

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-090-001723
[2018] NZDC 3880**

THE QUEEN
Prosecutor

v

CHRISTIAN CHARLES STOKES
Defendant

Hearing: 27 February 2018
Appearances: J Bull for the Crown
K Maxwell for the Defendant
Judgment: 13 March 2018

**DECISION OF JUDGE P A CUNNINGHAM
[Admissibility of items discovered in a search]**

[1] Christian Charles Stokes faces four charges as the result of a search of his bedroom by police on 4 April 2017. They are possession of methamphetamine for supply, unlawful possession of a .22 revolver pistol, possession of 4 x 0.22 rounds of ammunition except for some lawful proper and sufficient purpose and possession of cannabis.

[2] On 4 April 2017 the police executed a search warrant at an address at [address 1 deleted] having obtained a search warrant to search for evidential material from a burglary at [address 2 deleted] in Auckland. Their interest was in relation to a man named [Nikau Ware]. While the police were executing the warrant, the police located a number of items sitting on side tables in Mr Stokes' bedroom suggestive of drug related offending. They were AWS digital scales located on a bedside table, a spoon

with an unknown substance on a side table, plastic containers with residue and digital black scales.

[3] As a result of finding those items police invoked their powers under s 20 of the Search and Surveillance Act which authorises a warrantless search on reasonable grounds to suspect that an offence against the Misuse of Drugs Act had been committed. The items that are the subject of the charges were found in drawers in Mr Stokes' bedroom.

Challenge to the search

[4] For the defendant Ms Maxwell submitted that there were insufficient grounds to issue a search warrant in relation to the burglary items. Because of that illegality the warrantless search was invoked in relation to Mr Stokes bedroom. As a result the evidence should be excluded because that is a proportionate response to the impropriety.

[5] The Crown submits that the search warrant was lawfully issued and complied with and that once police saw the items on the side tables in Mr Stokes' bedroom they were entitled to invoke a warrantless search under s 20 of the SSA. Even if there was any invalidity in the warrant process, the balancing process under s 30 Evidence Act favours admission.

Background

[6] Between 23 and 28 December 2016 there was a burglary at a property across the road at [address 2]. One of the items taken in that burglary was a [car].

[7] On 4 January 2017 the police located the [car] at [address 1], the address where Mr Stokes was living on 4 April 2017. The car was forensically examined the following day. The fingerprint results were received on 24 January 2017 revealing prints from two persons, [Nikau Ware] and [Nathan Bartlett].

[8] On 23 January 2017 [Constable 1] had arrested [Nikau Ware] at [address 2] on an unrelated matter. At the time he had a bedroom at the address and he was on bail

for active charges at the time. Most of the charges were dishonesty offending. As at 23 January 2017 [Constable 1] was unaware of the burglary that had occurred across the road or that the police had located the [car] at the address of [address 1]. He became aware of the fingerprint evidence from the police computer system.

[9] On 4 April 2017 [Constable 1] applied for a search warrant to look for items taken in the burglary at [address 2]. The search warrant was granted and on that afternoon it was executed. None of the other items taken in the burglary were found at [address 1] during the search.

[10] Thus there was a delay of two months and ten days between when the fingerprint evidence came back until the date the warrant was applied for and executed.

The application for a search warrant

[11] The application states that it related to his investigation into [Nikau Ware] and his involvement in a burglary that occurred at [address 2] New Lynn. [Constable 1] listed all the items taken in the burglary as follows:

- a blue lawnmower
- Kirby Avalir vacuum cleaner
- Panasonic stereo with two speakers
- Sky Box G shock watch colour green and grey
- White Samsung tablet 2 x grey HP chromebooks
- Glass bathroom scale
- 42 inch LG television
- Material lounge suite four seater and one single, colour grey with black pattern

- Grey Panasonic microwave
- Samsung single door fridge
- Grey Samsung S7 cellphone
- Panasonic dishwasher
- [car] (which was referred to as an unlawfully taken motor vehicle)

[12] He then referred to the fact that the car had been found and forensically examined and the date the fingerprints results were returned.

