R v Thrasher, 2019 NWTSC 44

Date: 2019 10 24
Docket: S-1-CR-2017-000124

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

LLOYD THRASHER

Appellant

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] This is an appeal from conviction for three offences, two counts of failing to comply with a recognizance, contrary to s. 145(3) of the *Criminal Code* and one count of resisting a peace officer engaged in the execution of his duty, contrary to s. 129(a) of the *Criminal Code*.

[2] The Appellant was charged with four counts: failing to comply with a recognizance by consuming or possessing alcohol or other intoxicating substances; failing to comply with a recognizance by not being inside his place of residence between the hours of 9:00 p.m. and 7:00 a.m.; failing to comply with a probation order by not keeping the peace and being of good behaviour; and resisting Cst. Sturgeon, a peace officer engaged in the execution of his duty. All four counts were alleged to have occurred on April 11, 2017 in Yellowknife and arose out of the same incident.

[3] The Appellant plead not guilty to all charges and the matter was set for trial. At trial, the Appellant brought a *Charter* application alleging that his rights pursuant to section 8, 9, and 10(b) of the *Charter of Rights and Freedoms* were violated by the Royal Canadian Mounted Police when they attended his sister's residence on April 11, 2017 and arrested him.

[4] The Trial Judge concluded that the Appellant's *Charter* rights were not violated and found the Appellant guilty of counts 1, 2 and 4 on the Information. The Information indicates that count 3 was withdrawn.

[5] The Appellant now appeals his convictions. The Respondent argues that the appeal should be dismissed but states that there is an error on the Record which should be corrected. The Information incorrectly records that the Appellant was convicted of counts 1, 2 and 4 when it should be counts 1, 3 and 4 as the Crown stayed count 2 during the trial.

[6] For the reasons that follow, I conclude that the appeal should be substantially dismissed. However, there is an error on the Record which should be corrected to reflect that the Appellant was convicted of counts 1, 3 and 4 on the Information and that count 2 was stayed by the Crown.

FACTS

[7] The Trial Judge found that on April 15, 2017, the Appellant was on a recognizance which required him to be inside his residence from 9:00 p.m. to 7:00 a.m. daily and to attend the door of his residence when requested to do so by the bail supervisor or the RCMP performing a curfew check.

[8] At around 10:00 p.m. on April 15, 2017, the Appellant was outside his residence knocking on his neighbour's apartment door. The neighbour contacted the police.

[9] Constables Shea and Sturgeon responded to the call. Two other officers, Constables Hemeon and Dunphy, also responded as back up. All of the officers had previous dealings with the Appellant both when he was sober and when he was in an intoxicated condition.

[10] Constables Sturgeon and Shea knocked on the apartment door announcing their presence. They heard the Appellant say from inside that he had to get his pants on. Marlene Thrasher, the Appellant's sister, answered the door. Ms.

Thrasher was the sole tenant of the premises. She was also the Appellant's surety and was providing the Appellant with a place to stay.

[11] The officers had past dealings with Ms. Thrasher also and found her to be cooperative, helpful to the police and helpful to her brother, acting as a surety and providing the Appellant with a place to stay pending trial.

[12] Cst. Sturgeon thought he had reasonable and probable grounds to arrest the Appellant for breaching his recognizance but he also wanted to further investigate.

[13] Constables Sturgeon, Shea and Hemeon were in the hallway at the door, later joined by Cst. Dunphy. Ms. Thrasher left the door after she opened it and Cst. Sturgeon held the door open so that it would not slam shut. Cst. Sturgeon testified that he was holding the door with his arm and that he may have had a foot over the threshold of the apartment.

[14] Cst. Sturgeon observed the Appellant at the back of the apartment, about 15 feet down a hallway into the living room area. Cst. Sturgeon's opinion was that the Appellant had been drinking and was showing some symptoms of having consumed alcohol, including an odor of alcohol.

[15] The Appellant became agitated and Cst. Shea asked Ms. Thrasher if it was okay to come in and she replied that it was. Cst. Sturgeon stepped further into the apartment and arrested the Appellant over his protests. Ms. Thrasher said that she did not want any trouble and to take it outside. The officers struggled with the Appellant and it took all four officers to remove the Appellant from the apartment.

