

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Cater, 2011 NSPC 90

Date: November 23, 2011

Docket: 1997518 to
1997550; 2035773 - 2035784

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

Kyle Cater, Paul Cater and Torina Lewis; Kyle Cater

**DECISION ON CROWN MOTION FOR THE SUMMARY DISMISSAL OF
THE ABUSE OF PROCESS AND ARBITRARY DETENTION
APPLICATIONS**

JUDGE: The Honourable Anne S. Derrick

HEARD: November 23, 2011

DECISION: November 23, 2011

CHARGES: Sections 86(1) x3; 88(1) x3; 95(1) x 2; 92(1) x 2; 92(2) x 1 of
the *Criminal Code* (Cater, Cater and Lewis); Sections 100(2) x
6 ; 99(2) x 6 (Kyle Cater)

COUNSEL: Shauna MacDonald and Richard Hartlen, for the Crown

DEFENCE: Elizabeth Cooper, for Kyle Cater
Alfred Seaman, for Paul Cater
Cameron MacKeen, for Torina Lewis

Introduction

[1] Kyle Cater has brought an application to have the proceedings against him stayed on the grounds that he has been subjected to an abuse of process. The essence of his application is that he has been the target of relentless police harassment for years before and after the laying of the charges I am hearing, those charges being for possession of weapons and weapons trafficking. Mr. Cater is charged on the weapons possession charges with Paul Cater and Torina Lewis who have not joined in the abuse of process application.

[2] Mr. Cater alleges the continuation of a pattern of police and prosecutorial mistreatment that includes his most recent charges, laid on May 4, 2011, charges that are going to trial before a different judge. It is Mr. Cater's claim that there are no reasonable and probable grounds to have laid the May 4 charges or continued the prosecution (Ms. Cooper submits that these charges should be withdrawn) and that therefore the denial of bail and bail revocation that flows from the May 4 charges constitutes an arbitrary detention and a violation of Mr. Cater's section 9 *Charter* rights.

[3] The Crown is seeking summary dismissals of Mr. Cater's applications for a stay of proceedings for abuse of process and arbitrary detention. In the Crown's submission:

...if the facts alleged by the defence in its summary provide no basis for a finding of a *Charter* infringement, or a finding that the evidence in question is obtained in a manner which infringed the Charter, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence." (*R. v. Kutynec*, [1992] O.J. No. 347, paragraph 31, (Ont. C.A.))

[4] Mr. Cater bears the burden of proving that he has suffered a *Charter* violation. It is a threshold requirement on a *Charter* motion that he must establish a factual and legal basis for his claim that his *Charter* rights have been denied by the conduct of the police in their investigation of him. (*Kutynec*, paragraph 32)

Abuse of Process

[5] Mr. Cater submits that at the time of his arrest in January 2009 he was a Grade 12 student with very good marks. I heard evidence on the section 11(b) (delay) motion that he was subsequently accepted by the Nova Scotia Community College for a business administration programme starting in the fall of 2009.

[6] The Brief filed by Ms. Cooper on Mr. Cater's behalf asserts that Mr. Cater had a minor youth record at the time of his arrest on the weapons possession charges. The Brief states that Mr. Cater has been "subjected to innumerable unauthorized searches [by police] that never produced a thing." (*paragraph 8, Brief filed on behalf of Kyle Cater*)

[7] Submissions were made to me during the *Garofoli* application that Mr. Cater was stopped by police on two occasions in a red Honda based on confidential source information that he was selling drugs from the vehicle. No drugs were found during the searches that accompanied these police stops.

[8] In my decision on Mr. Cater's *Stinchcombe* application I determined that evidence about Mr. Cater being stopped and searched by police was not relevant to Mr. Cater's *Garofoli* application (which I have now dismissed) or to his full answer and defence. I took the same view of the searches involving the red Honda. (*R. v. Cater, 2011 NSPC 86, paragraphs 28 and 29*)

[9] In my decision on Mr. Cater's *Stinchcombe* application, I determined that evidence of police stops and searches of Mr. Cater,

...does not establish an abuse of police authority or powers. Exploring the issue would necessarily lead to my having to address the issue of whether the stops and searches were lawful, a wholly irrelevant and diversionary inquiry. (*2011 NSPC 86, paragraph 31*)

