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R. v. Kim

2020 BCSC 1075

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Supreme Court of British Columbia

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2020 BCSC 1075 R. v. Kim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kim,

2020 BCSC 1075

Date: 20200716

Docket: 27841

Registry: Vancouver

Regina

v.

Billie Onare Kim,

Kyle Stephen Latimer

and Jacob Angelo Pereira

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment -

Covert Physical Surveillance in Brighthouse Way

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Place and Date of Hearing:

Vancouver, B.C.

July 14, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2020

[1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

Introduction

- [2] The accused, Billie Onare Kim, Kyle Stephen Latimer and Jacob Angelo Pereira, are charged with several offences under the Controlled Drugs and Substances Act, S.C. 1996 c. 19 [CDSA], as well as several weapons offences under the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The charges arise as a result of a search of unit 1204, 5177 Brighthouse Way, Richmond BC on September 14, 2017.
- [3] The issue before me on this application is whether the applicants have standing to challenge the admissibility of the evidence that was obtained from covert physical surveillance conducted inside the common areas of the condominium located at 5177 Brighthouse Way, Richmond BC ("Brighthouse Way"). Specifically, at issue is the surveillance conducted by members of the Delta Police Department ("DPD") inside the secure parking garage over several days and on one occasion in the secure 12th floor hallway.
- [4] The Crown concedes that Mr. Kim has a direct interest in the search but he cannot establish an objectively based privacy interest. With respect to Mr. Latimer and Mr. Pereira the Crown submits they cannot establish a direct interest in the search as none of the observations pertained directly to them. The Crown relies primarily on R. v. Webster, 2015 BCCA 286, leave to appeal ref'd 2015 CanLII 85037 (S.C.C.) [Webster] and submits the facts in this case are distinguishable from those in R. v. Pipping, 2020 BCCA 104 [Pipping].

- [5] The applicants take the position that they have a reasonable expectation of privacy that is objectively reasonable. Mr. Kim and Mr. Pereira assert territorial privacy interests regarding the 12th floor hallway. Mr. Kim asserts a territorial and informational privacy over the parking garage observations and is joined by Mr. Latimer with respect his informational privacy interests. The applicants rely on the findings of fact I have made in my earlier rulings together with Pipping, R. v. White 2015 ONCA 508 [White] and R. v. Yu, 2019 ONCA 942, leave to appeal ref'd 2020 CanLII 41795 (S.C.C.) [Yu].
- [6] I have made several rulings in connection with the search that took place at Brighthouse Way and my findings inform my analysis on this application. In a ruling indexed as R. v. Kim, 2019 BCSC 2150 [Kim #1], I determined that the applicants had an expectation of privacy in the 12th floor hallway which I found to be an area that is more private than public. That application dealt with video recordings of all three applicants from the covert video camera installed by the police in the secure 12th floor hallway. In R. v. Kim, 2020 BCSC 1054 [Kim #2], I determined that Mr. Kim and Mr. Pereira had standing to challenge the validity of the search executed on unit 1204 but not Mr. Latimer. One factor that figured prominently in my analysis was the ability of both Mr. Kim and Mr. Pereira to regulate access to unit 1204 while Mr. Latimer had no such control. In R. v. Kim, 2020 BCSC 1064 [Kim #3], I determined that all three applicants had standing to challenge the seizure of materials from Brighthouse Way consisting of still photographs downloaded from the CCTV footage and fob access records. In that decision, I found there was no evidence to establish that the property manager had the authority to provide the police with the material. Even if there was, that fact alone would not extinguish one's expectation of privacy. Rather, it is only one of the factors to consider in the analysis.
- [7] The parties agree that the applicants bear the burden of proof on a balance of probabilities that they had a reasonable expectation of privacy in the searches conducted by members of the DPD.

