

CITATION: R. v. MacPherson, 2017 ONSC 7378
COURT FILE NO.: 15-F5540
DATE: 2017/12/11

**COURT OF ONTARIO
SUPERIOR COURT OF JUSTICE**

RE: R. v. Scott Kyle MacPherson

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: Colleen Liggett, for the Crown

Lara Malashenko, for Ottawa Police Service

Shira Brass, for the Accused

HEARD: November 30, 2017

ENDORSEMENT

[1] This is an application for production of records. Specifically the accused seeks disclosure of Global Positioning System (GPS) data to show the location of police vehicles operated by the officers who were involved in his arrest. The accused seeks this information because he believes it will contradict the evidence given by the officers at the discovery. His eventual goal is to prove breach of his *Charter* rights and to suppress the evidence resulting from a search of his vehicle.

[2] The question before the court is whether or not the GPS data available to the Ottawa Police Service must be disclosed. It is first necessary to determine whether these should be treated as “first party” or “third party” records.

[3] For the reasons that follow, I am of the view that on the facts of this case, the GPS data is subject to production under *Stinchcombe*¹ but the requested production is overly broad. I have narrowed the scope of the order.

Background

[4] The accused is facing two charges of possession for the purpose of trafficking and one count of possession of proceeds of crime. He was arrested following a search of his vehicle carried out by officers of the Ottawa Police Service early in the morning on June 14, 2015.

¹ *R. v. Stinchcombe*, [1991] 3 SCR 326

[5] In lieu of a preliminary inquiry, the Crown provided the accused with discovery of Constable St.-Pierre Babin, Constable Boldirev and Constable Turnbull who were investigating officers. It is the police evidence that the accused was questioned by the police because he was seen stopping his vehicle in a parking lot just after midnight in a darkened location where all the businesses were closed. The officers advise that they requested to see his documentation pursuant to the *Highway Traffic Act* and in the course of looking into the vehicle, one of the officers was able to see a baggie containing marijuana and marijuana seeds in the front console of the vehicle. This resulted in a search of the vehicle in the course of which the officers located cocaine, methamphetamine and \$1800 in cash.

[6] The accused contends that this was an unreasonable search and seizure in violation of his rights under the *Canadian Charter of Rights and Freedoms*. The accused originally questioned whether it was possible for an officer to see marijuana seeds through the windshield of the vehicle. I am advised that both the Crown and the accused have now conducted independent testing on that issue. The accused is also pursuing a theory that the officers specifically targeted him and he believes their version of events leading up to the search is simply untrue.

[7] The basis for this latter theory is that earlier in the evening the accused interacted with a police officer while he was at a party at a friend's house. The owner of the house where the party was held (Mr. Saumier) later witnessed a police vehicle following the accused when he left the party. On this basis the accused believes he was targeted by the police and the search of his vehicle was without reasonable justification.

[8] Mr. Saumier provided an affidavit but he also testified at the hearing of the application and was cross examined by the Crown. It is his evidence that when the accused left the party, an unmarked police vehicle sped up the street after him. He described the vehicle as a dark coloured police cruiser with police marked on the side in reflective lettering but not a standard white and blue police vehicle.

[9] Originally the accused had made a number of disclosure requests. One of those was for production of all communication between the officers and between the officers and police dispatch. Because the officers were part of D.A.R.T., however, the evidence is that their radio communication was on a frequency which is neither recorded nor preserved in any other fashion. For that reason there are no communication records other than a single recorded communication with police dispatch at the time of the arrest.

[10] The Crown has provided the accused with evidence that no query had been run on the accused's licence plate or on the accused before 12:30 a.m. which arguably demonstrates that the accused was not a target until the search. Furthermore there is no evidence that an unmarked police cruiser was used by any of the officers involved with arresting Mr. MacPherson and so no link between what Mr. Saumier observed and the subsequent arrest.

