
CANADA / JUDGMENT

R. v. De Paolis

2017 BCSC 2531

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 2531 R. v. De Paolis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. De Paolis,

2017 BCSC 2531

Date: 20171102

Docket: 168878-2; 168878-3

Registry: Victoria

Regina

v.

Giordano Martin De Paolis

Before: The Honourable Mr. Justice Baird

Oral Ruling on Voir Dire

Counsel for the Crown:

S. Simpson

Counsel for the Accused:

T. Russell

Place and Date of Trial/Hearing:

Victoria, B.C.

October 31, 2017

November 1 & 2, 2017

Place and Date of Judgment:

Victoria, B.C.

November 2, 2017

- [1] THE COURT: On the present indictment, Mr. De Paolis is charged on Count 1 with possession of cocaine for the purposes of trafficking, and on Count 2 with possession of MDMA, both alleged infractions contrary to the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [2] This is a Charter voir dire. The accused has argued that he was unlawfully arrested, and that the search of his person and motor vehicle, both claimed to be justified as incidental to arrest, were bad and unconstitutional. He also argued, although not strenuously, that his right to retain and instruct counsel without delay was infringed or denied. He seeks the exclusion from evidence of cocaine, MDMA, and money found on his person and in the vehicle.
- [3] The facts may be briefly stated. At approximately 11:20 p.m. on July 30, 2016, Sergeant Keleher was patrolling in the downtown area of Victoria. He received a dispatch concerning a possible impaired driver in the area of Bay and Blanshard Streets. He patrolled the area but was unable to locate the vehicle identified in the dispatch. However, he received information that the registered owner lived on Oak Bay Avenue. Sergeant Keleher started driving away from the downtown core towards Oak Bay and the registered owner's address to continue an investigation of the complaint.
- [4] As he was approaching the intersection of Pandora Avenue and Fort Street, he noticed a black Hyundai motor vehicle, not the vehicle that had been the subject of the dispatch, bearing the licence plate number 517 RRD. Sergeant Keleher observed this vehicle to swerve over the centre line and then go through a very stale yellow light at the intersection of Pandora and Fort, the light turning red, he said, just as the vehicle entered the intersection.
- [5] He radioed in the licence plate number and was advised at some point, he was not sure exactly when, that it was a rental car owned by National Rental. Thinking that the driver was impaired or distracted, Sergeant Keleher pulled the vehicle over. Mr. De Paolis was the driver and only occupant. Constable Keleher engaged him in conversation. He described Mr. De Paolis as talkative, friendly and even, he said, a little bit cocky. He was more talkative and friendly, at any rate, than most people that Sergeant Keleher has stopped in his 16 years as a police officer.
- [6] He noted an odour of alcohol on Mr. De Paolis's breath. He asked Mr. De Paolis if he had been drinking and the latter replied that he had drunk some tequila around dinner time. While they were talking, Sergeant Keleher noted what looked like a white powdery residue on the top of Mr. De Paolis's left hand in the small space between his thumb and forefinger.

It appeared to be concentrated in the middle, this spot, but it dissipated at the edges.

Sergeant Keleher said that the substance was adhered to Mr. De Paolis's flesh as if it were sticky. He said, "In my experience, I believed that this was possibly cocaine on his hand." He also noted what he called a "white fleck" on the accused's cheek, which he thought might also be cocaine.

