

CANADA / JUDGMENT

R. v. Walton

2016 BCSC 547

COURT

Supreme Court of British Columbia

DECIDED

18 March 2016

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2016 BCSC 547 R. v. Walton IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Walton, 2016 BCSC 547 Date: 20160318 Docket: 27001 Registry: Vancouver Regina v. Darryn Scott Walton Before: The Honourable Mr. Justice G.C. Weatherill On appeal/judicial review from: Provincial Court of British Columbia, October 5, 2015 (R. v. Walton, Vancouver File No. 233112) Oral Reasons for Judgment Counsel for the Crown (Respondent): J.M. Whiting Counsel for the Accused (Applicant): C.L. Corriveau Place and Date of Hearing: Vancouver, B.C. March 18, 2016 Place and Date of Judgment: Vancouver, B.C. March 18, 2016

- [1] THE COURT: This is an application by the accused for remedies by way of certiorari, mandamus, and prohibition, regarding a decision by the Provincial Court of British Columbia on October 5, 2015, that the trial of this matter had commenced on September 1, 2015, when the accused applied for production of certain GPS records from the RCMP, and that the accused was thereby precluded from re-electing for a trial in British Columbia Supreme Court.
- [2] As counsel for the Crown points out, the remedies of certiorari and mandamus are jurisdictional-based remedies and, accordingly, the applicant must establish that the court exceeded its jurisdiction in terms of certiorari and failed to exercise its jurisdiction as it should have in terms of mandamus.
- [3] The facts are as follows.
- [4] The accused is charged with the possession of stolen property over \$5,000 and for possession of methamphetamine for the purpose of trafficking. The charges were laid on November 18, 2014. At his arraignment before a justice of the peace on December 10, 2014, the accused elected for a trial in Provincial Court. The trial was set to commence in March 2015. It was adjourned for reasons that are not particularly germane to this application. The trial was thereafter scheduled to commence on October 5, 2015.
- [5] Between March 15 and September 1, 2015, the accused sought production from the Crown of the certain GPS records that were in the possession of the RCMP. The RCMP refused to produce those records.

- [6] On September 1, 2015, during a pre-trial conference that had been scheduled, counsel for the defence made an application to the court regarding production of the GPS records.
- [7] Counsel for the accused takes the position before me that the "application" made on September 1, 2015 was only for direction from the court to determine a procedural issue related to whether the records were in fact in possession of a third party, such that a third party notice was required. The Crown takes the position that the application on September 1, 2015 was for production of records and was plainly grounded in the Crown's constitutional Stinchcombe ongoing disclosure obligation.
- [8] On September 16, 2015, the learned Provincial Court judge ruled that, if the accused wished production of the GPS records, he, was required to seek them by way of an O'Connor application by giving notice to the RCMP.
- [9] In response, on September 18, 2015, the accused filed a notice of re-election for trial in the British Columbia Supreme Court.
- [10] On October 5, 2015, the date scheduled for the Provincial Court trial, the parties reappeared before the learned Provincial Court judge. Neither counsel attended with any intention of proceeding to trial on that date, given the re-election. However, the learned Provincial Court judge held that, because the application by the accused on September 1, 2015 was a disclosure application, pursuant to which the accused was seeking a constitutional or Charter remedy, the trial had in fact commenced in the Provincial Court on September 1, 2015, and that the accused's re-election to Supreme Court was therefore invalid.
- [11] At page 2 of the transcript of that proceeding, line 16, counsel for the accused said: And then as well my friend indicated that -- I gather that Your Honour feels that the trial has commenced. I didn't feel that the application that I made commenced the trial because it wasn't a Charter application. It was only an application in respect of whether or not I had to give third-party notice. THE COURT: The application was under the Charter, Ms. Corriveau. It couldn't have been anything else. It was a disclosure application. MS. CORRIVEAU: All right. THE COURT: It doesn't arise in -- out of thin air. It arises because of the Charter. It was a Charter application.
- [12] The learned Provincial Court trial judge then stated that but for defence counsel's inability to proceed because of illness, she would have commenced the trial then and there. However, because of defence counsel's illness, the trial was adjourned and it is now scheduled to commence on Monday, March 21, 2016, being two days from today.
- [13] The issues before me reduce themselves to this:
- i) Did the accused's counsel make an "application" for production of the GPS records on September 1, 2015? ii) If so, was the accused, by virtue of that application, seeking Charter relief? iii) If so, is the accused precluded from relying on his re-election?

