

CANADA / JUDGMENT

Further Detention of Things Seized (Re)

2023 BCSC 421

COURT

Supreme Court of British Columbia

DECIDED

20 March 2023

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2023 BCSC 421 Further Detention of Things Seized (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Further Detention of Things Seized (Re),

2023 BCSC 421

Date: 20230320

Docket: X084309-1

Registry: New Westminster

In the Matter of an Application/Petition for relief in the nature of Certiorari and

in the Matter of an Application to Quash Search and Seizure Warrants

Between:

Zemaan Chaudhry

Applicant

And

His Majesty the King

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Applicant:

P.S. McMurray

Counsel for the Respondent:

J.I. Katz

P.W. Shyba

Place and Date of Hearing:

New Westminster, B.C.

August 5, 2022

Place and Date of Judgment:

New Westminster, B.C.

March 20, 2023

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Introduction

- [1] These are reasons for judgment on an application for an order in the nature of certiorari, pursuant to Part XXVI of the Criminal Code, R.S.C. 1996, c. C-46 [Code], to quash an order for detention made on May 30, 2022 by a Judicial Justice of the Peace ("JJP"); and for an order to quash search warrants issued on May 25, 2022, by another JJP, all of the orders granted in relation to two cellular telephones; a Google cellular telephone and an iPhone Pro-Max cellular telephone (the "Cell Phones") seized at the Royal Columbian Hospital in New Westminster, B.C. (the "Hospital").
- [2] The applicant also seeks (1) a declaration that the Cell Phones were unlawfully seized from the applicant pursuant to s. 8 of the Canadian Charter of Rights and Freedoms Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]; and (2) an order pursuant to s. 24(2) of the Charter that the Cell Phones be returned forthwith to the applicant.
- [3] The respondent opposes the applications aforesaid.

Background Facts

- [4] At 5:30 am on May 25, 2022, the wife of Mr. Chaudhry telephoned the RCMP and she told police that males unknown to her entered her house, shot at her husband and the males were still in her home. Two neighbours of the Chaudhry home also phoned the police to report hearing multiple gunshots, and seeing males leaving the home running to a white hatchback and then driving away from the home.
- [5] When police arrived at the Chaudhry home, three minutes later, at 5:33 am, police met the applicant who appeared to have been wounded in the neck and right shoulder by gunfire. At that time, the applicant told the police he observed a white sedan race along his street and in response to that sight, he ran inside his house as "he knew something was up". He reported to the police that he was wounded in the neck; although he did not know the identity of the shooter. The applicant's wife told police at that time that she was awoken by a loud banging on the door of the home; her husband ran into the same room in a panicked state; she saw on a surveillance video system a white hatchback in the driveway of her home; she heard 4 to 5 gunshots, bullet holes were located at various places in the home; the applicant was the target because he was successful; and her husband had a "past" in the "street life" over ten years before she met him.
- [6] The applicant was transported by ambulance to the Hospital for assessment and treatment of his injuries.
- [7] Police officers subsequently attended the Hospital to speak to the applicant. Police noted that the applicant was argumentative with Hospital staff and he refused to provide a recorded statement to police.
- [8] When taken for an x-ray examination, the applicant gave the Cell Phones to a staff member at the Hospital. Upon return to the examination area of the Hospital, the applicant was informed that the Cell Phones had been seized by the Police. The clothing of the applicant and Cell Phones were seized at 6:40 am by an RCMP officer. SIM cards from the Cell Phones were placed in signal shielding bags to prevent the removal or deletion of digital evidence from the SIM cards.
- [9] On May 25, 2022, an RCMP officer submitted an information to obtain ("ITO") a search warrant seeking judicial authorization to search the Cell Phones. The search warrant was granted on the same day. On May 27, 2022, Cpl. S. Grewal of the Ridge Meadows RCMP detachment advised Ms. Chaudhry by e-mail that search warrants had been obtained which permitted police to search the Cell Phones, the search being limited to the period from midnight on May 23, 2022 up to 6:40 am on May 25, 2022.
- [10] The offence to which the ITO was directed was an assault with a weapon on May 25, 2022, committed against the applicant. The purpose of the application to obtain the seizure and search of the Cell Phones was to investigate that offence. The applicant for the ITO advised the Court that he had reasonable grounds to believe that data on the Cell Phones including