Factual Background

- [8] There was no evidence called on this application. In my previous rulings, I set out in detail the relevant facts with reference to the Agreed Statement of Facts ("ASF") and submissions of counsel therefore I will not repeat them here other than to re-emphasize facts of particular relevance to this application. The factual background contained in my previous decisions should be read together with the facts I set out here. I have also incorporated details from the supplementary ASF which was filed at the commencement of this application.
- [9] On August 4, 2017, Cst. Cessford of the DPD contacted Mr. Poon, the strata manager of the River Green complex requesting access to Brighthouse Way for the purposes of making covert observations inside the building. Mr. Poon provided permission to Cst. Cessford to contact the head concierge, Mr. Villeneuve, to discuss how best to accommodate the police request. Cst. Cessford sent a follow-up email to Mr. Poon the same day which was attached as Appendix 2 to the Supplemental ASF. The email states "as we discussed on the phone, I am

seeking permission to my team to access the River Green building for the purpose of making covert observations (surveillance). I understand there is a 24/7 on site concierge staff that will likely need to be involved in coordinating this". The email then sets out what Cst. Cessford was asking for which included permission to access the building, including common areas, elevators, hallways and the secure parkade for purposes of making covert observations as well as permission to receive two key fobs or keys to access the areas requested.

- [10] On August 4, 2017, Mr. Poon responded to Cst. Cessford's email, directing him to contact the head concierge for Brighthouse Way, Marc Villeneuve "to discuss and review your request". Mr. Poon's email also states "He would be able to discuss your request further in order to determine how best to accommodate your team's request to be discreet, while mindful of our resident's concerns and privacy."
- [11] Mr. Poon, in his capacity as property manager for Brighthouse Way, believed that he had the authority to provide the police with permission to access the building. However, as will be discussed in my analysis, there was no direct evidence from Mr. Poon or anyone representing the strata council to establish that Mr. Poon had actual authority to provide permission.
- [12] The DPD conducted physical surveillance of the interior of Brighthouse Way on August 8, 9, 11, 15, 17, 18, 25, 29 and 30, 2017 by doing "drive-throughs" in the underground parkade using an unmarked police car. This technique allowed them to make observations of other vehicles inside the parkade including those located in and around parking stall 353 which was a two-car stall associated to unit 1204. Mr. Kim's vehicle was observed on six occasions. On August 30, 2017 Mr. Kim and Mr. Latimer and vehicles associated to them were observed together in the area of parking stall 353. The parkade was accessed using the fob provided to DPD by Mr. Villeneuve.
- [13] On August 10, 2017 at 5:31 p.m. Cst. Cessford observed Mr. Kim using a key to unlock and open the door of unit 1204. Cst. Cessford made this observation while in the 12th floor hallway. Cst. Cessford was in plain clothes making covert observations of Mr. Kim.

The Governing Legal Principles

- [14] The legal principles that govern my analysis are not in dispute. I have canvassed the leading authorities from the Supreme Court of Canada and the privacy analytical framework they establish in my previous reasons for judgment on related applications referred to earlier in these reasons. As discussed in *R. v. Edwards*, [1996] 1 S.C.R. 128 [Edwards]; *R. v. Tessling*, 2004 SCC 67 [Tessling]; *R. v. Patrick*, 2009 SCC 17 [Patrick]; *R. v. Spencer*, 2014 SCC 43 [Spencer] and *R. v. Jones*, 2017 SCC 60 [Jones], the Supreme Court has identified three broad privacy interests protected by s. 8: personal, territorial and informational privacy. As discussed in my previous rulings, the test to determine whether one has a reasonable expectation of privacy is the "totality of circumstances" framework set out first in *Edwards*.

The test is flexible to address different expectations of privacy in different contexts. (see *R. v. Craig*, 2016 BCCA 154, at paras. 90 and 97)

