

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Thompson 2016 NSPC 77

Date: December 16, 2016

Docket: 2723111

Registry: Halifax

Between:

Her Majesty the Queen

v.

Caitlin Faye Thompson

TRIAL DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: December 5, 6, 7, 8, 9 and 13, 2016

Decision: December 16, 2016

Charges: section 140(1)(b) of the *Criminal Code*

Counsel: Erica Koresawa, for the Crown

Luke Craggs for Ms. Thompson

By the Court:*Introduction*

[1] On January 1, 2014, Matthew Penney's body was found burning on the Oakfield Park Road, a rural area outside Halifax. He had been shot in the head. When police were breaking the tragic news to his family, Tyler Berry dropped by. Mr. Berry indicated that Mr. Penney had attended a New Year's Eve party with him the night before at 3 Springhill Road in Dartmouth, the home of Caitlin Thompson and her boyfriend, Jason MacKenzie.

[2] Police investigators met with Ms. Thompson on January 5 to ask her about the party and Mr. Penney. She told them Mr. MacKenzie had brought Tyler Berry, his girlfriend, Keisha Slawter-Vassell, and Mr. Penney over to the house to celebrate the new year. According to Ms. Thompson, Mr. Penney had left some time after midnight on his own. She had not known where he was going.

[3] Under questioning by police after her arrest on March 20 Ms. Thompson admitted that, contrary to what she had said to investigators on January 5th, Mr. Penney had never left 3 Springhill Road. Tyler Berry had accidentally shot and killed him during the early morning hours of New Year's Day. Ms. Thompson told police Mr. MacKenzie admitted to her later that after the shooting he and Mr. Berry had panicked, removed Mr. Penney's body from the house and set it on fire.

[4] The information Ms. Thompson supplied to police on March 20th is corroborated by Admissions of Fact (*Exhibits 8 and 9*) and the forensic evidence.

The Public Mischief Charge

[5] Ms. Thompson is charged under section 140(1)(b) of the *Criminal Code* with intentionally misleading police to divert suspicion from herself and her friends by making a false statement about her "knowledge or involvement in regards to the death of Matthew Penney" causing the police to continue their investigation on the basis that he had left 3 Springhill Road.

[6] Ms. Thompson is not disputing that she gave a false statement to police investigators on January 5th, 2014 and did so intending to mislead them and divert suspicion away from herself, Mr. MacKenzie, Mr. Berry and Ms. Slawter-Vassell.

As she said in her March 20th police statement, Mr. Berry and Mr. MacKenzie told her what to say if investigators came to talk to her, that Mr. Penney had left the party and she did not know where he had gone.

[7] What Ms. Thompson does dispute is the Crown's allegation that her January 5th statement affected how the police conducted their investigation. She also says she cannot be convicted in circumstances where other people misled police with the same false story. Ms. Thompson says there is a reasonable doubt about whether the police investigation undertaken after her January 5th statement was different than it would have been had Ms. Thompson instead told the police nothing. She submits that her role and the role others played in how the police conducted the investigation cannot be disaggregated. In Ms. Thompson's submission, the Crown has failed to prove the essential element of the offence that her misleading statement about Matthew Penney influenced how the police continued their investigation.

Ms. Thompson's Statements to Police

[8] On January 5, 2014 Ms. Thompson told police everyone at the New Year's Eve party had been drinking and having a good time together. Ms. Thompson got quite drunk. Sometime after midnight - Ms. Thompson could not remember when - she said goodbye to Mr. Penney, wished him a happy new year, and went upstairs to check on her daughters who were sleeping. She said she heard the door close.

[9] Ms. Thompson told the investigators that no one else had been at the party.

[10] On March 20th, Ms. Thompson admitted to police that her January 5th statement was untrue. The truth was that she had gone upstairs after midnight to check on her children. She heard a loud noise. Looking down the stairs she saw that Mr. Berry, Mr. MacKenzie and Ms. Slawter-Vassell were all very upset. Mr. Berry and Mr. MacKenzie told her Mr. Penney had been accidentally shot and was dead.

