
CANADA / JUDGMENT

R. v. Andel

2013 BCCA 84

COURT

British Columbia Court of Appeal

DECIDED

26 February 2013

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2013 BCCA 84 R. v. Andel

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Andel,

2013 BCCA 84

Date: 20130226

Docket: CA039403

Between:

Regina

Respondent

And

Robert Andel

Appellant

Before:

The Honourable Madam Justice D. Smith

(In Chambers)

On appeal from: Provincial Court of British Columbia, September 14, 2011

(R. v. Andel, Vernon Registry No. 45784-2-C)

Counsel for the Appellant:

B. Olthuis

Counsel for the Respondent:

M. Mereigh

Place and Date of Hearing:

Vancouver, British Columbia

February 12, 2013

Place and Date of Judgment:

Vancouver, British Columbia

February 26, 2013

Reasons for Judgment of the Honourable Madam Justice D. Smith:

- [1] Robert Andel applies for the appointment of counsel pursuant to s. 684 of the Criminal Code, R.S.C. 1985, c. C-46, to act on his behalf with respect to his appeal from conviction in provincial court on two counts of possession of stolen property over \$5,000, contrary to s. 355(a) of the Criminal Code. He received concurrent sentences of nine months' imprisonment on each count, less four months' pre-sentence custody on the first count, resulting in an effective sentence of 13 months' imprisonment which he has now served.

Background

- [2] The circumstances of the alleged offences may be summarized as follows.
- [3] On September 28, 2010, the RCMP received a report that a cedar log outhouse had been stolen from a display home in Lumby. Police learned that a white pickup truck had been seen in the vicinity around the time of the theft.
- [4] A few weeks later Cst. Gillis received photos of the stolen outhouse in a new location on a large orchard. He and Cpl. Proce recognized the setting depicted in the photos and attended at the property in marked police vehicles to investigate. No search warrant was obtained.
- [5] The orchard property is about 30 to 35 acres in size and has numerous outbuildings and barns situated on it as well as two rental homes. At the time it was owned by several individuals. Mr. Andel rented a trailer on the property.
- [6] Upon entering onto the property, Cst. Gillis noticed a white 2007 GMC Sierra pickup truck pulling a black 2009 flat-deck TrailTech trailer. He also observed the driver of the truck who was later identified as Mr. Andel. When Mr. Andel saw the police officers he stopped the truck, exited the vehicle and fled on foot towards the highway. A chase ensued; he was eventually caught. He advised Cst. Gillis that the officers were on private property and initially refused to answer any questions including questions about his identity. He was arrested for possession of stolen property under \$1,000 in regard to the stolen outhouse although the property had not yet been searched and the outhouse had not yet been

discovered. He was handcuffed and placed in the rear of one of the police vehicles where he was given his Charter rights including his s. 10 Charter right. He was detained in that fashion while the officers conducted a search of the property and of his trailer. While he was detained the officers learned that the plates on the white pickup truck and flat-deck trailer were inactive or expired and that both the vehicle and trailer were stolen. They also learned that Mr. Andel had outstanding warrants for robbery and theft. They rearrested Mr. Andel on the charges of possession of stolen property of the truck and flat-deck trailer. There is no finding of fact as to whether the officers repeated Mr. Andel's Charter rights, in particular his s. 10(b) rights, in respect of the new charges.

- [7] The warrantless search of the property, including the area in which Mr. Andel's trailer was situated and the trailer itself, resulted in the discovery of the outhouse and additional items of stolen property in his trailer. All of the discovered items of stolen property formed the basis for the additional 20 counts in the 22-count information.
- [8] At trial, Mr. Andel alleged ss. 7, 8, 9 and 10 Charter breaches and sought to have all of the evidence, including the truck and flat-deck trailer, excluded as evidence pursuant to s. 24(2) of the Charter. During the course of the voir dire the Crown elected not to proceed with the additional 20 counts that stemmed from the warrantless search of the property and Mr. Andel's trailer, leaving only the two counts of possession of stolen property relating to the truck and flat-deck trailer.
- [9] At the conclusion of the voir dire, counsel for Mr. Andel argued that: (i) the police officers did not have reasonable grounds to arrest Mr. Andel and therefore his arrest was arbitrary contrary to s. 9; (ii) the searches on the property were not incidental to a lawful arrest and were therefore in violation of s. 8; (iii) Mr. Andel had been denied his right to obtain and instruct counsel without delay contrary to s. 10(b); and (iv) the evidence must be excluded pursuant to s. 24(2).
- [10] In his voir dire ruling the trial judge focused on Mr. Andel's alleged violations of his ss. 9 and 10(b) Charter rights and, if established, whether the evidence of the truck and flat-deck trailer, which he found had been abandoned by Mr. Andel, should be excluded pursuant to s. 24(2). He concluded that it was unnecessary to determine whether Mr. Andel's Charter rights had been violated because there was no causal, temporal or contextual connection between the alleged Charter breaches and the discovery of the real evidence. Mr. Andel had been observed by the officers driving the truck-trailer unit before the alleged Charter breaches and therefore any Charter breach was too remote to be causally connected to the discovery of the evidence.
- [11] Relying on *R. v. Strachan*, [1988] 2 S.C.R. 980 and *R. v. Goldhart*, [1996] 2 S.C.R. 463, the trial judge stated:

- [7] ...The vehicle and trailer are real evidence. They were not discovered as a result of the arrest or detention of the accused. There is no connection between any possible breach of the accused's rights and the discovery by the police that the vehicle and trailer were stolen. There is no evidence that the vehicle or trailer were searched. Rather, the plates were run and determined to be no longer valid. Subsequently, both the truck and trailer were discovered to have been stolen. The accused was seen in the driver's seat operating the truck.
- [12] In the result, the trial judge found Mr. Andel to be in possession of the stolen pickup truck and flat-deck trailer and convicted him of those two counts only.