electronic communications, media files, audio and video logs, location history of the devices, internet browsing history, documents and notes; contact entries and data relating to use and ownership of the Cell Phones ("the Data") together with physical evidence including bullets, bullet casings, bodily fluids, a sweater cut off of the applicant at his home, as well as surveillance footage and surveillance storage equipment located in the residence of the applicant would afford evidence of the offence. The affiant for the warrant believed that the examination of the contents of the Cell Phones would provide investigative avenues including identifying persons with whom the applicant was communicating and the contents of communications which may demonstrate associates with whom the applicant may have conflicts, and to allow investigators to seek evidence from such contacts, without which the police investigation of this serious crime would be stopped. Police also obtained a sealing order to prohibit access by interested parties or members of the public to all court records relating to the search warrant.

- [11] Video surveillance from the area of the applicant's home showed a white hatchback vehicle pull in front the home and two male persons exit the vehicle to chase a male into the home. Two males then exit the home and are seen to leave the area at the same time as two pickup trucks possibly associated with the white hatchback.

Submissions of the Applicant

- [12] The applicant submitted that the seizure of the Cell Phones was unlawful as the Cell Phones were seized without warrant contrary to s. 489(2) of the Code and without reasonable grounds relying on *Hunter v. Southam*, [1984] 2 S.C.R. 145, 1984 CanLII 33. It was argued that it is accepted law that cell phones have particular privacy interests to the data contained on them. The submission of the applicant was that the grounds cited were woefully inadequate and founded on a hearsay statement about the shooting of the applicant being a gang related shooting based on undisclosed information. The applicant also submitted that the Detention Order made by a JJP on May 27, 2002, was made without full disclosure by the police officer seizing the Cell Phones as to the circumstances of the seizure and without requisite grounds to determine the Cell Phones were required for an investigative purpose.
- [13] The principal submission of the applicant, however, was directed at the initial seizure of the Cell Phones, however the applicant did acknowledge that the application for a search warrant may have been supported by the information provided to the JJP. The applicant also submitted that the Search Warrants issued by a JJP on May 25, 2022 were issued without the requisite grounds to believe that the Cell Phones would afford evidence of an offence, that there was nothing beyond a suspicion put forward by the police to justify the seizure of the Cell Phones. The applicant further submitted that the seizure of the Cell Phones was unreasonable and contrary to s. 8 of the Charter, as was the subsequent detention of the Cell Phones was unlawful.

