
CANADA / JUDGMENT

R. v. Chappell

2016 BCSC 2603

COURT

Supreme Court of British Columbia

DECIDED

17 February 2016

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2016 BCSC 2603 R. v. Chappell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chappell,

2016 BCSC 2603

Date: 20160217

Docket: 63166

Registry: Chilliwack

Regina

v.

Gerald Allen Chappell

Before: The Honourable Mr. Justice Grist

Oral Ruling on Voir Dire #1

Counsel for Crown:

J.M. Le Dressay

Counsel for Defence:

A.S. Sidhu

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

February 15 - 16, 2016

Place and Date of Judgment:

Chilliwack, B.C.

February 17, 2016

- [1] THE COURT: The accused applies for suppression of evidence of a marihuana grow op found after Abbotsford Police entered a residence occupied by the accused and his daughter on January 15, 2012. The evidence is said to be the product of an unlawful search and a breach of s. 8 of the Canadian Charter of Rights and Freedoms [Charter].
- [2] The police officers who attended the accused's rural residence that day were responding to a dispatch after receipt of a 9-1-1 call at the detachment. The 9-1-1 call was from an anonymous source informing that a man named "Gerry" was holding another man tied up in a residence at 33520 Townshipline Road, that the man held there had been assaulted, and that there was a grow op and firearms in the house. The male caller said he had been in the house two hours before the call.
- [3] The officers that attended the residence were dispatched at 13:25 and arrived about 15 minutes later. Access to the house on the property was by way of a driveway connecting the house to Townshipline Road. There was a chain link fence enclosing at least the front yard of the property and two pit bull dogs were inside the fenced area.
- [4] The dispatch office did a search and identified Brittany Chappell, the accused's daughter, as being associated with the property. She was contacted by phone and asked to come to the house and take charge of the dogs. She informed that her father was on his way.
- [5] Shortly after, the accused, Mr. Gerald Chappell, arrived and spoke to Sergeant Chesley, who had taken over the investigation. Sergeant Chesley explained why the police were there and that they wanted him to take charge of the dogs to allow the officers to search the house to assure there was no one being held there or who needed medical assistance. The accused informed there was another dog in the house, that the complaint was ridiculous, and that a similar report had been made a few days before.
- [6] Sergeant Chesley confirmed there had been a previous 9-1-1 call similar to the one they were responding to. The earlier call, however, had given an address of 33523 Townshipline Road; an address that did not exist. The officers dispatched as a result of this first call made inquiries of Mr. Chappell on that day, but went no further with the investigation, likely because the address did not match.
- [7] The police remained adamant that they were going to enter the house. Mr. Chappell proposed he would take the three dogs and secure them in a room in the house. Sergeant Chesley agreed to this, and he entered the house and came back out a few minutes later.

- [8] The police entered and went room to room conducting a cursory search. When they reached the basement level, they found the basement area was sealed off with a locked door. The officers again spoke to the accused who said a friend was using the basement as storage and had the key. When told that the police were going to breach the door, he said he would look in his truck to see if he in fact had a key, and returned a short time later with a key to the door. On entry, a marihuana grow op was found consisting of several rooms of growing marihuana.
- [9] The issue presented on the voir dire called to determine the Charter question was whether the police actions fell within their common law duty and authority to preserve life and safety. This police common law duty to protect life is clearly established in *R. v. Godoy*, [1999] 1 S.C.R. 311 [Godoy]. The question in any individual case is whether the police conduct said to be in furtherance of that duty, in the context of the circumstances of the case, oversteps to constitute an unjustifiable use of police power.
- [10] In *R. v. Simpson*, [1993] O.J. No. 308 (Ont. C.A.) [Simpson], Doherty J.A. described what needs to be considered in assessing police action and whether it constitutes a justifiable response to the common law duty. From p. 499 of Simpson:
- [T]he justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.
- [11] The significance of the fact the police action was triggered by a 9-1-1 call was set out in *Godoy* at para. 16:
- [16] A 911 call is a distress call - a cry for help. It may indeed be precipitated by criminal events, but criminal activity is not a prerequisite for assistance. The point of the 911 emergency response system is to provide whatever assistance is required under the circumstances of the call. In the context of a disconnected 911 call, the nature of the distress is unknown. However, in my view, it is reasonable, indeed imperative, that the police assume that the caller is in some distress and requires immediate assistance. To act otherwise would seriously impair the effectiveness of the system and undermine its very purpose. The police duty to protect life is therefore engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined.
- [12] The call in this case was from a person apparently reporting criminal activity and not someone being victimized, but the priority of the response when the reported victimization comes from a third person remains similar to a first-person report.