- [7] Sergeant Keleher directed the accused to get out of his car. He testified that he had already decided to arrest the accused for possession of a narcotic, but he made a conscious decision not to say so until the accused was out of the vehicle and on the street. He did this, he said, because he was afraid that if he announced his intention to arrest Mr. De Paolis beforehand, Mr. De Paolis might take off in his motor vehicle. This has happened to Sergeant Keleher before, he told me.
- [8] As Mr. De Paolis was alighting from the vehicle, Sergeant Keleher claims to have seen in plain view, between the driver's seat and the driver's door, a clear glass vial with a black lid. This vial appeared to contain a white powdery substance that Sergeant Keleher suspected to be cocaine. Constable Keleher placed Mr. De Paolis under arrest for possession of cocaine and gave him his s. 10(a) and (b) Charter rights from memory. Mr. De Paolis said that he did not wish to speak to a lawyer at that stage.
- [9] Sergeant Keleher searched Mr. De Paolis and found another vial of what looked to be cocaine in his front pocket. He had 49 20-dollar bills in his back pocket. Have I got that right, Ms. Simpson, was that where the 49 twenties were found, counsel?
- [10] MS. SIMPSON: I believe so, My Lord.
- [11] MR. RUSSELL: Yes.
- [12] THE COURT: In his back pocket. He lodged Mr. De Paolis in his police vehicle and proceeded to search the Hyundai. He found what turned out to be 26.7 grams of cocaine and 2.7 grams of MDMA along with \$400 in cash. These items were found in the centre console between the front seats and in a Lululemon bag stowed in the rear foot well behind the driver's seat. Sergeant Keleher rearrested the accused for possession of narcotics for the purposes of trafficking and once again read him his s. 10(a) and (b) Charter rights. This time, Mr. De Paolis said that he wanted to speak to a lawyer.
- [13] The root issue on this voir dire is whether the arrest was lawful. Mr. De Paolis has alleged that it was not, and that his right not to be arbitrarily detained or imprisoned was breached. There were insufficient grounds for his arrest under s. 495 of the Criminal Code of Canada, he said. This unlawful arrest, he has urged me to conclude, led to the search of his person and his vehicle which, precisely because they were not conducted as an incident to a lawful arrest, constituted a violation of his s. 8 Charter right not to be subjected to unreasonable search and seizure.

- [14] As I said, a notice was filed concerning a breach of the accused's s. 10 Charter rights, but this argument was not advanced strenuously during submissions and I am not going to refer to it again.
- [15] Section 495 of the Criminal Code of Canada requires that an arresting officer must subjectively have reasonable grounds on which to base an arrest and those grounds must be justifiable from an objective point of view, meaning that a reasonable person, placed in the position of the officer in question, must be able to conclude that there were indeed reasonable grounds for the arrest.
- [16] In the present case, Crown counsel has argued that the arrest was justified under s. 495(1)(b) of the Criminal Code of Canada on the basis that Sergeant Keleher found the accused actually committing an offence. His grounds were basically that the accused looked to have used cocaine in the recent past, and it was reasonable to assume that he might have more of this substance on his person or in his vehicle.
- [17] It was common ground on this voir dire that the burden rests with the Crown to establish to the requisite burden of proof that the accused's arrest was lawful and that the search of his person and vehicle was authorized by law and was reasonable.
- [18] The police need not demonstrate anything more than reasonable grounds. They are not required to establish a prima facie case for conviction or proof beyond a reasonable doubt before making an arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241; *R. v. Debot*, [1989] 2 S.C.R. 1140.
- [19] The test for finding reasonable grounds for arrest is not as exacting as it might be in other situations where reasonable grounds are required, such as in considering the validity of a search warrant: *R. v. Polashek*, [1999] O.J. No. 968 (C.A.).
- [20] The standard does not rise as high as the civil standard of proof on the balance of probabilities and the totality of the circumstances is what matters: *R. v. Jir*, 2010 BCCA 497 at para 27.
- [21] The case authorities often talk about the point at which mere suspicion is supplanted by credibly-based probability in identifying the terrain of a lawful arrest. The subjective grounds are satisfied by the arresting officer's own honest belief: *R. v. Juan*, 2007 BCCA 351.
- [22] In this connection, Sergeant Keleher referred to a number of factors:
- 1) the manner of driving;
 - 2) the accused's voluble demeanour once pulled over;
 - 3) the white powdery spot on his hand and the fleck on his cheek;
 - 4) Sergeant Keleher's experience as a drug investigator and his knowledge that cocaine is a sticky, oily substance that would adhere to the accused's flesh in the manner alleged;