- [14] Despite both the Crown and counsel for the accused being of the view that the filing by the accused of his re-election was effective, and despite both counsel being of the view that the trial was not going to proceed in Provincial Court on October 5, 2015, the Provincial Court judge for the first time indicated that she was seized of the matter.
- [15] In my view, what occurred on September 1, 2015 was an application for production of the GPS records. I have reviewed the transcript of that proceeding. There was a full, detailed discussion of those records, their relevance, and the issue of privilege. Indeed, as counsel for the Crown points out, there was even a discussion as to how they could be disclosed to the accused by way of undertakings to protect any privilege that might exist.
- [16] Counsel for the accused conceded during her submissions that she would have expected the Crown to produce the records, had the court agreed with her that they were not third party records.
- [17] The Crown submits that because the September 1, 2015 hearing was an application for production of records, it was tantamount to an application under the Charter pursuant to the Crown's ongoing Stinchcombe disclosure obligations because the question put to the court on September 1, 2015 squarely raised those ongoing disclosure obligations, and, accordingly, squarely raised a Charter remedy. That being the case, Crown argues that the trial commenced on that date. I disagree.
- [18] First of all, a criminal trial does not start with an application for production of records. It starts with a plea. There has been no plea in this case. There was an arraignment in arraignment court on December 10, 2014 before a justice of the peace, but a plea was not taken. Indeed, a justice of the peace cannot take a plea.
- [19] Second, in my view, what occurred on September 1, 2015 was not an application by the accused for a Charter remedy. The mere fact that a judge hears an application for production of documents during a pre-trial conference prior to a plea does not result, in my view, in the pre-trial conference judge becoming seized as the trial judge: *R. v. Kreelak*, 2006 NUCJ 6 at para. 25, and *R. v. M.L.K.*, 2004 ABQB 734 at paras. 57 and 58.
- [20] I agree with counsel for the accused that virtually all applications in a criminal proceeding touch, either directly or indirectly, in some way on a potential Charter issue. But simply seeking disclosure pursuant to the Crown's ongoing disclosure obligations does not, in my view, equate to the formal seeking of a Charter remedy for which notice is required.
- [21] In my view, the learned Provincial Court judge exceeded her jurisdiction by seizing herself as the trial judge on the basis that the trial had commenced on September 1, 2015.
- [22] I am granting the relief sought by the applicant at paragraphs 4, 5, and 6.
- [23] THE CLERK: Sorry, My Lord, paragraphs 4, 5, and 6?
- [24] THE COURT: Six of the notice of application.

- [25] THE CLERK: Okay.
- [26] THE COURT: Actually, and number 3 as well.
- [27] THE CLERK: Number 3, 4, 5, 6, and I don't have it in front of me, is there ones that are not being granted?
- [28] THE COURT: Well, three is the relief in the nature of certiorari, quashing the ruling that the presiding Provincial Court judge was now seized of the trial as a result of having improperly ruled --
- [29] THE CLERK: Okay.
- [30] THE COURT: -- on the application that was not before the court.
- [31] THE CLERK: Okay.
- [32] THE COURT: By that, I mean that it was not a Charter application. Relief in the nature of certiorari quashing the ruling, when an improper ruling was made that it was a Charter application, and the mandamus and prohibition. "G.C. Weatherill J."

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