
CANADA / JUDGMENT

R. v. Cao

2008 BCSC 139

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 139 R. v. Cao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cao,

2008 BCSC 139

Date: 20080204

Docket: 69673-2

Registry: New Westminster

Between:

Regina

And

Van Dung Cao

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Crown

J. Loo

Counsel for the Accused

N. Cobb & E. Lewis

Date and Place of Trial/Hearing:

December 19 and 20, 2007

New Westminster, B.C.

INTRODUCTION

- [1] The accused is charged with production of marihuana and possession of marihuana for the purpose of trafficking contrary to s. 7(1) and s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The events giving rise to these charges occurred on March 10, 2004 when members of the Surrey R.C.M.P. drug squad executed a search warrant at a residence located at 11143-157A Street, Surrey, B.C. (the "Residence").
- [2] Inside the Residence the police located a marihuana grow operation in an unfinished basement area. Within this basement area four rooms were notionally created by room dividers and entry spaces. Each of the four rooms contained marihuana plants at various stages of development. In total, the basement contained 704 plants.
- [3] The accused does not challenge the validity of the search warrant; however, the accused maintains the search warrant was executed in an unreasonable manner and therefore contrary to his rights under s. 8 of the Charter of Rights and Freedoms. While noting that the onus of proof rests with the accused to prove a breach of s. 8 of the Charter on a balance of probabilities, the Crown agreed to call its evidence in a voir dire to facilitate the accused's argument. In addition, the Crown did not take issue with the accused's standing to argue a breach of his s. 8 rights.
- [4] The issue is whether the search warrant was executed in an unreasonable manner and, in particular, whether:
 - (a) the police properly announced their presence at the Residence.
 - (b) the police were denied entry implicitly by providing a reasonable period of time, in all of the circumstances, for any occupant to respond to their presence; and
 - (c) the entry with drawn weapons and the immediate detention and arrest of the accused was in the circumstances unreasonable.

SUMMARY OF THE EVIDENCE

- [5] On March 10, 2004 six members of the Surrey R.C.M.P. drug squad, including Constables Greenway and Foster, attended at the Residence for the purpose of executing the search warrant. Although Constable Foster had conducted surveillance of the Residence on a number of occasions prior to March 10 to obtain grounds for the search warrant, the drug squad did not watch the premises for any length of time prior to their entry on March 10. It is also apparent that the drug squad did not carry out a risk assessment of the Residence to determine the security measures required for the entry. Constable Foster testified that neither surveillance nor a risk assessment prior to entry with a search warrant is standard practice for the Surrey R.C.M.P.

- [6] On the nine occasions that Constable Foster conducted surveillance of the Residence before obtaining a search warrant, he did not observe any persons coming and going from the Residence. Nor did he observe any vehicles associated with the Residence. Further, there were no specific risks identified in respect of this Residence apart from the concerns generally known to be associated with residences housing marihuana grow operations. In particular, there was no specific concern about weapons inside the Residence and the drug squad had no reason to believe anyone was in the Residence when the warrant was executed. Constable Foster testified that there were also no identified concerns with regard to the preservation of evidence in this particular case.
- [7] The Residence is a two story house with a crawl space basement. The drug squad members approached the front door of the Residence with a battering ram ready to secure entry. The front door was a double wooden framed entry way with opaque glass insets. One of the officers pounded on the front door, and then called out "police" and "search warrant". Although Constable Foster's notes do not indicate that the words "search warrant" were spoken at the front door, both he and Constable Greenway testified that this was called out along with the word "police". I accept their evidence despite the discrepancy in Constable Foster's notes.
- [8] Because front doors in this neighbourhood are often barricaded, the drug squad abandoned entry via this entrance and proceeded to the garage door situated on the north side of the property. There is no evidence as to how long the police waited at the front door and there are various estimates of how long it took to re-locate to the garage door. Neither officer who testified recorded the time in their notes. Constable Foster estimated the time was between three and three-and-a-half minutes and Constable Greenway testified it took almost two minutes. They both testified that the female officer carrying the battering ram had some difficulty managing it and this delayed their relocation.
- [9] In addition, Constable Foster's notes and report to crown do not support his evidence that the drug squad officers moved together from the front door to the garage entry. The constable's notes and the report to crown appear to indicate the officers were in two groups and that they approached both doors simultaneously. However, Constable Foster testified that he had a clear recollection of the events because this was the first time he had been the affiant for a search warrant in a marihuana grow operation. Further, Constable Greenway's evidence corroborated Constable Foster's recollection of how the drug squad moved from the front door to the side entry in the garage. Finally, the accused testified that he heard the pounding on the front door and was on his way to answer it when he heard the noise at the garage door about a minute later. Thus, even the accused's evidence appears to corroborate the constables' evidence that there was at least a minimal period of time separating the knock at the front door and the entry through the side door at the garage.