- 5) the fact that the presence of the substance on his hand and cheek indicated recent consumption;
 - 6) Sergeant Keleher's background knowledge concerning the methods of ingestion, including intelligence gathered on at least a couple of occasions that sometimes users snort cocaine from their hands; and
 - 7) the fact that the accused said nothing when Sergeant Keleher expressed his opinion that the residue might be cocaine.
- [23] It is well known that in evaluating on an objective basis the grounds expressed subjectively by a police officer to make an arrest, the arresting officer's personal experience is relevant. See, for example, *R. v. Wilson*, 2012 BCCA 517, leave to appeal refused [2013] S.C.C.A. 71.
- [24] I must assess Sergeant Keleher's grounds for arrest, in other words, from the vantage point of a prudent, reasonable, and cautious police officer similarly experienced as the arresting officer, rather than that of an untrained civilian: *R. v. Messina*, 2013 BCCA 499 at para 24. It was not argued here that Sergeant Keleher lacked an honest subjective belief in his grounds for arrest. The question is whether those grounds were objectively sustainable.
- [25] There is no doubt that Sergeant Keleher is an experienced police officer with many years under his belt as a narcotics investigator performing all functions typical of drug-related policing, including involvement in street busts, surveillance, exhibit handling, dealing with informants, talking with users and dealers, and so on. He has specialized knowledge about the drug trade which he brought to bear in his investigation of Mr. De Paolis. The Crown introduced his curriculum vitae into evidence to reinforce his credentials.
- [26] Let me say, first of all, that there was nothing at all objectionable about the vehicle stop. This was not a random stop. There were good grounds for pulling Mr. De Paolis over. I can make nothing, however, of the fact that the accused was talkative and friendly. To the contrary, such innocent and unsuspicious behaviour might well be more consistent with a clear conscience than symptomatic of drug ingestion or impairment.
- [27] I would note in any case that none of the more typical symptoms of drug impairment, such as disordered thinking, dilated or constricted pupils, or problems with motor control, speech, and balance were observed to be present in Mr. De Paolis. Sergeant Keleher's evidence that the white substance observed on the accused's hands was "possibly" cocaine, with all due respect, does not rise to the level of credibly based probability, and the fact that the accused failed to confirm or to deny this possibility when it was put to him, to my mind, is neither here nor there.

- [28] In legal terms, to the contrary, the accused was under no obligation to respond to Sergeant Keleher's questions or suggestions or to participate in any conversation on the subject. We, all of us, have the right to remain silent when dealing with the police and nothing is to be gleaned from Mr. De Paolis's decision to exercise that right in the present circumstances. In my view, his silence does nothing to shore up an objective evaluation of Sergeant Keleher's grounds for his arrest.
- [29] The question really is whether the presence of a white powdery spot on the accused's hand and a similar looking fleck on his cheek, viewed objectively, are sufficient grounds for an arrest for cocaine possession.
- [30] For a police officer with such extensive experience in drug cases, especially in dealing with cocaine, Sergeant Keleher's opinion, expressed in his testimony in chief, that the substance he observed was possibly cocaine strikes me, with the greatest of respect, as falling well short of the mark. Even if I accept, for the sake of argument, that this possibility was more in the realm of probability, it strikes me that this could give rise only to a supposition that cocaine had been consumed sometime in the past, especially considered in light of the total absence of symptoms of cocaine impairment observable in Mr. De Paolis at the time that Sergeant Keleher was dealing with him. This could not form an objective basis for believing that Mr. De Paolis was presently in possession of the substance.
- [31] In my respectful view, the arrest in question was unlawful, in the sense that it did not comply with the requirements of s. 495 of the Criminal Code of Canada. Insufficient grounds were articulated to permit me, as an objective evaluator, to be satisfied that there were sufficient grounds in all of the circumstances for an arrest to be effected on the basis that Mr. De Paolis was in the midst there and then of committing a criminal offence, namely possession of a narcotic.
- [32] It may be that Sergeant Keleher had grounds for an investigative detention, but viewed objectively he lacked the proper lawful grounds to effect an arrest. In respect of an argument that an investigative detention would ineluctably have led to the discovery of the vial of powdery substance underneath the driver's seat, I was reminded by counsel of the law set out in *R. v. Whitaker*, 2008 BCCA 174, at para 65 to the following effect:

