified or updated and there is no guarantee of accuracy, reliability or completeness of the personal information. All Vancouver Island RCMP detachments completed the migration to PRIME in July 2007.
- [25] The VPD began using PRIME in December 2003. Before that, it used a different computer system to record information. It had access to PIRS but was never a submitting agency, in that it did not contribute information directly to PIRS.

- [26] PRIME links applications that incorporate various aspects of police work including dispatch, data access, entry and sharing, records management, bookings, and information sharing through interfaces with various systems and other authorized agencies, including PIRS and the Canadian Police Information Centre ("CPIC"). VPD does not have ownership of any information entered by other law enforcement agencies.
- [27] To document police actions, a General Occurrence ("GO") is generated in PRIME. This is done any time police resources are engaged, such as where there has been an alleged offence committed, an arrest made, a sudden death, a missing person, a breach of the peace, domestic violence, suspicious activity involving a person of interest, or a response to requests for medical assistance. Every individual whose name is entered in relation to a GO is assigned one of 48 role codes intended to best describe that individual's involvement, such as charged, complainant, suspect, witness or victim. None of the information entered into PRIME is independently verified.
- [28] When an individual's name is entered into PRIME, a document called a "Person Hardcopy" is generated, which provides a summary of the individual's involvement with various police agencies and an index to the information about the person that is contained in PRIME. The Person Hardcopy may contain sensitive personal information about the individual and others. Full PRIME GO files may be generated using the Person Hardcopy. These files may contain between 3 and 150 text entries and each entry can range from one to 100 pages. The VPD estimates that production of all PRIME files related to the witnesses listed in the defence's application would generate approximately 11,000 pages.

Likely relevance

- [29] The defence says that the evidence in this case will raise the issues of identification, accident and self-defence and all of the material sought is likely relevant to all three issues. Mr. Claus submitted that information about a witness' history of drug use and mental health issues may have a bearing on the ability of the witness to report what he or she observed, and information about violent acts that did not result in charges, associations with other street people, witnessing street violence, refusing to cooperate and general street people dynamics will be relevant to all issues as going to credibility. He referred me to *R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.), for the proposition that, where self-defence is raised, evidence of a deceased victim's tendency toward violence is admissible to show the probability that the deceased was the aggressor and to support evidence of the accused that he was attacked by the deceased. He suggests that the same principle can be applied to show the tendency of the street crowd for violence.
- [30] The Crown says that the likely relevance test does not include speculative assertions regarding credibility generally but requires that the material sought provide information relating to a witness' credibility on a specific and material issue.

- [31] This submission tracks the language used by L'Heureux-Dubé J. in O'Connor at para. 142, where she described the significance of the likely relevant burden on the accused:

The burden on an accused to demonstrate likely relevance is a significant one. For instance, it would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is. Similarly, the applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility on a particular, material issue at trial.

- [32] In *R. v. Nepinak*, 2010 BCSC 1659, Romilly J. denied a defence application that was based on a mere assertion that certain police occurrence reports were relevant to credibility. At para. 51 he stated:

That is not enough. An accused must point to some "case specific evidence or information" to justify that assertion. In my view, an accused must be able to point to something in the record adduced on the motion which suggests that the records contain information that is either not already available to the defence or has potential impeachment value.

- [33] Similar conclusions were made in *R. v. Tse*, 2008 BCSC 97. Although this case was decided before the Supreme Court of Canada decided *McNeil*, the analysis of Davies J. about the basis for disclosure of information in the possession of the Crown or police that was not part of the investigation is helpful. He adopted an approach that placed an onus on the accused to establish likely relevance to an issue at trial but did not displace the onus on the Crown to produce information that was sufficiently related to the investigation. He held that the accused must meet the burden of establishing likely relevance beyond issues relating solely to credibility, which exist in virtually every criminal prosecution.

- [34] The only case provided to me where PIRS records were considered is *R. v. Banfield*, 2007 NSPC 76. I did not find this decision to be helpful because the application there was for information in relation to the two co-accused, not witnesses, and the judge determined the issue under the *Stinchcombe* test, not O'Connor.

- [35] The cases are consistent in establishing that the credibility of a Crown witness generally is not sufficient to establish likely relevance to an issue at trial. Any other approach would result in very practical floodgates concerns. The likely relevant threshold has been imposed for good reason. The applicant is seeking to compel a third party to produce records where doing so may impose a significant burden. There is also the concern that trials not become side-tracked, delayed, or unnecessarily protracted by applications that are, in reality, grounded in speculation or wishful thinking that something will be found that may be of some assistance to the defence. As Charron J. stated in *McNeil*, at para. 29:

The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after O'Connor.

- [36] The defence application in this case identifies no time parameters. The VPD estimates that it would take three employees up to 20 business days to review approximately 11,000 pages of records for relevance and privacy concerns. This is a significant burden to the record holder.
- [37] But more importantly, I am not satisfied that the information contained in the PRIME and PIRS databases is sufficiently related to issues other than credibility "at large". There is no temporal connection between the information sought and the charge before the court. None of the information was accessed by police or Crown during the investigation. The lifestyle and drug habits of the witnesses are provable by reference to their criminal records and other information related to the records. To test their credibility and reliability as eyewitnesses, the defence will be able to cross-examine them at length about their records, the underlying offences, outstanding charges, their drug habits, and their interactions with police and others on the street.
- [38] The evidence elicited from the witnesses at the preliminary inquiry may establish that there was hostility between Mr. Groves, Mr. Westwood and the others congregated in the area, but in my view the submission of the defence that disclosure of these records may provide information that is relevant to the possible defences of accident and self-defence is speculative. None of the Crown witnesses are alleged to have been involved in the group that some witnesses have said was moving towards the man who pushed Ms. Simpson.
- [39] Accordingly, the defence application for disclosure is dismissed.

"Fisher J."

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