Date: 2023 04 09
File: T-1-CR-2022-000803

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

WILLIAM ROBERT ALEEKUK

REASONS FOR RULING ON VOIR DIRE
of the
HONOURABLE CHIEF JUDGE ROBERT GORIN

Heard at:	Inuvik, Northwest Territories
Date of Decision:	March 23, 2023
Date of Written Judgment:	April 9, 2023
Counsel for the Crown:	Clare Brackley
Defence Counsel:	Kate Oja

[Ruling on Admissibility of Evidence pursuant to SS. 8 & 24(2)
of the *Canadian Charter of Rights and Freedoms*]

Date: 2023 04 09
File: T-1-CR-2022-000803

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

WILLIAM ROBERT ALEEKUK

A. INTRODUCTION

[1] William Robert Aleekuk is charged with attempted murder with a firearm, discharging a firearm with intent to wound, and aggravated assault as a result of a shooting incident carried out with a shotgun in Inuvik in the early hours of October 10, 2021.

[2] During the aftermath of the shooting, the police carried out a warrantless search of the Mr. Aleekuk's vehicle, a white sedan, where they seized a number of items, in particular three shotgun shells they found inside a black duffel bag located in the back seat area. One of the shells had been discharged and the two others had not. The shells were all very similar to a discharged shell casing found close to the scene where the shooting had taken place. Their gauge, size, color and the printing on the exterior of the shell were all identical. The metallic color of the bases of each shell as well as the printing on them were also identical.

[3] Defence counsel states that the search and seizure was unreasonable, and that it therefore violated Mr. Aleekuk's rights guaranteed under s. 8 of the *Canadian Charter of Rights and Freedoms*. She asks that the evidence gained through the search be excluded pursuant to s. 24(2) of the *Charter*. Crown counsel concedes that the s. 8 violation is made out. However she argues that Mr. Aleekuk has not established that the evidence should be excluded.

[4] For the reasons that follow, I agree with both counsel that Mr. Aleekuk's right to be secure against unreasonable search or seizure was violated. However, I agree with the Crown that given the nature of the breach and all of its surrounding circumstances, admitting the evidence in issue would *not* bring the administration of justice into disrepute. Therefore, I deny Mr. Aleekuk's application. My reasons follow.

B. ANALYSIS

S. 8 of the Charter

[5] S. 8 of the *Canadian Charter of Rights and Freedoms* states:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

[6] The search of Mr. Aleekuk's vehicle and the duffel bag located inside of it was carried out without a warrant. It therefore falls on the Crown to satisfy the court that the search was reasonable.

[7] The police witnesses testified that the search was being carried out for the purposes of public safety. There exist statutory and common law powers to carry out warrantless searches based on both public and police safety concerns. S. 117.02 of the *Criminal Code* provides authority to search a place where the concern relates to a firearm and certain preconditions are met. S. 117.02 states:

> 117.02 (1) Where a peace officer believes on reasonable grounds
>
> > (a) that a weapon, an imitation firearm, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence, or
> >
> > (b) that an offence is being committed, or has been committed, under any provision of this Act that involves, or the subject-matter of which is, a firearm, an imitation firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance,
>
> and evidence of the offence is likely to be found on a person, in a vehicle or in any place or premises other than a dwelling-house, the peace officer may, where the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practicable to obtain a warrant, search, without warrant, the person, vehicle, place or premises, and seize any thing by means of or in relation to which that peace officer believes on reasonable grounds the offence is being committed or has been committed.

[8] The section sets out four prerequisites. Firstly, the police officer must have reasonable and probable grounds to believe that an offence was committed that involved a firearm. Secondly, they must have a reasonable believe that evidence will be found in the place (other than a dwelling-house) to be searched. Thirdly the grounds for obtaining a warrant must exist. Finally, there must be exigent circumstances that render it impracticable to obtain a warrant.

[9] Defence counsel concedes, and I agree with her, that the first three of the requirements are likely met in this case. However, she does not agree that there were exigent circumstances that made it *impracticable* to obtain a warrant under all of the circumstances. Once again, I agree.

