

CANADA / JUDGMENT

R. v. Anderson

2020 BCSC 2195

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2195 R. v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Anderson,

2020 BCSC 2195

Date: 20200828

Docket: X082064

Registry: New Westminster

Regina

v.

Michael Branden Anderson

Before: The Honourable Madam Justice Horsman

Oral Ruling on Voir Dire

re s. 8 Charter application

Counsel for the Crown:

S.H. Quendack

Counsel for the Accused:

J.B. Turner

Place and Date of Trial/Hearing:

New Westminster, B.C.

August 13, 24-27, 2020

Place and Date of Judgment:

New Westminster, B.C.

August 28, 2020

INTRODUCTION

- [1] The accused, Mr. Anderson, is charged with a number of offences, including attempted murder, in relation to a shooting that occurred on 149A Street in Surrey, British Columbia, in the early morning hours of May 5, 2018. The trial is ongoing.
- [2] The trial includes a blended voir dire that concerns two issues: (1) the voluntariness of statements made to police by Mr. Anderson following his arrest; and (2) the lawfulness of a police search of a white Jeep owned by Mr. Anderson's wife, Denise Anderson, who was also arrested.
- [3] The evidence relevant to the lawfulness of the search is now complete and I have received submissions from counsel. There is still evidence to come on the issue of the voluntariness of Mr. Anderson's statements. The parties agree that an early ruling on the search issue alone will facilitate the trial process. Accordingly, this ruling is limited to the issue of the lawfulness of the search of the Jeep. I will separately rule on the voluntariness of Mr. Anderson's statements to police at a later time.
- [4] The issue as it pertains to the Jeep is whether the search was carried out in a manner authorized by a search warrant issued by a judicial justice on May 7, 2018. In particular, the defence says that the search was not completed within the time period specified in the warrant, and therefore was a warrantless search. The defence says that any evidence derived from the search of the Jeep was obtained in a manner that infringes Mr. Anderson's rights under s. 8 of the Charter and should be excluded pursuant to s. 24(2).

THE EVIDENCE

- [5] I will begin with a review of the evidence tendered on the voir dire in relation to the search of the white Jeep. Of central importance is the evidence of RCMP Corporal John Hanson who executed the search.

Events leading to the search

- [6] It is unnecessary to review in detail the investigation that preceded the search of the Jeep, as the defence does not challenge the validity of the warrant itself. I will therefore review events leading to the search only in summary form to the extent necessary to give context to the s. 8 Charter issue that is raised on the voir dire.

- [7] The shooting in issue occurred within blocks of the RCMP District 2 office in Surrey. A number of RCMP officers present at the District 2 office heard the sound of gunshots and immediately drove to the area of the shooting. They observed two vehicles, an Acura sedan and a white Jeep Patriot. The Acura sedan was stopped by police at the scene. Police officers observed the Jeep to travel to the end of 149A Street before turning right on 102A Avenue.
- [8] A description of the white Jeep and its direction of travel was broadcast over the police radio. A nearby Air One police helicopter patrol located a white Jeep that appeared to match the description and direction of travel. The Jeep was tracked until it parked in a driveway off Scott Road by the back of a tattoo shop. Officers converged on the scene and arrested three occupants of the Jeep, including Mr. Anderson, who had been in the front passenger seat, and his wife, Ms. Watson, who was in the driver's seat.
- [9] The Acura sedan and the white Jeep were both towed to the Surrey main RCMP detachment and secured in a garage bay.
- [10] Police continued their investigation of the scene of the shooting in the early morning hours of May 5, 2018. Officers found one injured male at the scene who appeared to have been shot. He was transported to the Royal Columbian Hospital. Police found a number of 9mm spent bullets and bullet casings at the scene, as well as one unfired 9mm round.
- [11] Corporal John Hanson, a member of the RCMP Serious Crime Unit, was assigned the role of crime scene officer. He attended the scene of the shooting on the morning of May 5th and took control of the exhibits. Corporal Hanson was also involved in the execution of the warrants to search the white Jeep and the Acura sedan.

