

CANADA / JUDGMENT

R. v. Decaire

2020 BCSC 2134

COURT

Supreme Court of British Columbia

DECIDED

2 December 2020

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2020 BCSC 2134 R. v. Decaire

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Decaire,

2020 BCSC 2134

Date: 20201202

Docket: 177345-2

Registry: Victoria

Regina

v.

Cody David Decaire

Corrected Oral Ruling on Voir Dire #1: this Oral Ruling on Voir Dire #1 has been corrected on 25 January 2021, on the first page, to show the correct date of Judgment as December 2, 2020.

Before: The Honourable Mr. Justice R. Johnston

Oral Ruling on Voir Dire #1

Counsel for the Crown:

M.D. Halston

Counsel for the Defence:

C.L. Sutton

Place and Date of Trial/Hearing:

Victoria, B.C.

November 30 - December 2, 2020

Place and Date of Judgment:

Victoria, B.C.

December 2, 2020

- [1] THE COURT: This voir dire inquires into the lawfulness of a warrantless arrest of Mr. Decaire on July 2, 2019. On that day, Constable Jenkins of the Victoria City Police, was conducting surveillance of a parking area attached to a former motel; now a shelter. This property had been the subject of complaints of drug activity made by neighbouring businesses to the Victoria Police and was known to Constable Jenkins to be a "hotspot," as he put it. That is, one of the top five areas of the city for drug activity.
- [2] Constable Jenkins and another officer were in plain clothes in an unmarked minivan that was backed into a parking stall of a lot adjoining the area of interest. Constable Jenkins was in the rear of the minivan, looking through the back window toward the parking lot that he was interested in and he had a pair of binoculars to assist him. Constable Jenkins was transmitting the observations he made by radio from time to time while he was conducting the surveillance. This acted in place of notes that police officers might routinely make to record their activities.
- [3] Constable Jenkins' view of the parking area was unobstructed and unobscured. Constable Jenkins saw the accused Mr. Decaire, who was not then known to him, standing near the entrance of the shelter portion of the building. Mr. Decaire was about 150 to 200 feet away from Constable Jenkins. Constable Jenkins described the clothing Mr. Decaire was wearing at the time and remarked, in his evidence, that that clothing seemed somewhat expensive for Mr. Decaire's surroundings.
- [4] The parking area that Constable Jenkins was watching was busy. There were a number of people entering and leaving the shelter and moving about the parking area outside it. Constable Jenkins saw a male approach Mr. Decaire. There was a short interaction, in which Constable Jenkins thought there may have been a conversation. Then Constable Jenkins saw a quick hand movement from each of Mr. Decaire and the male who had approached him. Constable Jenkins described it as being as if they were about to shake hands, but the hands did not move in a handshake motion. At the end of this quick hand movement by each of the two, Mr. Decaire had cash in his hand, according to Constable Jenkins. Constable Jenkins could not recall the type or amount of cash that he saw in Mr. Decaire's hand. The unknown male who had interacted with Mr. Decaire then left. The entire encounter between the two was quite brief.

- [5] Constable Jenkins did not observe anything of interest for about another two hours until at about 16:53 p.m. a male with facial tattoos approached Mr. Decaire. There was, as in the last occasion, a brief opportunity for conversation, and then Constable Jenkins saw another movement on the part of both Mr. Decaire and this male. Constable Jenkins described this as a "hand-to-hand." In this case, Constable Jenkins says he saw the unknown male pass \$20 to Mr. Decaire. Constable Jenkins testified that he believed that Mr. Decaire produced a clear plastic bag, he called it a Ziploc, and that that plastic in turn contained smaller bags approximately one inch by one inch in size. Constable Jenkins believed that he saw Mr. Decaire pass one of these smaller bags to the unknown male who then left. This encounter, like the last, was fairly brief in duration. Constable Jenkins says he then saw Mr. Decaire leave the area in the company of a female but that Mr. Decaire returned very shortly.
- [6] At 17:03 p.m. Constable Jenkins saw a male, dressed in black, approach Mr. Decaire. Constable Jenkins says there was a brief conversation, followed by a movement of the hands of each of Mr. Decaire and this unknown male. Again Constable Jenkins described it as a "hand-to-hand" movement. After this, the unknown male then left.
- [7] At 17:19 p.m. a female approached Mr. Decaire. There was a brief interaction. Constable Jenkins saw another "hand-to-hand" movement, that is the female's hand and Mr. Decaire's hand meeting and then the female left. Mr. Decaire then left the parking area.
- [8] Constable Jenkins communicated by radio that Mr. Decaire could or should be arrested and that he was nearby. It appears, and I gather there is no issue here, that Mr. Decaire was shortly thereafter arrested in the parking lot to the rear of a nearby business. Constable Jenkins decided that he had reasonable and probable grounds to direct the arrest of Mr. Decaire.
- [9] Constable Jenkins had an unfortunate tendency, in giving his evidence, to make it appear that the decision to arrest was made by a committee. He used the royal "we" pronoun entirely too often, but eventually, as a result of being pushed, to some extent by counsel, clarified that it was him, that is Jenkins, who gave the instruction to arrest Mr. Decaire.
- [10] The arrest, of course, was without an arrest warrant. Warrantless arrest is governed by s. 495(1) of the Criminal Code. That provides that
- (1) A peace officer may arrest without warrant
- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- [11] It is beyond question, since the decision in *R. v. Storrey* -- and I will pause here to say that when I refer to authorities in these reasons, I will not give the citations, but a citation should be taken as given. These are authorities that both counsel have argued and have provided to me.