[10] The jurisprudence dealing with other similar statutory powers and the common-law authority for warrantless public safety searches is useful. In *R. v. Paterson*, 2017 SCC 15, the Supreme Court interpreted s.117(7) of the *Controlled Drugs and Substances Act*, which provides:

> (7) A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be *impracticable* to obtain one.

[11] Beginning at paragraph 33 of *Paterson*, the court stated:

> [33] The common theme emerging from these descriptions of "exigent circumstances" in s. 11(7) denotes not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety. This threshold is affirmed by the French version of s. 11(7), which reads "*l'urgence de la situation*".
>
> [34] *Even where exigent circumstances are present, however, they are not, on their own, sufficient to justify a warrantless search of a residence under s. 11(7). Those circumstances must render it "impracticable" to obtain a warrant*. In this regard, I respectfully disagree with the Court of Appeal's understanding of s. 11(7) as contemplating that the impracticability of obtaining a warrant would itself comprise exigent circumstances. The text of s. 11(7) ("by reason of exigent circumstances it would be impracticable to obtain [a warrant]") makes clear that the impracticability of obtaining a warrant does not support a finding of exigent circumstances. It is the other way around: exigent circumstances must be shown to make it impracticable to obtain a warrant. In other words, "impracticability", howsoever understood, cannot justify a warrantless search under s. 11(7) on the basis that it constitutes an exigent circumstance. Rather, exigent circumstances must be shown to cause impracticability.

> [35] The appellant says that the requirement of "exigent circumstances" rendering it "impracticable" to obtain a warrant requires, in effect, that such circumstances "leav[e] the police *no choice* but to proceed with entering a dwelling-house". In other words, he maintains that the "impracticability" of obtaining a warrant should be understood to mean impossibility. Conversely, the Crown submits that a much lower threshold is indicated, such that obtaining a warrant is not "realistic" (whatever that may mean) or "practical".
>
> [36] While I am not persuaded that the strict condition of impossibility urged by the appellant is denoted by Parliament's chosen statutory language of impracticab[ility], neither am I satisfied by the Crown's argument equating impracticability with mere impracticality. Viewed in the context of s. 11(7), however — including its requirement of exigent circumstances — "impracticability" suggests on balance a more stringent standard, requiring that it be impossible in practice or unmanageable to obtain a warrant. The French version of "impracticable" in s. 11(7) — "*difficilement réalisable*" — is also consistent with a condition whose rigour falls short of impossibility but exceeds mere impracticality of obtaining a warrant. So understood, then, "impracticable" within the meaning of s. 11(7) contemplates that the exigent nature of the circumstances are such that taking time to obtain a warrant would seriously undermine the objective of police action — whether it be preserving evidence, officer safety or public safety.
>
> [Emphasis Mine]

[12] Simply put, the court held that the term "impracticable" should not be equated with impossibility. However, the court also stated that more than mere impracticality is required. The court ultimately found that "impracticability" requires that "*obtaining a warrant [be] impossible in practice or unmanageable"*.

[13] In the present case exigent circumstances did not exist. Mr. Aleekuk was in custody at the time the search was carried out. There was no imminent danger that was such the vehicle could not have been secured and a warrant sought.

[14] Furthermore, for similar reasons it was not impracticable to obtain a warrant. While I agree that the scene surrounding where the search was carried out was chaotic, more could have been done. Five officers were present and at least two of them could have been available to secure the vehicle. In hindsight, the lack of steps taken by the police is not justifiable – at least not in the sense that a breach of Mr. Aleekuk's s. 8 *Charter* rights is not made out.

