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Garth Barriere
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Dear Mr. Barriere,

Re: R v FOX, Patrick – Assessment Letter Conviction & Sentence Appeal

Sentence Appeal

I am of the opinion that an appeal against sentence in this case would not stand a reasonable prospect of success.

The Crown sought an 18-month jail sentence, amounting in the circumstances to time served. At the time of sentencing, Mr. Fox had two years remaining of a previous probation order. The Crown asked for a further order of three years with various conditions attached.

Regarding the 18-month sentence, Mr. Fox indicated on the record that he did not care about that ("I honestly don't care": May 15, 2023 T8). The trial judge imposed a 15-month sentence with 15 months credit.

Mr. Fox expressed concern that a probation condition would effectively enable him to be continually arrested and charged. He asked for wording that require the police to establish that he is the person involved in putting the prohibited website information on-line before the police arrest him: May 15, 2023 T10. As far as I can tell, the trial judge made no such proviso when imposing the three-year probation conditions, but I cannot see any basis on which the Court of Appeal would reasonably intervene in the sentence imposed on Mr. Fox.

Conviction Appeal

I am of the opinion that an appeal against conviction in this case would not stand a reasonable prospect of success. I have identified only one issue that *might* reasonably cause the BC Court of Appeal to intervene. It is a search warrant issue.

A meritorious argument could be made that Judge Oulton incorrectly decided that there was no breach of Mr. Fox's s.8 *Charter* right when his phone was analyzed on August 18, 2022. I make no comment here on the possibility or likelihood that the evidence from Mr. Fox's phone would be excluded if it were found to have been unlawfully obtained.

Mr. Fox was convicted of making pictures of a certain person publicly available, contrary to a probation order that prohibited him from doing this.

As I understand the evidence in its generalities (leaving aside particularities for the moment), the Crown's case against Mr. Fox consisted of two sources:

1) eyewitness evidence by Ms. Meiklejohn and Sgt. McElroy
2) a report prepared by Sgt. Shook

1) The Eyewitness Evidence

On May 16, 2022 Catherine Meiklejohn accessed a website that contained pictures that Mr. Fox was prohibited from publishing. Sergeant McElroy stood behind Ms. Meiklejohn, looked over her shoulder, and saw the pictures. Ms. Meiklejohn used technology that took screen captures of the images.

Mr. Fox challenged the authenticity of the website viewed by Ms. Meiklejohn and Sgt. McElroy. He argued that it might have been created by anyone other than himself. He also theorized that the Vancouver Police Department was motivated to create a replica of the website he had been ordered to shut down, because of public criticisms Mr. Fox had levelled against the police department.

The trial judge, Judge Oulton, found that Mr. Fox's theory about the VPD's animus was speculative: R4J para 54. Judge Oulton also concluded that Mr. Fox's theory that Ms. Meiklejohn and Sgt. McElroy had seen a replica site that Mr. Fox did not create "remained speculative": R4J at para. 65. If this case were to be appealed, the BC Court of Appeal would not interfere with either of these conclusions.

2) Sgt. Shook's Report

The second source of evidence on which the Crown relied was a report prepared by Sgt. Shook. On August 18, 2022 he analysed the contents of Mr. Fox's phone and made a report of his findings. Sgt. Shook's efforts to extract information from the phone amounted to a search within the meaning of s.8 of the *Charter*.

Judge Oulton expressly refers to Sgt. Shook's evidence in his reasoning process toward conviction, yet it is difficult to say whether the evidence was essential to Mr. Fox's conviction. Judge Oulton wrote in his R4J at para 67:

> I accept Sergeant Shook's evidence about the searches performed by the user of Mr. Fox's cell phone, "Patrick", on May 13 and 14, 2022, and the continuing connection to accounts using [name redacted by Nowlin], also found on Mr. Fox's cell phone. **These are further pieces of evidence supporting the conclusion that the only reasonable inference from the evidence is** that Mr. Fox was the user of his personal cell phone, and **that on May 16,**

> **2022, Mr. Fox had made publicly available, directly or indirectly, information, comments, or photographs of [name redacted by Nowlin].** I find Crown has proven Mr. Fox's guilt beyond a reasonable doubt on Count 3 of the information. [My emphasis]

Sgt. Shook's report is derivative evidence, 'discovered' from a search of Mr. Fox's cellphone, so the lawfulness of the search could reasonably have bearing on the admissibility of the report.

3) The Search Warrant Issue

Mr. Fox challenged the legality of Sgt. Shook's August 18 search, but Judge Oulton ruled that it was lawful. When he was arrested on May 16, 2022, his cellphone and other devices were seized (incidental to arrest, I believe) and placed in a police storage locker.

On July 15, 2022 Sgt. McElroy applied for and obtained a warrant to search Mr. Fox's devices. We know that the warrant authorized at least this much:

> This is therefore to authorize and require Detective Constable Amber McElroy or her designate to enter the said premise between July 15th, 2022 up to and including July 28th, 2022.
>
> And to search the cellular phone, the things/data and to bring them before me or some other justice or submit a report in writing in respect of anything seized.
>
> See March 28, 2023 Ruling paras. 26-29.

The "said premises" are the secure locker at the VPD Special Investigations Section. From what I gather, on July 15 Sgt. McElroy removed Fox's phone from the police storage unit and gave it to technical personnel for analysis.

However, it appears as if Fox's phone was not actually analyzed until August 18, 2022, by Sgt. Shook. This was about a month later than the search period facially authorized by the warrant. The Form 5.2 (dated November 1, 2022) says that the phone 'was searched on August 18, 2022, meaning the data was extracted on August 18, 2022': see Ruling para. 31.