Submissions of the Crown

- [14] With respect to the application for the prerogative remedy of certiorari, which is a discretionary remedy, it was submitted it is necessary for the applicant to demonstrate that it was not in the interests of justice for the detention of the Cell Phones to continue. The Crown submitted that the applicant had not met this requirement.
- [15] On a review of the facts, there were multiple gunshots in and around the home of the applicant in the early morning hours of May 25, 2022, and police met with the wounded man, the applicant, within minutes of the shooting. There was clearly evidence before the JJP which formed a basis to conclude this event was a targeted shooting based on the white hatchback arriving at the home and bullets shot into the home as the applicant ran into his home. The evidence was the applicant suffered two bullet wounds.
- [16] Section 489(2) of the Code was reviewed to demonstrate when an officer is lawfully present, in a location in execution of duties, a seizure can occur where upon "reasonable" grounds the officer believes the thing seized may afford evidence in respect to an offence. A report in compliance with s. 490 was filed with a JJP on the same day the seizure of the Cell Phones which complied with that section and a detention order was made on May 30, 2022.
- [17] *R. v. Pickton*, 2006 BCSC 1098, *R. v. Makhmudov*, 2007 ABCA 248 and *R. v. Adam*, 2012 ABPC 77 and other cases were cited to demonstrate seizures that had been allowed, in the face of claims that the seizures and searches were unlawful violating rights under s. 8 of the Charter. At paras. 45 in *Adam*, following both *Pickton* and *Makhmudov*, the Alberta Court of Appeal stated:
- 45 The Court in *Makhmudov* clearly stated that s. 489 of the Criminal Code only required that the officer was in lawful execution of his or her duties and that the officer had reasonable grounds to believe that the items to be seized would be used in evidence. I find that Neufeld was in the lawful execution of her duties and I accept Neufeld's testimony that she took possession of Adam's clothing because she reasonably believe that his clothes would be used as evidence in the shooting investigation.
- [18] Appendix "A" filed in support of the application herein, is the Report to a Justice certified by a police officer who advises the JJP to whom the report was made that the items seized, including the Cell Phones, were required for the purposes of an investigation. The Crown submitted that statement in these circumstances was all that was necessary before the Justice making the detention order. Relying on *Hicks-CC990998*; *Walcott-CC91032*, 2000 BCSC 0089 and *R. v. Kawecki*, 2014 ONSC 3584, the Crown submitted that there was no jurisdiction in the JJP to hold a hearing or an inquiry into the bona fides of a police officer in the execution of duties under the Code. The Crown further submitted that a justice making a determination for detention on an item seized need only be satisfied that the item(s) seized have investigative value, "a very low evidentiary bar for that burden to be met".

- [19] The Crown also submitted that an applicant is not entitled to a free-standing review of a search warrant relying on the authority of *R. v. 1758691 Ontario Inc. [ATV Farms]*, 2019 ONSC 2933 at para. 11. An application for certiorari to review a search warrant in an extraordinary and discretionary remedy. This Court is obliged to determine whether the overall interests of justice are served by hearing the application. If that onus is not met, the Court should decline to hear the application.
- [20] The Crown acknowledged that the current applicant has standing to bring the current application.
- [21] In the Crown's submissions the applicant knew when he saw the white vehicle arrive at his property "that something was up", and the applicant ran inside the house followed by two men, who shot him twice. The two men had been waiting, near the applicant's home, for the applicant to leave his home and become exposed to their intended shooting. The applicant's wife disclosed that he had "street life" or as Crown counsel put it "gang life" in the past. After being shot twice by his assailants, the applicant refused to cooperate or provide a statement to the police.
- [22] The conclusion that police drew, in these circumstances, to the effect that the Cell Phones might provide potential evidence to elucidate the circumstances of this targeted crime was reasonable, according to the Crown counsel. In *R. v. Hayman Motors Ltd.*, [1998] O.J. No. 747 [Hayman], police executed a search warrant for the purpose of investigating a stolen car complaint. The stolen car was located, in the throes of being dismantled. In that search, Federal Certificate labels were located for two additional vehicles previously reported stolen. With that information a second search warrant was obtained and executed. During that search, officers located significant parts of eight Volkswagen vehicles and an engine from another vehicle, all previously reported stolen. A vast store of other vehicles in various states of dismantlement, and thousands of car parts were also located in the premises searched. The Garage Register of the business showed that only four vehicle transactions took place during 1997. With this information in hand, police sought a General Warrant which was subsequently issued which authorized broad searches of the premises of the business. This warrant was executable over a period of 12 days in November of 1997.
- [23] *Hayman Motors Ltd.* sought an order to quash the search warrants based on a jurisdictional error, however the Court stated:

25 The fact that a Charter right, as for example, the right to be secure against unreasonable search or seizure, has been infringed does not per se give rise to jurisdictional error. See, *R. v. Mills* (1986), 26 C.C.C. (3d) 481, 500-1 (S.C.C.), per McIntyre J. In some instances, s. 24(1) Charter applications may be grounded on claims of jurisdictional error for which prerogative relief in the superior court of criminal jurisdiction might be available. The paths to relief, however, remain discrete. So too, the grounds. All Charter violations and infringements are not jurisdictional in nature. Without jurisdictional error, there cannot be a remedy for jurisdictional error.