- [10] Based on the evidence as a whole, it is more probable than not that there was at least one minute and possibly close to two minutes between the knock at the front door and the entry via the side door in the garage.
- [11] The manner of entry through the side door is also in dispute. Constable Foster testified in direct that once at the garage door he again pounded on the door, announced "police" and "search warrant", and waited 8 to 15 seconds before forcing entry with the battering ram. In cross examination, the constable conceded that he did not time the entry and the wait period could have been as short as five seconds. Constable Foster also agreed that he made no note of any announcement at the garage door before entry was forced and, further, that in the three-and-a-half years since this search warrant was executed he was involved in over two hundred search warrant entries. Constable Greenway could not recall if there was any announcement at the garage door.
- [12] Based upon the evidence of the constables I am satisfied on a balance of probabilities that there was no announcement at the garage door. Constable Foster considered a very short wait time for entry was justified due to the prior "knock and announce" at the front door. It is equally likely that he considered a second announcement was unnecessary for the same reason.
- [13] The members of the drug squad entered the garage door with guns drawn immediately after battering down the door. They proceeded through the garage and kicked open the door leading from the garage to the inside of the house with guns drawn and without any further knock and announcement. Immediately after kicking in the door, the officers proceeded inside to the laundry room where they found the accused. The accused was taken into custody with guns pointed at his head and with the officers screaming out their commands. The accused was handcuffed behind his back and arrested for production of marihuana.

ARGUMENT

- [14] The accused argues the police violated his rights under s. 8 of the Charter by failing to adhere to the well established "knock and announce" rule. In particular, the accused maintains the police failed to provide him with sufficient time to respond to the knock at the front door and then entered through the garage door without any further announcement of their presence or lawful purpose for entry. The accused argues that by summoning him to the front door, abandoning that means of entry, and then gaining entry through the garage door without further notice, there was insufficient time to react and answer their request.
- [15] The accused argues there were no exigent circumstances that would warrant a dynamic entry without proper notice to any occupants. There was no evidence of any specific danger associated with the Residence and the police had no reason to suspect anyone was inside the house. The officers simply did not address their minds as to whether there were persons inside the house.

- [16] The accused also maintains the officers' decision to enter with violence, battering down the door and having guns drawn and ready to shoot, was unreasonable in all of the circumstances. There was no risk assessed in regard to the Residence; there was no prior surveillance to indicate there may be people in the Residence; and there was no indication that evidence may be destroyed if entry was gained the proper way.
- [17] Further, the accused argues the violent arrest with guns drawn immediately after entry was also unreasonable in the circumstances. The arrest thus aggravates the unreasonable entry to the Residence.
- [18] Finally, the accused maintains that the evidence should be inadmissible pursuant to s. 24(2) of the Charter as a result of the serious breaches of s. 8, the lack of good faith on the part of the officers, the fact the police conduct was standard procedure, and the deleterious long term impact on the justice system if the police are allowed to continue this practice.
- [19] In support of his arguments, the accused relies upon *R. v. Vadon*, [2000] B.C.J. No. 2081 (S.C.) (QL), *R. v. Mai*, 2005 BCSC 29, and *R. v. Nguyen* (28 November 2001), Vancouver 108670-1 (B.C. Prov. Ct.).
- [20] The Crown argues the police entry in this case was not a breach of s. 8 of the Charter. Between the "knock and announce" at the front door and the entry by the garage door, there was a period of up to two minutes available to the occupants to respond to the police request for admission. Having received no response, the Crown argues the police were entitled to presume they had been denied entry.
- [21] The Crown also argues that two minutes was a reasonable period of time in all of the circumstances. In a suspected marihuana grow operation the police must act quickly for their safety and the safety of any occupants for a number of reasons. First, it is normal to find weapons or traps associated with marihuana grow operations. Second, there is a risk that documentary evidence will be destroyed. Third, with additional time an accused may arm himself prior to entry by the police or escape by another exit.
- [22] The Crown maintains the manner of entry with guns drawn and the arrest of the accused did not violate s. 8 of the Charter. The police must protect themselves from risks that may be present in a grow operation. Further, the Crown argues that the police should not be straight-jacketed because every arrest poses a danger to the arresting officers. There is no evidence that guns remained out and pointed at the accused after his arrest and it is reasonable that guns remain drawn for the purpose of clearing the Residence of other persons.
- [23] Lastly, the Crown argues if the police conduct amounts to a breach of s. 8 of the Charter, the evidence should not be excluded under s. 24(2). To do otherwise would bring the administration of justice into disrepute.
- [24] In support of its submissions, the Crown relies upon *R. v. Lam*, 2002 BCCA 99, *U.S. v. Banks*, 540 U.S. 31 (2003), *R. v. Nguyen*, 2007 ONCA 645, and *R. v. Collins*, [1987] 1 S.C.R. 265.

