

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 2317

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2317 R. v. Alkhalil IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alkhalil, 2021 BCSC 2317 Date: 20211125 Docket: 27393-2 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: Toronto Surveillance of Wiwchar Counsel for the Crown: M. Sheardown S. Dworkin N. Gregoire A. Cochrane A. La Bar S. Wagner D. Darby Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil): R.S. Fowler, Q.C. K. Blok A. Tolliday Counsel for the Accused, Dean Michael Wiwchar: S. Buck J. Desbarats A. Dorin Counsel for the Accused, Larry Ronald Amero: M. Rock J. Myers J. Oppal L. Myers, Q.C Place and Dates of Trial/Hearing: Vancouver, B.C. November 23, 2021 Place and Date of Judgment: Vancouver, B.C. November 25, 2021

introduction

- [1] The Crown intends to lead evidence from several Toronto Police Service ("TPS") officers with respect to their surveillance of Dean Wiwchar in the Greater Toronto area in May and June 2012.
- [2] Mr. Wiwchar seeks to limit the extent of such evidence the Crown is able to lead, contending that its prejudicial effect outweighs its probative value. DISCUSSION
- [3] At the behest of the Vancouver Police Department ("VPD"), who were investigating Mr. Wiwchar for the murder of Sandip Duhre, the TPS conducted surveillance on Mr. Wiwchar when he travelled to Toronto in May and June 2012. The surveillance evidence that the Crown proposes to lead spans May 23 to June 4, 2012 and covers Mr. Wiwchar's movements in the Greater Toronto area during this period. The Crown also intends to lead evidence from these officers of Mr. Wiwchar's attempts, at time successful, to defeat the surveillance.

- [4] The Crown's purpose in leading this evidence is twofold: (a) to link Mr. Wiwchar to a rental vehicle, which, in turn, is linked to Mr. Alkhalil; and (b) to demonstrate that Mr. Wiwchar was under 24-hour surveillance while he was in Toronto and that he was aware he was under surveillance. The latter purpose, in turn, is relevant in identifying him as the author of certain messages sent from the WrathOfTitans phone and, therefore, as the user of this device. For example, on June 10, 2012 a message sent from that device read, in part, "being followed by pigs everywhere I have no heat here that I can see but in dot was under 24.7 surveillance it was bad".
- [5] Mr. Wiwchar contends that the probative value of the evidence is low since the Crown has already tendered a significant body of evidence to link him to the WrathOfTitans phone and does not need this evidence. On the other hand, he submits, the evidence is highly prejudicial because the jury will inevitably wonder why he was under constant surveillance and will likely conclude that it was because he was up to no good, whether engaged in criminal activity or as a suspect in another investigation. This concern is heightened by the fact that the officers conducting the surveillance were with the TPS, not the VPD, suggesting he was the subject of a separate police investigation. Mr. Wiwchar further submits that the jury will necessarily interpret the surveillance evidence in light of other text messages and conclude that he was in Toronto to engage in serious criminal activity; for example, a June 11, 2012 message, "I'm just trying to get this job done gotta sneak back into dot next week".
- [6] Mr. Alkhalil adds that whatever inferences the jury will draw about what Mr. Wiwchar was up to, they will likely further conclude that it was either with the assistance of or at the behest of Mr. Alkhalil because of the evidence linking them both to the rental vehicle. Evidence that is not admissible against Mr. Wiwchar for the reasons he has submitted is even less admissible against Mr. Alkhalil. Thus, the jury will need to be instructed that they cannot rely on anything Mr. Wiwchar is observed doing to conclude that Mr. Alkhalil was also involved in those acts. As regards Mr. Alkhalil, the evidence is highly prejudicial and probative of nothing.
- [7] The Crown says that the surveillance evidence is highly probative in linking Mr. Wiwchar to the WrathOfTitans phone, a critical aspect of the Crown's case. The fact that it may have tendered other evidence linking Mr. Wiwchar to the device does not diminish the reality that in the absence of an admission from Mr. Wiwchar that he was the user of the WrathOfTitans phone, the Crown needs all available evidence to eliminate any reasonable doubt in respect of this fact. As for prejudicial effect, the Crown says that it is not leading any evidence of criminality and will be surgical in the evidence it will elicit from the TPS officers as regards Mr. Wiwchar's awareness that he was under surveillance. In this regard, the Crown submitted: What the Crown is intending to lead from these officers is to keep it in the -- the relevance to this particular message, which is that he -- when he was in "dot", Toronto, he was under 24/7 surveillance, and he knew it. So the Crown is intending to lead evidence that there was significant surveillance going on, on all of those days that my friend mentioned, and that Mr. Wiwchar was aware of the surveillance, and took certain acts upon -- to detect

and defeat surveillance. So, for example, going up to an officer, looking at him in the face, repositioning his car to be right beside a surveillance officer, interactions with the surveillance officers that are unusual like that to show that he was aware of the surveillance.

- [8] The Crown will also elicit from the officers that they were assisting the VPD and, thus, it will be clear to the jury that the surveillance of Mr. Wiwchar was in connection with Project Reality and not a separate Toronto investigation.
- [9] Significantly, the Crown is also prepared to edit the messages of concern to Mr. Wiwchar, as follows: Message 159 10:42 pm, from ManVFood to SuperHero: All god... ill see him this weekendm... .fuck its hard fr me to do shit with this heat... in gunna finish dot shit go to dot then come back here... I'm going off when I get back... sick of this broke shit Message 162 2:15 pm, from ManVFood to Black Legion Underboss: Ok... I'm just tryin to get this job done.. .gotta sneak back into go back to dot next week! Message 166 9:15 am, from ManVFood to Keno: I don't see nothing here... I'm leaving tomorrow... sneaking going back to dot.\$gunna bus it to c town 9:19 am, from Keno to ManVFood: You get the ID 11:11 am, from Trick-Daddy to Keno: Ya I got it but it's the old dl... I'm not sure if it will work for flying..we'll see though 11:18 am, from Kenoto ManVFood: Ya it will. Np I use old one
- [10] The words that are struck through are those parts of the message the Crown is editing in an effort to remove any prejudicial effect of the message.
- [11] Submissions on this application were heard at the end of September. Counsel for the three accused subsequently advised the Crown that they were amenable to admissions with respect to the Toronto surveillance and the fact that Mr. Wiwchar frequently demonstrated awareness that he was being followed. The Crown prepared the admissions and counsel for two of the accused have signed them but one has not. Accordingly, it has become necessary to rule on this application.

conclusion

- [12] The Crown has proposed several measures to limit the prejudicial effect of the intended surveillance evidence, most notably, by editing the PGP messages as set out above. The Crown will also be surgical in eliciting the officers' testimony, and will make it clear through them that their surveillance of Mr. Wiwchar was in connection with Project Reality.
- [13] These measures substantially diminish the prejudicial effect of the surveillance evidence and I have no hesitation in concluding that its probative value in relation to linking Mr. Wiwchar to the WrathOfTitans device vastly outweighs any prejudicial effect that may remain. "Maisonville J."

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