- [12] Again, it is beyond question, since *R. v. Storrey*, that reasonable grounds for arrest require the existence, in the mind of the officer deciding to arrest, that the officer subjectively believes that he or she has grounds to arrest without a warrant and that that belief is objectively reasonable. Subsequent decisions that have been argued by counsel before me have refined and restated the principles in *Storey*. The decisions that I have referred myself to and reviewed overnight can be summarized as follows:
1. The requirement for reasonable and probable grounds for arrest does not amount to requiring an establishment of a *prima facie* case. That is from *Storrey*, [1990] 1 SCR 24.
 2. Standard of proof of grounds for arrest is less than reasonable doubt, less than a balance of probabilities, but higher than mere suspicion. It can and has been described as credibly-based probability. See *R. v. Jir*, 2010 BCCA 497.
 3. The required grounds must exist in the mind of the officer directing, ordering, or authorizing an arrest, not in the mind of the officer effecting the arrest, *R. v. Le*, 2009 BCCA 14.
 4. In considering whether grounds for arrest are reasonable, the knowledge, experience, and training of the officer who decided on arrest are relevant considerations as to whether a subjective belief in grounds for arrest are objectively reasonable. *R. v. To*, (1998) 209 B.C.A.C. 242; *R. v. Wilson*, 2012 BCCA 517.
 5. Reputation, including the reputation of a location, can properly be considered as a relevant factor, *R. v. Charlton* 1992 CanLII 367 (BCCA).
 6. In assessing the objective reasonableness of the decision to arrest, accumulative effect of evidence must be considered, not each individual piece of evidence in isolation, *R. v. Luong*, 2010 BCCA 158. That is to say that while each observation or bit of information gathered by an officer who arrests or instructs an arrest may have an alternate and innocent explanation, dissecting the grounds for arrest piecemeal would be a mistake. It is the constellation of factors that is relevant, not the individual stars, *R. v. Tran*, 2007 BCCA 491.
- [13] In this case, Constable Jenkins saw Mr. Decaire standing around a parking lot near a shelter in an area known to be a drug-use and trafficking area. Mr. Decaire was observed in that area for some two and one half hours; or near to it. Mr. Decaire appeared somewhat better dressed than the rest of the people milling about in that parking area. Constable Jenkins saw four different people approach Mr. Decaire. Constable Jenkins saw that there was an interaction between each of these people and Mr. Decaire that was quite brief on each of the occasions. Constable Jenkins saw what appeared to him to be a "hand-to-hand" movement between Mr. Decaire and each of the four people who approached him. In two of these interactions, Constable Jenkins saw that Mr. Decaire had some money in his hand during or at the end of each of the interactions. In the second of the two, Constable Jenkins saw the person Mr. Decaire was dealing with pass \$20 to him. In one of these interactions, Mr. Decaire was seen to have a large plastic bag, in which were several smaller plastic bags,

consistent, in Constable Jenkins' experience, with small quantities of street drugs.

- [14] Constable Jenkins brought to these observations from his training and experience as a police officer. He had some training and experience. It was not extensive, on his evidence, but it was sufficient, in my view.
- [15] In these circumstances, I conclude that Constable Jenkins' belief that he was watching Mr. Decaire engage in a trafficking activity was objectively reasonable. Add that to Constable Jenkins' objective belief, and I conclude that Constable Jenkins had reasonable and probable grounds to instruct that Mr. Decaire be arrested.

"R.T.C. Johnston J."

The Honourable Mr. Justice Johnston

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