[11] I was not provided with any affidavit evidence by the Crown or by the police concerning the exact nature and configuration of the GPS system. Counsel for the OPS confirms that the location of police cruisers is tracked by a GPS system and can be displayed in real time but is also retained in a database. I am told it is possible for the police to display locations and routes of police cruisers on a computer generated map using licenced software. I am also told that it is possible to output the data as GPS coordinates and to plot those coordinates on a map. The accused would be content with screen shots taken of the data displayed on the police computer for the times and vehicles in question.

[12] Of course the GPS data in the police database exists only in machine readable form. It is only useful to humans when relevant data is identified, extracted and displayed using the appropriate computer program or application. The significance of this is that the accused is looking for a report that does not currently exist and is not in the hands of the Crown. If I require the information to be produced, it will be necessary to produce a report in an appropriate form. It is clear however that if the Crown viewed this information as important and relevant, the Crown could request it and the OPS would be able to identify where the vehicles were located at any point in time.

[13] The only purpose for the accused's request is to verify or cast doubt upon the evidence given by the police officers by checking to see if the location of the police cruisers is consistent with the evidence given by the officers. It is the hope of the accused that if the officers were not where they say they were, the court will infer the accused was targeted by the officers and the search of his vehicle was unconstitutional. In this sense the requested data is not directed at the elements of the offence but only at the possibility of a *Charter* defence.

Analysis

[14] The first question is whether the information should be regarded as "first party records" within the control of the Crown and subject to disclosure under the *Stinchcombe* regime or whether this is an *O'Connor* application for the production of "third party records".

[15] In *Stinchcombe* the Supreme Court of Canada articulated the duty of the Crown to disclose all "fruits of the investigation" which are in the possession of counsel for the Crown. This covers material the Crown proposes to use at trial but also includes evidence which may assist the accused even if the Crown does not propose to adduce it. The Crown is not required to produce information that is clearly irrelevant. In certain circumstances the Crown may delay or withhold relevant evidence that might compromise the safety of a witness or which is protected by privilege. No relevant information should be withheld if there is a reasonable possibility that withholding the information will impair the right of the accused to make full answer and defence. With regard to *Stinchcombe* obligations, the Crown has the onus to justify withholding information which is within its power to produce.²

[16] An *O'Connor* application by contrast is an application for an order to produce information in the hands of a third party and which is not in the possession of the Crown.³ It applies to situations where the accused is seeking material directly from the custodian of the material which party has no duty to disclose without an order, and which material is not currently in the hands of the Crown. It is not necessary to show that the Crown or the police could not obtain the information. It is simply information in the hands of someone else that is not part of the investigation.

[17] An *O'Connor* application must be brought on notice to the custodian of the information and the onus is on the party seeking the information to demonstrate to the court that the material is likely to be relevant. If the court is persuaded that the material may be relevant then the court must consider whether

² *R. v. Chaplin*, [1995] 1 SCR 727

³ *R. v. O'Connor*, [1995] 4 SCR 411

there are competing values which preclude or limit production and the court may inspect the material to determine whether production is justified and on what terms. In *O'Connor* of course there was a significant concern for the privacy interests of the complainant whose therapeutic records were sought. No such concern exists in the case at bar.

[18] It is true that the police are a distinct entity with a significant degree of independence. In their investigative functions the members of the Ottawa Police Service are neither agents of the Director of Public Prosecutions nor of the Crown. A “police officer investigating a crime is not acting as a government functionary or as an agent of anybody”.⁴ The officer occupies a public office defined by common law and statute and is independent of the provincial or federal crown. Despite this, a request that the Crown obtain disclosure from the police in relation to a criminal prosecution is not always a third party records application as contemplated by *O'Connor*. The police are not the Crown but they share the duty of disclosure and like the Crown, the police must discharge their functions in the public interest.