- [15] In this application the parties also rely on four recent decisions dealing with the issue of standing in relation to police physical surveillance in the common areas of condominiums: *Webster*, *White*, *Yu* and *Pipping*. As will be discussed below, the resolution of each case depends on the totality of circumstances before it. I will review the findings of each of these cases as they guide my analysis.
- [16] In *Webster*, the Court of Appeal upheld the trial judge's ruling that Mr. Webster did not have an expectation of privacy in the common areas of his condominium. Therefore, the police entry into the building to make observations of him did not constitute a breach of his s. 8 Charter rights. The lead investigator resided in the same building and provided evidence that established non-occupants of the building were routinely in the hallway of the complex. While there was key access to enter the building, the police simply followed Mr. Webster as he entered the building and on other occasions they were granted access by someone else entering the building. In upholding the finding that Mr. Webster did not have a reasonable expectation of privacy the Court stated the issue was "not how secure the building was, but how exclusive occupation of the common area was" (para. 76).
- [17] In *White*, the Ontario Court of Appeal upheld the trial judge's ruling finding that Mr. White had a reasonable expectation of privacy in the common areas of his condominium. Mr. White owned and occupied a unit in a small, ten-unit condominium. The building security system operated to exclude strangers from entering the common areas of the building. The police made three surreptitious entries into the building- once entering by following a postal worker through a door that was locked and observing Mr. White's storage locker. On the other two occasions the police entered through a stairwell door that was not locked due to a malfunction. On these occasions the police officers hid in a stairwell and made observations of an individual attending the unit and overheard conversations inside the unit. Mr. White was not observed in the surveillance but he maintained a reasonable expectation of privacy in the common areas of his building.
- [18] In *White*, the Court considered that lower courts had rendered decisions rejecting reasonable expectation of privacy claims in several cases involving the common areas of multi-unit buildings. The need to maintain a flexible approach when applying the *Edwards* framework was explained as follows:
- [44] But the lesson from *Edwards* is that the reasonable expectation of privacy is a context-specific concept that is not amenable to categorical answers. A number of considerations may be relevant in determining whether an expectation of privacy is reasonable in the context of particular multi-unit buildings, albeit that none of them is dispositive. The *Edwards* factors must be considered as a whole, having regard to the particular circumstances of each case.

- [45] A resident may have possession or control of the common areas of a building to a greater or lesser extent. The size of a building may be a relevant consideration in determining reasonable expectations of privacy, as even in the context of a locked building protected by a security system it is reasonable to assume that the number of people that may be present in the common areas of the building will vary in accordance with the size of the building and its population. Ownership of the property may be of greater or lesser significance for the same reason. A resident of a large building with 200 units may have a lesser expectation of privacy than a resident of a small building with 2 apartments.
- [19] The Court acknowledged that in a multi-unit building where a large number of people may have access to the common area an expectation of privacy may be attenuated without being eliminated. For example, although Mr. White did not have absolute control over access to the building, the Court found it was reasonable for him to assume a number of things - that the building security system would operate to exclude strangers including the police "without permission or invitation and investigating at their leisure"; that although access to the building storage was not regulated it was not open to the general public and that people would not be hiding in the stairwell observing what was occurring in association with ones unit (paras. 47 - 48).
- [20] The notion that common areas in multi-residential units are "privacy free zones" was rejected in *White* as that notion was inconsistent with the broad conceptions of the right to privacy. (see *White* para. 48; *R. v. Latimer*, 2020 BCSC 488 at para. 160). I find the following observations from *White* instructive:
- [51] There is nothing "perverse" about providing a measure of privacy protection to the many Canadians who live in multi-unit dwellings. They, no less than those who live in detached homes, are entitled to the protection against unreasonable search and seizure the Charter provides. In any event, it is not an all or nothing choice. A balance must be struck between law enforcement objectives and privacy in modern urban life. Cases such as *Laurin and Thomsen* demonstrate that the police have considerable ability to investigate crime in multi-unit buildings. But they do not have *carte blanche*.
- [21] In *Yu*, the Ontario Court of Appeal considered whether the appellants had a reasonable expectation in privacy in a condominium parking garage and hallways. *Yu* arose out of a complex investigation into criminal gang activity in Toronto and targeted several condominium buildings including one on Western Battery Road and one on Joe Shuster Way ("Shuster Way"). I will review the facts in *Yu* in some detail.
- [22] The appellant Mr. Tang resided at Western Battery Road and although he was not subject to surveillance in the common areas of his building, the Ontario Court of Appeal found that he had a reasonable expectation of privacy in his own residence. Adopting the contextual approach applied in *White*, the Court found the "appellants had a reasonable expectation of privacy in the hallways of their respective buildings, although at the low end of the spectrum". In reaching that conclusion the Court considered a number of factors set out

paras. 82-87:

