

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 444

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2020 BCSC 444 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2020 BCSC 444

Date: 20200325

Docket: 27393-29

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: AvisCar Search and Seizure - Excision

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Place and Date of Hearing:

Vancouver, B.C.

March 25, 2020

Place and Date of Ruling:

Vancouver, B.C.

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introduction

- [1] This is an application to excise certain passages from the information to obtain ("ITO") in support of a production order for a rental agreement from AvisCar ("Avis").
- [2] Earlier rulings in connection with this matter are indexed at 2019 BCSC 1801, 2019 BCSC 2031, and 2019 BCSC at 2225.
- [3] In summary, on May 29, 2012, Det. Cst. Taylor contacted Avis seeking rental information with respect to a vehicle that the Applicant Rabih Alkhalil's co-accused, Dean Michael Wiwchar, had been seen driving. The Avis representative, Mr. Al Virani, disclosed information to the officer with respect to which I found the Applicant had a reasonable expectation of privacy (2019 BCSC 1901, the "Ruling"). As the information had been obtained without judicial authorization, and the search could not be justified at common law, I ultimately concluded that the Applicant's rights under s. 8 of the Charter had been infringed.
- [4] The issue now is what information should be excised from the ITO in support of the production order.

position of the parties

- [5] Although the parties are generally in agreement with respect to the information that must be excised from the ITO, several issues remain in dispute. The first is the scope of the Court's Ruling that the Applicant had a reasonable expectation of privacy in the information Det. Cst. Taylor received from Avis. The Applicant submits that all of the information obtained by the officer must be excised, including when and where the vehicle was rented, as well as the fact that payment by credit card was processed manually. The Crown, however, argues that only the Applicant's personal information, such as the fact that he was the individual who had rented the vehicle, and his address, telephone number, driver's licence number, date of birth, and credit card number should be excised.
- [6] The second issue relates to whether information derivative of the unconstitutionally obtained information should also be excised from the ITO. Relying on *R. v. Ferguson*, 2018 BCSC 378, the Applicant says that information in the ITO that was causally linked to information obtained during the phone call should be excised. The Crown responds that the causality analysis applied in *Ferguson* should be rejected, and that the question of whether any information was derivative of the s. 8 breach should be assessed under s. 24(2), not here at the excision stage.

the law on Excision

- [7] The rule concerning excision originated with the Supreme Court of Canada's trilogy, *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Wiley*, [1993] 3 S.C.R. 263; and *R. v. Plant*, [1993] 3 S.C.R. 281.
- [8] In *Grant*, Mr. Justice Sopinka, writing for the Court, held that evidence obtained as a result of an unlawful search must be excised from the grounds in support of a search warrant. He wrote (at para. 64):
- [50] [I]n circumstances such as the case at bar where the information contains other facts in addition to those obtained in contravention of the Charter, it is necessary for reviewing courts to consider whether the warrant would have been issued had the improperly obtained facts been excised from the information sworn to obtain the warrant: [*R. v. Garofoli*, [1990] 2 S.C.R. 1421]. In this way, the state is prevented from benefiting from the illegal acts of police officers, without being forced to sacrifice search warrants which would have been issued in any event.
- [9] In the case before the Court, police had obtained information as a result of two warrantless perimeter searches of the accused's residence. They then used the information to obtain a search warrant. Justice Sopinka ultimately found that "independent pieces of information" not obtained in contravention of the Charter, which included observations made by the police between the first and second warrantless searches, were sufficient to sustain the warrant.

