

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 1894

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1894 R. v. Alkhalil IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alkhalil, 2020 BCSC 1894 Date: 20201201 Docket: 27393-32(m) Registry: Vancouver Regina v. Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and Larry Ronald Amero Restriction on Publication: A publication ban has been mandatorily imposed under s. 648(1) of the Criminal Code of Canada, restricting the publication, broadcasting or transmission in any way of any portion of the trial at which the jury is not present. This publication ban applies until the jury retires to consider its verdict. Before: The Honourable Madam Justice Maisonville Ruling Re Application No. 32(m) - Crown's Vukelich Application Re: Information Sharing Counsel for the Crown: D.A. Jardine, Q.C. N. Gregoire A. Cochrane A. La Bar S. Dworkin D. Darby M. Sheardown Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil): K. Blok Counsel for the Accused, Dean Michael Wiwchar: S. Buck J. Desbarats A. Dorin Counsel for the Accused, Larry Ronald Amero: M. Rock Place and Dates of Hearing: Vancouver, B.C. November 4-5, 2020 Place and Date of Judgment: Vancouver, B.C. December 1, 2020

introduction

- [1] This is a Crown Vukelich application with respect to applications brought by each of the accused (Notification of Application nos. 32(m), 61, and 73) challenging the sharing of their information by police. The thrust of each application is that Project Reality investigators shared information in which the applicants had a reasonable expectation of privacy with other police agencies in a manner that violated s. 8 of the Charter. It is the position of the Crown that the Court ought not to direct a voir dire with respect to the applications as the issues they raise can be addressed summarily without the calling of evidence. THE APPLICATIONS
- [2] In brief, the three applications at issue are as follows. Application 32(m)
- [3] Application 32 is an omnibus application in which Mr. Amero seeks remedies for a range of alleged state misconduct. Subparagraph (m) alleges that the Vancouver Police Department ("VPD") shared the fruits of the search of his residence with numerous police services including the RCMP, the Montreal Police ("SPVM"), the Quebec Provincial Police, the Combined Forces Special Enforcement Unit and the Canadian Air Transport Security

Authority. Mr. Amero contends that the VPD had a general practice of providing whatever information was requested to the agency requesting it for any purpose, and that each occasion of information sharing constituted a separate unreasonable seizure of information contrary to s. 8 of the Charter. He seeks exclusion of the evidence under s. 24(2). Application 61

- [4] Application 61, brought by Mr. Alkhalil, also seeks the exclusion of evidence obtained from electronic devices seized from his residence under s. 24(2). He claims that the sharing of information, obtained pursuant to a warrantless search and in relation to which the Applicant had a reasonable expectation of privacy, by Project Reality investigators with other investigative agencies breached his rights under s. 8. He further, or alternatively, claims that the sharing of information obtained pursuant to judicial authorization and in relation to which the Applicant had a reasonable expectation of privacy, by Project Reality investigators with other investigative agencies rendered the search in question unreasonable and constituted a breach of s. 8.
- [5] The factual basis for Application 61 is detailed in paras. 1 - 55 of the Notice of Application. For the purposes of this Vukelich application, the summary in Mr. Alkhalil's submissions will suffice:
12. the factual basis, detailed in the Application, can be summarized as follows and must, for the purpose of the Crown's Vukelich, be accepted as true. From very early on in the investigation, in fact according to disclosure received for the first time last week as early as one week after the shooting of Mr. Duhre, the VPD formulated an intention to share the fruits of its investigation with other police agencies. They coordinated with other agencies in advance of various searches conducted by Project Reality about the sharing of information and expressed their intention to share the fruits of those searches even before authorizations were obtained. The VPD did not authorize justices for any of the authorizations it obtained of their intention to share the fruits of the searches with other investigative agencies who themselves did not have reasonable grounds to obtain the information sought. After the VPD conducted its searches, and in accordance with its plan to disseminate the fruits of the searches, the VPD shared Mr. Alkhalil (and his coaccused's) personal information with the law enforcement community at large and without any conditions designed to protect the accused's residual privacy interests with respect to that information. Furthermore, as a result of the Court's ruling on NOA #29 and the Crown's concession on NOA #26 that the searches of the devices obtained by police during the Montreal Search were illegal, the private information that the VPD disseminated was information that the police obtained illegally.
- [6] Accordingly, while accepting that police are generally entitled to share information with other police agencies, Mr. Alkhalil maintains that the manner in which the police shared information in this case infringed s. 8 of the Charter in three ways:

