

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 1602

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2020 BCSC 1602 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2020 BCSC 1602

Date: 20201028

Docket: 27393-17; 27393-67

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and

Larry Ronald Amero

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Before: The Honourable Madam Justice Maisonville

Ruling Re Application Nos. 17 and 67 - Arrest of Wiwchar and the Search and Seizure Incidental to that Arrest

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Place and Dates of Hearing:

Vancouver, B.C.

September 22-24, October 1, 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 28, 2020

INTRODUCTION

- [1] The applicant, Dean Wiwchar, seeks to exclude evidence recovered from Blackberrys seized incidental to his arrest in Toronto on June 21, 2012 for the murder of John Raposo. The sole issue on the present application is whether the police had reasonable grounds for his arrest. The parties are agreed that if the arrest was lawful, then the seizure of evidence incidental to the arrest was lawful as well.

BRIEF OVERVIEW AND GOVERNING LEGAL PRINCIPLES

- [2] On June 18, 2012, John Raposo was shot and killed while sitting on the patio of the Sicilian Sidewalk Café in the Little Italy neighbourhood of Toronto. Three days later on June 21, at the direction of Det/Sgt Terry Browne of the Toronto Police Service ("TPS"), the applicant was arrested for the first degree murder of Mr. Raposo. The applicant was a passenger in a taxi at the time. Incidental to the arrest, police seized four cell phones, \$45,000 in bundled cash, identification documents (both real and false) and several other items of interest. Two of the phones were PGP Blackberrys that were eventually decrypted in 2014 and found to contain evidence in relation to the Raposo murder, as well as the murder of Sandip Duhre in Vancouver and the conspiracy to murder Sukhveer Dhak at various locations in Surrey.
- [3] Det/Sgt Browne, the lead investigator with respect to the Raposo murder, was the sole witness on the voir dire. He outlined the investigative steps he and other officers took from the time of the murder to the arrest of the applicant, and also testified about the information he had received from other police agencies about Mr. Raposo and the applicant over these several days. I will review that evidence shortly but suffice to say the thrust of his testimony was that based on the information he had gathered and received during his investigation, on June 21, 2012 he had reasonable grounds to believe that the applicant had committed the murder of Mr. Raposo and he therefore directed that the applicant be arrested. The timing of the arrest was also informed by his significant public safety concerns with respect to the applicant, believing that he may have remained in the Toronto area to commit another murder. Det/Sgt Browne made the decision that the arrest had to be effected immediately and, thus, no warrant was obtained.
- [4] Section 495(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46 authorizes a police officer to arrest without warrant "a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence".
- [5] The principles that guide the determination as to whether the officer had reasonable grounds were recently reviewed by the Court of Appeal in *R. v. Harms*, 2020 BCCA 242:
- [41] An arresting officer must subjectively believe that there are reasonable grounds upon which to base an arrest, and those grounds must be objectively reasonable. The officer's subjective belief is what he or she personally believed at the time of the arrest and must include an honest belief that he or she has reasonable grounds to believe an offence has been committed, not mere suspicion: *R. v. Day*, 2014 SCC 74, affirming 2014 NLCA at para. 26; *Her Majesty the Queen v. Gerald Judson Brownridge*, 2000 BCSC 795 at para. 26. In assessing whether the grounds for arrest are objectively reasonable, the court considers the officer's observations through the lens of someone with the same experience, training, knowledge and skills and decides whether a reasonable person with the same lens would come to the same conclusion: *R. v. Luong*, 2010 BCCA 158 at para. 24.

[42] In *R. v. Storrey*, [1990] 1 S.C.R. 241, Justice Cory summarized the Criminal Code requirements for a warrantless arrest and the policy concerns on which they are based (at 249-251):

Section 450(1) [now s. 495(1)] makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest.

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[43] The standard applied by the court in assessing the grounds for a warrantless arrest is one of reasonable probability or credibly-based probability that an indictable offence has been committed. This standard is less than the criminal and civil standards of proof, but more than mere suspicion. It envisions a "practical, non-technical and common sense probability" as to the existence of the salient facts and inferences in question: *R. v. Jir*, 2010 BCCA 497 at para. 27, citing *R. v. Debot*, [1989] 2 S.C.R. 1140, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 and *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. Ct. (Gen. Div.)).