Presumably there is a good reason why the police asked for *two weeks* to search Fox's phone. Justice Fuerst made these comments in *R. v. Little*, 2009 CarswellOnt 8024, Fuerst, J),

> 161 I appreciate that the review of the contents of a computer can take days, weeks and even months to complete....It is within the ability of the applicant for a search warrant to specify in the Information to Obtain the time that will be needed to complete the search of a computer, and to seek a warrant that is valid for that period.

I presume that it is precisely on such logic that Detective Constable McElroy sought and obtained a warrant for a two-week search, to give VPD forensic personnel plenty of time to analyse Fox's phone and other devices.

The warrant at issue in *Little* was a one-day warrant (February 20, 2007, between 10:30 and 5:00 pm). It was issued the day before the search and authorized a search of three computers already in possession of the police: *Little*, para. 62. The police began the search on February 20, but did not finish, so kept going on February 21. The next day, February 22, the police had a discussion about possibly getting another warrant (for a concern unrelated to the warrant's temporal parameters). Analysis of the computer continued into May. Justice Fuerst concluded that the search was unreasonable for being outside the temporal parameters of the warrant on the basis of the above logic. She also wrote,

> 161 … the police were bound by the time frame specified by the justice of the peace.
>
> 162 …The only authorization for the search was the warrant. Once it expired, the police were not authorized by law to search the computer's contents.
>
> 172 The search of the computer was not carried out in accordance with the search warrant. Mr. Little's rights under s.8 were violated.

In Mr. Fox's case, the Crown did not supply the court with any case law to support Its argument that a search on August 18 was within the temporal parameters of the warrant: Ruling para. 32.

In ruling that the search warrant authorized the August 18, 2022 search of the phone, Judge Oulton cited no case law and engaged in virtually no reasoning process. He reasoned simply that the warrant authorized a 2-step process.

First,

> … the warrant contemplates a process which begins with the getting of the phone, that is, going to the "said premise", which is the secured locker and getting the phone between July 15, 2022, up to and including July 28, 2022. Ruling para. 33

Second, he wrote,

> …The next step, which is set out in the next sentence, next paragraph, is the subsequent search of the phone for things or data. Strictly speaking, it would be for data. That part is not date-specified. Ruling para. 33

Without more, except to mention that the required Form 5.2 provides judicial "oversight" (Ruling para 34), Judge Oulton concluded,

> I do not find, on a reading of what this warrant authorized, that Mr. Fox has satisfied me that his constitutional rights to be free from unreasonable search and seizure were violated here. Ruling para. 35.

Arguably, Judge Oulton acted unjudiciously in ruling on this search warrant issue without consulting any case law, especially given that Mr. Fox was unrepresented.

As suggested above, the terms of the search warrant were atypical insofar as they permitted a search of a device already within police possession and with a specific two-week duration for the search.

Ontario case law permits the police to search an electronic device outside of the warrant's temporal parameters. These cases tend to involve a standard one-day search warrant, the type of warrant that authorizes the police to search for something that they do not yet possess. They are given a discreet number of daylight hours on a particular day to look for the thing.

The logic tends to be that it is unrealistic to expect peace officers to do a proper search of electronic devices within a select few hours authorized by a standard warrant: see, e.g., *R. v. Barwell*, 2013 CarswellOnt 10608 (Sup Ct, Paciocco J) at paras. 16-17, regarding a search that took place after the "brief search window" [15 hours] on the face of the warrant": "the law treats the initial search and seizure and subsequent forensic examinations separately."

Barwell was followed in *R. v. Nurse*, 2014 ONSC 1779. The warrant at issue in *Nurse* authorized the police to enter the "General Property Vault of the OPP" and (by appendix) to conduct a search of the electronic items including phones. Its temporal parameters were a single day, November 16, 2011, between 6:00 am and 9:00 pm. However, the search of the phone was conducted on Nov 25 2011 more than a week later. Justice Coroza upheld the search, finding Justice Paciocco's logic in *Barwell* persuasive.

In *R. v. T.I.*, 2021 ONSC 2722, the warrant authorized the police to search a private residence within a 5-day period (Sept 27 – Oct 2, 2018). The police entered the residence within the permitted time frame (on Sept 27) and seized phones. However, they did not submit the phones for data extraction until November 28, 2018, well outside the 5-day parameters. Justice Akhtar followed *Barwell* and other cases (*R. v. Yabarow*, 2019 ONSC 3669, and *United States of America v Viscomi*, 2016 ONSC 5423), and upheld the search.

Barwell also cited an Alberta case, *R. v. Weir*, [2001] A.J. No. 869 (Alta CA), which was addressed more generally to "off-site" data collection (*Weir* para 19: "As long as the CPU was seized properly, the information contained in it could be extracted at a later date.")

However, as indicated above, Justice Fuerst's decision in *Little* seems to be most relevant to Mr. Fox's case just because it is likely that Detective-Constable McElroy asked for a two-week search period on the basis that the search could be completed in two weeks. The logic of the other cases is inapt. It was entirely *realistic* to expect that VPD forensic personnel could conclude their search of Mr. Fox's phone within the two weeks specified in the warrant, once Detective Constable McElroy supplied them with the phone,

Thus, it is reasonable to expect that the BC Court of Appeal would agree that VPD personnel searched Mr. Fox's phone contrary to s.8 of the *Charter*, but I am not confident that the Court would do this. Moreover, when weighed against the eyewitness evidence of Ms. Meiklejohn and Detective-Constable McElroy mentioned above, I am much less confident that the BC Court of Appeal would find reasonable cause to intervene in Mr. Fox's conviction.

Accordingly, and to reiterate, I do not believe that an appeal against conviction in Mr. Fox's case would stand a reasonable prospect of success.

Sincerely,

Christopher Nowlin