[16] The events at the door and inside the apartment occurred over a minute or two and the audio recording of the incident reflected a number of people talking and yelling at the same time.

[17] The Trial Judge found that Ms. Thrasher gave permission to the officers to enter the residence and that Ms. Thrasher consented to the police entering the residence.

[18] The Trial Judge found that any entry into the apartment before the arrest was a matter of mechanics as the officers were keeping the door open and the intrusion was minimal. The Trial Judge concluded that there was no breach of the Appellant's *Charter* rights.

[19] The Trial Judge proceeded to convict the Appellant and sentenced him to 2 months of imprisonment concurrent on both counts of breaching a recognizance and 3 months of imprisonment consecutive for resisting arrest.

ISSUES ON APPEAL

[20] The Appellant claims that the Trial Judge made a number of errors. He argues that the Trial Judge erred in concluding:

a) That the Appellant did not have a reasonable expectation of privacy in Ms. Thrasher's residence;

b) That the initial entry by the police into the residence was lawful; and

c) That the continued presence of the police in the residence became lawful because of the apparent consent from Ms. Thrasher.

[21] The Appellant also claims that the Trial Judge erred in his assessment of the evidence when he concluded that the police were not already in the residence when they sought Ms. Thrasher's permission to be in the residence.

[22] The Appellant argues that there are two core issues on appeal. The first is the third party consent doctrine and whether, in this situation, a co-habitant can authorize a warrantless entry into a residence to investigate or arrest another co-habitant. The second issue is whether the consent obtained in this case was valid.

[23] The Respondent argues that the Trial Judge was correct in concluding that the Appellant did not have a reasonable expectation of privacy in the common areas of Ms. Thrasher's apartment. The Respondent further argues that to the extent the Appellant had any limited expectation of privacy in the common areas of the apartment, Ms. Thrasher had a superior interest and provided valid consent to render the entry lawful and reasonable.

ANALYSIS

Standard of Review

[24] The standard of review in an appeal relating to an alleged *Charter* breach is that a Trial Judge is entitled to deference on underlying factual findings in the absence of palpable and overriding error. The Trial Judge's assessment of the evidence and findings of fact must be accorded substantial deference on appellate review, even on evidence that the appellate court has the same opportunity to

examine as the Trial Judge. *R v Whipple*, 2016 ABCA 232 at paras 16-19, leave to appeal to SCC refused, 37241 (02 Feb 2017); *R v Cornell*, 2010 SCC 25 at para 25.

[25] The application of the correct legal standard and the application of law to the facts are questions of law to which a standard of correctness applies. *Whipple*, para 18; *R v R.M.J.T.*, 2014 MBCA 36 at para 28.

Did the Trial Judge Err in his Assessment of the Facts?

[26] One of the issues on this appeal is whether the police were already in the residence when they sought permission to enter. This was in issue at the trial. The interaction between the Appellant and the police was audio-recorded and entered into evidence at the trial. The police officers testified and were cross-examined about their entry into the residence.

[27] The Appellant argues that the audio-recording demonstrates that the police were already in the residence and that they sought permission from Ms. Thrasher to remain inside the residence and they did not seek permission to enter the residence.

[28] With respect to this issue, the Trial Judge concluded:

> (…) any intrusion before the arrest was a matter of mechanics and nothing more, keeping the door open and not an invasion or a bursting in. And the intrusion was at the worst, minimal.
>
> *Appeal Book*, tab 3, pages 99-100.

[29] The evidence of the officers was that they remained in the doorway area of the residence until they received permission to enter the apartment from Ms. Thrasher. Cst. Sturgeon's evidence was that he was in the doorway of the residence holding the door open as it closed automatically and the other officers were behind him. Cst. Sturgeon was cross-examined about his positioning in the doorway and whether he was already in the residence. When confronted with the audio recorded evidence, he testified:

> A Like I said, I know I was in the doorway. I don't know if I was holding the door. We were – we were in the door, the entrance to the – to the house. In the door frame, I can't tell you how many feet in front of the door frame, but we were in the from – in the door – in the entrance to the house.
>
> *Appeal Book*, tab 2, page 71.

