
CANADA / JUDGMENT

R. v. Ball

2013 BCSC 2495

COURT

Supreme Court of British Columbia

DECIDED

25 July 2013

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2013 BCSC 2495 R. v. Ball

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ball,

2013 BCSC 2495

Date: 20130725

Docket: 38126-2

Registry: Courtenay

Regina

v.

Andrew Tavis Ball

Before: The Honourable Mr. Justice MacKenzie

Oral Ruling on Voir Dire #1

Re s. 8 & s. 9 Charter rights

Counsel for the Crown:

R. Richardson

Counsel for the Accused:

E. Chesterley

Place and Date of Trial/Hearing:

Courtenay, B.C.

July 25, 2013

Place and Date of Judgment:

Courtenay, B.C.

July 25, 2013

- [1] THE COURT: Mr. Ball is before the court for trial, charged with several offences originating from an incident on March 13, 2013. The charges focus on possession of a .38-calibre handgun whilst prohibited from doing so, as well as other handgun offences, including a charge under s. 95(1) of the Criminal Code that Mr. Ball possessed a loaded restricted firearm, that being the .38-calibre handgun, and occupying a vehicle knowing that there was a firearm and ammunition in that vehicle.
- [2] He is also charged with possession of cocaine, and a subsequent charge between March 13 and March 17 of possessing other firearms whilst prohibited from doing so pursuant to the Criminal Code.
- [3] At the commencement of the trial, a voir dire was conducted in order to consider an application by the defence to have the warrantless arrest and search of Mr. Ball declared unlawful.
- [4] The defence says the unlawful police conduct in these circumstances breached Mr. Ball's s. 8 and 9 Charter rights, and as a result applies to exclude as evidence the handgun and several packages of cocaine that were located on Mr. Ball when police immediately searched him upon his arrest. That application for exclusion is of course pursuant to the analysis outlined by the Supreme Court of Canada in the cases of Grant and Harrison.
- [5] Conversely, the Crown says, given the totality of the circumstances, Mr. Ball's arrest was lawful or, alternatively, the police were entitled to detain Mr. Ball for investigative purposes and to conduct a brief protective pat down.
- [6] The facts that are the basis of the charges on Counts 1 through 6 are relatively brief and uncontested. Those facts are that at approximately 8:20 p.m. on March 13, 2013, a 9-1-1 call was placed to the police in Courtenay from a gentleman who identified himself by name to the dispatcher and who said he was a friend of Mr. Tavis Ball.
- [7] That caller told the 9-1-1 operator that he had just had a telephone conversation with Mr. Ball, at which time Mr. Ball told the caller that he was in an area just outside of Courtenay known as the pipeline, and was discharging a handgun. The caller advised the 9-1-1 operator that Mr. Ball was with a woman, who the caller said was the daughter of his boss. The caller also advised the operator that Mr. Ball was a known drug dealer. In addition, the caller said that he could hear shots being fired in the background while he was talking to Mr. Ball.

- [8] It is uncontradicted that this specific caller was unknown to the police. The defence submits that this inability, therefore, to test the reliability of the information provided by the caller is significant. I do not disagree with that general proposition, but in and of itself that issue is not fatal to the Crown's case with respect to the lawfulness of Mr. Ball's arrest and detention.
- [9] In any event, the information that the operator received from this gentleman was dispatched to the police on duty. According to the testimony of Constable Busch, because of the serious circumstances surrounding the call, he and another plainclothes officer in an unmarked car, along with at least two other marked units, responded. One of those marked units was operated by Constable Wood. A few moments after the telephone call was received by the 9-1-1 operator, he observed a green Jeep YJ on a rural road, approximately 2.8 kilometres from this area known as the pipeline. This vehicle matched the description and licence plate of a motor vehicle registered to Mr. Ball.
- [10] This officer followed this vehicle. During this period of time the police dispatcher advised other officers that Mr. Ball was prohibited from possessing firearms because of a prior trafficking conviction. Constable Busch was one of the plainclothes officers who was receiving this information along with his fellow officers.
- [11] In addition to this information, Constable Kelly Godard, advised the police that she had information Mr. Ball was known to her to have a handgun. Constable Busch and his partner then observed Constable Wood behind Mr. Ball's vehicle. They proceeded to follow Constable Wood. A few moments later, in downtown Courtenay, Mr. Ball pulled into a parking lot adjacent to a liquor store and bar.
- [12] At this point in time, I acknowledge defence counsel's point that Mr. Ball operated his motor vehicle in an appropriate fashion and did not embark upon any evasive action or counter surveillance, if you will, as has been described in other cases that I have been presented with today. By the same token, the police, especially Constable Busch, testified that the police sirens or emergency lights were not activated until Mr. Ball pulled in and parked in the liquor store parking lot.
- [13] Because of the totality of the information the officers had received, the police conducted what they described as a high-risk takedown in order to mitigate danger to themselves and the public, due to the information they have about Mr. Ball discharging a handgun only minutes before and his alleged involvement in the drug trade.
- [14] This high risk takedown involved the police exiting their vehicle and drawing their firearms. One of the officers ordered Mr. Ball out of the Jeep, to back up towards him with his hands in the air, and to kneel down, where he was handcuffed behind his back.
- [15] The officers testified Mr. Ball was cooperative and did not resist, and complied with their commands.