[13] [Constable 1] went on to say I have reasonable grounds to believe that the search will find evidential material in respect of the offence, and he listed other items taken in the burglary apart from the car. He then stated his reasonable grounds to believe the material might be found as follows:

- the fact that the [car] was located at [address 1]
- that [Nikau Ware] had a bedroom at the address at the time he arrested him on 23 January 2017
- it was unknown to him at the time that he arrested [Nikau Ware] that he was wanted in relation to a burglary and unlawfully taking of the motor vehicle
- some of the items stolen in the burglary are large such as the couch, dishwasher, fridge and dining table and that due to their size the items will still be at the address of [address 1]. They are less likely to have been pawned and most likely still be in use by occupants at [address 1]
- [Nikau Ware] is currently in prison

[14] [Constable 1] gave oral evidence at the hearing before me. In terms of his explanation for the delay between locating the fingerprints and applying for the search warrant [Constable 1] explained that during this period of time he was asking the

occupants to provide him with serial numbers of the items taken. He said this took a while. He explained that it is best practice to have serial numbers. He also said that obtaining a search warrant in this case had less priority than other matters he was dealing with at the time.

[15] That he did not make any enquiries whether [Nikau Ware] still had a bedroom at the address when he applied for the search warrant. He explained that he did not want to alert anyone of potential interest in his coming to the address. He did make some computer enquiries about who was living at the address and he knew that neither [Nikau Ware] nor [Nathan Bartlett] were living there. He knew [Nikau Ware] was in custody.

[16] He agreed that none of the items in the burglary were present at the address. He agreed that people living at the address were unhappy about the search including that [Nikau Ware] was not there and he did not live there.

[17] He explained that when the car was located it had different number plates on it but the true identity of the vehicle was able to be ascertained from checking other parts of the vehicle.

[18] I asked him about the fact that the car taken from an address was located directly across the road to which the Constable replied that he had seen it before that a vehicle taken from one address was still being used in close proximity to where it had been stolen.

[19] [Constable 1] was also asked whether anyone had been charged in relation to the burglary and to his knowledge it had not. However he believed that [Nikau Ware] might have been charged with receiving or getting into the motor vehicle.

Challenge to the search warrant

[20] For Mr Stokes it was submitted that there were insufficient grounds to issue the search warrant. This is because there were not reasonable grounds to believe that a search would find evidential material in respect of the offence of burglary (as

required by s 6 of the Search and Surveillance Act 2012). Ms Maxwell referred to the case of *Williams*¹ where the Court of Appeal said that belief means there has to be an objective and credible basis for thinking that a search will turn up an item(s) named in the warrant (see *Laughlis* at 354 to 355), whilst suspicion means thinking that it is likely that a situation exists.

[21] That the following matters do not amount to reasonable grounds to suspect a burglary.

- the vehicle stolen from [address 2] was located at [address 1] two weeks after the burglary. Fingerprints were found of two persons [Nikau Ware] and [Nathan Bartlett]. Locating fingerprints does not safely lead to the conclusion that the owner of one of the prints stole a vehicle or committed the burglary. There is no evidence linking [Nikau Ware] to the burglary at [address 2]
- the fact that [Nikau Ware] had 18 charges before the Courts; most of which were dishonesty related does not add anything material to the requirement for reasonable grounds
- the fact that the stolen vehicle was found at [address 1] does not provide real evidence linking the other items stolen during the burglary at [address 2]
- it is not logical to infer that because large items were taken that they would not have been transported a great distance from the location

[22] Ms Maxwell referred to the case of *R v McColl*² where the Detective applied for a search warrant two months after receipt of information from an informant and nearly three months after the transaction to which the information related. On the issue of delay the Court observed:

¹ [2007] NZCA 52 at para [213].

² CA139/99 30 June 1999.

The information on which the application was based had become too stale at the time it was relied on...

[23] In *Duncan v R*³ the applicant's challenge to the validity of a search warrant executed in relation to the activities of a [suspect]. [The suspect] did not live at the address and he had been bailed to a different address. There was no evidence of any material connection between [the suspect] and the applicant's address. The search resulted in charges being laid against Mr and Ms Duncan. The search was deemed unlawful.

