

CANADA / JUDGMENT

## R. v. Van Buskirk

2023 BCSC 1873

### COURT

Supreme Court of British Columbia

### DECIDED

24 October 2023

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2023 BCSC 1873 R. v. Van Buskirk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Van Buskirk,

2023 BCSC 1873

Date: 20231024

Docket: 32959

Registry: Vancouver

Between:

Rex

And

Brent William Van Buskirk

Corrected Judgment: The front page of the judgment was corrected on February 12, 2024.

Before: The Honourable Madam Justice Murray

Reasons for Judgment re: Accused's Application for Third Party McNeill Disclosure re Rob Ferris

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Place and Date of Hearing:

Vancouver, B.C.

September 26, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 24, 2023

## INTRODUCTION

- [1] The accused, Brent Van Buskirk is charged with possession of prohibited firearms and restricted weapons and possession of fentanyl and methamphetamine for the purpose of trafficking. All offences relate to evidence located during searches on November 17, 2020.
- [2] He applies for production of two groups of materials:
- 1) McNeil disclosure regarding disgraced former Victoria police officer Rob Ferris ("Mr. Ferris"); and
  - 2) Information regarding the Victoria Police Department's (VicPD) decision to let Mr. Ferris take an active role in the investigation that ultimately led them to the accused, knowing that Mr. Ferris was under criminal investigation himself. Included in this request is information regarding what the VicPD knew about Mr. Ferris' alleged misconduct, what safeguards were put in place to ensure that he did not compromise the investigation and what communications they had with the RCMP Anti-corruption Unit (ACU) regarding Ferris' misconduct.
- [3] The ACU investigation revealed that between January and May 2020, Mr. Ferris was believed to be involved in 19 instances of misconduct including associating with suspects of police investigations in southern Vancouver Island, divulging details of police investigations to family members, improperly accessing police databases, lying to investigators and divulging sensitive information to civilians. Mr. Ferris has not been charged criminally for his misconduct. According to Sgt. Robert Brown of VicPD, Mr. Ferris's misconduct did not relate to the first investigation in any way.

- [4] McNeil refers to the Supreme Court of Canada's decision in *R. v. McNeil*, 2009 SCC 3 (McNeil), which dealt with the Crown's disclosure obligations regarding police disciplinary records. Under the McNeil regime, third party police misconduct records which are relevant to the accused's case are to be disclosed as though they were first party records under the Stinchcombe regime. In this way, the police have a corollary duty to participate in the disclosure process. Information that has not been provided on a first party basis by the Crown can be applied for under the O'Connor regime. The parties are ad idem that this is a third-party records application subject to the O'Connor regime.
- [5] Under the O'Connor regime, there are two stages of analysis to determine if records should be disclosed.
- [6] First, the applicant must establish that the records sought are "likely relevant" which has a "wide and generous connotation and includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence.": *McNeil* at para. 44. For example, likely relevance will be established if there is a reasonable possibility that the records sought are logically probative to an issue at trial, to the competence of a witness to testify, or because it could be used "in meeting the Crown case, advancing a defence or otherwise making a decision which could have affected the conduct of the defence": *R. v. Gubbins*, 2018 SCC 44 at paras. 18, 26 and 27. That said, the likely relevance threshold is not to be so wide and generous that it opens the door to fishing expeditions which detract focus from the issues at hand.
- [7] If likely relevance is established, then the application proceeds to the second stage of analysis whereby records are produced for review by a judge to determine the "the true relevancy of the targeted record in the case against the accused": *McNeil* at para. 39. Issues of legislated confidentiality and/or privilege are considered at this stage.
- [8] While conceding that the threshold is low, the Crown opposes the accused's application on the basis that none of the information sought is "likely relevant".
- [9] In order to assess the application, I must set out the background of the investigation and disclosure in some detail. In doing so I will rely in great part on written submissions of counsel.

## BACKGROUND

### The First Investigation (VicPD File 2020-14203)

- [10] At some point in 2019, VicPD became aware of serious allegations that Mr. Ferris, a member of the Strike Force unit, was engaging in breach of trust and obstruction of justice. The RCMP Anti-corruption Unit (ACU) was enlisted to investigate the allegations.