[44] In assessing whether the grounds for arrest amount to a reasonable probability that an offence has been committed, the court must consider the totality of the circumstances: *R. v. Bracchi*, 2005 BCCA 461 at paras. 21-22. Reasonable grounds may be based on indirect evidence, partial information and reasonable inference drawn from personal observation or information provided by others and the key question is whether the officer's belief was reasonable at the time of arrest, not whether, in hindsight, it turns out to have been accurate: *R. v. Vance* (1979), 48 C.C.C. (2d) 507 (Y.T.C.A.) at 515; *R. v. Bush*, 2010 ONCA 554 at para. 66. In conducting the assessment, the court should not examine the evidence in isolation or a piecemeal fashion: *R. v. Whitaker*, 2008 BCCA 174 at paras. 41-42, leave to appeal refused, [2008] S.C.C.A. No. 296; *Jir* at para. 28. It should also be recalled that, as Justice Doherty stated in *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), a decision to arrest may have been made quickly, based on available information which may be less than exact or complete.

- [45] Often, more than one officer will be involved in the events that lead up to an arrest without warrant. In such circumstances, the court is not limited to considering the observations, knowledge and testimony of the arresting officer, although the focus is on the officer who decided to effect the arrest and what that officer knew when the decision was made: *R. v. Quilop*, 2017 ABCA 70 at paras. 20, 28. To the extent that other officers may provide evidence regarding their knowledge and participation in the salient events, that evidence only relates to the grounds for arrest if it was communicated or otherwise known by the officer who effected the arrest: *Jir*, at para. 26.
- [6] With these principles in mind, I turn now to review Det/Sgt Browne's evidence as it relates to the arrest of the applicant.

THE EVIDENCE OF DET/SGT BROWNE

June 18, 2012

- [7] On June 18, 2012, while on call with the Homicide Unit, Det/Sgt Browne heard on the police radio that a shooting had just occurred (at a location subsequently determined to be the Sicilian Sidewalk Café) with one confirmed death. He attended at the scene and was briefed by the investigating officers. He learned that the deceased male had been identified as John Raposo, and that there had been a second victim who had been transferred to hospital with non-life threatening injuries. The shooter had been described as wearing construction clothing. He had been sitting at the east side of the bar on the patio, brandished a firearm, discharged it a number of times and then fled the scene.
- [8] Det/Sgt Browne made arrangements to have the CCTV video from the location taken to the technical unit to be downloaded but later learned that it only covered the interior of the establishment and did not capture the shooting incident. He also took the standard investigative steps of directing officers to canvass the surrounding area for additional witnesses and CCTV video, and requesting that "sweeper" services be deployed to capture licence plates.
- [9] Det/Sgt Browne entered the crime scene, which he described as chaotic with overturned chairs and tables and broken glass. As soon as he saw Mr. Raposo's injuries, which included multiple gun shot wounds to the head, one directly to his right eye, it was apparent to him that the shooting had been a targeted hit and that the shooter knew what he was doing. Despite the large number of people who had been on the patio, the only collateral injury was a graze to the person who had been sitting beside Mr. Raposo.
- [10] Ballistic evidence seized from the scene consisted of six shell casings and two partial projectiles from a .45 calibre Winchester handgun.
- [11] Det/Sgt Browne reviewed witness summaries as they became available (all prior to the applicant's arrest) from which he learned the following. The patio had been full to capacity with patrons watching a Euro Cup soccer game between Italy and Ireland. Around 3:30 p.m.

a man came onto the patio and took up a position at a table that had just been vacated. The witnesses' descriptions of the shooter had some discrepancies but were largely consistent. He was a white male with a possible tan complexion and was at least six feet in height. He was wearing a construction helmet and construction vest or T-shirt, possibly with an "X" on it, as well as black pants and a medical mask. One person described him as wearing sunglasses and another as having a beard. He had long hair or a mullet, described in various shades such as copper or light brown. Some identified it as a wig. He wore black shoes that were not of a construction type. One witness described seeing gloves. They described hearing between four and six shots.

