File No: 202364-1
Registry: Vancouver

In the Provincial Court of British Columbia

REGINA

v.

JIAN XIONG WU

RULING OF
THE HONOURABLE JUDGE MCMILLAN

RE DEFENCE APPLICATION
FOR PRODUCTION OF THIRD PARTY RECORDS

COPY

Crown Counsel:	**M. Wiancko**
Defence Counsel:	**B. Makohn, Articled Student (as Agent for J. Solomon)**
Counsel for Vancouver Police Department:	**B. Toy**
Place of Hearing:	**Vancouver, B.C.**
Date of Judgment:	**May 24, 2012**

[1] THE COURT: These are my reasons on the application.

Introduction

[2] Mr. Wu is charged under Information 202364 with unlawfully possessing, on or about September 13, 2010, at or near Vancouver, B. C., a controlled substance: cannabis marihuana, in an amount not exceeding three kilograms for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. The trial is scheduled to proceed for two days commencing June 4, 2012. I am the assigned trial judge.

[3] On January 24, 2012, defence counsel, Mr. Solomon, the applicant, filed a notice of application for production of third party records directed to Crown counsel, Ms. Wiancko, and counsel for the Chief Constable of the Vancouver Police Department, Mr. Toy.

[4] In its application, defence counsel seeks an order for the following: (1) the disciplinary record of Constable John Gibbons (whom I have styled Constable Gibbons) in relation to the finding against him of "abuse of authority for conducting a non-consensual search of a driver and the motor vehicle he was driving" held by the Vancouver Police Department be produced to the court; and (2) the disciplinary record be

produced to the applicant. In support of its application, the applicant filed and relies on the affidavit of Ms. B. Vaukshee [phonetic], a legal assistant with his office.

[5] Section 77(1) of the *Police Act*, Royal Statutes of British Columbia, 1996, Chapter 367, defines misconduct as,

> . . .[including] a disciplinary breach of public trust described in subsection (3) of this section.

Subsection (3) states,

> . . .any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:
>
> (a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,
>
> (i) intentionally or recklessly making an arrest without good and sufficient cause,
>
> (ii) in the performance, or purported performance, of duties, intentionally or recklessly
>
> (A) using unnecessary force on any person, or
> (B) detaining or searching any person without good and sufficient cause, or
>
> (iii) when on duty or off duty but in uniform using profane, abusive or insulting language to any person, including, without limitation, language that tends to demean or show disrespect to the person on the basis of that person's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or economic or social status.

[6] In its submissions in response to comments by counsel for the third party, the defence further particularized the nature of the documents which it seeks from the disciplinary records to include any findings of the disciplinary body, transcripts of the disciplinary hearings, statements of Constable Gibbons contained in that file and/or any factual matrix relevant to that proceeding.

[7] The applicant has brought the application as an *O'Connor* application. However, the defence asserts its application is more properly characterized and brought as a *McNeil* application. The applicant stated in its written argument that it was its "position that counsel for the third party does not have standing to speak to this matter. However, out of an abundance of caution and in the face of the Crown's insistence, the application has been brought under *O'Connor*."

[8] Given the applicant has brought its application pursuant to *O'Connor*, I intend to deal with it in that way. I do not intend to approach it from the standpoint that it may well be, properly speaking, to have been brought as a *McNeil* application.

[9] The Crown opposes production of the disciplinary record of Constable Gibbons on the ground it would have no realistic bearing on the credibility or reliability of Constable

Gibbons' evidence at Mr. Wu's trial.

[10] The third party, in its written submission, which I have carefully reviewed, also opposes production of Constable Gibbons' disciplinary record largely on the ground it is not relevant, or if relevant, that it is a matter which must be decided by the trial judge at trial and as such the applicant's application is premature. Moreover, it asserts any such record is collateral to the issues at trial.

[11] I will first set out the background to this matter, followed by the law as set out in *R. v. O'Connor*, [1995] 4 S.C.R. No. 411. I will then determine whether the first step in that two-step procedure has been met such that the disciplinary record ought to be produced and shown to me for my review and perhaps later disclosure.

Background

[12] The Crown advised the facts alleged in relation to Mr. Wu are as follows: On September 13, 2012, Constable Gibbons and his partner, Constable Howell, members of the Vancouver Police Department, were in uniform, on duty, and patrolling in an unmarked police car in the vicinity of East 32nd Avenue and Commercial Drive. They saw Mr. Wu's car parked on the side of the road. Mr. Wu was in the driver's seat. A Mr. Dieppe [phonetic] was in the front passenger seat. Both police

officers allegedly saw "suspicious behaviour" exhibited by Mr. Wu and Mr. Dieppe.

[13] The officers decided to investigate and thus conducted a vehicle stop. They pulled up behind Mr. Wu's vehicle. Constable Gibbons went to the passenger side of it while Constable Howell went to the driver's side. As he approached the vehicle, Constable Gibbons allegedly smelled bulk marihuana. He therefore believed these men were arrestable for possession of marihuana.

[14] Constable Howell arrested Mr. Wu while Constable Gibbons arrested Mr. Dieppe. Constable Gibbons searched Mr. Wu's vehicle incident to arrest. He located a bag behind the driver's seat. It contained 78.75 grams of marihuana. Constable Howell performed a search of Mr. Wu's person incident to arrest. Constable Gibbons was the exhibit's officer.