- [10] Of note, Sopinka J. did not consider whether the first warrantless search was connected to the evidence the police obtained in the later investigation. He did, however, find a connection between the initial Charter breach and subsequently obtained evidence to be a relevant consideration in the s. 24(2) analysis. The Crown here submits that this suggests that any analysis of causality only occurs at the s. 24(2) stage, not at the excision stage.
- [11] Following on Grant was the Court's decision in Wiley, in which Sopinka J., again for the unanimous Court, found that a warrantless perimeter search breached the accused's s. 8 Charter rights but that the warrant could still be sustained on the basis of other evidence. The Court did not examine the causal relationship between the breach and the subsequently obtained evidence at that stage, instead leaving it for s. 24(2). This approach was similarly adopted in Plant.
- [12] The two contexts in which prior unconstitutional conduct has potential relevance was addressed by Watt J.A. in R. v. Mahmood, 2011 ONCA 693, where he explained:
- [115] Prior unconstitutional conduct is relevant in two discrete contexts in this case. The first has to do with excision from the ITO of information obtained by unconstitutional means. The second relates to the influence of prior unconstitutional conduct on the application of s. 24(2) to evidence obtained later in the investigation and not directly as a result of the previous constitutional infringement.
- [116] The parties agree about excision. Information obtained by unconstitutional means must be excised from the ITO on Garofoli review and what remains, as amplified on review, must be assessed to determine whether the warrant could have issued: Araujo, at para. 52; Wiley, at pp. 273-74 S.C.R.; and R. v. Grant, [1993] 3 S.C.R. 223, at p. 251 S.C.R.
- [117] Prior unconstitutional conduct may also have an impact on the decision about admissibility of evidence obtained by later Charter infringement, at least where there is a sufficient nexus between the prior infringement and the later gathering of evidence: R. v. Strachan, [1988] 2 S.C.R. 980, at pp. 1005-1006 S.C.R.; Grant (1993), supra, at pp. 254-55 S.C.R.; Wiley, at p. 278 S.C.R.; and Plant, at p. 299 S.C.R.
- [13] Mahmood was applied in R. v. Sanghera, 2012 BCSC 385, a decision of Madam Justice Holmes, now the Associate Chief Justice. In that case, firearms and other items had been seized from the accused's vehicle. Relying on the "obtained in a manner" language from s. 24(2), the defence argued that the breaches of ss. 10(a) and (b) that had been found to have occurred during the accused's arrest tainted the subsequent seizure such that reference to the seized items should be excised from the ITO in support of a wiretap authorization.
- [14] Justice Holmes rejected the argument, stating that whether the s. 10 breaches may have tainted the process as a whole was an issue that could arise in relation to the exclusion of the intercepted communications at the end of the voir dire under s. 24(2) but did not have any meaningful application at the stage of excision. She explained the proper analysis as follows (at para. 28):

The proper analysis in the context of a review of a wiretap authorization is that required by the Garofoli test, and not the analysis in s. 24(2) of the Charter. In the application of the Garofoli test, information obtained by unconstitutional means is excised on that relatively straightforward basis, and not by virtue of the opening language in s. 24(2).

- [15] After quoting the earlier passage from Mahmood, Holmes J. found that the application before her engaged the first of the two contexts - excision from the ITO of information obtained by unconstitutional means - and that s. 24(2) only arose in relation to the second context.
- [16] More recently, a similar issue was considered in Ferguson, where Madam Justice DeWitt-Van Oosten (as she then was) was asked to decide the scope of the excision rule in the context of a facial challenge to a search warrant. In an earlier ruling, she had found several violations of the accused's s. 10(b) rights following his arrest and detention by police. The accused subsequently sought to have excised from the ITO all portions that referred to information obtained by police in violation of his right to counsel, as well as those portions that were derivative of the information. He argued that for the purpose of excision, the court should take the same broad-based and flexible approach adopted under s. 24(2) of the Charter in deciding whether evidence had been "obtained in a manner" that infringed the Charter. This would necessarily capture information or facts that were obtained by police as an immediate result of the Charter breach, as well as anything that was "temporally, contextually and/or causally connected" to the breach.
- [17] The Crown conceded that information obtained directly from the accused contrary to his Charter rights should be excised but submitted that a demonstration of causality was necessary before the other impugned information could be said to have been unconstitutionally obtained. While the Crown accepted that the "obtained in a manner" jurisprudence had informative value to the excision analysis, it maintained that the predominant focus of the excision exercise should be on causality, and that only information with a clear causal connection to the breach should be caught by the rule.
- [18] Justice DeWitt-Van Oosten ultimately concluded that it was unnecessary to consider the breadth of the excision rule because whatever its parameters, the rule was necessarily limited by the "four corners of the affidavit" within the context of a facial challenge to a warrant. She wrote (at para. 57):

In other words, on a facial challenge to a warrant, excision is only mandated to the extent that a relationship between the established breach and the information or facts sought to be removed from the ITO for the purpose of review is readily apparent from the face of the affidavit. Going beyond that would require the reviewing judge to speculate on the existence of a derivative relationship and/or the degree of interconnectedness between impugned facts and the established Charter breach.