[15] Defence counsel submits that the search cannot be justified under the *ancillary powers doctrine* as it applies to safety searches. As noted in *R. v. McDonald*, 2014 SCC 3, while safety searches are important, the power to carry

them out is not unbridled. They can only be carried out where the police officer believes on reasonable grounds that their safety is at stake and that the search is therefore necessary. As the court stated at paragraph 41 of *McDonald:*

> [41] [. . .] The legality of the search therefore turns on its reasonable, objectively verifable necessity in the circumstances of the matter. As the court stated in *Mann*, a search cannot be justified on the basis of a vague concern for safety. Rather, for a safety search to be lawful, the officer must act on "reasonable and specific inferences drawn from the known facts of the situation" (*Mann*, at para. 41).

[16] Defence counsel is correct in stating that the search carried out by the police was not a response to an imminent threat. The police were searching for firearms. Once the police established that there was no actual firearm in the vehicle they could have stopped, secured the vehicle, and made an application for the warrant.

[17] As stated, the Crown concedes the s. 8 breach. I agree with both counsel and find that the warrantless search of Mr. Aleekuk's vehicle was not otherwise authorized by law and that his right to be secure against unreasonable search and seizure was therefore violated.

S. 24(2) of the Charter

[18] S. 24(2) of the *Charter* states:

> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[19] Defence counsel submits that after considering the three branches of the test for exclusion of evidence set out in *R. v. Grant*, 2009 SCC 32, this court should exclude the evidence of the items, seized from Mr. Aleekuk's vehicle, including the shells. The Crown takes the opposite position, arguing that the evidence should be admitted.

Seriousness of the Charter-Infringing State Conduct

[20] On the first branch of the *Grant* test, the seriousness of the breach, defence counsel concedes that the police do not appear to have been acting in bad faith. However, she argues that their conduct manifested a lack of attention or ignorance to *Charter* rights or standards. One of the officers who carried out the search and seizure, Constable Helguson, testified that in doing so, he was simply following the

orders of his superior, Sergeant Bishop. He testified that he had been told that a warrant could be obtained in the event they found a firearm. The other officer who carried out the search, Constable Tyler, stated that ultimately it was his opinion that he had the grounds for a warrant, but that it did not occur to him at the time of the search to get one. He did not consider any alternatives to simply searching the car then and there.

[21] Defence counsel refers to *R. v. Paradis*, 2019 NWTSC 14, where Smallwood J. (as she then was), beginning at line 2 of page 41 of the judgement's transcript, stated:

> Whether the police were operating in good faith is another consideration in assessing the seriousness of the police conduct. However, the Court in *Grant* also noted that ignorance of Charter standards must not be encouraged, and negligence or willful blindness do not constitute good faith. As stated in *Grant*, at paragraph 75:
>
> > Wilful or flagrant disregard of the Charter by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct.

[22] While defence counsel takes the position that ignorance of the *Charter's* requirements should not excuse the conduct of the police, she also concedes that in the present case, it has not been established that there is or was any systemic problem related to the police conduct in question.

[23] Crown counsel points out that in *Paradis*, the court held that there had been multiple breaches contrary to ss. 8, 9, 10(a), and 10(b) of the *Charter*, occasioned by the conduct of the police. The court noted that that was a factor in concluding that the lack of care for the accused's *Charter* rights occasioned a "mid to serious" level of *Charter*-infringing state conduct. Beginning at line 26 of page 42 the court stated:

> The Court in *Grant* referred to the spectrum of seriousness of *Charter* violations with inadvertent or minor violations at one end and willful or reckless disregard for *Charter* Rights at the other end. There is no evidence of systemic or institutional abuse, which would aggravate the seriousness of the breaches. I find that the conduct of the officer that led to the multiple *Charter* breaches in this case reflects a lack of care for the accused's *Charter* Rights which is in the mid to serious end of the spectrum. The *Charter* breaching conduct can be considered serious and tends to support the exclusion of the evidence.

[24] In the present case, the *Charter*-infringing conduct was considerably less serious than that which occurred in *Paradis*. Crown counsel conceded that both officers, in particular Constable Helguson, appeared to be basing their decisions on direction from superiors. However, Constable Tyler testified that he was concerned with having a vehicle with a firearm in it at the crime scene. It is noteworthy that his fears were justified in the sense that when the police returned to the vehicle the following day, it had been broken into. As stated however, Crown counsel acknowledges that neither officer turned his mind to whether or not it was feasible to get a warrant and that exigent circumstances were not apparent.