- [82] Once inside an access-controlled condominium building, residents are entitled to expect a degree of privacy greater than what, for instance, they would expect when approaching the building from the outside. This results from the fact that anyone can view the building from the outside, but there is some level of control over who enters the building.
- [83] The level of expectation of privacy inside a condominium building will vary. The level of expectation of privacy is dependent on the likelihood that someone might enter a certain area of the building, and whether a person might reasonably expect a certain area to be subject to camera surveillance.
- [84] Some areas of condominium buildings are routinely accessed by all condominium residents, such as the parking garage or elevator lobby. The level of expectation of privacy in those areas is low, albeit remaining greater than would be expected outside of the building. The level of expectation of privacy increases the closer the area comes to a person's residence, such as the end of a particular hallway of a particular floor of the building. Even in those less-frequented areas the level of expectation of privacy is low, but not as low as in the more commonly used areas.
- [85] A resident or occupant's reasonable expectations surrounding camera surveillance in a condominium building depend on whether the cameras are visible, and whether the resident has been informed by the condominium management as to the location of any security cameras installed in the building. If there is no visible camera, and if the resident has been told that there are no security cameras, then residents are entitled to expect their movements are not subject to camera surveillance.
- [86] The only time that condominium residents should expect complete privacy is when they are inside their unit with the door closed. As soon as they open their door, or exit their unit, it is reasonable to expect that they may be observed, with that level of expectation increasing the closer they get to the main areas of the building or to any security cameras.
- [87] On balance, the factors listed above establish a low, but reasonable expectation of privacy in these common areas
- [23] The Court of Appeal also concluded that the appellant's expectation of privacy with respect to common areas was further reduced "given the possibility that property management could consent to police entry" (para. 94). After considering the provisions of the Condominium Act, 1998, S.O. 1998, c. 19, ss. 17(1), 17(2) [the Act], the Court found the Act conferred a responsibility and authority on the board to act as a decision-maker for the owners as a collective and by extension the same authority to the property management. This authority included regulation of access. However, that finding did not end the Court's consideration of whether there had been valid consent. The Court went on to consider the evidentiary record and concluded that valid consent was provided at Shuster Way but there was insufficient evidence to conclude that the police had consent to enter Western Battery

Road. With respect to Shuster Way, the Court found "there was extensive evidence in front of the application judge about the circumstances surrounding Mr. Chudnofsky's consent" (para. 99), but there was no evidence from the property manager or board regarding the circumstances surrounding the giving of consent at Western Battery Road. Therefore, the Court found the Crown could not rely on consent to authorize the warrantless hallway entries at Western Battery Road (para. 97-106). In Yu, the Court considered the validity of consent relying on the factors set out in R. v. Wills, 1992 CanLII 2780 (O.N.C.A.), 7 O.R. (3d) 337 (C.A.) and determined the Shuster Way search was authorized by a valid consent and hence did not violate s. 8.

- [24] With respect to the Western Battery Road parking garage, the observations were made from the visitors' section which did not require access into the secure parking garage. Applying the analytical framework established in Edwards as refined in Spencer, the Court of Appeal concluded that Mr. Tang and the other appellants "did not have a reasonable expectation of privacy regarding observations made from a space accessible to the general public", and further found even if they did have an expectation of privacy in the garage, it was not objectively reasonable (para. 80).
- [25] In Pipping, the Court of Appeal upheld the trial judge's ruling that the appellant had a reasonable expectation of privacy in the hallway outside of his unit in a multi-unit condominium complex. The Court also concluded the police surveillance in the hallways was a search. In conducting their analysis, in addition to considering the analytical framework established in Edwards, the Court reviewed Webster, White and Yu which as discussed above are the leading authorities applying the Edwards factors when dealing with standing in relation to police physical surveillance in the common area of condominiums.
- [26] In Pipping, the police had determined that targets of their investigation were associated with a condominium complex in Burnaby. The building was a four-level condominium containing 96 units, with key access to outside entrances, open access once inside, and no video surveillance. The property management company responsible for managing the building refused the police request for tenant information. As a result, the police obtained a general warrant pursuant to s. 487.01 of the Code which authorized them to search the common areas of the property. I pause to note that the general warrant was held to be invalid on appeal due to a technical breach. The police entered the building and one officer was able to surreptitiously observe Mr. Pipping entering unit 403 with a key. The police relied on these observations to seek and obtain a search warrant.
- [27] In finding that the facts were more similar to White and Yu than Webster, the Court identified the factors that were important to their analysis at para. 31:

The important facts in the case before me include the property manager's refusal to grant the police access to the building without a warrant, the secured access to the building, the lack of video surveillance, that unit 407 is at the end of a hallway, and the narrow breadth of the observations made by the police.