- [19] Justice DeWitt-Van Oosten declined to excise the alleged derivative evidence from the affidavit in support of the authorization, finding that the affidavit provided no facial indicia of a derivative relationship between the unconstitutionally obtained information and that which the accused sought to have excised. Her analysis was as follows:
- [80] From the face of the affidavit, Det. Adams attended City Centre at 3:10 a.m. This was after the allegedly stolen vehicle was stopped at roadside (according to para. 26.b, the stop occurred at 02:35 hours), and before the accused was advised of his right to counsel. Det. Adams spoke with the accused "at the arrest scene" (para. 28.b) and "learned", during the conversation, that the accused "was staying in room 126 or 127 at the City Centre Motel" (para. 28.b). Within a maximum 35 minutes, she was at City Centre and obtained information from a motel clerk confirming that the accused "was staying in room 127" (para. 28.c).
- [81] In my view, it is readily apparent from paras. 26.b, 28.b and 28.c of the ITO, when read together, that Det. Adams' attendance at City Centre must have occurred very shortly after her conversation with the accused at roadside. I find as a fact that it did. Moreover, I am satisfied, from these same paragraphs, that a reasonable inference can be drawn it was her conversation at roadside that enabled Det. Adams to make the verbal enquiries of the office clerk that she did at 3:10 a.m., thereby confirming an occupancy link between the accused and room 127.
- [82] In other words, a close causal nexus between Det. Adams' violation of the accused's right to counsel, the information she elicited from him at roadside, and her subsequent personal engagement with the "office clerk" at City Centre is made manifest in the ITO. In my view, it is apparent from the face of the ITO that these events functionally formed part of one transaction.
- [83] With reference to para. 26.g, it is also apparent from the face of the affidavit that the statement provided to Cst. Szykowski about the whereabouts of Mr. Ferguson's personal identification was received from the accused in response to Cst. Szykowski's determination that he had none with him; this statement was provided at roadside in direct interaction with the accused; and, it was made prior to Mr. Ferguson being transported to the Vancouver Jail and receiving access to counsel.
- [84] Again, a causal nexus between violations of the accused's right to counsel, as conceded by the Crown, and the information elicited by Cst. Szykowski from Mr. Ferguson is made manifest in the ITO.
- [85] On the remainder of the facts sought to be excised by the accused, as captured within paras. 9; 28.ci and cii, and d; 29.a, b, c and d; and 38 of the ITO, I am not satisfied from the face of the affidavit that the information set out in these paragraphs was "obtained in a manner contrary to the Charter" (R. v. Wiley), or, "obtained by unconstitutional means" (R. v. Mahmood).

[86] There is no basis within the "four corners of the affidavit" from which I can reasonably conclude that the information laid out in these impugned paragraphs are concretely tied to the right to counsel breaches that were conceded by the Crown on the first pre-trial application, and found by me to have occurred before issuance of the search warrant. Nor am I in a position to assess the strength of any such connection, should it exist.

analysis

[20] The dispute between the parties is primarily focussed on two paragraphs in the ITO, paragraphs 465 and 467. While the parties are also at odds in regards excision of information from other paragraphs in the ITO, determinations in relation to paragraphs 465 and 467 are likely to resolve them.

[21] Paragraph 465 of the ITO reads as follows:

465 I read the evidence of Detective 187 Taylor titled "Task 437" and learned in part the following:

- a. On May 29, 2012, Detective 1887 Taylor contacted AI VIRANI ("VIRANI") of Avis Rental Car regarding the rental information for Ontario plate BLNB 733 ("the Chevrolet Impala") and learned in part, the following:
 - i. The vehicle was rented to Robie (sp) ALKHALIL with the date of birth of May 8, 1987 [ALKHALIL];
 - ii. The vehicle was rented on May 27, 2012 and was expected to be returned on June 3, 2012;
 - iii. ALKHALIL gave the following address: 806 Petra Private, Kanata, Ontario, K2T 0J3;
 - iv. ALKHALIL gave the following telephone number: (613) 899-9966;
 - v. Driver's License: (Ontario) A5414 65808 70508; and
 - vi. The rental fee was paid with a credit card;
 - vii. The vehicle was rented at the Toronto Airport, Ontario;
 - viii. The credit card was processed manually at the airport location as the magnetic stripe on the card was used at the credit card terminal;
 - ix. The card was processed on May 27, 2012 at 5:13 p.m. (Ontario time);
 - x. The credit card used was a Visa card with the number of 4514011801272590 with an expiry date of June 2015;