[11] A day or two later Mr. Berry and Mr. MacKenzie proposed a plan to divert suspicion from all of them. There was to be a common front on the issue of what had happened to Matthew Penney: he had left the party and no one knew where he had gone. The story was intended to cause the police to conclude there was nothing

to learn from Ms. Thompson or any of the others about how Matthew Penney ended up on the Oakfield Park Road with a bullet hole in his head.

[12] When police came to talk to her on January 5th, Ms. Thompson followed the agreed-upon script.

The Police Investigation

[13] After speaking to Ms. Thompson on January 5th, police investigators proceeded on the basis that 3 Springhill Road was Matthew Penney's last known whereabouts.

[14] D/Cst. Jonathon Jefferies, the lead investigator on the Penney homicide investigation, described how police investigators conducted a fruitless search for evidence of where Mr. Penney had gone after he was said to have left 3 Springhill Road. The search for witnesses and video surveillance radiated out from 3 Springhill Road, encompassing residences and businesses in the area. The search also extended from nearby Windmill Road to Highfield Park where Mr. Penney lived and from Oakfield Park Road to Springhill Road.

[15] The investigation required painstaking effort. Police officers were working very long and late hours. It was D/Cst. Jefferies' evidence that canvassing for witnesses and video surveillance "takes a fair amount of police resources." Police officers from the General Investigation Section (GIS) and patrol were pulled in to assist with the investigation. D/Cst. Jeffries had to watch video surveillance from 30 Springhill Road in real time as it could not be fast-forwarded. He then tasked another officer with watching it in case he had missed something. Members of the "tech crime" unit examined Mr. Penney's tablet which had been provided to police by his family. The unit also analyzed his ex-girlfriend's cell phone which she supplied with the information that she and Mr. Penney had been in contact before he went to the New Year's Eve party.

[16] The investigators turned up nothing. No video surveillance footage, Metro Transit bus video footage or information from taxi companies provided any evidence of Mr. Penney. Other than what Ms. Thompson had told them, the police had no evidence that Mr. Penney had left 3 Springhill Road.

[17] D/Cst. Jefferies detailed some of the specific leads police investigators pursued. The superintendent at 30 Springhill Road indicated that an associate of Mr. Penney's who lived in the building had held a New Year's Eve party and was surprised Mr. Penney did not show up. Blood was detected in the foyer of 10 Springhill Road. It was tested. It was not Matthew Penney's blood. Information that Mr. Penney had been arguing with his ex-girlfriend earlier on New Year's Eve was followed up. That inquiry also failed to produce any evidence of where Mr. Penney was between the time Ms. Thompson said he left her home and the discovery of his body on the Oakfield Park Road.

[18] A break in the case came on February 17, 2014 when police were informed that K.S. had been at the 3 Springhill Road New Year's Eve party. She told police that Matthew Penney was still at the residence when she left around 4 a.m. on January 1. Police investigators confirmed that K.S. had indeed been picked up by her aunt from that address.

[19] K.S.'s presence at the Thompson/MacKenzie New Year's Eve party was at odds with what police had been told by Ms. Thompson on January 5th about who attended the party. D/Cst. Jefferies testified that it refocused the investigation on 3 Springhill Road. Police surveillance was initiated and relevant evidence was retrieved out of garbage that was placed at the curb. The pieces of the investigative puzzle began to fall into place.

[20] The police coordinated arrests on March 20, 2014 of Mr. Berry, Ms. Slawter-Vassell, Mr. MacKenzie and Ms. Thompson. A search of 3 Springhill Road on March 20 turned up a .25 calibre shell casing. Bullet fragments recovered at Mr. Penney's autopsy had markings consistent with being fired from a .25 calibre pistol.

Analysis

[21] Ms. Thompson submits that her admissions of intentionally misleading the police with a false statement about Matthew Penney leaving her house are not enough to convict her. She says a further essential element of the offence - causing police to continue an investigation based on what she said - has not been made out. Ms. Thompson submits there is a reasonable doubt about whether what she told police had any effect on their investigation.