- [11] On May 6, 2020, Strike Force initiated an investigation into the "Dobell group". The primary targets were Vu Bao Nguyen and Byran Balla. I will refer to this as the first investigation. It ran between May 6, 2020 and June 18, 2020.
- [12] The investigative team was headed up by Sgt. Jeff Lawson. He was aware from the inception of the first investigation that Mr. Ferris was under criminal investigation by the ACU. Despite that, Mr. Ferris was permitted to participate in the investigation on a "business as usual" fashion so as to not alert him to the fact that he was under investigation. Mr. Ferris attended three briefings, was twice a member of the surveillance team and co-handled with Cst. Ewington one of the informants, Informer D. Mr. Ferris provided information from Informant D to the affiant, Cst. de Wit to use in Informations to Obtain (ITO) which provided Judicial officers the grounds to issue several authorizations in the first investigation.
- [13] On June 18, 2020 Mr. Ferris was arrested by ACU for obstruction of justice and breach of trust. On that date, VicPD decided to immediately terminate all of the ongoing investigations that Ferris had been involved in, including the first investigation.

### **The Second Investigation: Project Juliet (VicPD 2020-25050)**

- [14] Days later, on June 23, 2020 VicPD decided to recommence the first investigation. A new file (with a new file number) was opened and the investigation of Nguyen and Balla continued. The investigation became known as Project Juliet. All the same officers (save Mr. Ferris) were involved in Project Juliet. Sgt. Lawson remained the team commander and Cst. de Wit the primary affiant. Cst. Kim Taylor, who was involved in the first investigation, was named primary or lead investigator.
- [15] According to the written submissions of Crown, investigators appreciated that the arrest of Mr. Ferris and the allegations against him were serious, and that it was unlikely that any prosecution that relied on Mr. Ferris's evidence would be able to proceed. In an effort to distance the investigation from Mr. Ferris, the investigators decided that they would not use any information learned from the first investigation and would re-learn anything that they had learned before.
- [16] Project Juliet progressed quickly. Surveillance was set up on Nguyen and Balla within two days (June 25, 2000). An undercover operation was commenced on June 30, 2020 which resulted in investigators making undercover buys of fentanyl from Nguyen and Balla on July 7, 8, 17 and 31, 2020.
- [17] During surveillance on July 29, 2020, Nguyen was followed to Vancouver where he was observed meeting with a man who was later identified as the accused Van Buskirk. Based on what Nguyen had told an undercover operator and the short trip he made to meet with Mr. Van Buskirk, investigators formed the belief that Mr. Van Buskirk was Nguyen's fentanyl supplier.

- [18] As a result, on September 2, 2020, VicPD entered into a joint forces operation with CFSEU in Surrey. VicPD investigators remained in Victoria and continued to conduct surveillance of Mr. Nguyen and Mr. Balla, while the CFSEU investigators concentrated on conducting surveillance of Mr. Van Buskirk in the Lower Mainland area. Cst. de Wit continued as the affiant for all authorizations. Cst. Kim Taylor was assigned the role of file coordinator. Cst. Ewington continued as handler for Informer D. He provided Informer D's information to Cst. de Wit for the Project Juliet authorizations.
- [19] On November 17, 2020, Messrs. Van Buskirk, Nguyen and Balla were arrested. Police executed search warrants at 2703-1155 Seymour Street, Vancouver, 3305-4510 Halifax Street, Burnaby and a storage locker at 6-1601 Lougheed Highway, Coquitlam. The items seized in those searches form the allegations against the accused.
- [20] Messrs. Van Buskirk, Balla and Nguyen were charged on the same Information with drugs and weapons offences. Mr. Van Buskirk was charged as a co-accused with Nguyen in two of the counts.

## Disclosure

- [21] The Report to Crown Counsel (RCC) that was disclosed to the accused following his arrest outlines the investigation called Project Juliet that targeted him, Nguyen and Balla. It states that the investigation commenced in June 2020. Nowhere in the 347-page RCC is there reference to any investigative steps taken by VicPD prior to June 23, 2020. Nor does it mention Mr. Ferris' misconduct.
- [22] Not only did police not mention the first investigation, they obscured it. For example, in a task to document the commencement of the file and why the targets were selected, Cst. Kim Taylor set out the information received by VicPD regarding Balla and Nguyen but mentioned nothing about the first investigation. And in a task to document key developments, Cst. Taylor recorded the first key development in the investigation as her June 23, 2023 review of an "unrelated police file". Of note, Cst. Taylor played an active role in the first investigation.
- [23] In the task for documenting the submission and obtainment of judicial authorizations, none of the authorizations obtained in the first investigation were mentioned. Nor were they mentioned by police to issuing Justices in order to obtain authorizations in Project Juliet. For example, Cst. de Wit, the affiant in both investigations, documented his July 9, 2020 applications for a Tracking Warrant (TW) and a transmission data recorder warrant (TDR) without referencing the previous TW and TDR that he obtained during the first investigation and which he had just requested to be disconnected two days before he applied for the warrants he referenced in this task. On July 9, 2020, Cst. De Wit solemnly affirmed in an ITO to obtain three authorizations under the heading "Previous Applications Authorized or Denied" that "This is the first application for judicial authorization related to this investigation". In the synopsis of investigation portion of the ITO, Cst. de Wit attested that the investigation commenced in June 2020 when VicPD received informer information. In

subsequent ITOs under the heading "Previous Applications Authorized or Denied", Cst. de Wit detailed, under affirmation, only the authorizations he obtained on Project Juliet, thereby concealing the authorizations he obtained in the first investigation.