[15] I note in its materials the defence stated Constable Gibbons "used the patrol car to box in the accused vehicle thereby arbitrarily detaining them." This was the only material difference from the defence's recitation of the facts and that of the Crown.

[16] While the Crown had not yet received at the time of the

hearing of the application any formal notice of the *Charter* issues, Ms. Wiancko stated she understood the *Charter* issues to be: (1) the grounds for arrest of Mr. Wu; and (2) s. 10 of the *Charter*.

[17] It is clear from the applicant's written argument that the issue will be whether the police conducted an arbitrary detention and warrantless search of Mr. Wu. "The focus of the voir dire and the existence of a *Charter* breach in this case will turn on the unlawful nature of the detention occurring as it did without reasonable grounds for suspicion, and the reasonableness of the warrantless search."

[18] This matter was originally scheduled for trial on February 2012. The Crown advised the trial date was lost as a result of the applicant bringing this application. The new trial date of June 4, 2012, was set.

[19] On April 12, 2011, Ms. Wiancko for the Crown wrote defence counsel, Mr. Solomon. The letter referred to the "*McNeil* disclosure-Constable Gibbons". The letter stated in part [as read in]:

> The Crown has been advised by the Vancouver Police Department that Constable John Gibbons, No. 2399, has police disciplinary records --

And that was styled as disciplinary records]

-- as follows:

> 1. Neglect of duty for failing to prepare a supplemental occurrence report.
> 2. Abuse of authority for conducting a non-consensual search of a driver and the motor vehicle he was driving.
>
> These disciplinary records relate to investigations which are unrelated to the drug investigation against your client. We have considered the officer's role in the investigation involving your client and the nature of the disciplinary records, and the Crown's position is that the latter would have no realistic bearing on the credibility or reliability of Constable Gibbons' evidence at your client's trial. As the disciplinary records would have no impact on the case against your client, it is the Crown's position that its disclosure obligations as set out in *R. v. McNeil*, 2009 S.C.C. 3, have been satisfied by this letter.

[20] At the hearing of the application before me, the Crown advised that a senior Crown had attended at the Vancouver Police Department and reviewed the disciplinary record. That Crown counsel determined at that time it was not related and was thus irrelevant to the drug investigation. According to Ms. Wiancko for the Crown, the disciplinary record is not currently in its hands.

[21] As can be seen from the above, the defence only seeks the second item of the disciplinary records for abuse of authority for conducting a non-consensual search of a driver and the motor vehicle he was driving referred to in the letter of

April 12, 2011, since it asserts it is the only disciplinary record which may be relevant to these proceedings.

The Law Under *O'Connor*

[22] I do not propose to exhaustively set out here the two-step process to an application of this sort. It is well known to all counsel. Suffice it to say the burden is on the applicant in an *O'Connor* application, although the burden is not an onerous one. Moreover:

> The first step in any contested application for production of non-privileged documents in the possession of a third party was for the person seeking production --

- In this case the accused -

> -- to satisfy the court that the documents were likely relevant to the proceedings.

[23] The test of "likely relevant" 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.

That is *O'Connor* at paragraph 22.

[24] An "issue at trial" includes not only material issues concerning the unfolding of 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.

That is *O'Connor* at paragraph 22, as well.

[25] The court noted that it:

> ... 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.

See *O'Connor* at paragraph 25.

[26] Concerns regarding the admissibility of any documents produced do not arise at this stage.

> A relevance threshold, at this stage, is simply a requirement to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production.

That is *O'Connor* at paragraph 24.

[27] If the first stage of the likely relevant test is met as defined as above, then:

> ...the judge should examine the records to determine whether, and to what extent, they should be produced to the accused.

See *O'Connor* at paragraph 30.

Discussion.

[28] Has the applicant satisfied the court the disciplinary

record, specifically those documents relating to a finding against Constable Gibbons for "abuse of authority for conducting a non-consensual search of a driver and a motor vehicle he was driving", are likely relevant within the meaning of the *O'Connor* test. I have concluded it has.

[29] First, the disciplinary record as described by the Crown in its April 12, 2011, letter deals with a parallel situation to that at bar - a non-consensual search of a driver - and the motor vehicle he drove. It may be the facts which underpin the disciplinary hearing are identical or close to identical to the case at bar. That remains to be seen.

[30] Second, the applicant seeks the records as they may contain the information that bears on Constable Gibbons' credibility. In light of the parallel nature of the circumstances - the non-consensual search of the car and driver - and the fact that an issue at trial will likely be credibility, as it always is, then there is a reasonable possibility the disciplinary record may be likely relevant.

[31] Third, the applicant states that if the *Charter* breach is made out at the voir dire, the disciplinary record may contain information that may be relevant to the 24(2) analysis under *R. v. Grant*, [2009] S.C.J. No. 32. I agree, and especially in light, and I return to it, the parallel nature of the

circumstances. I do not consider the applicant to be engaged in a fishing expedition or something which is fanciful or speculative.

[32] The third party submits the application is premature and speculative; it should be made at trial. I disagree. To make it then would be disruptive to the trial and would likely result in an adjournment. The proper timing for the application is the pre-trial period, as here.

[33] The third party also submits the documents may well not be admissible. The short answer is this: admissibility is not a concern at this stage of the proceedings; disclosure is.

[34] I order the disciplinary records relating to item two of the April 12, 2011, letter of the Crown to defence counsel be produced to the court for my review. I will review them and then apply the second stage of the *O'Connor* test as necessary.

(REASONS CONCLUDED)