- a) The VPD failed to advise the justices authorizing search warrants and production orders in this case of its intention to share his personal information with other law enforcement agencies;
 - b) The VPD shared his personal information with the law enforcement community at large and without any restrictions aimed at protecting his residual privacy interests; and
 - c) Since it has now been determined that his Avis Car Rental information was illegally obtained and the Crown has conceded that the search of the phones seized from the Montreal Residence was illegal, the VPD shared personal information that it had obtained illegally, a clear violation of s. 8 of the Charter.
- [7] Mr. Alkhalil submits that the information sharing here was both formal and informal, and that its full extent can only be discerned through examination of witnesses. It is clear, in any event, that information in relation to which he had a significant privacy interest (as recognized in *R. v. Vu*, 2013 SCC 60) was shared by the VPD. While acknowledging that police are entitled to share information with other investigative agencies in some circumstances, he says that the manner in which police did so here infringed s. 8. Application 73
- [8] Mr. Wiwchar's application is very similar, alleging that during their investigation into the Duhre homicide, the VPD liaised with other police agencies involved in distinct investigations, in part, with the aim of sharing intelligence about common targets. His application identifies two broad categories of information sharing: (a) private information burned onto a CD/DVD and distributed to third parties as part of Project Scrapyard, a multi-jurisdictional intelligence gathering operation; and (b) his PGP communications recovered from phones seized during the Montreal search and following his arrest in Toronto for the Raposo homicide (the Crown has already conceded that the search of the Montreal devices was warrantless). Mr. Wiwchar contends that the manner in which the police disclosed his personal information infringed s. 8 of the Charter and he therefore seeks the exclusion of this information under s. 24(2).
- [9] Mr. Wiwchar makes the following allegations:
- a) The VPD knowingly exceeded the scope of their authority in disclosing Wiwchar's private information to third parties for unauthorized purposes; or, alternatively, the VPD did not turn their minds to the scope of their authority in disclosing Wiwchar's personal information;
 - b) The VPD failed to place any limits on the scope of information disclosed to third parties including;
 - i. Limits on the uses that could be made of the information; ii. Restrictions on further dissemination or disclosure of the information; and iii. Reasonable limits on the scope of information disclosed.

- c) The VPD failed to manage Wiwchar's personal information in a manner that respected Wiwchar's residual privacy interests;
- d) The VPD engaged other agencies in a "quid-pro-quo" exchange of Wiwchar's personal information;
- e) The VPD provided Wiwchar's personal information to civilian analysts for the purposes of creating analytical work product that incorporated the Applicants' personal information, and with the intention of sharing the information with third parties. This work product was disclosed to third parties;
- f) The VPD disclosed Wiwchar's personal information to third parties without reviewing the information;
- g) The VPD uploaded Wiwchar's personal information onto a database accessible by third parties;
- h) The VPD disclosed a broad swath of highly personal information engaging the Applicant Wiwchar's residual privacy interests, in the manner described above, and without any discernible investigative purpose, including but limited to:
 - i. Private communications (including mail, PGP texts, and intercepted oral communications);
 - ii. Medical records; iii. Psychological reports; iv. Banking records;
 - v. Safety deposit box contents; vi. Personal identification; vii. Web browser history; viii. Personal photographs; and ix. Information subject to solicitor client privilege.

[10] The principles governing Vukelich applications are well known as the Crown has brought multiple such applications in these proceedings; see for example, 2020 BCBC 1219. Accordingly, I will not review those principles again here.

[11] The authority upon which the applicants primarily rely, both to ground their applications and to resist the Crown's Vukelich application, is *R. v. Ferguson*, 2018 BCSC 594 (as well as *Vu and United States of America v. Wakeling*, 2014 SCC 72 cited therein). In *Ferguson*, DeWitt-Van Oosten J. (as she then was) considered a defence application alleging that the manner in which the VPD had conducted its search and seizure of data from two mobile devices, including sharing the results with other investigative agencies, rendered the search unreasonable within the meaning of s. 8 of the Charter. The VPD had obtained a warrant to search six mobile devices seized from a vehicle in which the accused had been present at the time of his arrest. Unusually, the authorizing justice issued Reasons for Decision accompanying the warrant that made explicit that the warrant authorized search of the mobile devices for evidence of the offences set out in the warrant (possession of stolen property and possession of a loaded restricted firearm) only, and not for any other offences. Despite that restriction, the VPD delivered the devices to the CFSEU for processing and gave them unrestricted access to the data extracted from the devices for the purposes of their own investigation of the accused for offences unrelated to those for which the VPD had been

granted the authority to search.