The search

- [12] I will turn now to the circumstances of the search. The warrant to search the white Jeep was issued by Judicial Justice Campbell on May 7, 2018. The critical provision of the warrant for the purpose of this voir dire reads as follows, and I am quoting:

THIS IS THEREFORE to authorize and require you to enter the said vehicle between the hours of 8:30 a.m. and 8:59 p.m. on the 07th of May, 2018 and to search for the things and to bring them before me or some other justice, or submit a report in writing in respect of anything seized.

- [13] Corporal Hanson was not involved in obtaining the warrant. Rather, the warrant was obtained by his colleague, Corporal Smith. Corporal Hanson testified that when he arrived at the vehicle bay at the RCMP detachment on the morning of May 7, 2018, Corporal Smith handed him three warrants to execute: one for the Acura, one for the Jeep, and one for the tattoo shop. Corporal Hanson read the warrants and confirmed that the vehicles in the police bay matched the description in the warrant.

- [14] At the time of the search, the Acura and the Jeep were side-by-side in the police bay. Corporal Hanson started with a search of the Acura. He was assisted by Constable Moe Haddaghkar, a member of the Surrey RCMP Forensic Identification Unit. Constable Haddaghkar took photos of the vehicle. The items seized from the Acura included four spent bullet casings.
- [15] Corporal Hanson testified that shortly before noon on May 7th, he was directed by his sergeant to suspend the search of the Acura and execute the search warrant on the Jeep. Corporal Hanson says he followed this direction. He opened the driver's door of the Jeep and observed a 9mm pistol magazine in the driver's footwell, as well as a spent round. He opened both rear passenger doors and did not note anything of particular interest. He opened the rear hatchback and observed a 12-gauge shotgun with a round in its chamber. He opened the passenger front door and then opened the glovebox. He observed a 9mm pistol. He looked further and observed a 9mm magazine with a round in it that appeared to be of the same description as the one in the front driver's footwell.
- [16] Corporal Hanson reported the results of his search of the Jeep to his sergeant. He did not move or photograph the items he observed, leaving them in the vehicle for proper documenting and processing. He then suspended the search of the Jeep and resumed his search of the Acura.
- [17] Corporal Hanson completed the search of the Acura at 1338 hours on May 7th. He spent some time securing the exhibits before travelling to the tattoo shop that was the subject of the third warrant. He did not stay long at the tattoo shop. He had difficulty executing that warrant due to problems in accessing the building. Corporal Hanson returned to his office to drop Constable Haddaghkar off and check in with his team. He went off shift at approximately 5:00 p.m., having started that workday at 7:00 a.m.
- [18] Corporal Hanson intended to continue with the search of the Jeep on the morning of May 8, 2018. He was accompanied on this occasion by Corporal Page of the Forensic Identification Unit who would be taking pictures of the Jeep. Corporal Hanson was told not to start with the search immediately, because members of the Integrated Homicide Investigation Team ("IHIT") had obtained a warrant to search the Jeep in relation to a separate investigation and they were on their way with a warrant. He was told to wait so the Jeep could be processed at the same time.
- [19] Corporal Hanson estimates that he spent about four hours searching the Jeep on May 8th and seizing items that included the weapons he had observed on May 7th. He spent a further two to three hours searching the Jeep on May 9th. He described the process as a labour-intensive search, particularly given that the police wanted to capture the possibility of any DNA evidence left in the Jeep.
- [20] Corporal Hanson denied the proposition put to him in cross-examination that he was aware of the IHIT warrant on May 7th and this is why the completion of the search of the Jeep was delayed until the following day. He said he only became aware of the IHIT warrant on the

morning of May 8th, when he was told to wait for IHIT investigators to arrive before recommencing his search of the Jeep. He says the decision to suspend the search of the Jeep on May 7th was prompted by his concern to ensure the searches of the two vehicles were carried out in a timely and organized fashion, and to avoid the potential for any mix-up of the exhibits. Given the demands of trying to execute three warrants in one day, time did not permit him to complete a diligent search of the Jeep on May 7th.

- [21] Corporal Hanson also denied the proposition put to him in cross-examination that he and the investigator executing the IHIT warrant, Constable Ryder, were just "cherry picking" items from the Jeep, rather than seizing all items relevant to the respective investigations. Corporal Hanson says he seized everything from the Jeep that he considered relevant to his investigation.