- [12] One person who had been sitting near the man noticed a firearm in his lap, which caused her concern and she got up to leave. There were varying descriptions of the firearm by the witnesses. One said it was silver or shiny; another said it was black. It was also described as similar to a semi-automatic or automatic firearm.
- [13] The waitress who had served the shooter said that he had ordered a Corona from her. As she was ringing in his order she heard a pop and looked out, observing the shooter with extended arms pointed at the victim. She saw him fire two more shots.
- [14] Det/Sgt Browne ordered a background search on Mr. Raposo and learned that he had been involved in traditional organized crime in some sort of drug capacity. He also received a call from Det/Sgt Burks advising him that Robert Skojo was a close associate of Mr. Raposo and that a duty to warn should be undertaken. Det/Sgt Browne went to check on his well-being but was unable to make contact with him.
- [15] Det/Sgt Browne learned that CCTV footage (the "Montrose video") had been seized from a nearby address and captured the shooter dressed in construction clothing walking in and around the adjacent laneway shortly before the shooting. It appeared to him from the shooter's gait and "swagger" that he had a medical ailment with respect to his hips or legs.
- [16] The officer agreed in cross-examination that in none of the witness statements had the shooter been described as having an unusual gait. He also agreed that the CCTV footage had limitations and that the fact that it was motion activated meant that it captured a limited number of frames making the video seem jerky.

June 19, 2012

- [17] In the early morning hours of June 19, 2012, Det/Sgt Browne reviewed the Montrose video, as well as all of the officers' notes and reports he had in his possession at the time as they related to the investigation.

[18] At 7:20 a.m., Det/Sgt Browne received and reviewed an email from Det. Scott Whittemore that had originated from Toronto Pearson Airport and relayed information from Det. St. Amant of the VPD with regards to the latter's interest in an individual by the name of Dean Wiwchar. Det. St. Amant's email, sent on June 18, had requested surveillance assistance with respect to Wiwchar if he was observed in the Toronto area. It added:

This heightened vigilance is in response to the public shooting this afternoon in Toronto (1530 hours Toronto time) and the description was a tall/slim male wearing a disguise. We currently have not confirmed the whereabouts of WIWCHAR and want to distribute his photograph to determine if he is at the Toronto airport this evening.

Three photographs of the applicant were attached.

[19] Det/Sgt Browne had never heard of Dean Wiwchar prior to this time and did not know anything about the VPD's investigation. He found it somewhat peculiar that an email from the VPD would be forwarded to him within 15 hours of the homicide he was investigating but he "tucked it in the back of [his] mind."

[20] Det/Sgt Browne also reviewed summaries of calls to 9-1-1 dispatchers and learned of a maroon Hyundai seen leaving the area of the shooting in the immediate aftermath.

[21] At 1:50 p.m., Det/Sgt Browne attended a briefing that included members from the TPS Homicide Unit and the Combined Forces Special Enforcement Unit ("CFSEU"). The officers from the latter were Det/Sgt Burks, Cpl. Scarlett and Cpl. Cripps. Det/Sgt Burks advised that at the request of the VPD, the CFSEU had been monitoring the movements of Dean Wiwchar, a suspect in the murder of Sandip Duhre in Vancouver in January 2012. Wiwchar was described as a white male, 6'2" with a pronounced limp and known to wear disguises. The VPD had not seen Wiwchar since June 12. Wiwchar had been under surveillance in the Greater Toronto Area ("GTA") from May 27 to June 4, 2012, when he returned to Vancouver. The Montrose video was played, and Cpls. Scarlett and Cripps, who had conducted surveillance of Wiwchar at the Pearson Airport on May 27, indicated that the gait and walk of the shooter was "similar to that of Wiwchar--it appears to be exaggerated".

[22] At the meeting, Det/Sgt Burks relayed that the VPD had noted similarities between the Raposo and Duhre murders. He further advised that on May 22, 2012, the VPD had requested that the CFSEU conduct 24-hour surveillance of Wiwchar upon his arrival in Toronto. Wiwchar arrived on May 23 and was observed visiting friends in Innisfil. The next day he was "misplaced" by the CFSEU but was relocated at secondary screening at the airport as he was heading back to Vancouver. On May 27, Wiwchar returned to Toronto and was observed by surveillance officers driving a car that had been rented by Rabih Alkhalil. Det/Sgt Browne did not know who Alkhalil was at the time but was advised he was a known drug player who used to reside in BC and was now based out of Ottawa.