DECISION

[25] The lawfulness of an entry to a residence pursuant to a valid search warrant depends upon the reasonableness of the manner of entry chosen by the police. Where there are no exigent circumstances justifying a dynamic entry, as in the circumstances of this case, the police are required to knock, announce their presence and their lawful purpose for entry, and allow a reasonable amount of time for a response by any occupants. This so called "knock and announce" rule is not a mere formality. This rule is necessary to ensure the personal safety of anyone inside the residence at the time of entry as well as the police. When the police batter down a door to secure entry to a residence unannounced with firearms drawn and ready to be discharged, it creates a high degree of risk to both the occupants and the police. This risk is substantially reduced when the occupants have time to prepare themselves for the entry rather than responding instinctively to an unknown and possibly dangerous intruder.

[26] The underlying basis for the "knock and announce" rule is found in *Eccles v. Bourque* (1974), 19 C.C.C. (2d) 129 (S.C.C.) where Dickson J. (as he then was) said at p. 133:

An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance.

[27] A dynamic entry, where there is no prior announcement and request to enter, is only justified if there is a real threat of violent behaviour associated with the particular residence or a demonstrated risk that evidence could be destroyed. It is not sufficient to warrant a dynamic entry that the police identify the risks associated with marihuana grow operations in general. As Williamson J. concluded in *Vadon* at ¶21:

To attempt to justify the routine use of a battering ram to violate, unannounced, a private residence on the grounds that there have been weapons found in some homes where there have also been marihuana grow operations does not come close to meeting the onus upon the police to show why they concluded such force and surprise were necessary in a particular entry. It is clear from the comments in *Genest* [[1989] 1 S.C.R. 59] that the Crown must lay an evidentiary framework to show that there were grounds to be concerned about the possibility of violence in this particular case.

[28] There were clearly no exigent circumstances identified in evidence warranting a dynamic entry in this case. The police had never observed anyone associated with this Residence. There is also no evidence that, at the time, the police addressed their minds to the question of whether there was a risk of a violent response from any occupants in this Residence in particular. Nor did the officers consider a dynamic entry was necessary simply because they suspected it housed a marihuana grow operation.

- [29] It is also apparent that a warrant for the purpose of searching a residence for bulk or growing marihuana, equipment, and documentation does not, by itself, justify a dynamic entry to prevent the destruction of evidence. This is not the kind of evidence that may be destroyed in the time necessary for a proper announcement: Vadon at ¶22. Indeed, Constable Foster acknowledged that in this case there was no demonstrated risk of the destruction of evidence.
- [30] The facts of this case are somewhat unusual. The police first sought entry through the front door of the Residence, abruptly abandoned this route, and then gained entry through a side door in the garage attached to the house. While the police knocked and announced at the front door, there was no announcement at the garage door before the garage door was battered down and entry secured. Between one and two minutes elapsed between the time of the "knock and announce" at the front door and entry through the garage door.
- [31] One of the underlying purposes of the "knock and announce" rule is to allow any occupants a reasonable period of time to permit entry to the police. In most cases, one or two minutes would clearly be sufficient time for an occupant to respond to a demand for entry. In this case, however, the police directed the occupant's attention to the front door and then surprised him by entering through the garage door. Whether or not I accept the accused's evidence that he was endeavouring to respond to the pounding on the front door, the police have to assume that when they knock and announce at the front door, that will be the door to which the occupants will direct their attention. Consequently, if the police abandon the front door for another entrance to the residence, they must at least knock at the second door and give a reasonable period of time for the occupant to respond. Absent these minimum standards, the entry is in effect a dynamic one, which surprises the occupant, without any evidence of extrinsic circumstances.
- [32] While Constable Greenway suggested five seconds was a sufficient period of time to wait at the garage door because they had already given the occupant time to ready weapons and respond with violence as a result of their knock at the front door, it is not acceptable for the police to create their own exigent circumstances. Moreover, Constable Greenway's assumption has no evidentiary foundation because there was neither a risk of weapons associated with this Residence nor any expectation that the house was occupied.
- [33] It must also be emphasized that this was not a small apartment where any door could be quickly accessed by an occupant. This was a two storey residence with a basement crawl space. The breeched door was accessed through an inside door in the basement leading to the garage and a walk across the garage. Thus, it is questionable whether an occupant could have responded to the garage door in the five seconds allotted by the police had they knocked and announced at this door.