[30] Cst. Shea testified that he was wearing an audio recorder during the incident. He testified that he did not enter the apartment until Ms. Thrasher gave permission for the officers to enter the apartment. He testified that Cst. Sturgeon was in front of him. He also stated that he couldn't say exactly where Cst. Sturgeon was but that Cst. Sturgeon was in the doorway and he may have been over the threshold.

[31] The audio-recording of the incident reveals that the Appellant told the officers that they were "not allowed to come in here" and he urged his sister to tell the police that they were "not allowed in here." An officer can be heard asking the Appellant to "come here and talk to me." Shortly after, an officer asks Ms. Thrasher to "come talk to me" and then asks her if it is okay to be in here. The whole incident is brief, over in a matter of minutes. Portions of the recording are somewhat chaotic with multiple people talking at the same time.

[32] The Trial Judge is entitled to substantial deference on his assessment of the evidence and his findings of fact. It appears that the officers were in the doorway area of the residence when they asked the Appellant to come and talk with them and then asked Ms. Thrasher to come talk with them. When she came over, they asked if it was okay to be inside the residence and she granted permission. Whether these exchanges occurred when the police were already in the residence is open to interpretation. In my view, the audio-recording does not clearly establish that the police were already in the apartment when they sought permission from Ms. Thrasher. It is equally possible that the officers were asking permission to leave the doorway and enter the residence.

[33] There is no palpable and overriding error in the Trial Judge's assessment of the facts and the Trial Judge's conclusion that any intrusion by the police was a matter of the mechanics of holding the door open and was, in any event, minimal is supported by the evidence.

Legal Framework: Section 8 Analysis

[34] Section 8 of the *Canadian Charter of Rights and Freedoms* states that everyone has the right to be secure against unreasonable search or seizure.

[35] A person claiming a section 8 breach must establish that they had a reasonable expectation of privacy which is determined on the basis of the totality

of the circumstances. The totality of the circumstances involves an assessment of factors including, but not limited to: an examination of the subject matter of the search; whether the claimant had a direct interest in the subject matter; the existence of a subjective expectation of privacy, and the objective reasonableness of the expectation. *R v Edwards,* [1996] 1 S.C.R. 128 at para 45; *R v Cole,* 2012 SCC 53 at para 40.

[36] If there is a reasonable expectation of privacy, then section 8 is engaged and it must be determined whether the search was conducted in a reasonable manner. A warrantless search is presumed to be unreasonable. To establish that a search is reasonable, the Crown must prove on a balance of probabilities that the search was authorized by law, the law itself is reasonable, and that the search was conducted in a reasonable manner. *Cole,* para 37.

Did the Appellant Have a Reasonable Expectation of Privacy in Ms. Thrasher's Residence?

[37] Whether the Appellant had a reasonable expectation of privacy was not in issue at the trial. The Crown conceded at trial that the Appellant had a reasonable expectation of privacy in the apartment and a reduced expectation of privacy in the common area of the apartment.

[38] The Trial Judge did not specifically address this issue in the decision however, it is apparent that he viewed the Appellant's rights *vis-à-vis* the apartment as significantly less than that of Ms. Thrasher, stating:

> [Ms. Thrasher] was the sole tenant of the premises. Whatever legal rights to the premises that existed were hers and hers alone. Mr. Thrasher was staying there at her sufferance. Apparently, in order to get [his] release on recognizance, he persuaded Madeline (sic) Thrasher, his sister, to act as surety and to provide a residence. Without that, Mr. Thrasher said he was homeless.
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> *Appeal Book,* tab 3, page 95.

[39] The Trial Judge ultimately concluded that the Appellant's constitutional rights had not been breached. Counsel on the appeal approached the issue as though the Trial Judge had concluded that the Appellant did not have a reasonable expectation of privacy in the apartment.

[40] On appeal, the Respondent Crown has taken a contrary position and now argues that the Appellant did not have a reasonable expectation of privacy in the common area of Ms. Thrasher's apartment. The Respondent was unable to

articulate a reason for the change in position between trial and the appeal beyond stating that the issue was not litigated at trial and the judge's conclusions on the reasonable expectation of privacy raised the issue. The issue was not litigated before the Trial Judge precisely because the Respondent had conceded that the Appellant had a reasonable expectation of privacy, albeit a reduced one, in the common area of the apartment.