[28] In upholding the trial judge's finding that Mr. Pipping had a reasonable expectation of privacy in the hallway outside unit 407 the Court observed "occupants of the building reasonably expected that entry to the building would be limited to invitees and otherwise members of the public would be excluded" (para. 32).

[29] With these legal principles in mind, I turn to my analysis.

ANALYSIS

(i) Was there valid consent to enter the parking garage and 12th floor hallway?

[30] I intend to address this issue first as the Crown acknowledged that the main factor that distinguishes this case from Pipping is the existence of consent by the property manager. The Crown submits Mr. Poon's belief that he had authority to provide the police with permission to access the building is supported by reference to the terms of the Agency Agreement entered into between the River Green Strata Corporation and FirstService Residential BC Ltd. ("the Agreement") which was filed as Appendix 1 to the Supplemental ASF. The Crown also relies on the analysis in Yu, where the Court of Appeal considered the provisions of the Act in determining whether the property manager had authority to grant consent.

[31] The Crown points to various clauses in the Agreement to illustrate that the provisions are essentially the same as those set out in the Act considered in Yu. Thus, the Crown submits if I adopt the interpretation from Yu I can conclude that the Agreement provides the same authority to regulate access, including access to the police. In my view, even if I apply the most generous and expansive reading to the Agreement, it would not advance the Crown's position. While I acknowledge the Agreement contained terms dealing with agent services and administration including "assisting the Strata Council in managing the affairs of the Strata Corporation" (term 3.1) and "assist in the administration of the common property and common assets of the Strata Corporation under the direction of the Strata Council" (term 3.2) I am not prepared to infer those terms contemplated the Agent (who is represented by the strata manager) providing unbridled access to all areas of the secure building to the police. Throughout the Agreement, there are numerous examples of limitations placed on the authority of the strata manager.

[32] For example, under the section Bylaws and Rules, term 3.28 deals with bylaw and rules enforcement. The clause reads "to assist with the enforcement of the Bylaws and Rules and, if so directed by the Strata Council, take appropriate action including legal action to enforce or stop any breach .". In Kim #3, I found that there was no evidence to establish that Mr. Poon had considered the requirements of section 40(4)(c) or 40(7)(a) of the strata bylaws dealing with permitting law enforcement to review video files or security fob usage records. I also found that there was no evidence that Mr. Poon had authority to make that decision. A plain reading of term 3.28 of the Agreement supports my earlier finding and demonstrates that Mr. Poon required direction from the Strata Council before taking action. In my view, it

is only reasonable to infer from this example that, if Mr. Poon did not have authority to permit the police access to the video files and fob access records without the direction of the Strata council, he would not have authority to permit police carte blanche access to the secure areas of the building. As I said, on the evidence I do have, Mr. Poon acted individually in cooperating with the police. There is no evidence that he was acting on any instructions from the Strata council.

[33] I have also considered the analysis in Yu. As I discussed earlier in these reasons, the Court was satisfied valid consent had been provided based on the evidentiary record regarding the authority of the property manager to provide consent at Shuster Way. However, the Court found there was insufficient evidence to draw the same conclusion with respect to Western Battery Road where Mr. Tang resided. In Kim #3, I concluded there was no evidentiary foundation to support the Crown's argument that Mr. Poon had the authority to decide whether to provide the police with photographs and fob access records. Having considered the additional material relied on by the Crown and mindful of the analysis in Yu, I reach the same conclusion here. The evidentiary record does not establish that Mr. Poon had the requisite authority to permit members of the DPD to conduct covert surveillance inside the secure areas of the building. To the extent the Crown is asking this Court to dispose of the analysis on the reasonable expectation of privacy on the basis that there was consent by the property manager, I decline this invitation. To accept the Crown's position on this argument (which even if I were to find there was consent, which I do not) is to focus too narrowly on merely one aspect of the multifactorial consideration the jurisprudence requires me to undertake.