[22] In Ms. Thompson's submission the Crown's case against her fails for two reasons. She says there is no evidence to indicate whose information influenced the police investigation – was it Ms. Thompson's false information or false information provided by Mr. Berry or Mr. MacKenzie or Ms. Slawter-Vassell? Ms. Thompson submits the Crown must prove beyond a reasonable doubt that it was her false statement to police that had an effect on the investigation. She says reasonable doubt is found in the uncertainty about whose false statement caused police to conduct the investigation as they did.

[23] Ms. Thompson submits there is also no evidence the police investigation was conducted differently because of her false statement than it would have been if she had said nothing. She notes that D/Cst. Jefferies was not asked what the course of the investigation would have been if she had simply refused to speak to the police as many people do.

[24] I will first deal with the argument that Ms. Thompson's effect on the investigation cannot be teased out of the role others played in misleading the police. I have some evidence that indicates Mr. Berry and Mr. MacKenzie also gave the fabricated story about Mr. Penney leaving the party. D/Cst. Jefferies testified that Mr. Berry suggested Mr. Penney left because he was the odd man out amongst the two couples and that Mr. MacKenzie speculated he had been going to see a woman. This is not hearsay evidence; it is simply evidence of what Mr. Berry and Mr. MacKenzie said to police. Mr. MacKenzie's embroidery to the left-the-party story led the police to follow up with Mr. Penney's ex-girlfriend. D/Cst. Jefferies testified that wasn't an investigative step taken specifically because of Ms. Thompson's false statement.

[25] All I know about Ms. Slawter-Vassell is that she was charged jointly with Ms. Thompson for public mischief under section 140(1)(b). That suggests Ms. Slawter-Vassell did something to give the police reasonable grounds to charge her. Perhaps she gave police the same agreed-upon false story that Ms. Thompson, Mr. Berry and Mr. MacKenzie provided. It is reasonable to draw this inference from the fact of the joint charge although I have no direct evidence that is what happened.

[26] D/Cst. Jefferies' evidence tells me that at least Mr. Berry and Mr. MacKenzie also lied to police about Mr. Penney leaving the New Year's Eve party. I do not find that undermines the Crown's case against Ms. Thompson. It does not matter if the police investigation was influenced by multiple collaborating sources, only one of which was Ms. Thompson. What matters is whether Ms. Thompson, either as the sole source of deliberately misleading information or as a member of a group executing a plan to mislead the police, contributed to the police investigating on the basis that Matthew Penney had left the party. I find that if some aspects of the police investigation were influenced by Ms. Thompson's false statement it is irrelevant if false statements by others were also relied on. And the several false statements would have had a reinforcing effect. Irrespective of the order in which they were all interviewed, it was not just Mr. Berry and Mr. MacKenzie saying that Mr. Penney had left the party, Ms. Thompson was saying it too.

[27] In conclusion on this issue I will address Ms. Thompson's suggestion that she must have been the "substantial cause" of the investigative steps taken by police. Mr. Craggs referred me to *R. v. Stapleton*, [1982] O.J. No. 49 where the Ontario Court of Appeal found that "...it was the detailed statements made by [Stapleton] that substantially caused Sergeant Cronk to enter upon the investigation of the offence alleged in those statements to have been committed." (*paragraph 7*) The Court said this in the context of determining that it was Stapleton's detailed allegations of police abuse and not his mother's earlier telephone call claiming her son had been mistreated that animated the police investigation.

[28] Ms. Thompson misled police as part of a group effort to avoid suspicion. Her false statement was a "substantial cause" of the investigative steps taken by police to try and find evidence of where Mr. Penney had gone. As I have already explained, the fact that by spinning the same false story Mr. Berry, Mr. MacKenzie and likely Ms. Slawter-Vassell also contributed to how the police conducted their investigation does not mean that Ms. Thompson's conduct cannot be found to constitute public mischief.

[29] This takes me to Ms. Thompson's second point, that the Crown has not established the police investigation was conducted differently than it would have been if Ms. Thompson had said nothing when the investigators came to interview her.

[30] The law does not require people to cooperate with a police investigation. Ms. Thompson could not have been forced to talk to the investigators. She made the choice to do so, as part of a plan to draw police attention away from 3 Springhill Road and the New Year's Eve party. Ms. Thompson's false statement had the intended effect: for weeks the police did not look more closely at 3 Springhill Road as a possible source of information about what happened to Mr. Penney. Instead, investigators spent considerable time, energy and resources trying to determine where Mr. Penney went after the party and what might have happened to him.