Crown submissions

[24] The Crown submissions proceeded on the basis that there were reasonable grounds to believe that evidential material would be found at [address 1]. This was the cumulative effect of a number of factors. Reference was made to *R v Fox*⁴ as referred to in the *Legros v R*⁵:

As this Court said in *R v Fox* it is necessary to adopt a realistic approach to attacks upon search warrants. Whether or not there is a proper basis for the warrant to be issued needs to be considered in a common-sense way. There has to be sufficient linkage between evidence of a crime, the suspect, and the property and things for which the authority to search is sought. It is the global picture, rather than individual factors, that is important.

[25] There were reasonable grounds for belief because:

- there were good evidence linking the stolen items to [Nikau Ware] and good evidence linking the stolen items to the property at which [Nikau Ware] had been residing
- the [car] was located by police at the property. The burglary occurred between 23 and 28 December and the vehicle was located at the property on 4 January 2017 (which was a week after 28 December 2016)

³ [2010] NZCA 318.

⁴ (2002) 19 CRNZ 652.

⁵ [2016] NZCA 586.

- the burglary occurred on the other side of the street. As large household items were taken it was logical to infer they may not have been transported a great distance
- fingerprints lifted from [car] identified [Nikau Ware] thus linking him to one of the stolen items
- it is also relevant that Mr [Ware] was facing 18 active charges; most of which was dishonesty offending
- Mr [Ware] was known by the police to be residing at the property and was on bail conditions when he was arrested on an unrelated matter on 23 January 2017
- large items were less likely to have been pawned and more likely to be in use by the occupants of the property
- the delay between the burglary and the application for the warrant does not negate the reasonable grounds for belief that the stolen items would be found. Because he was incarcerated Mr [Ware] would have been unable to deal with the stolen property

[26] In *Legros v R*⁶ the Court of Appeal dealt with a similar case involving a delayed application for a search warrant, namely two months after the burglary. The Court held that given the quantity of material taken there was a reasonable belief that some of the property remained at Mr Legros' residence was well open.

[27] The Crown also made submissions as to the scope of the warrant given the items that were taken it was not reasonable to limit the search to Mr [Ware]'s bedroom as some of the items were for use in the kitchen and other communal areas of a house.

Discussion and analysis

⁶ [2016] NZCA 586.

[28] I begin by referring to the application for the search warrant. I have referred to the contents of the application in some detail at paragraphs [11] – [13] inclusive. Although the warrant stated that Mr [Ware] was arrested on 23 January 2017 and that he was in custody as at 4 April 2017, the application did not make it clear that Mr [Ware] had been in custody between those two dates. Thus the authorised issuing officer reading the warrant may not have realised that Mr [Ware] had not been living at the property for two months and ten days. Having said that, this does not mean that [Constable 1] was trying to conceal this. It was just that the application did not make it clear. There was no explanation given in the application for the search warrant as to the delay in making the application.

[29] I do not accept the submission that there was no evidence to link [Nikau Ware] to the burglary at [address 2] which occurred between 23 and 28 December 2016. He was living across the road as at 27 January 2017. The fingerprints of [Nikau Ware] were lifted from a car taken at the time of the burglary. I do accept that there could be some other explanation for why his fingerprints were on the car but one possibility is that [Nikau Ware] took it. The car was located directly across the road. While it is possible that someone else took the car to [address 1], the fact that Mr [Ware]'s fingerprints were found on it would cause police to suspect he was involved in the burglary. If a vehicle stolen at the same time as other items from inside a house, in my view it is reasonable to link the stolen car with other items taken at the same time.

[30] I do not agree with the fact that Mr [Ware] had 18 active charges before the Court, most of which was dishonesty related offending is not relevant to the assessment of whether or not there were reasonable grounds to suspect that he may have been involved in a burglary. The nature of his active charges are not reasonable grounds to believe per se but a factor that the police would have been entitled to take into account when deciding whether reasonable grounds to believe existed.