[34] This does not end my analysis. The issue of consent is just one factor to consider in the totality of circumstances when determining whether the applicant's have established a reasonable expectation of privacy.

(ii) Do Mr. Kim and Mr. Latimer have an expectation of privacy with respect to the parking garage?

[35] I accept that the applicants have a direct interest in the subject matter of the search of the parking garage. However, there are a number of factors that militate against any subjective expectation of privacy being objectively reasonable.

[36] The parking garage was a secure two-floor underground parking lot which serviced the six residential buildings at the River Green complex, including Brighthouse Way. Brighthouse Way was a large residential building consisting of 14 floors and 458 suites. Although I do not have evidence of the precise number, I can infer that there are hundreds of residents and/or individuals who have access to the parking garage by means of a fob associated to a specific unit in one of the six buildings. In other words, hundreds of people would have access to the parking garage. Given the security measures, it is reasonable for one to assume that their vehicle parked in the designated stall will be secure. It is also reasonable for one to assume that only vehicles they permit access to will be parked in the designated parking stall. An

individual would have control over the parking space but they would have no control to stop any other person in the parking garage from making observations of what was transpiring inside the garage including at their individual parking stall. In these circumstances it is not reasonable for one to assume that their activities in the parking garage would be private and unseen by others. The practical reality is the parking garage, accessible to hundreds of people, was more public than private. As stated in Yu, with reference to the factors set out in Spencer, "unit owners could not have an objectively reasonable expectation of privacy in a garage shared with so many other owners and over which they have very little control" (Yu, para. 79) I reach the same conclusion. None of the applicant's have established on a balance of probabilities that they have an objectively reasonable expectation of privacy with respect to the parking garage.

(iii) Do Mr. Kim and Mr. Pereira have an expectation of privacy with respect to the 12th floor hallway?

[37] As stated earlier, in this application my analysis is informed by relevant findings I have made in earlier applications. With respect to this issue I must factor into my analysis my findings that the 12th floor hallway was more private than public and both Mr. Kim and Mr. Pereira had standing to challenge the search of unit 1204.

[38] I find that both applicants have established a subjective expectation of privacy with respect to the 12th floor hallway. As I have already determined, only Mr. Kim and Mr. Pereira had access or control over the 12th floor in relation to unit 1204. Access to the 12th floor hallway was restricted. While not completely private, its access was limited to those who had a fob for the 12th floor or were otherwise invited up by those who had fob access to the floor. I find that both applicants had a reasonable expectation of privacy in the 12th floor hallway, albeit one on the lower end of the spectrum.

[39] As stated in Pipping at para. 30, "Edwards, Webster, White and Yu are consistent in their focus on the manner in which the control of public access to the common areas of a building is key to the assessment of a reasonable expectation of privacy". While each case turns on its own facts, there are several similarities between Pipping and this case. Neither applicant is the registered owner or tenant; the condo building was secured and accessible only by key and there was no evidence of a register of occupants near the entrance. Both units were located at the end of the hallway, resulting in less traffic and somewhat more privacy than other units on the floor. While there was no video surveillance in Pipping, the video surveillance in this case did not extend to the 12th floor thus enhancing one's expectation of privacy. In Pipping access to other areas in the building was not restricted. Although Brighthouse Way was a larger multi-unit residential building, access to the 12th floor was limited to those who had 12th floor fob access.

[40] In addition, as I determined earlier in this decision, the entry onto the property was without valid authority. This is another factor that aligns with the circumstances in Pipping, White and Yu.

[41] Having considered the totality of circumstances in my analysis I am satisfied that Mr. Kim and Mr. Pereira's subjective expectation of privacy in the 12th floor hallway is objectively reasonable.

Conclusion

[42] Mr. Kim and Mr. Pereira have established standing to challenge the evidence obtained from the covert surveillance on the 12th floor.

[43] Mr. Kim and Mr. Latimer's application for standing to challenge the evidence obtained from the covert surveillance in the parking garage is denied.

"Devlin J."

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