[23] Det/Sgt Burks then provided details about the locations and neighbourhoods in the GTA in which Wiwchar had been surveilled. He checked out of the Fairmont Royal York Hotel on May 28 and booked into the Four Points Sheraton the same day. This hotel was in close proximity to the residence of Jorge Barreira, and Wiwchar was observed walking from the hotel towards the Barreira residence. Intelligence information was that Barreira was "an opponent to the Wiwchar group" so it was suspected that Wiwchar may have been conducting surveillance on him. This prompted the police to attempt to conduct a duty to warn Barreira of the possible threat to his life. Robert Skojo also resided close to the hotel, which prompted the duty to warn that Det/Sgt Browne had attempted to undertake at the request of Det/Sgt Burks.

[24] Det/Sgt Burks provided the following information derived from a VPD profile sheet with respect to Wiwchar:

- Cool and accomplished shooter
- Buys camouflage clothing
- Uses face altering methods such as wigs and full face masks to disguise his identity
- Very surveillance conscious
- Uses "sweeping" devices re: wires
- Uses "jamming" devices for police radios that is capable of jamming communications of surveillance vehicles that are 2 car lengths from the subject
- Uses "PGP" encrypted Blackberry devices that are difficult to intercept
- WIWCHAR's limp is as a result of a car accident that affected his left knee
- He does surveillance on his intended targets for up to one (1) month
- He may have false travel documents sufficient to fly

[25] Following the meeting, Det/Sgt Browne was briefed about the results of the post-mortem examination of Mr. Raposo. There were five entry wounds to the head on the right side and four exit wounds on the left. There was also a gunshot wound to the right elbow. The officer testified that the precise grouping of the shots supported his opinion that Mr. Raposo's shooter was very skilled:

that was the shooter for this homicide was very skilled, very accurate, and able to perform under what others might find a stressful situation. This was a very crowded patio with lots of people there to enjoy a soccer game, 3:30 in the afternoon. The shooter was able to successfully get out of his chair, approach the victim, strike him five times in the head successfully and then, without injuring anyone else other than the gentleman that was beside him, and again, that was a graze wound which could have been from a number of reasons, perhaps one that exited that got him. I can't say with certainty, but it was a very, very precise grouping.

[Sept. 23, T: p. 42, ll. 30-43]

[26] Det/Sgt Browne reviewed background documents that had been compiled by Det. Whittemore regarding Raposo and Wiwchar. With respect to the latter, they included his criminal record, which contained both adult and youth convictions for violent offences, a VPD surveillance target sheet, and a "profile narrative" with respect to Wiwchar prepared by Det. St. Amant of the VPD. It read, in part:

WIWCHAR is the Primary Suspect in the shooting murder of known gangster Sandip DUHRE which took place at a busy downtown Vancouver restaurant at the Wall Centre on January 17th, 2012.

WIWCHAR is a twenty six year old Caucasian male who is currently living in Vancouver, British Columbia. He has several convictions for violent offences, served time in prison and his DNA is on the Known Offender Databank. Originally from the North York Region (Toronto) he has a history of assaults. While incarcerated in British Columbia he had several contacts with law enforcement in relation to assaults and threats to corrections staff while in prison.

His BCDL [redacted] (learner's permit) lists him as 6'03" in height, 174 lbs weights with brown hair and green eyes.

He is believed to associate with Larry AMERO, Rabih ALKHALIL and James Clayton RIACH.

These persons are affiliated to the ALKHALIL/"Wolfpack" organized crime and intelligence indicates they are in conflict with the DHAK/DUHRE group which is the leading investigative theory behind the murder of Sandip DUHRE. Investigators believe that R. ALKHALIL and RIACH are co-consiprators in the murder of DUHRE and were present during the crime.

Investigators believe WIWCHAR is a "soldier" for hire by the ALKHALIL crime group which is based in the Canadian cities of Montreal and Ottawa.

The investigation received information that WIWCHAR travelled to Toronto on May 23rd on Air Canada flight 108. The flight is expected to arrive in Toronto Pearson International at 1420 hours on May 23rd, 2012. This was confirmed by surveillance.

It is unknown why WIWCHAR is travelling to Toronto however one theory is that he will meet with associates for business. A complete target package will be forwarded.

[27] In addition, Det/Sgt Browne received surveillance reports with respect to Wiwchar's presence in the GTA from May 22 to June 4. While he received them on June 19, he was not certain whether he reviewed them all that same day or the next. The surveillance reports of May 28 were of particular interest to him, as they showed Wiwchar near the Raposo residence at various points in the day. Those reports he reviewed on June 19.