[10] In her submissions, Ms. Cooper has repeatedly referred to Mr. Cater as an innocent young man who was unfairly targeted by police seeking "to put Mr. Cater in jail without evidence because they do not like the people with whom he associates." (*paragraph 42, Brief filed on behalf of Kyle Cater*) In dismissing Mr. Cater's *Garofoli* application I addressed the allegation of Mr. Cater being unfairly targeted for the company he keeps. In that decision I found that the police

investigation targeted Mr. Cater because of confidential source information they received that implicated him in drug trafficking activities. I held that the Affidavit used in support of the police application for an authorization for intercepts,

...provides an ample basis on which the authorizing justice could have concluded that there were reasonable and probable grounds to believe that Kyle Cater was engaged in drug trafficking activities with or on behalf of other named targets and other individuals and that the interceptions being sought may assist in the investigation of these activities. (*2011 NSPC 89, paragraph 45*)

[11] In the *Garofoli* review (*R. v. Cater, 2011 NSPC 89*) I found there was no evidence of the police having misled the authorizing justice, no evidence of misrepresentations by the police, and no evidence that the police targeted Mr. Cater in the absence of having reasonable and probable grounds to do so.

[12] In terms of the supports for Ms. Cooper's submissions on the abuse of process claim, I have knocked several of them away already. I will not repeat everything I have said in previous decisions I have made on Mr. Cater's *Charter* applications. I determined the police stops and searches to be irrelevant and diversionary and I have dismissed Mr. Cater's application to have the authorization set aside. In the context of that *Garofoli* application I dealt with, and dismissed, all Ms. Cooper's submissions that the information in the possession of the police did not amount to a reasonable and probable basis for obtaining the right to intercept Mr. Cater's private communications. Much of Ms. Cooper's 262 page Brief deals with these *Garofoli* submissions that were also the oxygen for the abuse of process application.

[13] Ms. Cooper, as part of her abuse of process submissions, takes aim at the search of Mr. Cater's father's residence at 80 Cavendish Road. She asserts that the police exceeded their authority in searching 80 Cavendish Road as they did not have reasonable and probable grounds to do so and that because Kyle Cater was charged with offences as a result of the search of 80 Cavendish Road, his rights have been directly affected. (*paragraph 40, Brief filed on behalf of Kyle Cater*) Ms. Cooper otherwise has conceded that Mr. Cater has no standing to challenge the search of 80 Cavendish Road, a residence where he did not live, that was occupied by his father and stepmother.

[14] The Ontario Court of Appeal decision in *R. v. Pugliese*, [1992] O.J. No. 450 is a complete answer to Kyle Cater's claim that he can attack the search at 80 Cavendish Road even though he has no standing under section 8 of the *Charter* to do so:

16 The appellant's target theory, that is, the theory that since he was the target of the search at McInnis's apartment he acquired a right under s. 8 of the Charter, has never been accepted in this jurisdiction and has been specifically rejected in the United States. There, as here, the emphasis is upon the constitutionally protected personal privacy right of the accused person. A constitutional right to privacy is not created merely by reason of a person becoming the target of a search. An accused person's right to challenge the legality of a search and seizure depends upon whether he has first discharged the burden of satisfying the court that his personal constitutional rights have been violated. The appellant in this case has not satisfied the court as such, because, although he may have been a target of the search, the search and seizure which ensued neither established nor violated any constitutionally protected privacy right with respect to him. (*emphasis added*)

[14] The search of 80 Cavendish Road is not a source of any *Charter* rights for Mr. Cater. He cannot craft out of the search any basis for asserting a *Charter* right in connection with it. It was a search that did not implicate his privacy rights. The laying of charges against him as a result of evidence found during that search does not give rise to a *Charter* right for Mr. Cater under section 7. Ms. Cooper pointed me to no authority that says it does.

[15] I will pause for a moment to comment on the search at 80 Cavendish Road. This search is being challenged by the accused persons who do have a privacy right to assert in relation to it – Paul Cater and Torina Lewis. I am hearing these section 8 arguments in December. The Briefs filed by Paul Cater and Torina Lewis indicate that intercepted communications were the basis for the search warrant application and I can see that from the Information to Obtain the warrant. I have already determined in my decision on the *Garofoli* application that the intercepts are admissible. The issues to be decided on the application challenging the search

of 80 Cavendish Road are whether the search violated Paul Cater's and Torina Lewis' section 8 Charter rights, and if so, whether the evidence collected should be excluded from the trial. Those are issues Kyle Cater will be keenly interested in but he has no standing to advance any *Charter* right in relation to them. The Crown has indicated it is advancing its prosecution against Mr. Cater on the basis of constructive possession.