- [16] Constable Busch testified that once Mr. Ball was, to use his words, "under control," it was Constable Busch's intention to arrest him at that point in time and provide him with his Charter rights. However, before Constable Busch could effect this arrest, Mr. Ball asked Constable Busch, "What's this all about?" Constable Busch replied, "A gun complaint."
- [17] Constable Busch testified Mr. Ball then said, "I have a gun on me." Immediately upon hearing this utterance, Constable Busch did arrest Mr. Ball for possession of a restricted weapon without having a licence to do so, given that Constable Busch said he was aware Mr. Ball was prohibited from having in his possession a restricted weapon, and advised him of his s. 10(a) and 10(b) Charter rights.
- [18] Constable Busch testified he had one hand on Mr. Ball's arm and with his other hand immediately felt what he believed was the handle of a pistol located on Mr. Ball's lower chest, the side of his body, and under his hoodie. Constable Busch asked Mr. Ball if it was loaded. Constable Busch testified that Mr. Ball said, "Of course it's loaded, it's not much fucking good if it's not."
- [19] Constable Godard then pulled down the hoodie and saw the handgun in a holster, attached to the belt of Mr. Ball and strapped across Mr. Ball's body. Because the police officers did not want to take the handcuffs off Mr. Ball in order to remove the gun, and did not want to take the gun out of the holster, Constable Godard took a small knife and cut the strap of the holster, and the handgun was seized.
- [20] Constable Godard then conducted a search incident to that arrest and located a prescription pill bottle with several small baggies, which it is conceded contained cocaine, as well as a folding baton.
- [21] Moments later, Mr. Ball was arrested for possession of a restricted weapon, possession of a controlled substance, as well as possession of a weapon for a dangerous purpose.
- [22] A further search of Mr. Ball's vehicle resulted in the seizure of 120 live rounds of ammunition, including ammunition for a .38 Special revolver, as well as several empty casings.
- [23] It is in these circumstances that the Crown submits it has established the police had subjective grounds to reasonably believe that Mr. Ball was committing an indictable offence and that, when viewed objectively, this belief was indeed reasonable. As I have said, the alternative argument put forth by the Crown is that the police had reasonable grounds to suspect Mr. Ball was involved in an offence and entitled to detain him for investigative purposes and conduct a brief protective pat-down search. As such, the Crown says there was no breach of Mr. Ball's Charter rights pursuant to s. 8 or s. 9; that is, his right to be secure from an unreasonable search and seizure, as well as arbitrary detention.

- [24] The police are entitled to arrest without warrant pursuant to s. 495(1) of the Criminal Code. Moreover, the police are entitled to search incidental to a lawful arrest in order to guarantee the safety of the police and the accused person, to prevent the accused from escaping, or to secure evidence: see *Cloutier v. Langlois*, [1990] 1 S.C.R. 158.
- [25] In addition to the requirement that the arrest must be lawful and the search conducted as an incident to the lawful arrest, the manner in which the search is carried out must be reasonable: *Stillman*, [1997] 1 S.C.R. 607 at paragraph 27.
- [26] Furthermore, as I have already alluded to, the onus is on the Crown to establish that the arrest was lawful; that is, that the police had reasonable and probable grounds to arrest in order to justify a warrantless search.
- [27] The test for an arrest without warrant has been set out in *R. v. Storrey*, [1990] 1 S.C.R. 241. The court in *Storrey* held that an arrest without a warrant may be made where the police officer believes, on reasonable and probable grounds, the accused has committed an indictable offence, and where such grounds are objectively justifiable. The court concluded it is not necessary that the police officer make a *prima facie* case for conviction before arresting the suspect.
- [28] At paragraph 17, Justice Cory stated:
- the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.
- [29] Justice Cumming, in our Court of Appeal in *R. v. Charlton*, 15 B.C.A.C. 272, defined the standard of proof on this issue as one of reasonable probability.
- [30] Turning first to the subjective belief of the arresting officer, Constable Busch, given the totality of the information he was entitled to rely on, when listening to both the information provided by the dispatch operator, the information that Mr. Ball was prohibited from possessing firearms, and the information from Constable Godard as to her information that Mr. Ball had a handgun, I accept Constable Busch's belief that he had reasonable and probable grounds on which to base his arrest.
- [31] As I have just mentioned, these grounds must also be justifiable from an objective point of view. When determining this issue of objective justification for an arrest, the totality of the circumstances must be taken into consideration: see *McKenzie* in the Ontario Court of Appeal, 2011 ONCA 42.
- [32] The test as to whether the officer had reasonable grounds to arrest Mr. Ball, when viewed objectively, was recently reviewed by Justice Frankel in *Jir*, 2010 BCCA 497. At paragraph 27, Justice Frankel stated:

As has been stated many times, the "reasonable grounds" standard is not only less than that required for conviction, but is also less than the civil standard of proof. Madam Justice Wilson put it this way in *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.