[41] In considering the totality of the circumstances test, the subject matter of the search was the Appellant himself in which he obviously has a direct interest. The police went to the apartment to investigate a complaint about the Appellant and, before they entered the residence, had grounds to arrest the Appellant, although they wanted to investigate before deciding to arrest the Appellant.

[42] The Appellant also had a subjective expectation of privacy which can be inferred from the circumstances. While Ms. Thrasher was the tenant of the premises, the Appellant was residing there temporarily and had resided there for approximately four months. The Appellant had his own bedroom, his own key for the unit, he paid money towards the rent and telephone bill and contributed towards the food for the residence. The threshold for establishing a subjective expectation of privacy is not high[1] and in these circumstances, it seems clear that the Appellant would have had a subjective expectation of privacy in the place where he was residing, even if only temporarily.

[43] The objective reasonableness of the Appellant's expectation of privacy has to be considered in the context of the circumstances of the case. The Appellant was on a recognizance in which Ms. Thrasher was the surety and he was required to reside at her residence, maintain a curfew and present himself to the door of the residence should the authorities conduct a curfew check. Ms. Thrasher was the tenant of the premises and agreed to let the Appellant reside at her residence pending his trial. The Trial Judge was correct in stating that the Appellant only resided with Ms. Thrasher at her sufferance. Ms. Thrasher could have asked the Appellant to leave the premises and had done so in the past. She also could have sought to be removed as his surety if she no longer wished to act as his surety.

[44] The Appellant had his own bedroom in the residence and shared the common area with Ms. Thrasher and her children. He had a key to the residence and the ability to enter and leave the residence at will. The Appellant testified that he had the ability to ask others to leave the residence. This has to be considered in the context of the incident with the police where the Appellant asked the police to

[1] *R v Marakah*, 2017 SCC 59 at para 22.

leave the residence and then asked Ms. Thrasher to tell them to leave. It can be inferred from the circumstances that the Appellant recognized that Ms. Thrasher was the ultimate decision-maker with respect to access to the residence.

[45] The Appellant's control over access to the common area of the residence was limited in comparison with Ms. Thrasher. He shared the common area of the residence with Ms. Thrasher and her children and could only reside in the residence with her continued consent. He was also required to present himself at the door of the residence if requested to do so by the authorities conducting a curfew check. His control over the common area of the residence was shared and subservient to Ms. Thrasher's control over the residence. This diminished his privacy interest in the common area of the residence. However, a reasonable expectation of privacy can exist even when a place is not under the exclusive control of the claimant. Shared control over the residence does not mean that a person has no control and does not mean that that the Appellant's expectation of privacy no longer exists. *R v Reeves*, 2018 SCC 56 at paras 36-37.

[46] In the circumstances, I find that the Appellant's subjective expectation of privacy was objectively reasonable. The Appellant had a reasonable expectation of privacy, albeit a reduced expectation of privacy *vis-à-vis* Ms. Thrasher's rights in the common area of the apartment. Therefore, to the extent that the Trial Judge failed to state the correct legal standard and, in his consideration of the application of the law to the facts, apparently found that the Appellant did not have a reasonable expectation of privacy in the common area of the apartment, I conclude that he was in error.

Third-Party Consent: Can a Co-habitant Authorize a Warrantless Entry by the Police into a Residence to Investigate or Arrest Another Co-habitant?

[47] Having found that the Appellant had a reasonable expectation of privacy in the residence, the next consideration is whether the Crown has proven on a balance of probabilities that the search was reasonable. The justification for the reasonableness of the search is based upon Ms. Thrasher's consent to permit the police to enter the residence and arrest the Appellant.

[48] The Trial Judge implicitly accepted that Ms. Thrasher had the authority to authorize the police to enter the residence and arrest the Appellant.

[49] The Appellant argues that a co-habitant cannot consent to police entry into a shared residence for the purpose of investigating or arresting another co-habitant. The Appellant relies upon the concurring reasons of Moldaver J. in *Reeves* wherein

he proposed applying the ancillary powers doctrine to the analysis of whether the police can lawfully enter a joint residence when invited by one of the occupants.