[31] I cannot dismiss the submission that items taken in the burglary may not have not been transported a great distance from the location of the crime. There is a likelihood that these items (or some of them) may have been kept for use in a household of the person who took them or someone associated with them.'

[32] While none of the matters referred to in the foregoing three paragraphs individually amount to reasonable grounds to believe items in relation to the burglary would be found at the address, in my view when considered together they do amount to just that. This is considering matters in a common-sense way and taking into account the global picture as referred to in *R v Fox*.

[33] Ms Maxwell emphasised the amount of time since Mr [Ware] had lived at the address, two months and ten days. Given that he was in custody it was known to the police that he was no longer living there. It was not known whether there had been another person move into his room or even completely different tenants from those residing at the address as at 24 January 2017. Thus there were no reasonable grounds to conclude Mr [Ware] continued to be associated with the address. Hence no reasonable grounds to believe that a search would secure items taken during the burglary.

[34] In *Legros*, the Court found that given the quantity of goods taken, a reasonable belief that some of the property remained at the defendant's address was well open. In that case, Mr Legros was a second-hand dealer known to store goods at his house.

[35] Notwithstanding the different circumstances here, namely that Mr [Ware] was in custody between 23 January 2017 and 4 April 2017, I am of the view that the reasoning in *Legros* still applies here. The list of items taken in the burglary contained 12 different items (apart from the car) many of which were large items and therefore not easy to move.

[36] In my view there were reasonable grounds to believe the items taken during the burglary at [address 2] were at [address 1]. It follows that the search warrant was validly issued and the ensuing warrantless search of items found in Mr Stokes' room was justified.

[37] In the event that I am wrong about the validity of the search warrant, I turn to address the s 30(3) factors which apply to improperly obtained evidence.

The importance of the right breached

[38] Ms Maxwell submitted that an intrusion into someone's residence is a serious breach of the right to privacy. The Crown accepted that Mr Stokes had a strong privacy interest in his home. This factor favours exclusion.

The nature of the impropriety

[39] Ms Maxwell submitted that the preparation of the warrant application was gross carelessness. For the Crown Ms Bull submitted that this was not a case where there was an unjustified warrantless search or a failure to comply with the terms of a warrant.

[40] Clearly here the police applied for and were granted a search warrant. Paragraphs [29] – [31] herein deal with my view of the matters linking Mr [Ware] to the address of [address 2] and the burglary that occurred there between 23 and 28 December 2016. I said that at paragraph [32] that taken together they formed reasonable grounds to believe that items relating to the burglary would be found at [address 1]. I have dealt with the delay of two months and 10 days at paragraphs [33] – [35] herein. In my view the only concern in the application process was making it clear that Mr [Ware] had been in prison for two months and ten days at the time the application for the warrant was made. Therefore he had not been associated with the address for that period of time. I have already found that this did not amount to finding that [Constable 1] had acted improperly (see para [28] herein). I am therefore of the view that if there was a breach of the application process then the nature of the impropriety was not serious, rather it was at the other end of the scale, more minor in nature.

Nature and quality of the evidence

[41] Ms Maxwell submitted that the most serious charge faced by Mr Stokes involves possession of 10.1 grams of methamphetamine. The Crown describe this as the lead offence. However it must be remembered that there are also firearms charges here and in particular the combination of the two types of charges is concerning.

[42] I agree that the evidence is of great importance to the Crown case and this should be weighed in favour of inclusion. Both counsel were agreed that the other factors in s 30(3) do not apply.

[43] Weighing up the factors above, the strongest factor against admitting the evidence is the breach of a privacy right. The exclusion of the evidence is not a proportionate response. Given my finding that the nature of any impropriety is not serious but minor in nature, it is my view the balancing process favours admission of the evidence.

Decision

[44] The evidence against Mr Stokes obtained as a result of the search of his bedroom at [address 1] on 4 April 2017 is admissible.

Dated at Auckland this 13th day of March 2018 at _____ am/pm.

P A Cunningham
District Court Judge