June 20, 2012

[28] At 1:30 that afternoon, Det/Sgt Browne attended a meeting with the TPS and Niagara Regional Police Service ("NRPS") where areas of overlap between the Raposo murder and a NRPS investigation, Project Ink, were discussed. Det/Sgt Browne learned that a confidential source had revealed to the NRPS that Raposo owed someone \$1 million in relation to a drug deal that had gone awry. Danny Rego was a close associate of Raposo and he had been surveilled in February to the Sicilian Sidewalk Café. The NRPS also advised that there were intercepts from their Part VI authorization that appeared to relate to the Raposo murder.

[29] Following that briefing, Det/Sgt Browne attended a second briefing, this one in relation to Wiwchar's background and the VPD's investigation into the Duhre murder. Det. Dungey of the VPD was in attendance. He took lead of the meeting and shared information the VPD had in regards their interest in Wiwchar:

I was already aware that this was in relation to the death of Mr. Duhre that had occurred and he provided some insight in - in regards to Mr. Wiwchar proper, and some of the things that he was aware of as characteristics and - and things about him, specifically that he was very surveillance conscious; that he did have a pronounced limp; he had a nickname of Vicious or Wolverine; that VPD did have him on surveillance wearing disguises, including wigs and movie props; that he likes to use PGP phones, which are very hard to track; and on portions of the Part 6 that they presently had up there were intercepts where he speaks - where he speaks about getting fake driver's licence or a medical card, which would permit him enough to fly.

He likes to deal mostly in large sums of cash and not credit cards. He had a safety deposit box in banks that the Vancouver Police Department was aware of; that they had - that members of the Vancouver PD had followed him to a shooting range; and some of the probes that were intercepted had him speaking to someone, presumably his girlfriend, asking how he looked as a blond.

Of course I took that to mean, and I'm not sure if I was sure, that it was assumed that he was wearing a wig or making reference to a wig, but that's that's a notation I made.

And at some point, and I'm not sure where or where this comes from, but there was a - a probe or an intercept that - where you could hear the sound of what was believed to be a gun racking.

[Sept. 23 T: p. 20 ll. 1 to 32]

[30] Det/Sgt Browne further learned from Det. Dungey that the last time Mr. Wiwchar had been seen was in Vancouver on June 12, when he took a taxi to Pacific Centre and sprinted away.

[31] Inspector Shourie of the RCMP then shared information about several matters:

- (a) a meeting had taken place in Montreal on May 24 attended by a number of individuals associated with criminal activity, including Rabih Alkhalil, who was believed to be involved in the drug trade;

- (b) when Wiwchar checked out of the Four Points Hotel when he was last in the GTA in late May officers attended his room and seized discarded rubber gloves and wipes (information which told Det/Sgt Browne that Mr. Wiwchar was conscious of his surroundings and did not want to leave a trail of where he had been);
 - (c) Mr. Alkhalil had rented a car for Mr. Wiwchar on May 27 (though this was information Det/Sgt was already aware of) that Mr. Wiwchar had used to drive around areas close to the residences of Raposo, Skojo and Barreira; and
 - (d) on May 28, Mr. Wiwchar had been surveilled to an area close to Mr. Raposo's girlfriend's residence.
- [32] Following the meeting, Det/Sgt Browne reviewed newly obtained video footage from Montrose Street that permitted the front of the shooter to be seen. He noticed that the shooter was wearing a sports glove on his right hand, which would have been unexpected for a construction worker but unsurprising for someone experienced in firearm use. Det. Dungey (from the VPD) watched the footage with him and advised that the individual in the video walked in a manner consistent with how he knew Mr. Wiwchar to walk, specifically the way in which his right shoulder dipped when walking. He also asked Det/Sgt. Browne if the shooter had a beard, as Mr. Wiwchar had a neatly trimmed beard when he was last seen in BC.
- [33] Det/Sgt Browne received information from Det/Sgt Kulmatycki with respect to the NRPS's Project Ink, specifically that Nick Nero's phone was being analyzed and the NRPS believed it to contain evidence relating to the Raposo murder, specifically, discussions in May 2012 about the use of a .38 or .45 handgun.
- [34] Det/Sgt Browne had a flag put on CPIC so that any officer in Canada who would have reason to run a check on Mr. Wiwchar would receive a message to contact him immediately.