POSITIONS OF THE PARTIES

- [22] The defence says that the search of the Jeep was a warrantless search, because the warrant only authorized a search between the hours of 8:30 a.m. and 8:59 p.m. on May 7, 2018. It is argued that the warrant had expired by the time Corporal Hanson completed the substance of the search on May 8, 2018, and possibly even later on May 9th. The defence says that despite Corporal Hanson's denials, the court should conclude that he purposefully chose to wait to execute the warrant until May 8th, due to an operational desire to have both warrants executed at the same time. The practical consequence of this, it is argued, is that some items potentially relevant to the present charges were seized by the IHIT and not by Corporal Hanson.
- [23] The defence relies on *R. v. Campbell*, 2018 NSCA 42, in support of the proposition that the language in a warrant must be strictly construed so as to ensure protection of the Charter rights of an accused. Defence counsel acknowledges that Campbell addressed a different issue than arises in the present case. In Campbell, the warrant set an erroneous and factually impossible timeframe for execution (between the 7th of May 2016 and the 7th of January 2016). The Nova Scotia Court of Appeal upheld the decision of the trial judge that the error was so obvious that it rendered the warrant invalid. Although not directly on point, the defence says that Campbell is of assistance in highlighting the importance of strict compliance with the terms of a warrant.
- [24] The defence says any evidence gathered by police pursuant to what counsel characterizes as an unreasonable warrantless search should be excluded pursuant to s. 24(2) of the Charter. The defence says the balancing of factors required by *R. v. Grant*, 2009 SCC 32, favours exclusion of the evidence. While acknowledging that there is a reduced expectation of privacy in relation to a vehicle as compared to a private residence, the defence says that the exclusion of evidence gathered in the search of a vehicle is warranted where Charter-infringing conduct is serious and will have a long-term effect on public confidence in the administration of justice. The defence relies on *R. v. Dhillon*, 2012 BCCA 254 at paras. 76-78.

- [25] The Crown argues that the search of the Jeep was authorized by the warrant and therefore presumptively reasonable. The Crown relies on a series of cases from the British Columbia Supreme Court holding that time parameters contained in a warrant such as the one issued by Judicial Justice Campbell in the present case require only that a search commence within the parameters set out in the warrant, not that it must complete within that timeframe: *R. v. Cardinal*, 2003 BCSC 158 [Cardinal]; *R. v. Pickton*, 2006 BCSC 1090 [Pickton]; and *R. v. Veranski and Bellotti*, 2012 BCSC 220 [Veranski]. The Crown says in the present case, Corporal Hanson did commence the search of the Jeep within the time parameters set out in the warrant, as his initial visual search occurred midday on May 7, 2018. The fact that the search completed after May 7th does not, in the Crown's submission, make it a warrantless search.
- [26] The Crown says that Corporal Hanson testified to his reasons for suspending the search of the Jeep and those reasons make practical sense, given the demands Corporal Hanson faced in executing three warrants in one day. The Crown notes that Corporal Hanson disagreed with the suggestion put to him in cross-examination that he suspended the search of the Jeep in order to await the execution of the IHIT warrant. The Crown says that Corporal Hanson's evidence should be accepted by the Court.
- [27] In the alternative, the Crown says that if the court concludes that the evidence gathered in the search of the Jeep was obtained in a manner that infringed Mr. Anderson's s. 8 Charter rights, the evidence should not be excluded under s. 24(2). While the Crown concedes that Mr. Anderson had a reasonable expectation of privacy in the Jeep because it was owned by his wife, Ms. Watson, the Crown says that an individual's reasonable expectation of privacy in a vehicle is reduced as compared to a home or office. The Crown relies on *R. v. Belnavis*, [1997] 3 S.C.R. 341, *R. v. Haevischer*, 2013 BCSC 1524, and *R. v. Cole*, 2009 CanLII 72331 (ON SC).