- [12] In finding that the manner in which the search had been executed rendered it unreasonable under s. 8 of the Charter, DeWitt-Van Oosten J. began by reviewing Wakeling and Vu. She observed that in Wakeling, the majority accepted that law enforcement agencies are entitled, at common law, to share the lawfully obtained fruits of a judicial authorization in the absence of further review by a judge without infringing s. 8. She quoted McLachlin C.J.C.'s concurring reasons, including the reference that "provided information is shared for purposes of law enforcement, the individual cannot complain that the sharing violates his s. 8 right to privacy" (at para. 93). Justice DeWitt-Van Oosten then commented:
- [189] However, Wakeling also makes clear, at para. 92, that the entitlement to share, without risking a s. 8 Charter breach, is dependent on the existence of common law authority, or a valid warrant authorizing the search, a "reasonable" execution of the search, and, the evidence provided to the other investigative entit(ies) must be used for the purposes of law enforcement.
- [190] In *United States of America v. Mathurin*, 2015 ONCA 581, the principle endorsed in Wakeling was explained this way at para. 43: The majority recognized that law enforcement authorities are entitled to share information obtained through a reasonably executed search with foreign authorities for the purposes of law enforcement, without prior judicial authorization. [Emphasis added.]
- [191] Wakeling recognizes that the manner in which sharing occurs between agencies can render a search unreasonable within the meaning of s. 8.
- [13] She continued (at paras. 194 and 195):
- [194] As I read the majority ruling in Wakeling, investigative agencies are entitled to share evidence they lawfully seize in the absence of further authorization, without contravening s. 8 of the Charter. However, there may be cases in which the unique circumstances surrounding the decision to share, the sharing methodology employed by those with conduct of the search, or other features of the evidentiary matrix raise concerns about the sharing and its impact on the overall reasonableness of the search.
- [195] In these scenarios, the result is that the search may not have been "reasonably executed". Without a reasonable execution of the search, the Wakeling principle cannot save (or validate) access to the fruits of the search for the purpose of an unrelated investigation.
- [14] It is in the context of DeWitt-Van Oosten J.'s comments in para. 194 that the applicants maintain that a voir dire is necessary to develop the evidence relevant to this Court's consideration of "the unique circumstances surrounding the decision to share, the sharing methodology employed by those with conduct of the search, or other features of the evidentiary matrix [that] may raise concerns about the sharing". The witnesses they propose to call are:

- a) Det. St. Amant (VPD) - He was the lead investigator for Project Reality and is able to speak to a variety of topics including the VPD's operational plan in terms of sharing the fruits of their investigation with other agencies; the scope of information sharing; whether information was reviewed and vetted for relevance prior to being shared; and the disclosure of analysts' reports and the use of a database to share information;
 - b) Insp. Desmarais (VPD) - He is able to speak to high level decision-making with regards to the operational plan to share the fruits of Project Reality and the scope of information sharing, in particular, through Project Scrapyard;
 - c) Insp. Forget (SPVM) - He was involved in Project Loquace and can testify about an agreement with the VPD to share the fruits of the Montreal search, as well as about his understanding of the SPVM's authority to access and search the information provided by the VPD;
 - d) Supt. Porteous (VPD) - He was involved in the Project Scrapyard meetings and can speak to the objectives of the Project and discussions about information sharing;
 - e) Peggy Irwin (VPD civilian analyst) - She was provided with Mr. Wiwchar's information and tasked with creating work product that was shared with other agencies. She will testify about the nature of the information she reviewed and the scope of the sharing of her work product; and
 - f) Cpl. Bernier (RCMP TAT/ITCU) - He conducted searches of various devices that were encrypted. He can speak to the technical capabilities of the forensic analyst conducting data removal, in particular, whether there is a process for limiting information that is contained in reports.
- [15] They say that five days will be needed for the evidence and a further two to three days for submissions.
- [16] I do not understand the Crown to contend that the defence applications should not proceed; rather, I understand the Crown to say that the facts grounding the applications are largely not in dispute and that the calling of evidence is therefore unnecessary. Although the Crown has put considerable effort into responding to each of the factual allegations in the applicants' notices of application and identifying the many areas in which it says there are no factual disputes of substance, I am ultimately not prepared to foreclose the applicants from leading the evidence they say they require to develop the factual matrix in light of Ferguson. They have identified the witnesses they intend to call and the timeline within which they plan to complete their evidence. Given the importance of the issue to each of the applicants, they should have the opportunity to present their cases as they see fit.

conclusion

- [17] I decline to grant the Crown's Vukelich application. "Maisonville J."

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