Mr. Andel's Position

- [13] Mr. Andel advances five arguments in his appeal:
- (a) The trial judge erred in his application of s. 24(2) because the test for the exclusion of evidence necessarily includes a consideration of the Charter breach in issue.
 - (b) The trial judge erred in not considering whether there was a s. 8 violation on these facts. The police proceeded without a warrant onto private property where the accused lived and therefore had a reasonable expectation of privacy. They did so for the purposes of locating the evidence (i.e., the outhouse). In their testimony on the voir dire, the police officers appeared to accept that the circumstances would have normally called for a warrant.
 - (c) His arrest was without warrant and without reasonable grounds contrary to s. 495 of the Criminal Code and thus contrary to s. 9 of the Charter. When he fled from police, they had not yet announced the purpose of their investigation or their presence on the property. Moreover, they had not yet located the stolen property which had been the subject of their investigation and therefore at that point in time they could not have had objectively reasonable grounds for arrest.
 - (d) The trial judge did not make any findings of fact that would support his conclusion that both aspects of his s. 10(b) rights were honoured in this case (i.e., his right to counsel upon arrest and an additional opportunity to speak to counsel where the investigation had developed to a point where speaking to counsel again was necessary to serve the underlying purpose of the Charter right).
 - (e) Last, the required temporal, contextual and causal connections existed to engage s. 24(2). Had the analysis of the Charter breaches and s. 24(2) been properly undertaken, there was a meritorious argument that the evidence should have been excluded under the Grant analysis.

Legal Test Under s. 684

- [14] Section 684(1) sets out the two-fold test for the appointment of counsel on an appeal. The applicant must establish that the appointment of counsel "appears desirable in the interests of justice" and that "the accused has insufficient means to obtain that assistance".
- [15] The "interests of justice" branch of the test engages a consideration of the following factors (see *International Forest Products Ltd. v. Wolfe*, 2001 BCCA 632, 94 B.C.L.R. (3d) 67 at para. 6):
- (1) the complexity of the case;
 - (2) any point of general importance in the appeal;
 - (3) the applicant's competency to present the appeal;
 - (4) the need for counsel to marshal facts, research law or make argument;
 - (5) the nature and extent of the penalty imposed; and
 - (6) the merits of the appeal.

Discussion

- [16] In regard to the second branch of the test, Mr. Andel has provided a letter from the Legal Services Society in which they have refused his application for legal aid on the appeal. In addition, Mr. Andel has provided an affidavit in which he has outlined his financial circumstances. There is no issue that Mr. Andel lacks the financial resources to retain counsel to argue his appeal.
- [17] The sole issue is whether the interests of justice mandate the appointment of counsel to act for him on his appeal.
- [18] The legal issues raised by Mr. Andel relate to the interplay between the alleged Charter violations (ss. 8, 9 and 10) and the exclusion of real evidence pursuant to s. 24(2) of the Charter. Section 24(2) provides that where: (i) evidence is obtained "in a manner that infringed or denied" a Charter right; and (ii) its admissibility would "bring the administration of justice into disrepute", then the evidence must be excluded at trial.
- [19] The issue of remoteness between a Charter breach and the discovery of evidence was addressed in both *Strachan* and *Goldhart*. In *Strachan*, the Court stated "[s]ituations will arise where evidence, though obtained following the breach of a Charter right, will be too remote from the violation to be 'obtained in a manner' that infringed the Charter" (para. 46). In *Goldhart*, the Court referred to the "temporal and tactical" connections to be considered in determining whether the infringements were sufficiently strong to treat them as "part of a single transaction" in obtaining the evidence in a manner that infringed the accused's Charter rights (paras. 38 and 39). The Court noted that "the entire relationship between the Charter breach and the impugned evidence" must be examined to determine the strength of

the causal relationship between the breach and the impugned evidence (paras. 40 and 42).

- [20] The trial judge appears to have assumed, without expressly finding, that at least the ss. 9 and 10 alleged Charter violations were established. He did not address the alleged s. 8 infringement. He did not conduct an analysis as to the manner in which the alleged infringements occurred, or the cumulative effect of the infringements based on the "entire chain of events during which the Charter violation occurred and the evidence was obtained" (Strachan at para. 46). He made no findings regarding the manner in which the assumed Charter violations occurred in order to assess the strength or remoteness of the causal, temporal and tactical connection of the infringements with the discovery and seizure of the truck and flat-deck trailer. He simply found no connection between the alleged Charter violations and the discovery of the evidence based on the fact that Mr. Andel was seen driving the truck and trailer before the assumed Charter violations had occurred. The absence of any findings as to the manner in which the Charter breaches alleged by Mr. Andel (ss. 8, 9 and 10) may have been connected to all, part, or none of the seizure of the truck and flat-deck trailer raises at least an arguable appeal of these issues.
- [21] These are complex legal issues for which most lay persons are not well equipped to argue. They also transcend the immediate issues in Mr. Andel's appeal because they engage the application of the new approach to the exclusion of evidence as articulated in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. The fact that Mr. Andel has served his sentence should not in these circumstances exclude him from obtaining the assistance of counsel to have his convictions meaningfully reviewed.
- [22] In the result, I would exercise my discretion by ordering the appointment of counsel under s. 684(1) of the Criminal Code to act on behalf of Mr. Andel in his appeal from convictions for possession of the stolen truck and flat-deck trailer.

"The Honourable Madam Justice D. Smith"

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Prepared on 27 October 2026 · Esheria