[31] Ms. Thompson correctly points out that I only know what the police did, not what they would have done if Ms. Thompson had not told them anything. She says I do not know if they would have been suspicious or have simply assumed any reluctance to assist them was due to Ms. Thompson not wanting to be seen as someone who cooperates with police.

[32] I will note that the police would have known in January, just as they did on March 20th when Ms. Thompson was arrested and questioned, that she did not have a criminal record nor any involvement with the criminal justice system. In circumstances where the police also knew that Mr. Penney had been at Ms. Thompson's home for New Year's Eve, the last place anyone had seen him alive, I think it is highly likely that her refusal to answer any questions on January 5th would have stirred the suspicions of the police investigators.

[33] But that reasonable inference about the probability that an uncooperative Ms. Thompson would have made police investigators suspicious is not determinative. What is determinative is how the investigation proceeded after the interview with Ms. Thompson. I have the evidence of the extensive police search for clues into where Mr. Penney may have gone after the New Year's Eve party. I do not need evidence of how the police would have conducted their investigation had Ms. Thompson refused to answer their questions.

[34] The cross-examination of D/Cst. Jefferies sought to establish that what the police did to investigate Matthew Penney's homicide they would have done irrespective of Ms. Thompson's false statement. It was put to D/Cst. Jefferies that canvassing for video surveillance and witnesses is standard investigative practice.

It was suggested that was also true of checking for information from taxi companies. D/Cst. Jefferies agreed that witness canvassing is a standard investigative task and with so many video cameras in operation nowadays so is canvassing for video surveillance footage. He qualified his response about inquiries with taxi companies by saying this is not necessarily standard practice as it depends on what the police have been told about the victim. D/Cst. Jefferies testified that in this case the police had no information other than Mr. Penney had left 3 Springhill Road. That raised the possibility he had taken a taxi somewhere. It was D/Cst. Jefferies' evidence that because Ms. Thompson had told police Mr. Penney had left, investigators "looked everywhere."

[35] D/Cst. Jefferies was cross-examined about other aspects of the investigation that he acknowledged were not driven by Ms. Thompson's false statement. In his response to these questions, he explained the role that Ms. Thompson's lie played in the investigation:

...A lot of these decisions were being made based off the information that we got from these people...but ultimately the statement that she provided us was that he had left that residence. If she hadn't provided that statement and told us that he was there...none of that would have been done...certain elements of that investigation would not have been done...

[36] And although D/Cst. Jefferies agreed that had Ms. Thompson refused to answer the investigators' questions, the investigation would not have been suspended, he went on to add, "...maybe some elements we pursued wouldn't have been pursued if she, I guess, hadn't told us that."

[37] D/Cst. Jefferies was the lead investigator into Matthew Penney's homicide. His evidence establishes the significance of Ms. Thompson's misleading information to the investigation. It confirms that some investigative steps were taken because Ms. Thompson had told investigators that Mr. Penney left 3 Springhill Road. The fact that investigative decisions were also influenced by others who had spun the false story does not impair the Crown's ability to prove its case against Ms. Thompson.

[38] A police investigation may be unaffected by deliberately misleading information. Investigators may disbelieve the false story because of its source or they may be in possession of evidence that shows it to be bogus. Consequently, no investigative steps are taken in response. That was not the case here.

Conclusion

[39] On January 5th, 2014 Ms. Thompson made an intentionally misleading statement to police about Mr. Penney to divert suspicion away from herself, Tyler Berry, Jason MacKenzie and Keisha Slawter-Vassell. I find her false statement contributed to police investigators continuing to search for evidence of where Mr. Penney had gone and what happened to him after he was said to have left 3 Springhill Road. This is the final element of the offence of public mischief under section 140(1)(b). What Ms. Thompson did is criminalized by that provision. I am satisfied the Crown has proven beyond a reasonable doubt that Ms. Thompson is guilty of all the elements of the offence of public mischief. I enter a conviction against her accordingly.