ANALYSIS

- [28] The law in British Columbia with regard to the timeframe for executing a search warrant is settled. A search must commence within the parameters specified in the warrant, but need not necessarily be completed. This is the effect of the decisions in *Cardinal*, *Pickton*, and *Veranski* that the Crown relies on.
- [29] The defence did not argue that I should decline to follow these cases. Instead, the defence emphasizes that the police do not have an unfettered ability to search beyond the timeframe specified in a warrant. The defence relies on the following passages from *Pickton*:
- [91] In summary, the weight of authority on this issue is to the effect that where a warrant uses the "enter - time - search and seize" format, entry must occur within the time specified but that the search and any seizures may extend beyond those parameters. There may be cases where the police conduct that causes the search to continue past the specified time is otherwise unreasonable, and in those circumstances there may well be a basis for

invocation of the Charter. As a general proposition, however, I do not accept Mr. Pickton's submission that an interpretation of the timing clause that does not require the search to be completed within the stipulated time is inconsistent with the Charter. I echo MacKenzie J.'s observation in *R. v. Bohn*, supra, the police cannot reasonably be expected to predict with precision the duration of a search given the exigencies they may encounter. Some measure of latitude is necessary, keeping in mind that at all times the police are constrained by the Charter requirement that the search be reasonable.

- [92] I therefore conclude that the search of Mr. Pickton's property was not rendered unreasonable by the fact that it continued past the time period set out in the warrant.
- [30] The warrant issued by Judicial Justice Campbell used the "enter - time - search and seize" format described by Justice Williams in the above passage from Pickton.
- [31] The manner in which the arguments were developed by the parties on the voir dire raises two sub-issues on the question of whether the search infringed Mr. Anderson's s. 8 Charter rights:
1. Did the search commence within the time parameters of the warrant? If not, then the police did not comply with the warrant.
 2. If the search did commence within the time parameters, was the manner in which the search was conducted otherwise unreasonable?

Sub-issue 1

- [32] The evidence relevant to the first sub-issue is not in dispute. Corporal Hanson testified that on May 7, 2018, within the time period specified in the warrant, he conducted what he characterized as a "cursory" search of the Jeep. The search consisted of opening the doors to the vehicle and observing weapons and other items of potential interest to the investigation. He did not touch or move the items and did not photograph them. The issue is whether this constituted the commencement of a search.
- [33] A similar issue was addressed by Justice Ker in *Veranski*. A warrant was issued in that case authorizing police to search a room in an auto-repair shop that appeared to contain a clandestine drug lab. The police entered the room within the time specified in the warrant, between 10:00 p.m. on May 24, 2007, and 10:00 a.m. on May 25, 2007, and took note of the room's contents, but the search was suspended late in the evening of May 24th due to occupational health and safety concerns and lighting conditions. The search continued through the next day and into May 26. In rejecting the argument the search did not take place within the time parameters of the warrant, Justice Ker stated:
- [114] The Crown correctly argues that when the search began is a question of law and submits that entry with the Search Warrant at 23:00 hrs is when the search in this case began. Although the first exhibit was not seized until May 25, 2007, after 10:00 a.m., I find that the search began at 23:00 hrs on May 24, 2007, when the Team entered the Premises under the

authority of the Search Warrant. Entry, taking control of a premises and conducting a visual search of the area in issue all constitute a search in law. Thus the search in this case commenced with the first entry on May 24, 2007, after Cst. Gormick delivered the Search Warrant to the scene and members of the Team began their execution of it when they entered the Premises pursuant to its authorization.

- [34] In my view, this reasoning is applicable to the circumstances of the present case. Corporal Hanson had physical custody and control of the Jeep. He gained entry to the Jeep by opening the doors and he conducted a visual search, all within the time specified in the warrant. This constituted a search in law. The search of the Jeep was thus commenced within the time parameters of the warrant.