June 21, 2012

- [35] Det/Sgt Browne spent the morning reviewing the investigative file but at the time of his testimony he could not recall what specifically he looked at. He testified that at that point he had not turned his mind to whether he had grounds to arrest Mr. Wiwchar since it was a "moot point". No one knew where he was and there was no information to suggest he was in Ontario. When defence counsel put to him the proposition that the applicant was at that point a possible suspect in his mind, not a probable suspect, Det/Sgt Browne replied, "At that point in time he was in fact a possible suspect, who in my mind was still in British Columbia, correct."
- [36] At around 1:00 that afternoon, Det/Sgt Browne learned from Det/Sgt Burks of the CFSEU that Mr. Wiwchar had been located at a nursing home in Aurora, a suburb of Toronto. The significance of this fact to him was that all of the information he had learned over past number of days had now become very relevant since Mr. Wiwchar was in the general area

where the Raposo homicide had occurred. Prior to this point there had been no reason to believe that Mr. Wiwchar had been in the area at the time of the murder. The best information Det/Sgt Browne had from the VPD was that the applicant was last seen in Vancouver on June 12, and he had inferred or assumed from this that he was still there as he had received no information suggesting otherwise. Asked about the import of receiving the information about Mr. Wiwchar's presence in the area, Det/Sgt Browne responded:

Well, the person that everyone had been providing information to me about, Mr. Wiwchar, the person that had been described as fitting the general description of my shooter, the characteristics of Mr. Wiwchar, including having a limp and other aspects of that, he is now in my jurisdiction.

Obviously I did not anticipate he was going to be there, but his - his interest in me has now drastically jumped from someone that I am getting lots of information to, of, about, to a probable suspect in my homicide.

[Sept. 23 T: p. 31, ll. 32 to 42]

[37] In response to this information, Det/Sgt Browne contacted Supt. White, who was with the intelligence unit, to see if he could liaise with the VPD to find out about their surveillance intentions (the CFSEU had been conducting surveillance on Mr. Wiwchar at the request of the VPD). It was relayed to him that the VPD did not have any particular plan in place. Det/Sgt Browne then communicated to Supt. White that, based on the information he had, he had reasonable grounds to believe that Mr. Wiwchar was the shooter in regards the Raposo homicide. He gave instructions that Mr. Wiwchar be arrested and asked Supt. White to liaise with the CFSEU officers that were on scene to effect the arrest.

[38] With respect to the timing of the arrest, Det/Sgt Browne testified that he additionally had grave public safety concerns regarding Mr. Wiwchar's presence in the area in light of his counter-surveillance history and ability to successfully evade surveillance in the past. Mr. Wiwchar's continued presence in the jurisdiction three days after the murder caused him real concern that his intent was to carry out another killing, and he had a duty under the Ontario Police Services Act, R.S.O. 1990, c. P.15 to protect public safety.

[39] Det/Sgt Browne denied in cross-examination that he felt pressure from the VPD or NRPS to arrest Mr. Wiwchar, notwithstanding that his investigation had been "powered" by these agencies to some degree. He also denied the suggestion that his real concern was that Mr. Wiwchar might leave the jurisdiction. He said that his concern was that Mr. Wiwchar, who was a suspect in a homicide investigation in Vancouver, was now in Toronto. Notwithstanding that he was suspected of having committed a murder three days earlier, he had not left the jurisdiction as might be expected but instead remained in the area.

POSITIONS OF THE PARTIES

- [40] In brief, the applicant submits that the Crown has failed to establish that Det/Sgt Browne had subjective grounds for his arrest. He says that as of the morning of June 21, 2012, the officer held the view that the applicant was a "possible" suspect, and he did not become a "probable" suspect until he learned that the applicant was in the Toronto area.
- [41] The applicant further submits that the evidence establishes that Det/Sgt Browne directed his arrest for two reasons: (a) his concerns for community safety; and (b) his concern that the applicant could possibly evade the police. While acknowledging these reasons may relate to legitimate police duties, they do not, the applicant argues, establish grounds for arrest. The applicant contends that should the Court conclude that he had subjective grounds, those grounds were not objectively reasonable.
- [42] The Crown submits that on the basis of the cumulative weight of all of the evidence gathered by Det/Sgt Browne and also conveyed to him by other police agencies, it is clear that on June 21, 2012, the officer had the subjective grounds to arrest the applicant for the Raposo murder. It further submits that those grounds were objectively reasonable.