- [34] Thus, I conclude the police violated the "knock and announce" rule in the circumstances of this case. They failed to alert the occupant to their demand for entry to the garage door and failed to provide a reasonable time for response before battering the door down and gaining entry violently.
- [35] Aggravating this violation of s. 8 of the Charter was the presence of drawn weapons in the ready position. Underlying the "knock and announce" rule is the personal safety of the police and the householder who may be placed in jeopardy when there is a violent intrusion into a private residence. Because there was no formal or informal risk assessment supporting the use of drawn weapons in this particular case, and no reasonable suspicion that anyone was inside the Residence, the abrupt and violent entry executed by the police went well beyond what was necessary in the circumstances. The actions of the police created a real risk of harm to an occupant by accidental shooting and to the police in terms of an aggressive response to the violent entry. In my view, a shocking entry without a prior "knock and announce", with guns drawn and ready to be discharged, and pointed at the accused's head, could have produced disastrous consequences. As the Commission of Inquiry into the police conducted by then Mr. Justice Oppal said:

Most people are aware of the instruments of force available to the police, and the need to avoid even presenting the appearance of danger to entering officers. The knock-notice rule permits the householder, such as the young man shot in the 1992 drug raid, to prepare to be safely detained or arrested and to put down toy guns, channel changers, or other objects that have the potential to mistakenly signal life-threatening danger to the entering police officers.

- [36] Turning to the inquiry under s. 24(2) of the Charter, the Court must address whether the evidence obtained in breach of the accused's s. 8 rights should be admissible in the trial. The evidence is non-conscriptive and thus its admission will not affect the fairness of the trial process. Accordingly, it is the serious nature of the breach and whether the administration of justice will be brought into disrepute by the admission or exclusion of the evidence that must be considered.
- [37] Turning to the facts of this case, I find the violent entry executed by the police was unnecessary in all of the circumstances and clearly created a danger for the accused and the police. Coupled with the high expectation of privacy accorded to persons in their homes, the police created an extremely dangerous situation by forcing entry without any regard to the particular circumstances before them. Moreover, this kind of violent and forceful entry with guns drawn appears to be standard practice for the Surrey R.C.M.P. I note here that neither pre-entry surveillance nor a risk assessment to determine the amount of force required for a safe entry is normal procedure.

- [38] The charges against the accused are serious and, if convicted, he could face heavy penalties. Further, it is well known that in the Lower Mainland the existence of marihuana grow operations in private residences is an ever increasing problem that in some municipalities has become epidemic. As a consequence, society's interest in bringing those charged with serious offences to justice is a significant factor in this case.
- [39] Balancing the relevant factors, I am satisfied the evidence should be excluded. Notwithstanding production of marihuana is a serious offence and the Crown will be unable to prove its case without the evidence secured by the entry to the Residence, to admit the evidence would bring the administration of justice into disrepute. The manner of entry employed by the police in this case potentially endangered lives without any exigent circumstances to warrant their actions. They acted without addressing their minds to any particular risks identified in regard to the subject Residence.
- [40] There were clear alternatives available to the police that did not involve a breach of the accused's rights under the Charter. As a consequence, there was an absence of good faith on the part of the police, not because the breach was deliberate, but because their actions were unreasonable. Applying the Collins principles, it is inappropriate to condone the police failure to take the proper precautions to preserve the safety of all involved as well as the rights of the accused. Short cuts taken by the police that ignore constitutional rights should not be condoned. As Doherty J.A. says in *Regina v. Golub* (1997), 117 C.C.C. (3d) 193 at 214-15 (Ont. C.A.):

The moral authority to apprehend and punish those who commit crimes rests on the community's commitment to the rule of law. Convictions procured by state violations of our most fundamental law lack that moral authority. Respect for the rule of law and the long-term viability of the justice system suffers where the police engage in "short cuts" or fail to respect the constitutional rights of those they encounter in the course of the exercise of their duties. The long-term harm to the justice system is not worth the short-term gain made by admission of the evidence which was obtained in a manner that ignores the rule of law.

- [41] For these reasons, I find the evidence obtained during the execution of the search warrant is inadmissible.

"The Honourable Madam Justice Bruce"

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