[50] Prior to *Reeves,* the Supreme Court of Canada in *R v Cole,* 2012 SCC 53, at para 79, rejected the idea that a third party could "validly consent to a search or otherwise waive a constitutional protection on behalf of another."

[51] In *Cole,* the Court dealt with the issue of informational privacy in the context of a computer. The issue was whether a third party, an employer, could waive the privacy rights of an employee in a work laptop where child pornography had been found during routine maintenance on the computer.

[52] In *Reeves,* the Court again dealt with the issue of informational privacy. In that case, the issue was a computer that Reeves and his common-law spouse shared at their family residence. The spouse contacted the police regarding suspected child pornography which she had found on the computer. The police attended the family home and the spouse allowed the police to enter and consented to the police seizing the computer. Reeves' consent was not sought.

[53] The Court concluded that taking the shared computer without Reeves' consent interfered with his reasonable expectation of privacy in the computer and that his spouse could not waive his privacy rights in the computer. The issue before the Supreme Court of Canada in *Reeves* was the seizure of the computer and not the police entry into the home.

[54] Without going into Justice Moldaver's proposed application of the ancillary powers doctrine, I am not prepared to apply it to this case for two reasons. First, Justice Moldaver, in his reasons, states that his articulation of this power is tentative, he is expressing "tentative views" and that a final determination must be determined on another day. Second, the Supreme Court of Canada specifically declined to decide the issue. The majority decision, written by Karakatsanis J. and concurred with by six other justices, noted that the issue was not argued before them and that it was not prudent to explore the issue in the absence of full submissions on the issue. *Reeves,* paras 23-26, 71, 76.

[55] The issue in *Cole* and *Reeves* related to informational privacy in the content stored in a computer and the Supreme Court of Canada viewed the expectation of privacy in such information as high. The Court has held that computers raise unique privacy concerns because they are used for personal purposes and contain highly private information which fall at the "very heart of the "biographical core" protected by section 8 of the *Charter*." *Cole,* paras 47-48; *Reeves,* paras 34-35.

[56] The Supreme Court of Canada has addressed the warrantless entry by police into a residence in *R v Feeney,* [1997] 2 S.C.R. 13. The Supreme Court of Canada held that a warrant was required to arrest a suspect inside a residence and that the police may not make a warrantless arrest in a residence except in the cases of hot pursuit. *Feeney* did not involve a co-habitant consenting to the entry of the police into a residence.

[57] The Supreme Court of Canada has not addressed the specific issue of a co-habitant consenting to the police entering into the common areas of a residence to investigate or arrest another co-habitant who has not consented to the entry. While the Supreme Court of Canada has yet to decide this issue, several appellate courts in Canada have considered the issue.

[58] In *Tymkin v Ewatski et al,* 2014 MBCA 4, the Manitoba Court of Appeal held that consent to enter a residence for the purpose of an arrest was an exception to the requirement that the police obtain a *Feeney* warrant. The Court held that the police could rely upon a valid consent to enter the premises to effect an arrest.

[59] In a later case, *R v R.M.J.T.,* the Manitoba Court of Appeal, at para 46, following *Tymkin*, quoted from *Tymkin* at para 89:

> Where police seek to rely upon a consent to enter the premises to effect and arrest, they must rely upon a valid one. The requirements for a valid consent include that:
>
> a) it must be given by someone who has a privacy interest in the premises; and
> b) the consent must be an informed one. (citations omitted)

[60] In *R.M.J.T.*, a person who lived in the home consented to the entry of the police into a shared area of the home. The Court held that there was a reduced expectation of privacy in shared areas of a residence and that the person who provided consent had the authority to do so and had provided informed consent. *R.M.J.T.*, paras 50-52.