DISCUSSION

- [43] The starting point is to consider whether Det/Sgt Browne had subjective grounds to arrest the applicant for the murder of Mr. Raposo. As set out earlier, an officer's subjective belief is what he or she personally believed at the time of the arrest and must include an honest belief that he or she had reasonable grounds to believe an offence had been committed, not mere suspicion.
- [44] I am satisfied that Det/Sgt Browne subjectively believed he had grounds to arrest the applicant for the murder of Mr. Raposo. He testified several times that as a result of receiving the information about the applicant's presence in the jurisdiction on June 21, the applicant "jumped from a possible suspect to a probable suspect". Det/Sgt Browne also communicated to Supt. White that he had grounds:

Q. And based on all of the information that you had, then, about your murder, the Raposo murder, what did you communicate to Superintendent White?

A. That based on the information that I had at this moment that I was just learning about Mr. Wiwchar's presence in our GTA, that I believe that - or reasonable grounds to believe that Mr. Wiwchar was in fact the shooter for the Raposo homicide and I gave instructions that he could be arrested based on my instructions.

[Sept. 23 T: p. 32, ll. 28-37]

- [45] In describing the basis for his belief, Det/Sgt Browne said it derived from the information he had received over the previous number of days. He explained that Mr. Raposo, who was involved in organized crime, was the victim of what was clearly a targeted hit carried out by

an individual in construction gear and a mask. The tight grouping of bullet wounds to the victim's head suggested that the shooter was proficient with firearms. He was also prepared and able to carry out the endeavour on a crowded patio in the middle of the day without injuring anyone else present. As the investigation unfolded, Det/Sgt Browne received information about Mr. Wiwchar, a suspect in a homicide in Vancouver, who was described as very surveillance conscious, calm and poised. He had been known to use wigs and costumes, had been surveilled to a firing range, and had an ability to procure identification to permit him to travel. He was then determined to be nearby in Aurora.

- [46] The applicant argues that notwithstanding the officer's testimony about having the requisite subjective belief, his conduct at the time of his decision belies his claim. He submits that Det/Sgt Browne stalled to obtain more information, having his liaison officer reach out to the VPD to inquire about their intentions with respect to the applicant. This hesitation, he says, is evidence of equivocation and uncertainty on the part of Det/Sgt Browne. The applicant additionally submits that Det/Sgt Browne's alternate reason for the arrest--community safety--further suggests uncertainty on his part as to whether he had subjective grounds. He contends that the officer decided to arrest not so much because he believed he had grounds but because he was worried about the consequences of not directing his arrest.
- [47] I am not persuaded by these submissions. Defence counsel asked Det/Sgt Browne in cross-examination why, if he was so concerned about the urgency of arresting the applicant, he paused to seek direction from the VPD. The officer responded that he had done so because he wanted to be sure that he would not be interfering with the VPD's investigation into the applicant. In my view, that explanation was entirely logical.
- [48] As for Det/Sgt Browne's concerns for public safety, they were relevant to the exigency of the arrest but they do not undermine his subject belief that he had reasonable grounds to arrest the applicant for the Raposo homicide.

Objectively Reasonable Grounds

- [49] In arguing that Det/Sgt Browne's decision to arrest the applicant was objectively reasonable, the Crown relies upon the following circumstances, viewed cumulatively:
- a) The description of the Raposo shooter--as taken from witnesses at the scene and especially the Montrose video showing his peculiar gait--was consistent with that of the applicant;
 - b) The Raposo shooter "knew what he was doing" and his professionalism, reflected in the precise grouping of shots to the victim's head and his ability to perform in stressful circumstances, was consistent with what police knew about the applicant. The shooter had a glove on one hand, which could have been used to assist in the grip or use of a firearm. According to information relayed by the VPD on June 19, the applicant was a cool and accomplished shooter who had been followed to a shooting range. He may have had false travel documents. The applicant engaged in counter-surveillance when under surveillance, and was described in the VPD profile sheet as surveillance conscious in various respects.