The Crown argued, in brief, that even if the police did not have reasonable grounds to arrest Mr. Whitaker, his detention was not arbitrary because he could have been detained under the common law power of investigative detention recognized in *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52. The difficulty with this argument is that the police did not invoke the common law power of investigative detention; they invoked the statutory power of arrest, with its more extensive power of incidental search of the person. When the police have wrongfully arrested someone, their actions cannot be defended on the basis that they could have detained this person on some other basis. In deciding whether the police infringed Charter rights, they are to be judged on what they did, not what they could have done: *R. v. Charley* (1993), 22 C.R. (4th) 297 (Ont. C.A.) at para. 5.

- [33] In conclusion, I have decided that the Crown has failed to discharge its onus of satisfying me that the arrest of Mr. De Paolis was lawful, and it follows that the search alleged to have been incidental to that arrest was not authorized by law and was unreasonable. I find accordingly that Mr. De Paolis's Charter rights to be free from arbitrary detention and secure from unreasonable search and seizure have been infringed.
- [34] Where evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter of Rights and Freedoms, s. 24(2) thereof mandates that the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. The guide for determining whether to exclude or admit evidence was handed down in *R. v. Grant*, [2009] S.C.C. 32, and consists of three lines of inquiry:
- 1) the seriousness of the Charter-infringing state conduct;
 - 2) the impact of the breach on Charter-protected interests of the accused; and,
 - 3) society's interest in the adjudication of the case on its merits.
- [35] In my view, the unlawful arrest and subsequent unauthorized search of both the accused and his vehicle constituted a serious infringement of the accused's rights guaranteed by the Charter of Rights and Freedoms. The impact of these breaches on the accused's Charter-protected interests was marked. The groundless arrest of a citizen, followed by an unauthorized search of his person and property is, to my way of thinking, no small matter. The balance required to be struck under s. 24(2) has nothing to do with punishing the police, but rather is concerned with the preservation of public confidence in the rule of law and its processes.
- [36] Few things could strike more firmly against public confidence than the knowledge that we, as citizens, might be arrested without proper lawful grounds and that our persons or places in which we have a reasonable expectation of privacy might be searched without objectively sustainable and lawful grounds.
- [37] In this case, while the evidence gathered in the search or the searches was real and non-conscriptive, and it is vital to the Crown's case, in my view, the long-term reputation of the legal system is better served by its exclusion than by its admission. While there is undeniably a public interest in the prosecution of this case on its merits, I have decided that the more important imperative is the reinforcement of the fundamental democratic values expressed in our Charter of Rights and Freedoms.
- [38] To admit the evidence in the circumstances described before me in testimony would, in my view, amount to a condonation of serious Charter infringements and amount to a licence for the commission of similar breaches in like circumstances in the future. In my respectful view, this would have the effect over the long term of bringing the administration of justice into disrepute.

- [39] Accordingly, the evidence seized from the search of Mr. De Paolis himself and from his vehicle is hereby ordered excluded from evidence under s. 24(2) of the Charter of Rights and Freedoms.
- [40] THE COURT: Ms. Simpson.
- [41] MS. SIMPSON: Crown is not calling any further evidence.
- [42] THE COURT: All right. Mr. Russell?
- [43] MR. RUSSELL: I invite you to find him not guilty on both counts.
- [44] THE COURT: Stand up, Mr. De Paolis. You have heard my ruling. You are, like everybody else in this country, protected by the Charter of Rights and Freedoms. You enjoy constitutional protections because you live in a civilized country. As I have excluded the evidence that was the basis of this prosecution against you, I hereby enter an acquittal. You are free to go.

"Baird J."

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