Justice Frankel then went on to state:

More recently, in *Mugesera v. Canada* . . . 2005 SCC 40 . . . the Court stated (at para. 114):

the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities [citations omitted].

[33] Justice Frankel then noted the comments of Justice Hill in *Sanchez*, 93 C.C.C. (3d) 357, where at 367, Justice Hills said:

The appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted.

[34] Applying this test to the circumstances of the present case, including the detailed 9-1-1 call from the caller, the fact that this person had said Tavis Ball was a friend of his, that Mr. Ball was with a younger female, that Mr. Ball told his friend he was firing a handgun at a specific location, and finally that this friend could hear shots being heard while having this conversation with Mr. Ball, coupled with the information Mr. Ball was prohibited from having in his possession restricted firearms because of the trafficking conviction, in my view this specific and first-hand information, when viewed objectively, gave Constable Busch reasonable grounds to believe Mr. Ball was in unlawful possession of a handgun, and entitled him to arrest Mr. Ball based on this constellation of information.

[35] In my view, as Justice Doherty stated in *Golub*, 34 O.R. (3d) 743, not only were the police justified in acting on this information, they would have been derelict in their duty if they did not act on it.

[36] In those circumstances, therefore, I find the arrest of Mr. Ball was lawful.

[37] I am also satisfied the search incidental to the arrest was reasonable, once again given the totality of the circumstances. On this point, the police properly described this 9-1-1 report as a "gun call" requiring immediate attention. As Justice Doherty said in *Golub*, at page 7:

In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered.

[38] In my view, the high-risk takedown of Mr. Ball by the officers was justified and reasonable. Once again, when considering this issue, the comments of Justice Doherty in Golub are apropos to the present circumstances. At page 11, he said:

In this case, I am concerned with the police interest in protecting the safety of those at the scene of the arrest. This interest is often the most compelling concern at an arrest scene and is one which must be addressed immediately. In deciding whether the police were justified in taking steps to ensure their safety, the realities of the arrest situation must be acknowledged. Often, and this case is a good example, the atmosphere at the scene of an arrest is a volatile one and the police must expect the unexpected. The price paid if inadequate measures are taken to secure the scene of an arrest can be very high indeed. Just as it is wrong to engage in ex post facto justifications of police conduct, it is equally wrong to ignore the realities of the situations in which police officers must make these decisions.

At page 12, Justice Doherty goes on to state:

In my opinion, one cannot ask the police to place themselves in potentially dangerous situations in order to effect an arrest without, at the same time, acknowledging their authority to take reasonable steps to protect themselves from the dangers to which they are exposed.

[39] In my view, the police were justified in acting on the information they had received pertaining to Mr. Ball on the night in question, involving his discharging of a firearm minutes before the police observed his motor vehicle in an area consistent with having just come from the location where the caller said Mr. Ball advised him he was firing a handgun, and as well taking him into custody in the manner in which they did.

[40] Alternatively, as the Crown has submitted, given the totality of the circumstances, I am also satisfied the officers were acting reasonably in detaining Mr. Ball for investigative detention and conducting the protective pat down.

[41] The Supreme Court of Canada in *R. v. Mann*, [2004] 3 S.C.R. 59, stated the principle that while there is no general power of detention for investigative purposes, police officers may detain an individual if there are reasonable grounds to suspect, in all the circumstances, that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. The court concluded that these circumstances include the extent to which the interference with individual liberty is necessary to the performance of the officer's duty, to the liberty interfered with, and to the nature and extent of the interference.

[42] At paragraph 43, Mr. Justice Iacobucci for the majority stated the following:

The importance of ensuring officer safety has been recognized in obiter by this Court in *R. v. Mellenthin*, [1992] 3 S.C.R. 615. Police officers face any number of risks everyday in the carrying out of their policing function, and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible. As noted by L'Heureux-Dubé J. in *Cloutier*, supra, at p. 185, a frisk search is a "relatively non-intrusive procedure", the duration of

which is "only a few seconds". Where an officer has reasonable grounds to believe that his or her safety is at risk, the officer may engage in a protective pat-down search of the detained individual. The search must be grounded in objectively discernible facts to prevent "fishing expeditions"

- [43] In these circumstances, I am satisfied that the officers did have a reasonable basis to detain Mr. Ball for investigative purposes and to conduct the brief pat-down search that they did when they were locating the firearm.
- [44] For all of these reasons, I am satisfied that the arrest was lawful, that the search was reasonable, and the police were entitled to conduct themselves in the manner in which they did. In either scenario, the arrest or the investigative detention scenario, there was no breach, in my view, of Mr. Ball's s. 8 or s. 9 Charter rights.
- [45] As a result, there is no need for me to invite counsel to make submissions with respect to the Grant analysis pursuant to s. 24(2) of the Charter.
- [46] I will state, however, while acknowledging I have not heard submissions on this point, the comments of Mr. Justice Moldaver in the decision in McKenzie might very well have been instructive in considering the issue of whether the evidence should have been excluded pursuant to 24(2), but be that as it may, I am not required to embark upon that analysis.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie

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