- [24] Through their actions investigators misled the Crown, defence and the Justices that issued authorizations and warrants into believing that the investigation commenced in June 2020.
- [25] In around the beginning of November 2020, defence counsel, scrupulously reviewing disclosure, noticed a report date in one of the tasks of April 20, 2020. This stuck out as all material that had been disclosed commenced on June 23, 2020. As a result, the defence requested disclosure of "all notes, occurrence reports or other investigative material between April 2020 and June 23, 2020". Crown counsel sent a request to Cst Taylor with pointed questions for example: "Can we explain why Task 1 was started April 20, 2020 and then nothing really happens until June 23, 2000?" and "Were any notes, occurrence reports or any other investigative material generated between April 2020 and June 23, 2020?" Primary investigator Cst. Taylor assured Crown counsel that the investigation did not start before June 23, 2020 as follows:

- "The task was created on June 23, 2020 - in line with the front page on the task front page of the investigation and the ledger. The April 20 date is an admin oversight in some regard
- June 23 2020 was the start date."; and,
- "There is no investigative or administrative material whatsoever prior to June 23, 2020. File commenced June 23, 2020".

[Emphasis added.]

- [26] Following further inquiries of defence counsel, Crown counsel spoke with Cst. Taylor on December 7, 2020. During that conversation, Crown learned for the first time of the first investigation, but they were told only that it was limited to brief periods of surveillance. Crown was left with the impression that Mr. Ferris was involved only in surveillance and a few background checks.
- [27] As a result of learning of the first investigation, on December 12, 2022 Crown counsel wrote to Cst. Taylor instructing police to "shut down investigation into Nguyen and Balla". Crown counsel also asked Cst. Taylor (or whomever necessary) to prepare a will-say to explain the situation including that "a police officer who was under investigation had a role in that investigation, albeit peripheral".
- [28] On January 5, 2023, Crown counsel disclosed the existence of the first investigation to the defence. On January 10, 2023, Crown counsel learned for the first time that judicial authorizations were obtained during the first investigation. On January 25, 2023, Crown counsel learned for the first time that Cst. Ferris was an informant handler on the first investigation.

- [29] On February 17, 2023, the Crown stayed all charges as against Mr. Nguyen and Mr. Balla.
- [30] On October 19, 2023, while this judgment was on reserve, Crown counsel advised the accused that Cst. Kim Taylor, the lead investigator on Project Juliet, is presently being investigated by the Delta Police Department's internal standards section pursuant to an order by the Office of the Police Complaints Commissioner (OPCC) for allegations of discreditable conduct and neglect of duty relating to the disclosure of the first investigation to Crown counsel. The investigation began in September 2023.
- [31] The OPCC initially ordered an external investigation into now S/Sgt. Lawson of the same delicts as well. However, after learning from Insp. Colin Brown of VicPD that S/Sgt Lawson had not had any involvement in the investigation after November 2020 and was not involved in disclosure or any decision making around disclosure, the OPCC issued an Amended Order for External Investigation that named only Cst. Taylor.

## ISSUE

- [32] The issue can be framed as follows: whether the accused has established that there is a reasonable possibility that the information sought may assist the accused in the exercise of his right to make full answer and defence. Put more specifically is it reasonably possible that the records sought could be logically probative to an issue at trial, to the competence (credibility and/or reliability) of a witness to testify, or because it could be used in meeting the Crown case, advancing a defence or otherwise making a decision which could affect the conduct of the defence.
- [33] In assessing this question I must be mindful that the Supreme Court of Canada has described the burden as "not onerous". The purpose of the first stage is to weed out "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production": McNeil at para. 29. In other words, the "likely relevance threshold is a first-step inquiry designed to prevent fishing expeditions, but nothing more" [emphasis added]: R. v. Gubbins, 2018 SCC 44 at para. 28. In order to find that likely relevance has not been made out, a court must be able to say "with confidence ... there is no reasonable possibility that the records" might assist the defence, without having any opportunity to review those records: R. v. Schirmer, 2022 BCCA 214 at para. 91. I must further be mindful that at this stage the accused has not seen the information sought and is therefore making submissions in a vacuum. Accordingly, the accused is not required to specify a use to which the records sought will be put: McNeil at para. 29.