[61] The British Columbia Court of Appeal has also considered this issue in *R v Clarke,* 2017 BCCA 453 which involved the warrantless entry by police into a residence occupied by two people. The primary occupant consented to the entry of the police into the residence to search for firearms. In finding that the co-habitant could consent to the police entry into common areas of the residence, the Court stated, at para 55:

> The appellant and Ms. Ferrer had overlapping reasonable expectations of privacy in the shared spaces of the residence. These privacy interests were co-mingled. Given normative social standards, the broader contextual circumstances and absent evidence to the contrary, the appellant would reasonably have expected Ms. Ferrer would have the authority to consent to police entry into the common areas of the house. Ms. Ferrer was the primary occupant of the residence. The nature of her relationship with the appellant and their use and treatment of the residence, considered in the totality of the circumstances, supports the conclusion that she could validly consent to police entry into the shared or common areas of the residence. As held in *Reeves*, "Descriptively, a co-resident knows from the outset that the other co-resident has the right to invite others into shared spaces."[2]

[62] I find the analysis in *Tymkin, R.M.J.T.* and *Clarke* helpful in determining whether the police could enter the residence with Ms. Thrasher's consent to investigate or arrest the Appellant.

[63] The decision of the Trial Judge again does not deal explicitly with this issue. The Trial Judge's decision focuses mainly on Ms. Thrasher's consent and whether it was valid, which will be discussed later in these reasons. The Trial Judge appears to accept that Ms. Thrasher had the right to consent to the police entry into the residence. The Trial Judge viewed Ms. Thrasher as being the sole tenant of the residence and having the only legal rights with respect to the residence. In my view, for the reasons stated above, this was incorrect and the Appellant did have a reasonable expectation of privacy in the residence. This, however, is a different issue from whether Ms. Thrasher could consent to the police entering the common areas of the residence.

[64] The Appellant and his sister each had a reasonable expectation of privacy in the common areas of the residence, although their privacy rights in the common areas were not equal. Access to the common area was shared between the Appellant, his sister and her children. As I concluded above, the Appellant's control over the common areas of the residence was shared and subservient to Ms. Thrasher's control over the residence. His expectation of privacy was diminished in comparison to Ms. Thrasher's.

[65] Ms. Thrasher was the Appellant's surety and as part of this process, Ms. Thrasher signed an acknowledgement of surety in which she acknowledged that she was responsible for the Appellant's behaviour on release, that she was

[2] This reference is to *R v Reeves*, 2017 ONCA 365 for which leave to appeal to the SCC had been granted at the time *Clarke* was decided.

guaranteeing that the Appellant would obey all of the conditions of his bail and that she was responsible for ensuring that the Appellant complied strictly with the conditions.

[66] The Appellant had entered into a recognizance which had an impact upon his rights. In order to secure his release from custody pending the resolution of his other charges, the Appellant had pledged to comply with conditions that restricted his movement and his actions. He was required to reside at his sister's residence and follow the rules she established. He was required to comply with a daily curfew and to attend at the door of the residence when requested to do so by a bail supervisor or the RCMP completing a curfew check.

[67] Ms. Thrasher's role as a surety for the Appellant and the conditions he was required to comply with as part of his release are part of the broader contextual circumstances that have to be considered in this case. It would be reasonable, in this situation, for the Appellant and his surety to expect that Ms. Thrasher would have the authority to consent to the police entering into the common areas of the residence.

[68] The nature of their relationship, as accused and surety, the circumstances of their occupation of the residence and the conditions associated with the recognizance, considered in the totality of the circumstances, lead me to conclude that Ms. Thrasher could consent to police entry into the common areas of the residence. Therefore, the Trial Judge's conclusion that Ms. Thrasher could consent to the police entry into the residence was correct.

Was the Consent Obtained in this Case Valid?

[69] Having concluded that Ms. Thrasher could consent to the police entry into the common area of the residence, the issue remains whether the consent she provided was valid.

[70] The Appellant argues that the Trial Judge failed to articulate the correct legal standard, that there was no basis for the Trial Judge to find informed and voluntary consent and that he failed to consider relevant factors.