[19] The Supreme Court dealt with the role of the police in *R. v. McNeil*.⁵ The court clarified that *O'Connor* applied to any records in the hands of a third party which are beyond the possession or control of the prosecuting crown whether or not there is a privacy interest. But the court also articulated the obligation of police to disclose all material pertaining to its investigation to the prosecutor. Thus, with regard to any information falling within the ambit of *Stinchcombe*, the police or other investigating authority share the same constitutional disclosure obligation as the Crown. Although distinct and independent from the Crown at law the police in their investigative capacity will not be treated as a third party. The police are on the same first party footing as the Crown with respect to material pertaining to the investigation.⁶

[20] Counsel for the police service readily conceded that in practice the Crown acts as the gatekeeper. In this case there is no privacy interest to consider. If Crown counsel concluded that the data was relevant to the investigation and requested it be produced the police would do so. It follows that if the requested data appears to be relevant to the investigation, it falls to be produced under *Stinchcombe*.

[21] This creates a somewhat circular problem. Undoubtedly the police have records that are not related to a particular investigation and which could only be obtained by an *O'Connor* application. But if the information is relevant because it is related to an investigation it falls under *Stinchcombe*.

[22] Data automatically collected by the police to track the whereabouts of police vehicles falls into a gray area. It is not truly “fruits of the investigation” in the sense of having been gathered for the purpose of investigating the accused. It serves other purposes and was not primarily gathered as an investigative tool. At the same time it is data recorded during the investigation and is related to the investigation insofar as it will illustrate exactly where the police cruisers were located at the relevant time. If the Crown’s case depended on showing the precise location of police vehicles, I have no doubt that the data would have been reduced to useable form and produced. It should be equally amenable to production if the accused requires it for his defence. It does not follow that GPS tracking data is relevant in every case and should be automatically subject to production. Whether it is relevant or not will be fact dependent.

⁴ *R. v. Campbell*, [1999] 1 SCR 565 @ para. 27

⁵ *R. v. McNeil*, [2009] 1 SCR 66

⁶ *Supra*, para. 14

[23] In *R. v. Shan*⁷ the court was dealing with production of GPS data as well as production of the user's manual for a radar device. I disagree with the finding of the learned Justice of the Peace that the *O'Connor* regime is applicable at least if he intended that as a general statement of the law relating to police GPS data in all circumstances. But I agree with his analysis that speculation on the part of the accused that the data "may contradict what the officer is saying" is insufficient to demonstrate a probability of relevance. In the context of the evidence before him the request for disclosure was nothing more than a fishing expedition.

[24] In the case before me, the only evidence suggesting the accused was targeted is the belief held by Mr. Saumier that a police vehicle followed the accused up the street when the accused left the party. Mr. Saumier's evidence is compromised as he had been drinking alcohol for most of the day and had consumed some marijuana. The precision of his observations may be questionable. In addition, even if a police vehicle did follow the accused up the street, that fact would not necessarily be probative that the accused was targeted. There is no evidence that officers in an unmarked police cruiser were involved in the arrest.

[25] As mentioned above, the Crown has provided disclosure that at no point in the evening prior to his arrest did any officer query the accused or his licence plate on the police information system. The officers have been cross examined. The Crown suggests there is nothing in their evidence to suggest they are being untruthful. To the contrary, the independent test carried out by the accused demonstrates that it would have been possible for the officer to spot the baggie with marijuana seeds from where he was standing. There is also no evidence linking the arresting officers to any officers that were in the vicinity of the party at either 11:30 or again just after midnight. Of course that is the very point made by the accused. It is precisely why he wants the GPS data.

[26] There are two aspects to this case that fuel the suspicions of the accused. Firstly, the communication between the officers on the night in question was not recorded because they were operating on a non recorded radio frequency. It is the evidence of the officers that the DART frequency is not recorded and they are aware of this. There is therefore no record of conversations that took place over the DART frequency leading up to the search and arrest. 911 calls, mobile data communication and police dispatch records are fairly routinely produced or ordered in appropriate cases.⁸ If the communications made over the DART frequency had been recorded and if they were relevant they would have been produced. The accused argues that the absence of those records render the GPS data more significant.