## ANALYSIS

- [34] Mr. Van Buskirk seeks disclosure of a long list of documents related to the criminal and/or Police Act investigations into former police officer Ferris.

- [35] While the Crown acknowledges that Mr. Ferris's misconduct is serious and that VicPD's decision to continue their investigation was unwise, it contends that the accused does not need more detailed information to make full answer and defence.
- [36] Generally, the Crown maintains that there is no factual or temporal nexus between the information sought and the investigation and prosecution of Mr. Van Buskirk. Mr. Van Buskirk was not a target of the initial VicPD investigation, nor was he known to the investigators when Mr. Ferris was involved in the investigation of the former co-accused. Mr. Van Buskirk only came to the attention of the police through investigative steps taken after Mr. Ferris had been arrested and after the VicPD had restarted their investigation of the former co-accused. Crown argues that there is no merit to the contention that the continued prosecution of the applicant would constitute an abuse of process and that further production will not advance the Charter arguments that Mr. Van Buskirk intends to pursue. Additionally, the Crown says that disclosure of further details of Mr. Ferris' misconduct will compromise informer privilege.
- [37] Crown counsel concedes that in any challenge to judicial authorizations that the accused is permitted to bring, all information received from Informer D should be excised from the ITO. That should address all concerns regarding Mr. Ferris's handling of Informer D.
- [38] I am unable to conclude that there is no connection between the first and second investigations for several reasons. Just four days passed between the termination and recommencement of the investigation. It appears possible that VicPD basically carried on from where they left off. The same investigators were involved. TWs and TDRs obtained in the first investigation were kept active. Task action reports show that Sgt. Lawson did not direct that they be disconnected until July 7, 2020 (or July 20, 2020 according to Follow Up# 45), meaning that police continued to gather information from these devices on Project Juliet. The investigation evolved quickly once recommenced. The investigation into Nguyen and Balla led police to Mr. Van Buskirk. The three were initially charged together. The Crown theory is that Mr. Van Buskirk was Nguyen's and Balla's supplier. Based on those facts, there is some basis upon which to argue that it was one continuous investigation.
- [39] I agree with Mr. Van Buskirk that although the Crown claims that Mr. Ferris played an insignificant role in the first investigation, the Crown's actions in staying the serious charges against Nguyen and Balla belie that. As do VicPD's efforts in concealing the first investigation.
- [40] The documents being sought in this application are similar to those which were ordered to be disclosed by our Court of Appeal in *R v. Schirmer*, 2022 BCCA 214. In *Schirmer*, the Court found that documents related to the investigation of Mr. Ferris met the standard of likely relevance for Mr. Schirmer's appeal, despite the fact that the investigation into Mr. Ferris's misconduct commenced three years after Mr. Schirmer's arrest. Unlike in *Schirmer*, Mr. Ferris was under investigation and was found to have been actively associating with suspects of police investigations during the period he was involved in the first investigation. In

addition, the threshold for establishing likely relevance on a trial when innocence is at stake is much broader than on appeal.

- [41] The credibility and reliability of the officers involved and the evidence they obtained are central issues in this case. Mr. Van Buskirk is challenging every authorization. Mr. Ferris's information regarding what Informer D told him was vital to authorizations obtained for TDR warrants on Nguyen and Balla's phones and a TW on Nguyen's vehicle in the first investigation. In none of the impugned ITO's when deposing to the reliability of the information obtained from Mr. Ferris did Cst. de Wit disclose that Mr. Ferris, Handler "D", was under investigation for criminal conduct by the ACU. The evidence gained by these warrants ultimately led police to Mr. Van Buskirk.
- [42] In Project Juliet investigators misled the Crown, defence and issuing Justices by concealing the existence of the first investigation. I am unable to conclude that there is no merit to a possible abuse of process application.
- [43] As stated above, at this stage the task of the court is to weed out fanciful requests based merely on speculation. For the reasons outlined above I am satisfied that the defence requests are neither fanciful nor based on speculation. In the circumstances of this case, I am satisfied (with one exception) that there is a reasonable possibility that the records sought, might assist the accused in making decisions regarding his defence and in pursuing applications. I fail to see how the first request - the date upon which VicPD first became aware of allegations made against Mr. Ferris has any bearing on Mr. Van Buskirk's defence.

## CONCLUSION

- [44] I order that a sealed, but unredacted copy of the records sought, save the date upon which VicPD first became aware of allegations made against Mr. Ferris, be produced to the Court for review. Upon receipt, that application will proceed to stage two for an assessment of actual relevance. Concerns regarding confidentiality and privilege will form part of the decision regarding what records should be disclosed to Mr. Van Buskirk.

"The Honourable Madam Justice Murray"

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