[71] The Trial Judge's decision did not refer to the legal standard but did address the issue of consent and whether it was informed. The Trial Judge concluded:

> The events at the door and inside occurred in a minute or two. The police wanted, and Ms. Thrasher wanted Lloyd out of the house. The audio reflects a number of people talking and yelling at the same time and the accused protesting, and it is

> over in moments. While we took almost a full day to dissect what happened, it all happened within a minute or two. I find that Thrasher gave permission to Constable Shea, which, obviously, was overheard by Constable Sturgeon. That Constable Sturgeon stepped in, joined by Constable Shea. Was her consent informed? In any ordinary conversation, there are nuances, assumptions, physical cues going back-and-forth that assist in communication. But I am satisfied that she knew: (1) she could eject the accused at any time, and, in fact, had done so.
>
> (2) That she did not like him drinking, and that she had cooperated with the police in the past and here said, "Yeah, sure". In my view, she was doubly affirming her consent. I infer that based on her history with her brother, his yelling at her not to give consent, that she knew she had that option. She exercise that option back in December when she ejected him from drinking.
>
> Moreover, I am unable to find that there is any element of compulsion by the police. Now, we can visualize two big strapping members, six-and-a-half feet high, armed to the teeth with equipment, dominating someone, certainly. But that does not appear to be the case that happened here at all.
>
> The two constables that she dealt with at first, Shea and Sturgeon, asked her in ordinary language, words to the effect, said, "is it okay we come in"? And her answer was, "Yeah, sure." She had dealt with these officers or these members in the past. They had come to her assistance in the past. So the police saying to her in the midst of all of the arrest, "Don't listen to your brother", I do not make anything of that. To me, it reflects more the member trying to focus Thrasher on what was going on, trying to contain the situation, and not reflecting any kind of intimidation or words of pressure. "Is it okay if were in here?" "Yeah, sure." She wanted the police, she did not want trouble with her brother, she did not want trouble with her kids, she wanted her brother out. In my view, her consent was short, affirmative, reinforced with the word "sure".
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> *Appeal Book*, tab 3, pages 98-100.

[72] The onus is on the Crown to establish on a balance of probabilities that consent is voluntary and informed. Consent must be voluntary and informed to be valid: *Cole*, para 78.

[73] Consent can be express or implied and must be given by someone who has the authority to give consent. The consent must be voluntary and not the product of police oppression or coercion. The person giving consent must be aware of the nature of the police conduct for which the consent is sought and know that they have the right to refuse to grant the consent. They must also have an awareness of the potential consequences of giving the consent. *R v Wills*, 70 C.C.C. (3d) 529 (Ont. C.A.) at para 69.

[74] Ms. Thrasher's role as a surety and the conditions the Appellant was required to comply with as part of his release are again part of the broader contextual circumstances that must be considered in determining whether Ms. Thrasher provided valid consent to the police entering the residence. I have referred to those considerations in paragraphs 65-66 of this decision.

[75] Ms. Thrasher was aware that she could ask the Appellant to leave the residence and had done so in the past. The police officers involved in this incident had dealt with the Appellant and had attended to the residence in the past. Some of the officers had also dealt with Ms. Thrasher in the past and she had been cooperative and assisted the police in facilitating previous bail compliance checks on the Appellant.

[76] Ms. Thrasher answered the door when the police arrived at the residence. During the incident, the Appellant repeatedly told the officers that they were not allowed in the residence and also urged his sister to tell the police that they were not allowed in the residence. Following this, an officer asked Ms. Thrasher if it is okay to be in the residence and she responded affirmatively saying "yeah, sure". The police officers entered the residence and attempted to arrest the Appellant. An officer advised the Appellant that he was under arrest. A skirmish resulted and Ms. Thrasher told the police and the Appellant that she didn't want trouble and asked them to leave the apartment. While the police did not inform Ms. Thrasher that she had the right to refuse permission to the police to enter the residence, in the circumstances, I infer that Ms. Thrasher was aware that she had that right and that she was aware that the police were there to investigate the Appellant.

[77] The Trial Judge found that Ms. Thrasher provided informed consent and, in the circumstances, I see no reason to conclude otherwise.

CONCLUSION

[78] In conclusion, the Appellant's section 8 *Charter* rights were not breached as the police entry into the residence to investigate and arrest the Appellant was validly consented to by Ms. Thrasher, the tenant of the property and the Appellant's surety.

[79] For these reasons, appeal is substantially dismissed. There is an error on the Record which should be corrected to reflect that the Appellant was convicted of counts 1, 3 and 4 on the Information and that count 2 was stayed by the Crown.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
24th day of October, 2019

Counsel for the Respondent: Jay Potter
Counsel for the Appellant: Ryan Clements

S-1-CR 2017 000 124

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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MEMORANDUM OF JUDGMENT OF
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