[27] The second issue is that Constable Boldirev's testimony was recently found wanting in a case with superficial similarities to this one.⁹ In that case the officer had testified that he stopped to investigate a vehicle that made a sudden unexplained lane change and when he approached the vehicle, he was able to see and smell marijuana which in turn gave him grounds to search the vehicle. There was also a use of force issue in that case. Justice Bourgeois found that the credibility of his evidence was deficient both in regard to his use of force, in regard to the allegedly unsafe lane change and in his ability to see or smell

⁷ 2016 ONCJ 289

⁸ See for example *R. v. Nelson*, [2009] O.J. No. 3209 (OCJ), *R. v. Pellegrini*, [2007] O.J. No. 3373 (OCJ), *R. v. Van Duzen* 2006 ONCJ 2006

⁹ *R. v. Hamed*, 2017 ONCJ 205

the marijuana. The court concluded that the detention and arrest were arbitrary and unreasonable. His evidence was excluded and the accused was found not guilty.

[28] The accused did not suggest that an adverse finding of credibility against an officer in a particular trial should create a presumption that his evidence is unreliable in all investigations. Nor is he suggesting that similar fact evidence be formally admitted on the motion. He argues that this finding demonstrates that *Charter* violations can and do occur and that the evidence of police officers cannot not always be accepted at face value. The absence of other objective evidence that would in all probability be produced if it existed, makes the production of the GPS data critical to the possibility of a *Charter* defence. In *R. v. McNeil*, given the facts of that case, the Supreme Court held that police disciplinary records fell under the *Stinchcombe* regime. Any information that may reasonably be necessary for the defence must be produced.

[29] The GPS data of course has nothing to do with establishing whether the essential elements of the offences are true or not. Quite the opposite. The GPS data is sought in order to suppress the truth by excluding evidence that might otherwise establish guilt. This however is a false distinction because a full and fair defence includes access to the evidence necessary to demonstrate whether or not the evidence was obtained in breach of *Charter* rights. Under the circumstances of this case, although the evidence of Mr. Saumier is far from conclusive, the notion that the police may have followed the accused or stopped him and searched the vehicle for reasons other than what the officers have disclosed has some air of reality and is not purely fanciful.

[30] In the absence of communication records, the GPS records are of more importance. To the extent that proportionality should inform decisions in criminal matters, the production request is not disproportionate to the importance of the issues.¹⁰

Conclusion and Ruling

[31] The importance of the GPS records lies in the fact that they may demonstrate a *Charter* breach if they are inconsistent with the version of events given by the arresting officers. The theory of the accused is based on conclusions that may well prove to be faulty but which are not merely speculative or fanciful. Accordingly, particularly in light of the lack of recorded communication or other data that might ordinarily be produced, the GPS data pinpointing the vehicle locations is relevant. I find that the GPS data is in this case subject to production under *Stinchcombe*. The Crown has not met the onus of proving the data is irrelevant.

[32] I do not agree that a three hour window is necessary. The evidence was that a uniformed officer in a marked cruiser spoke to the accused at the party at approximately 11:30 p.m. Sometime after midnight, the unmarked or masked cruiser was seen to follow the accused. His arrest took place just after 12:30. The evidence he seeks to challenge is where the officers were when they allegedly spotted his vehicle entering the parking lot. The pertinent window is the time between 11:30 p.m and 1:11 a.m. and

¹⁰ Proportionality is a consideration. See for example *R. v. Chaplin*, [1995] 1 SCR 727 @ para.32 and Rule 1.04 of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*.

this data is the data necessary to determine the location and routes of the three police cruisers used by the six officers involved in the arrest.

[33] If disclosure was ordered, the Crown requested an opportunity to consult with the police and counsel for the accused with respect to the manner in which the disclosure should take place and to make further submissions if necessary. I trust counsel can reach agreement with the OPS on the appropriate manner of producing the necessary information. The critical questions seem to be whether the accused was followed and whether the officers were actually sitting at the Newfoundland Pub when they say they were. The accused indicated that screen shots would suffice. Alternatively, the police advised me they could output data and plot it on a map. I will hear submissions and give further direction should that be necessary.

[34] Accordingly, an order will go for production of the information stored in the GPS system for the three police cruisers in the window of time identified above. The form of the production is to be agreed between counsel or will be the subject of further direction by the court.



Mr. Justice Calum MacLeod

Released: December 11, 2017

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