- [22] The Crown concedes that sub-paragraphs 465(a)(i), (iii), (iv), (v), and (x) should be excised from the ITO, given the Ruling. However, it submits that the balance of the information should remain as (a) the ruling left the "when" and "where" of the rental information unaddressed (as opposed to the "who"), and (b) it is not information that originated with the Applicant or over which he had any direct interest or control; in other words, it is not personal information that engaged the Applicant's privacy interests.
- [23] It is the position of the Applicant, however, that the Court concluded in the earlier ruling that the "search in issue" was the phone call from Det. Cst. Taylor to Avis, and that the search violated s. 8 of the Charter. Accordingly, he contends, all of the information in paragraph 465(a) should be excised.
- [24] The factual basis for the application to exclude the evidence from Avis has been an Agreed Statement of Facts, which provides as follows:
1. On January 17, 2012 Sandip Duhre was shot and killed in a restaurant at the Wall Centre Hotel in downtown Vancouver. In the weeks and months following the shooting the Vancouver Police Department ("VPD") came to suspect that Dean Wiwchar was the shooter. As a result, the police established surveillance of Mr. Wiwchar.
 2. On May 27, 2012 surveillance officers observed Mr. Wiwchar arrive at Toronto Pearson International Airport. He took a taxi from the airport to the Fairmont Royal York Hotel in Toronto (the "Fairmont").
 3. On May 28, 2012, Det. Smith received information from security at the Fairmont that the person believed to be Mr. Wiwchar had attended at the valet parking area driving a silver Chevrolet Impala bearing Ontario licence plate BLNB 733 (the "Chevy Impala"). Mr. Wiwchar was seen over several days driving the Chevy Impala. Surveillance officers described Mr. Wiwchar as engaging in counter surveillance techniques.
 4. The police queried the Chevy Impala's license plate and determined that it was a rental vehicle associated to WTH Rental ULC, 1 Convair Drive east, Toronto, ON, which the police later associated to Aviscar Inc., the company name for Avis Car Rental ("Avis").
 5. On May 29, 2012, VPD Det. Cst. Taylor telephoned Avis and spoke to Al Virani seeking rental information for the Chevy Impala. Mr. Virani told Det. Cst. Taylor:
 - a. The Chevy Impala was rented to a Robby Alkhalil on May 27, 2012 and was expected to be returned on June 3, 2012;
 - b. Alkhalil's date of birth was May 8, 1987;
 - c. The address provided to Avis by Alkhalil was 806 Petra Private, Kanata, Ontario, K2T 0J3;
 - d. The phone number provided to Avis by Alkhalil was (613) 899-9966;
 - e. Alkhalil's Ontario driver's licence number was A5414 65808 70508;

- f. The rental fee was paid with a credit card;
 - g. The Chevy Impala was rented at the Toronto Airport;
 - h. The credit card used to rent the Chevy Impala was manually processed at the airport location on May 27, 2012 at 5:13 pm; and
 - i. The credit card used to rent the Chevy Impala was a Visa card with the number 4514 0118 0127 2590 and an expiry date of June 2015.
6. Cst. Taylor recognized the first four digits of the credit card as being associated to a Royal Bank of Canada ("RBC") account and contacted Robert Wallace of RBC Investigative Services. Mr. Wallace confirmed that the Visa credit card used to rent the Chevy Impala was in the name of Robby Alkhalil and was valid. Mr. Wallace advised that Mr. Alkhalil had the card for a "couple" of years. Mr. Wallace further advised that a production order would be required to obtain information about the transaction history, account holder information, account address changes and notes on account history.
7. On May 30, 2012 Det. Cst. Taylor contacted David McWilliams, Director of Operations Support for Avis Car Rentals and requested a hard copy of the rental agreement signed on May 27, 2012 related to the Chevy Impala. She was advised by Mr. McWilliams that a production order would be required to obtain a hard copy of the rental agreement.
8. On June 20, 2012, VPD Det. Cst. Laurin queried Mr. Alkhalil on the Ontario Motor Vehicle Branch database system [known as PARIS] and learned that a person by the name of Robby ALKHALIL had an Ontario Driver's License bearing A5414-65808- 70508 issued September 30, 2010 with the address of 806 Petra Private, Kanata, Ontario.
9. On June 22, 2012, Det. Cst. Laurin swore an information to obtain (ITO) in support of a request for two production orders under s. 487.012 of the Criminal Code [Tab 2 of Joint Book of Materials]. She requested a production order for Avis for a certified hard copy of the rental agreement signed on May 27, 2012 by the renter of the Chevy Impala. She also requested a production order for RBC for the transaction history, account holder information, account address changes, and notes on account history for the credit card bearing 4514 0118 0127 2590 for the period of December 1, 2011 to June 4, 2012.
10. On June 23, 2012, Judicial Justice H.J. Lindsey granted the requested production orders [Tabs 3 and 4 of the Joint Book of Materials].
11. Pursuant to those production orders, the police received documents from Avis and RBC [Tabs 5 and 6 of the Joint Book of Materials].
- [4] Det. Cst. Laurin included the information that Det. Cst. Taylor obtained from Mr. Virani, as well as details of Det. Cst. Taylor's conversations with Mr. Wallace and Mr. McWilliams, in an information to obtain ("ITO") sworn on June 22, 2012. Pursuant to that ITO, Judicial Justice H.J. Lindsay issued two production orders on June 23, 2012 (collectively, the "Production

Orders"). One Production order was for the Avis car rental agreement dated May 27, 2012. The other Production Order was for Mr. Alkhalil's RBC Visa account statements from December 1, 2011 to June 4, 2012.