[25] However, Crown counsel submits that while the circumstances were not exigent, the scene was chaotic and the situation was quickly evolving. There were many people in the area and the police were receiving other calls that they had to act on. She argues that these factors are relevant to the officers' state of mind and how they felt they needed to allocate their resources during a serious and fluid situation.

[26] There was a long gun case in the back of the vehicle. Constable Tyler was concerned that someone might access any firearm that was in the vehicle. Constable Tyler did not know the type of firearm that had been used in the shooting which is why, after determining that the long gun case was empty, they searched the smaller duffel bag. Crown counsel submits that had the police gone and requested a warrant to carry out the search as they did, they would have received one. I agree that a warrant would very likely have been granted given the information that the police had at the time. This is not a case where the police did not have reasonable and probable grounds to carry out the search.

[27] I also concur with many of the Crown's other submissions on the first branch of *Grant*. After considering, the circumstances faced by the police, the fact that the search was of a vehicle (including bags that were in the vehicle) as opposed to a place in which Mr. Aleekuk would have had a higher privacy interest, the lack of bad faith on the part of the police, and the fact that the police would very likely have obtained a warrant had they applied for one, I conclude that the *Charter*-infringing state conduct was on the lesser end of the spectrum.

Impact on the Charter-Protected Interests of the Accused

[28] Having regard to the second branch of the test set out in *Grant*, the impact on Mr. Aleekuk's *Charter*-protected interests, defence counsel concedes that the Mr. Aleekuk's reasonable expectation of privacy in a vehicle is not as high as the privacy interests in a home or office. She suggests, however, that his privacy

interest was substantially elevated given that there were multiple things that were being kept in his car.

[29] Defence counsel submits that it is not clear what else, if anything, was in the duffel bag in which the shells were found. One officer said that there were only the shells and another officer said there were other things as well. She submits that it was not only a search of the vehicle, but also a search of a duffel bag plus the long gun case and that this renders the violation of Mr. Aleekuk's s. 8 rights more serious.

[30] Crown counsel emphasizes the Mr. Aleekuk's lesser expectation of privacy in a motor vehicle. She submits that that lesser interest exists since lawful warrantless searches of vehicles can be carried out in circumstances that would not apply to a dwelling-house or other places. Certainly it is well established that motor vehicles carry a decreased expectation of privacy in contrast to a home or office, given that the use of highways is a highly regulated activity; see *R. v. Wise*, [1992] 1 SCR 527, at 533.

[31] I find that given that it was a motor vehicle that the police searched, the impact on Mr. Aleekuk's *Charter*-protected interests was, at most, moderate. I make this finding taking into account that in addition to the vehicle being searched, so too were the bags located inside - including the duffel bag from which the shotgun shells were seized. I am unable see how searching the duffel bag inside the vehicle adds much to the search's impact on Mr. Aleekuk's *Charter*-protected interests in this case.

Society's interest in an Adjudication on the Merits

[32] In addressing society's interest in an adjudication of the charges against Mr. Aleekuk on its merits, defence counsel concedes that the charges are extremely serious. However she argues that the evidence of the shotgun shells that were found in the vehicle is of lower probative value. It is the Crown's theory that the shells found in the duffel bag in Mr. Aleekuk's car match the spent shell found around the scene of the shooting. She suggests that it will be difficult for the Crown to establish that the spent shell found close to the scene was connected to the offence at all since the evidence establishes that there were a large number of people and vehicles moving in that general area following the shooting and prior to the shell's discovery. She points out as an example that there is conclusive video evidence of an ATV driving through the scene during that interval.

