

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 2071

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2071 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2021 BCSC 2071

Date: 20211021

Docket: 27393-104

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 No. 104 - Lost Evidence

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Place and Dates of Trial/Hearing:

Vancouver, B.C.

October 6, 8, 13 and 14, 2021

Place and Date of Ruling:

Vancouver, B.C.

October 21, 2021

introduction

- [1] Dean Michael Wiwchar seeks a declaration that the police breached his right to a fair trial under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms by failing to preserve and disclose sales data related to certain clothing items he is alleged to have purchased. As a remedy for this "lost evidence", he seeks the exclusion, pursuant to s. 24(1) of the Charter, of a sales receipt the Crown intends to tender at trial.
- [2] The Crown responds that Mr. Wiwchar's application should be denied in accordance with the principles established by *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (C.A.) and subsequent authorities, as Mr. Wiwchar has no reasonable prospect of success in obtaining the remedy he seeks.

BACKGROUND FACTS

- [3] Following the shooting death of Sandip Duhre at the Sheraton Wall Centre Hotel on January 17, 2012, police learned from CCTV video that the shooter had worn a distinctive grey and lime green jacket. Det. Davies of the Vancouver Police Department (the "VPD") conducted an internet search of the jacket, and formed the investigative theory that it was a Firefly Edge Core Insulated Jacket, colour green, sold at SportChek stores (the "Firefly Jacket").
- [4] Det. Hyde of the VPD conducted inquiries with respect to the FireFly brand and learned that it was the house brand for the Forzani Group ("FGL"), the parent company of a number of retail chains in Canada, including SportChek. On January 24, 2012, he contacted Lisa Van Oosten, an FGL loss prevention analyst, to request national sales data for the Firefly Jacket for the January 1 to 17, 2012 period and for all sizes of the item. Ms. Van Oosten emailed him a spreadsheet with the sales data for the 74 transactions that fit those parameters. Det. Hyde then requested the transaction records for the three transactions that had occurred in the Lower Mainland and used that information to seek CCTV footage in relation to the transactions. He was able to obtain CCTV video from Richmond Centre and Park Royal; the Metrotown SportChek had already deleted the video.
- [5] Later that month, on the theory that the shooter would have purchased the jacket with cash, Det. Hyde requested records from Ms. Van Oosten for all cash transactions across the country involving the Firefly Jacket within the same January 1 to 17, 2012 time frame. Ms. Van Oosten emailed him data for ten transactions. Det. Hyde attempted to obtain CCTV footage from the stores where these transactions occurred; however, only three locations still retained the video (in Kelowna, Halifax, and Thunder Bay).
- [6] Subsequently in June 2012, Det. Dykman undertook follow-up action and contacted Ms. Van Oosten to request transaction records for the Firefly Jacket for all transactions in the Lower Mainland prior to February 2012, whether paid by cash or credit card. She emailed him a document listing 50 transactions.

- [7] A second item of interest to the police were Sims Forbes Men's Insulated Pants ("Sims Pants"), as a result of a pair (charcoal grey, size medium) having been seized during a search of a storage locker in Mr. Wiwchar's Jervis Street apartment building. On November 5, 2013, Det. Dykman contacted Ms. Van Oosten and requested national records for the Sims Pants in size medium, charcoal, for the period from December 1, 2011 to January 31, 2012. One week later Ms. Van Oosten emailed the officer a 63-page spreadsheet with the sales data for the 704 pairs of Sims Pants meeting those criteria. Det. Dykman then narrowed his request to sales in BC and requested the corresponding transaction records. Ms. Van Oosten emailed him a 26-page list of sales transactions relating to 126 pairs of Sims Pants.
- [8] Det. Dykman noted that only one of the transactions for the Sims Pants also included a Firefly Jacket (along with other items). That transaction occurred on December 18, 2011 at Richmond Centre. The Sims Pants were a size medium and the Firefly Jacket was a size X-large. Det. Dykman requested CCTV footage from the SportChek store at Richmond Centre for that date but it was no longer available.
- [9] Several years later in November 2017, Crown counsel asked Det. Dykman to review whether any of the items listed in the December 18, 2011 receipt had been located during the searches of the various locations associated to Mr. Wiwchar. In reviewing photographs of items observed during an April 2012 search of the Surrey safe house, Det. Dykman noted a photograph of a green striped Under Armour toque. The item had been photographed but not seized. One of the items listed on the December 18, 2011 receipt was a "UA Mens Striped Bean". On his initial review of the receipt, Det. Dykman had erroneously believed the item to be a shirt. However, when he searched the UPC code in November 2017, he learned it was a green striped beanie. He believed it to be the same item as had been photographed at the Surrey safe house.
- [10] Det. Dykman emailed Ms. Van Oosten a screen capture of the December 18, 2011 transaction and enquired about the item listed as "UA Striped Bean" with its corresponding UPS code. She emailed him confirming that the item was an Under Armour men's green striped beanie and included a screen capture of the item.
- [11] A direct indictment was preferred against Mr. Wiwchar and his co-accused on January 22, 2018. In February 2018, Mr. Wiwchar received the first production of disclosure, which included all of the task action reports and FGL data referred to above. No further substantive FGL data was received by the Crown or disclosed after this date.
- [12] On September 14, 2021, counsel for Mr. Wiwchar inquired whether further sales data for the Firefly Jacket and Sims Pants was still in existence. The Crown spoke with Ms. Van Oosten and advised counsel later that day of the information they received from her:
- a) The sales data in regards to the Firefly Jacket and the Sims Pants was no longer in existence;
 - b) Ms. Van Oosten believed the retention period was eight years but could not confirm this from memory; and