[16] In her submissions, Ms. Cooper accuses the police of “creating evidence to get this man” – referring to Kyle Cater. (*paragraph 24, Brief filed on behalf of Kyle Cater*) There is not a shred of evidence that the police created any evidence in targeting or investigating Mr. Cater. As I already addressed earlier in these reasons, there is no basis at all for Ms. Cooper's assertion that “the state seeks to put Mr. Cater in jail, without evidence, because of the company he keeps.” (*paragraph 45, Brief filed on behalf of Kyle Cater*)

[17] Ms. Cooper has made very serious allegations against the police without any evidence to support them. The seizing of weapons from a home under a search warrant and the laying of charges against someone who does not live there does not represent “creating” or “manufacturing” evidence. The use of such language is reckless. As the section 8 challenge to the search of 80 Cavendish Road indicates, the police relied on intercepted communications to get the warrant. There is nothing extraordinary or nefarious about the police doing so. Whether *Charter*-protected rights have been violated is an issue to be decided by me, as I have said, in the context of Paul Cater's and Torina Lewis' section 8 application.

[18] I will also say that once issues of admissibility have been dispensed with, the evidentiary basis for a prosecution becomes the target for Defence cross-examination and evidence at trial.

[19] I reject Ms. Cooper's submission that the investigation of Kyle Cater discloses any conduct that could be characterized as an abuse of process. There is no evidence of abusive conduct on the part of the police, no evidence of the police “creating” evidence, no evidence in the intercept authorization application of misleading information – an issue I already fully dealt with in my *Garofoli* application decision, and no evidence that the police concocted an allegation that Mr. Cater was involved in drug trafficking activities, which they then deceitfully

used to support the wiretap application. (*paragraph 65, Brief filed on behalf of Kyle Cater*) There is no evidence whatsoever that Mr. Cater has been the subject of an *ad hominem* persecution. I have found no basis – nothing – to support these accusations. They apparently represent how Ms. Cooper and Mr. Cater view his experiences but they are presented without any factual foundation. The Affidavit used to obtain the “Operation Intrude” intercepts discloses the basis for the police interest in Mr. Cater. They targeted him because they had reason to believe he was connected to a larger network of individuals engaged in criminal activities.

[20] Ms. Cooper asserts throughout her Brief that Mr. Cater did nothing wrong and has been the victim of an abuse of police power and authority. The issue of whether the Crown can prove that Mr. Cater “did something wrong” is a trial issue with the burden squarely on the Crown at trial to prove the charges against Mr. Cater beyond a reasonable doubt. Throughout this trial process, to the point there is, if there is, proof beyond a reasonable doubt of his guilt, Mr. Cater is presumed to be innocent. Innocent people are charged and put on trial; that is what a trial is for - to determine as a matter of fact and law if the Crown can discharge its onerous burden of establishing that the presumptively innocent person is guilty beyond a reasonable doubt.

[21] As far as an abuse of process is concerned, there is nothing, not an iota of evidence, that would support entertaining the application for a stay of proceedings. The application is without any merit and I dismiss it summarily.

Arbitrary Detention

[22] Ms. Cooper was already told that I will not entertain evidence about the May 4 arrest. This is an issue for the trial judge hearing Mr. Cater’s trial on the May 4 charges. I am not hearing that trial.

[23] The allegation by Ms. Cooper that Mr. Cater has been arbitrarily detained because his bail on the weapons charges was revoked as a result of the May 4 charges fails to acknowledge that Mr. Cater was afforded due process by virtue of a bail hearing on May 9 and 11 where evidence was called and he was represented by duty counsel. Bail was denied on May 13. This was not an arbitrary process or decision. Mr. Cater’s bail revocation cannot be characterized as “capricious, despotic or unjustifiable” (*R. v. Cayer, [1988] O.J. No. 1120 (Ont. C.A.)*);

application for leave denied, [1988] S.C.C.A. No. 370) This language has been adopted in Nova Scotia by this Court (*R. v. Petrie*, [2006] N.S.J. No. 437) and the Nova Scotia Appeal Division in *R. v. Baker*, [1988] N.S.J. No. 421.

[24] This is a criminal trial. Mr. Cater's claim of being arbitrarily detained is suggestive of a civil claim for wrongful arrest and detention. He has not established that he has been subject to an arbitrary detention in the context of these criminal proceedings. If Mr. Cater was unhappy with the results of his bail hearing that is a matter for a bail review. This application is also dismissed summarily.