This was also demonstrated by the seizure of gloves and wipes from the applicant's hotel room on an earlier trip to Toronto.

- c) The Raposo shooting was brazen. The applicant was the primary suspect in the shooting of a known gangster in a busy downtown Vancouver restaurant, and the pool of individuals who would have the skill and composure to carry out such homicides would have been very small. The very public nature of the homicides serves as a form of signature that contributes to an inference they were perpetrated by the same person;
 - d) The applicant's travel pattern back and forth from Vancouver to Toronto three times in the space of three weeks was highly unusual, and he had been "off the grid" at the time of the Raposo murder. He was then located in the Toronto area within three days of the Raposo homicide.
 - e) The surveillance evidence from late May, three weeks before the shooting, suggested that the applicant was himself conducting surveillance in areas close to Mr. Raposo's residence, engaging in counter-surveillance manoeuvres as he did so.
 - f) The VPD believed the applicant was a "soldier" for hire by the Alkhalil crime group based in Ottawa and Montreal. The VPD's profile sheet indicated that investigators believed that Alkhalil and Riach were co-conspirators in the murder of Duhre. When the applicant was in Toronto from May 27 to June 4, he drove a vehicle that had been rented by Mr. Alkhalil, which was capable of contributing to a reasonable inference that the applicant was working for Mr. Alkhalil as a "soldier".
 - g) The applicant had a lengthy criminal record that included convictions for several crimes of violence.
- [50] The applicant highlights different features in arguing that there were no objectively reasonable grounds for arrest. He says that on the morning of June 21, prior to the call from Det/Sgt Burks about the applicant being in the GTA, Det/Sgt Browne considered the applicant to be only a "possible" suspect. The applicant submits that a helpful way to frame the question is to ask whether the elevation of the applicant from possible to probable suspect upon receipt only of the information that he was in the area was reasonable. He answers that it was not, as nothing of substance had changed in the investigation. Moreover, the applicant further argues:
- a) The fact that the applicant was in the GTA decreased the likelihood that he was the shooter given Det/Sgt Browne's evidence that he would have expected the shooter to leave the jurisdiction after the shooting. There was an obvious explanation for his presence in the area, being that his parents lived nearby in Stouffville and his grandmother, who he had been visiting just prior to his arrest, lived in Aurora.

- b) Although Det/Sgt Browne testified that he was concerned about community safety, it is more likely that he decided to arrest the applicant because he had the opportunity to do so. If he had truly been concerned about community safety, that would have been a concern wherever the applicant happened to be, not only in the GTA.
 - c) Det/Sgt Browne testified that it was not an "optimal time" to arrest the applicant, which the applicant submits indicates that he required further investigation with respect to the identity of the shooter. However, he was distracted instead by the VPD and NRPS "powering" his investigation.
 - d) The information Det/Sgt Browne received from the VPD was second hand and is not objectively discernible; for instance, the proposition that the applicant was a "cool and accomplished shooter" was not supported by any evidence.
 - e) The NRPS had provided Det/Sgt Browne with evidence that a group of drug traffickers had a motive to kill Mr. Raposo because he owed them \$1 million. Det/Sgt Browne did not appear to have considered that the applicant had no connection to this group of traffickers and the fact that Raposo was killed shortly after the loss of the money.
- [51] As set out in the passage reproduced earlier from Harms, in assessing whether the grounds for arrest are objectively reasonable, the court considers the officer's observations through the lens of someone with the same experience, training and skill. The standard is one of reasonable probability or credibly-based probability that an indictable offence has been committed and, while less than the criminal or civil standards of proof, requires more than mere suspicion. The determination is made with consideration of the totality of the circumstances, and envisions a "practical, non-technical and common sense probability" as to the existence of the salient facts and inferences in question (at para. 43, citing JIR at para. 27).
- [52] I have no hesitation in concluding that Det/Sgt Browne's decision to arrest the applicant was objectively reasonable. The officer's testimony regarding the grounds for his subjective belief were summarized above in para. 44. They provide an ample basis from which to conclude that there was a reasonable or credibly-based probability that the applicant had committed the murder of Mr. Raposo. The officer's subjective belief was objectively reasonable.
- [53] For these reasons, I conclude that the police had reasonable grounds for the arrest of the applicant for the murder of Mr. Raposo.

"Maisonville J."

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