- c) The two items were from the Fall/Winter 2011 season so were not sold in any FGL stores before September 2011.
- [13] The Crown has so far tendered into evidence at trial a Firefly Jacket purchased online, the Sims Pants seized from the locker at the Jervis Street apartment and a photograph of the beanie photographed at the Surrey safe house. The Crown intends to tender through Ms. Van Oosten a photograph of the green striped Under Armour beanie, the December 18, 2011 receipt, and the sales records for the Sims Pants for December 2011 and January 2012. The original electronic records from which these documents were created no longer exist.
- [14] The Crown's theory is that Mr. Wiwchar was the purchaser of the items listed on the December 18, 2011 receipt and that he wore the Firefly Jacket on the day of the Duhre homicide.

POSITIONS OF THE PARTIES

Mr. Wiwchar

- [15] Mr. Wiwchar identifies two primary issues to be addressed on the substantive application:
- (a) whether the FGL sales data was within the possession or control of the VPD; and
 - (b) if so, whether the failure of police to seize the FGL sales data amounts to unacceptable negligence (the burden of refuting which rests with the Crown).
- [16] On this Vukelich application, Mr. Wiwchar emphasizes that he need only meet the low threshold established in the authorities that he state with "reasonable particularity" the basis upon which the application is made: *R. v. Fredrickson*, 2018 BCCA 2 at para. 33 and establish a "toe-hold" in the jurisprudence: *R. v. McDonald*, 2013 BCSC 314 at para. 43.
- [17] Citing *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, Mr. Wiwchar says that the Crown's obligation to disclose all information in its possession or control that is not clearly irrelevant gives rise to a duty to preserve the fruits of an investigation. This duty to preserve will in some circumstances extend to evidence in the possession of a third party, as recognized in *R. v. Chan*, 2020 BCSC 189.
- [18] Mr. Wiwchar submits that on the facts of the present case, the FGL sales data were in the possession or control of the VPD. They had easy access to the data, which they obtained by making informal requests of Ms. Van Oosten. Indeed, she essentially acted as an agent for the VPD, filtering and sorting the data to meet the parameters requested by the officers. Further, the police accessed the sales data on numerous occasions over a period of years.
- [19] Mr. Wiwchar says that it is evident from the police reports and their overall investigative theory that the VPD recognized that the sales data was highly relevant due to the inferences that could be drawn from it. They also used it to further their investigation. Nevertheless, they selectively preserved only that which accorded with their theory and took no steps to preserve the rest. They did not direct FGL to preserve its sales data nor did they inquire

about the company's retention period for data. Mr. Wiwchar submits that the Crown is tendering the December 18, 2011 receipt as circumstantial evidence to prove that he was the shooter, and the evidence is, therefore, relevant to a key issue at trial. The importance of evidence is, in turn, relevant to the care required to preserve it. Accordingly, says Mr. Wiwchar, the loss of the sales data here was due to unacceptable negligence.

- [20] Mr. Wiwchar contends that the loss of the evidence has impacted his ability to make full answer and defence by depriving him of the ability the police and the Crown enjoyed to mine the data for information to support their theory. Because the relevance of the December 18, 2011 receipt derives from inference and the improbability of coincidence, Mr. Wiwchar could have, for example, potentially located in the sales data other occasions on which the Firefly Jacket and Sims Pants were sold together, which would diminish the significance of the purchase of those items together on December 18, 2011. Similarly, establishing the total number of Sims Pants sold during the 2011/2012 season, from September 2011 to July 2012, could tend to reduce the significance of the discovery of the pants in the locker at his Jervis Street apartment. Accordingly, Mr. Wiwchar disputes the Crown's assertion that a remedy could never be granted on the present facts.