- [13] The issue of justifiability becomes acute when the police action in response to their common law duty comes in conflict with a recognized freedom associated with the privacy rights of others. In many cases, this issue crystallizes when the police response to their common law duty brings them to the doorstep of a residence or other place where someone has a clear privacy interest.
- [14] In *Godoy*, the police responded to a disconnected 9-1-1 call and attended at the front door of the apartment where the 9-1-1 call had originated. The accused answered the door, assured the police that nothing was wrong, and attempted to close the door. The police forced entry and searched the premises. In dealing with these facts, the court found at para. 18 of *Godoy*:
- [18] In the case at bar, it was necessary for the police to enter the appellant's apartment in order to determine the nature of the distress call. There was no other reasonable alternative to ensure that the disconnected caller received the necessary assistance in a timely manner.
- [15] Accordingly, the action taken must be seen as reasonable in the circumstances; and there must be no other obvious course of action with less impact on the privacy concern that constitutes an appropriate response.
- [16] The test here, however, recognizes the clear need for direct and practical action. The test of reasonableness is something quite different from the tandem objective/subjective test of reasonable belief for the issuance of a warrant. The circumstances where the common law duty is in play are exigent. Lives may be in danger, and a more dramatic response is mandated.
- [17] However, in some cases, the uncertain veracity of the information will challenge the extent of the response. *R. v. Brunskill*, 2010 BCSC 187, is such a decision.
- [18] In *R. v. Larson*, 2011 BCCA 454 [Larson] the information related to a reported home invasion and came from a mentally disturbed person, clearly being affected by paranoid delusions, who informed that the supposed criminal acts had been directed at him in his home. Nothing else suggested criminal activity in the house, and there were steps the police could have taken to confirm if there had been any illegal activity. At paras. 38 and 39 of *Larson*, the court followed the two-step analysis that was suggested in *Simpson* in the following manner. The court states at para. 38:
- [38] In this case, prudence dictated that the police not ignore the accused's report of a home invasion. Accordingly, I accept that the police conduct fell within the general scope of their duties.
- [19] But at para. 39, the court states:

- [39] The real question in this case, it seems to me, is whether it was reasonable, in all the circumstances, for the police to conduct a search of Mr. Larson's home, keeping in mind that such a search could only be justified on the basis that it was conducted to protect life and safety. As this Court pointed out in Jamieson [2002 BCCA 411] at para. 28, a search that is conducted for the purpose of investigating crime requires a warrant. Only where there are concerns of a threat to life or personal safety will a warrantless entry and search be justified.
- [20] On the facts in Larson, the unwarranted search of the home was ruled unreasonable, and the evidence of the grow op found in the home was excluded. This was notwithstanding the fact that the police duty was initially engaged by the delusional report of the accused.
- [21] In this case, the defence did not challenge the fact that the initial report of an assault, an injured person being held captive and the presence of firearms, gave rise to the common law duty to preserve life. The challenge here was to the police officer's fixed insistence on an entry into the premises after they had spoken to the accused, who had agreed to secure the dogs and whom they had allowed to enter the house unaccompanied to lock the dogs into an interior room. In the defence submission, this illustrated that although the accused had the same given name as the person indicated in the 9-1-1 report, and notwithstanding there were said to be firearms and a captive person in the house, the officers had satisfied themselves that there was no real threat. In these circumstances, the continued search was said to be unreasonable.
- [22] The argument has some force, but it is clear that the officers' intention to search the premises was stymied by the presence of the dogs and, as Sergeant Chesley acknowledged, she had to weigh the disturbing prospect of having to shoot the dogs in dealing with the issue of officer safety. She had obviously gained some confidence that the accused was going to cooperate, and she made a decision to enlist his aid based on her - and to quote from her evidence - "best judgment". There might be some debate whether her decision was in fact warranted. But for the purposes of this analysis, I am satisfied that, in the circumstances, the officer's original concern, focusing on their common law duty, continued to be operative. The officers' insistence that they proceed with their search to assure there was no safety concern remained a reasonable one.
- [23] Factors that weigh in support of the continued viability of the concern are:
1. The report apparently came from someone having firsthand knowledge of the situation.
 2. The supposed threat to the captive individual was an exigent one.
 3. The report named a person actually associated with the house, in fact the accused.
 4. The house was guarded by dogs, a feature sometimes seen in cases where a grow op is on the premises.
 5. Firearms are often associated with grow ops.

- [24] The fact there had been a call with similar characteristics a few days before is to my mind a neutral factor. The police went as far with this as they judged appropriate in the circumstances, but this did not result in an actual search of the premises, which the officers on scene on January 15 deemed necessary in response to the call received on that day.
- [25] On balance, I find the police action in insisting on the fairly cursory search reasonable in the circumstances and justifiable in response to the common law duty to preserve life and safety.
- [26] Accordingly, the s. 8 challenge is dismissed.

"W.G. Grist J."

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