26 The only real purpose which can underlie this application is ultimately to obtain a ruling that the evidence gathered under the warrant is the product of constitutional infringement which should be excluded under Charter s. 24(2). Pre-trial quashing of a search warrant has an air of unreality about it. Evidentiary exclusion does not follow, without more, an order quashing the warrant. See, *Re Zevallos and The Queen* (1987), 37 C.C.C. (3d) 79, 81 and 84 (Ont. C.A.), per Morden J.A.; and, *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 18-19 (S.C.C.), per Lamer J. The evidence obtained remains presumptively admissible.

27 It is settled law that it is for the trial judge to determine issues of admissibility. The rule applies irrespective of the basis of exclusion which is involved. Appellate review is available after final verdict. Errors of law made in deciding questions of admissibility are not jurisdictional in nature. See, for example, *Quebec (Attorney General) v. Cohen* (1979), 13 C.R. (3d) 36 (S.C.C.); and, *Patterson v. R.* (1970), 2 C.C.C. (2d) 227 (S.C.C.). It follows that they are not amenable to correction or supervision by extraordinary remedy, either in anticipation or after the fact.

[24] In *Hayman*, the Court concluded that the issue of return of property seized pursuant to a warrant was an extraordinary remedy which should be dealt with by a trial judge. In the case at bar, it is not anticipated the applicant will be the subject of a criminal charge based on the offence being investigated.

[25] In the case at bar, in the applicant's argument, the factual basis contains a single paragraph to the effect that "the Applicant has very private information and communications on each of the Cell Phones and does not wish to have them searched for any purpose". A JJP was required to take into account the circumstances that a person shot in an apparent targeted shooting might have an interest in bringing the perpetrators to justice. The refusal of the applicant to cooperate with the police leaves law enforcement with the Cell Phones, as a primary avenue of investigation.

[26] The Crown highlighted that s. 8 of the Charter protects people and not places. To demonstrate a breach of that right to privacy has been violated, however, this applicant is not an accused and as noted above, therefore no remedy is available under s. 24(2) of the Charter. The dangers of dealing with an application to quash a search warrant or detention order prior to and outside of a trial setting creates concerns about the need to preserve scarce judicial resources and the avoidance of inconsistent decisions as well as the danger of reaching an incorrect decision based on an incomplete factual record, as compared to the complete record available to a trial judge: *ATV Farms* at para. 31.

[27] The applicant has claimed that there is private information on the Cell Phones, which is not surprising, but the police are only seeking a small discrete slice of the information on those Cell Phones in circumstances and time shortly before the offences being investigated

Conclusions

- [28] Crown counsel noted that counsel for the applicant conceded that the ITO was likely sufficient to have permitted the JJP to issue the search warrant.
- [29] That said, the issue which remains outstanding is whether the detention order could have been issued by the judicial justice? Section 489(2)(c) of the Code validates the seizure of the Cell Phones. The police officer was lawfully at the hospital in the execution of his duties and at that location seized the Cell Phones for the purpose of investigating the crime involved in the shooting of the applicant. The Court is satisfied that seizure of the Cell Phones was lawful.
- [30] Given the evidence of the history of the applicant received from his wife and the description of the offence it was clearly a targeted shooting, taken with the attempts of the police to investigate a serious life-threatening criminal offence, and the refusal of the applicant to cooperate with that investigation, it was necessary for police to examine the available evidence to fulfil the public duty to investigate crime. Further, the officer gave full and frank disclosure to the JJP in the ITO. The Crown satisfied the burden of satisfying the JJP making the determination that the Cell Phones had investigative value, as noted above, "a very low evidentiary bar for that burden to be met".

Orders

- [31] The application of the applicant, Zemaan Chaudhry for an order in the nature of certiorari is dismissed. The applications to set aside or vacate the search warrant and the detention order are also dismissed based on the reasons given above.

"Ball J."

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