[33] Defence counsel takes the position that the given what she characterizes as "the very questionable probative value" of the spent shell found around the scene of the shooting, the similar shells found within the duffel bag in Mr. Aleekuk's vehicle have similarly limited value. She submits that because the evidence is not strong, it is less essential to society's interest in adjudicating the charges against Mr. Aleekuk on their merit. She points out that one of the factors in *Paradis* that resulted in the evidence in issue being admitted, was its essential nature. As stated by the court in *Paradis* (beginning at page 46 line 11):

> The evidence in this case consisting of drugs, money, weapons, and ammunition is highly reliable and relevant evidence. It is critical evidence to the Crown's case and essential to a determination on the merits.

[34] Crown counsel, on the other hand, submits that, although there were people and vehicles moving around the general area where the shooting had occurred and where the spent shell was later found, the likelihood of it having been deposited in that area, other than as a result of the shooting, is not great. The shell was found within a couple of hours of the shooting. She submits that the street where the shooting occurred and where the police recovered the shell is a main street in Inuvik and "isn't a shooting range" or otherwise an area where firearms are typically used.

[35] Crown counsel argues that given that the shotgun shells found in Mr. Aleekuk's vehicle match the spent shotgun shell on the street, the evidence is significantly probative in identifying Mr. Aleekuk as the person who shot Mr. Tyler. She concedes that there is other evidence, both direct and circumstantial, tending to identify Mr. Aleekuk as the shooter. While she also concedes that the evidence of the shotgun shells may not in itself be determinative, she takes the position that it is substantial. She submits that this is especially so given that video evidence depicting the actual shooting shows what appears to be the shooter bending down and picking something up off the ground immediately following the shooting. She further submits that when one considers this video evidence, and that one of the shells found in the duffel bag was spent, the probative value is even more substantial than what it otherwise would be.

[36] Crown counsel also argues that given the high level of seriousness of the charges – attempted murder with a firearm, discharging a firearm with intent to wound, and aggravated assault – society's interest in adjudicating the case on its merits is high.

[37] I agree with the Crown's submissions on the third branch of *Grant*. I find that the evidence of the shotgun shells found in Mr. Aleekuk's vehicle is of substantial probative value. It is significant evidence identifying Mr. Aleekuk as the shooter. The seized shells match the discharged shell found at the scene a few hours after the shooting. Under all of the circumstances, it would seem that there is a very real likelihood that the discharged shell was deposited at the scene as a result of the shooting.

[38] I have viewed the video of the shooting on multiple occasions. It appears that right after firing the shots, the shooter twice picked something up off the ground, or attempted to do so. His actions are consistent with picking up something which might well have been a spent shell. I find that the probative value of the shells found in the bag, in particular the spent shell, is certainly substantial on the issue of identity.

[39] Moreover, given the serious nature of the charges, I have no hesitation in finding that society's interest in an adjudication on its merits is particularly high and leans strongly in favour of the admission of the shotgun shells seized from Mr. Aleekuk's vehicle. This is especially so given their considerable probative value.

C. CONCLUSION

[40] I have concluded that

- the seriousness of the *Charter*-infringing conduct of the police was low given the circumstances that prevailed at the time and the place where the search was carried out,

- the impact of the breach on the *Charter*-related interests of Mr. Aleekuk was, at most, moderate, given the place or places searched and the manner in which the search was carried out, and

- society's interest in an adjudication of the charges on its merits is high and strongly favours admission of the evidence given the substantial probative value of the evidence in issue and the seriousness of the charges.

[41] After assessing each of the foregoing branches of *Grant* and weighing them together, I find that Mr. Aleekuk has not established that the seized evidence in issue should be excluded under s. 24(2). I deny his application.

Robert Gorin
Chief Judge of the
Territorial Court

Dated at Yellowknife, Northwest Territories,
this 9th day of April, 2023.

R. v. Aleekuk (2), 2023 NWTTC 06

Date: 2023 04 09
File: T-1-CR-2022-000803

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

WILLIAM ROBERT ALEEKUK

REASONS FOR RULING ON VOIR DIRE of the HONOURABLE CHIEF JUDGE ROBERT GORIN

[Ruling on Admissibility of Evidence pursuant to SS. 8 & 24(2) of the *Canadian Charter of Rights and Freedoms*]