- [25] The entirety of the phone call was considered by me. At paras. 6-7, for instance, the issue to be considered was cast as follows:
- [6] The issue before this Court is whether the information received by Det. Cst. Taylor from Mr. Virani was obtained in a manner that violated Mr. Alkhalil's s. 8 Charter right to be free from unreasonable search and seizure.
- [7] Specifically, the issue is whether Mr. Alkhalil had a reasonable expectation of privacy in the information disclosed by Mr. Virani, such that the disclosure amounted to a warrantless search.
- [26] Later, after applying the totality of the circumstances test, the Court concluded that "the applicant had a reasonable expectation of privacy in the rental car information obtained from Mr. Virani by Det. Cst. Taylor" (at para. 102).
- [27] It follows that the Court's conclusion in the Ruling applies to the entirety of the information received from Mr. Virani, and that all of the information in paragraph 465(a) of the ITO must therefore be excised.
- [28] Having so concluded, it may be that there is no longer a dispute regarding paragraph 467 of the ITO. That paragraph reads:

I have read the police statement of Detective 2522 Smith titled Task "437" and learned that on May 31, 2012, Detective 2522 Smith attended AVIS car rental headquarters where he viewed surveillance video from the Toronto, Ontario airport location. Detective 2522 Smith positively identified the person on the video as being a male known to him as ALKHALIL.

- [29] The relevance of the paragraph would seem to be in its connection to paragraph 465 of the ITO; that is, the surveillance video mentioned in paragraph 467 depicts the rental transaction referred to in paragraph 465. The Crown argues that in combination, a reasonable inference can be drawn from these paragraphs that the Applicant was the individual who rented the Chevy Impala later driven by Dean Wiwchar. Once paragraph 465 is excised, however, it is unclear whether anything turns on paragraph 467.
- [30] Nevertheless, I am satisfied that paragraph 467 is derivative of the information that Det. Cst. Taylor obtained from Mr. Virani. Even within only the "four corners of the affidavit", the only reasonable inference is that Det. Smith reviewed Avis surveillance video for its Toronto airport location two days after the telephone communication between Det. Cst. Taylor and Mr. Virani, because of the information about the rental vehicle that Det. Cst. Taylor obtained. Accordingly, there is "a relationship between the established breach and the information or facts sought to be removed from the ITO for the purpose of review [that] is readily apparent from the face of the affidavit" (Ferguson at para. 57).

- [31] Despite the submissions of the Crown, I am not prepared to depart from the reasons of DeWitt-Van Oosten J. in Ferguson. While the Crown argues that her approach is inconsistent with Sanghera, Mahmood and the Supreme Court of Canada trilogy, most of those decisions were squarely before her but did not address the question she had to resolve. As she wrote (at paras. 32-33):
- [32] The position taken by [the accused] raises a question about the scope of the excision rule. When the courts have held that "facts within an information which were obtained in a manner contrary to the Charter" must be excised (R. v. Wiley), or, that "information obtained by unconstitutional means" must be disregarded in assessing the sufficiency of an ITO (R. v. Mahmood), how far does this go?
- [33] Is it only evidence that is directly and immediately attributable to the established Charter infringement(s) that must be excised, or, is the excision rule broader in its scope, capturing any facts in the ITO that police became aware of, or were able to pursue, in whole or in part, because of their unconstitutional engagement with the accused?
- [32] Although Sanghera does not appear to be mentioned in her reasons, it addressed a different situation. There, the accused sought to have references to firearms and other items that had been lawfully obtained excised from an ITO on the basis that they had been seized during a broader course of events that involved Charter-infringing conduct. Those were not the circumstances in either Ferguson or the case at bar.
- [33] Paragraph 467 of the ITO must be excised.

Conclusion

- [34] All of the information in paragraph 465(a) and paragraph 467 of the ITO will be excised.
- [35] Although the parties made submissions with respect to the sufficiency of the ITO in the event the Court determined that the impugned information should be excised, the Crown's submissions only addressed the issue in the context of its more limited proposed excisions. In the circumstances, I therefore refrain from addressing the matter.

"Maisonville J."

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