Sub-issue 2

- [35] As noted in *Pickton* at para. 91, even if a search is commenced within the time specified in a warrant, the conduct of the police in executing the search may render the search unreasonable.
- [36] The facts relevant to the conduct of the police in conducting the search of the Jeep in this case are in dispute. The dispute turns on the credibility of Corporal Hanson and his evidence as to the reasons why the search of the Jeep was suspended on May 7, 2018. The Crown says Corporal Hanson's evidence should be accepted. The defence asks me to reject Corporal Hanson's evidence and to conclude that he suspended the search because he was aware on May 7th that an IHIT warrant would be executed the next day. The defence says it was not reasonable for Corporal Hanson to suspend the search for operational reasons such as waiting on a warrant from a separate investigation.
- [37] The factual dispute between the parties requires me to determine the credibility of Corporal Hanson's evidence. The assessment of a witness's credibility involves examination of such factors as their ability and opportunity to observe events, the firmness of their memory, whether the witness's evidence is consistent with independent evidence that has been accepted, whether the witness can be influenced to change or modify their evidence, and whether the witness's testimony seems unreasonable, impossible, or unlikely, and whether the witness has a motive to lie: see *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, affirmed 2012 BCCA 296.
- [38] Corporal Hanson obviously had the opportunity to observe relevant events. He was firm in his memory of the chronology of events on May 7th and his reasons for suspending the search of the Jeep. His evidence did not change between his direct and cross-examination. While the defence suggested that Corporal Hanson became defensive and argumentative on cross-examination, I did not find him to be so. Corporal Hanson did refuse to modify his evidence on being confronted in cross-examination with propositions with which he did not agree. This in itself does not make a witness argumentative. It is true that Corporal Hanson took umbrage at the suggestion that he and Constable Ryder had "cherry picked" which

items to seize from the Jeep, but this is perhaps understandable since the proposition put to him called into question his professionalism.

- [39] Corporal Hanson's evidence about his reasons for suspending the search of the Jeep on May 7th is consistent with other independent evidence on the voir dire. There is no dispute that Corporal Hanson was given three warrants to execute on May 7th and that the search of the Acura and his attendance at the tattoo parlour consumed most of the day. The fact is that it was, at the very least, impractical, if not impossible, for Corporal Hanson to complete the search of the Jeep within the timeframe specified in the warrant, given the other demands he faced that day. This would have added another six to seven hours to Corporal Hanson's work day on May 7th. The result would have been a rushed search that may have extended beyond the time parameters of the warrant, in any event.
- [40] Accordingly, I accept the evidence of Corporal Hanson that he was unaware of the IHIT warrant until the morning of May 8th, and that he suspended the search for the reasons he gave in his evidence. I further conclude it was reasonable for him to suspend the search so that it could be continued carefully and diligently the following day, rather than attempting to complete the search of both the Jeep and Acura on May 7th. It would have been evident to Corporal Hanson from the evidence he identified in his cursory search of the Jeep on May 7th that the completion of the search could be time-consuming.
- [41] I should be clear that I express no opinion on whether it would have been unreasonable for Corporal Hanson to suspend the search of the Jeep on May 7th in order to await the attendance of an IHIT investigator executing a separate warrant the following day. It is not necessary for me to resolve that question, because those are not the facts of this case.
- [42] Finally, I will address the defence submission that, regardless of Corporal Hanson's motives for suspending the search, the fact that it was carried out in conjunction with the execution of the IHIT warrant meant that the items relevant to this proceeding were seized by the IHIT and not by Corporal Hanson. The defence placed particular emphasis on two items that are said to have been seized by the IHIT: a personal recording device that was in the trunk of the Jeep and a bullet casing found in a purse belonging to Ms. Watson.
- [43] I am not persuaded that the fact that the two warrants were executed at the same time renders the search unreasonable. Corporal Hanson testified that he seized everything he believed to be relevant to his investigation. When pressed in cross-examination about his failure to seize the personal recording device and the bullet casing from Ms. Watson's purse, Corporal Hanson explained why he did not consider those items to be relevant to his investigation. I accept Corporal Hanson's evidence on this subject and reject the defence's suggestion that he cherry picked items to be seized from the Jeep.

[44] For these reasons, I conclude that Mr. Anderson's s. 8 Charter rights were not infringed in the police search of the Jeep. The search was conducted under the authority of a warrant and was not otherwise unreasonable. Mr. Anderson's application to exclude evidence obtained as a result of the search is therefore dismissed.

"Horsman J."

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