The Crown

- [21] The Crown submits that Mr. Wiwchar is unable to demonstrate that the FGL sales data are governed by the first party Stinchcombe regime, as the police never possessed or even saw the data in question. Simply because Ms. Van Oosten complied with police requests for transaction data does not transform other data to which she had access into first party materials. They remain third party materials, and the loss or destruction of such materials cannot give rise to a "lost" evidence breach.
- [22] The Crown says that even if Mr. Wiwchar were able to satisfy the Court that the sales data were subject to Stinchcombe principles, the remedy he seeks would not be granted. The law accepts that a certain degree of negligence is acceptable (*R. v. McFarlane*, [2020] O.J. No. 2204) and, thus, the burden would shift back to Mr. Wiwchar to establish that the evidence the Crown seeks to admit is so prejudicial that it would impair his right to a fair trial. While the Crown does not dispute that the transaction record for the December 18, 2011 purchase is relevant and probative, it says that it was lawfully obtained. There is no independently prejudicial effect of the evidence beyond the fact that it is highly probative. The Crown contends that the inferences to be drawn from it and its ultimate weight are matters for the jury to decide. Mr. Wiwchar will be able to cross-examine the Crown's witnesses and make submissions to the jury with respect to the issues he has argued here, such as the possibility of other transactions involving the same combination of purchases.
- [23] Accordingly, the Crown submits that there is no reasonable prospect that Mr. Wiwchar will be granted the remedy he seeks, and his application for a *voir dire* ought therefore to be dismissed.

DISCUSSION

- [24] Numerous Vukelich applications have been brought in these proceedings so the principles are by now well known. Several lost evidence applications have also been heard so the governing principles, again, do not require review.
- [25] In his oral submissions, counsel for Mr. Wiwchar indicated that he was not seeking to lead *viva voce* evidence, and that a screening hearing, as a Vukelich hearing is meant to be, serves no purpose here as he has already presented his full argument on the substantive application. He explained that were the Court to dismiss the Vukelich application and grant a full hearing, the parties would make essentially the same arguments and go over the same facts as they have already, only with an agreed statement of facts.
- [26] Because of what I see as the determinative issue, I agree that it is appropriate that I address the substantive application rather than simply the Crown's Vukelich application. That issue is whether the FGL sales data are subject to first party or third party disclosure; in other words, whether the sales data were in the possession or control of the police/Crown. Mr. Justice Paciocco discussed the importance of the distinction in *R. v. Fitts*, 2015 ONCJ 262 at para. 19:
- [19] Lost evidence complaints are about "first party disclosure," not "third party disclosure." This is because lost evidence applications are predicated upon the prosecuting Crown obligation to preserve information that it is obliged by law to disclose: *R. v. La*, [1997] S.C.J. No. 30 at para. 20. One cannot "preserve" what one does not possess or control. While it is no doubt possible to bring a Charter application against the Crown if state agents cause the loss or destruction of "third party disclosure," such applications would not be "lost evidence" applications *per se*. To succeed in the kind of lost evidence application brought before me the subject information must be information that the Crown is obliged to disclose as "first party disclosure."
- [27] The thrust of Mr. Wiwchar's submissions with respect to the VPD's control or possession of the FGL sales data appears to rest on the proposition that Ms. Van Oosten was cooperative with police and gave them easy access to the company's data on numerous occasions over a period of years. As noted, Mr. Wiwchar characterizes her as essentially an "agent" for the police. I do not take him to suggest there was a literal agency relationship; rather, I take him to use the term as descriptive of the level of confidence the police had in her that she would comply with their requests for information. In my view, however, Ms. Van Oosten's preparedness to cooperate with the police simply does not put them in possession or control of data to which she had access but which they had not sought or reviewed. To conclude otherwise would lead to the untenable outcome that every third party that complied with a police request for information would be subject to the Stinchcombe regime.

[28] Mr. Wiwchar cites Chan for the proposition that the duty to preserve evidence will in some circumstances extend to evidence in the possession of a third party. In that case, the police reviewed security video from a condominium building in which it was believed the accused had a stash house. The police seized video of the accused attending on some occasions but not on others. The accused argued that the police were in control of the video they did not seize and that they had failed to preserve it. At para. 24, Justice A. Ross wrote:

[24] In this case, the security video evidence falls into three categories:

- a) clips that were seized and produced by the police;
- b) clips that were viewed by the police, but not seized; and
- c) clips that existed at the time of the investigation, but were never viewed or seized by police.

[25] The first category is not at issue because those clips were produced. The third category was not argued before me. This application relates only to the second category, that is, clips that the police viewed, but did not seize.

[Emphasis added.]

[29] While Ross J. did conclude that the police were in possession of the video clips they had viewed but not seized, what is at issue on the present application are items in category (c), which he expressly did not consider. Moreover, it is important to note that Ross J.'s conclusion that the police were in possession of the video they had not seized was based in part on the important fact that a description of the activities recorded on that video was referenced in an Information To Obtain used to obtain a search warrant. That the police would have included that in the Information To Obtain clearly establishes the known relevance of the video to the police, unlike the case before me.

[30] Here, there is nothing in the material to suggest that the police thought the sales data Mr. Wiwchar now seeks had import. I am not persuaded that the obligation of law enforcement to seize information during an investigation extends as far as Mr. Wiwchar contends.

[31] I have no hesitation in concluding that the sales data were not in the possession or control of the VPD and, therefore, not subject to the Stinchcombe regime. It follows that the data are not lost in the relevant sense, and there is, accordingly, no need to consider the parties' submissions further.

[32] Mr. Wiwchar's application is dismissed.

"Maisonville J."

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