

CANADA / JUDGMENT

R. v. Dinh

2023 BCSC 2446

COURT

Supreme Court of British Columbia

DECIDED

22 March 2023

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2023 BCSC 2446 R. v. Dinh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dinh,

2023 BCSC 2446

Date: 20230322

Docket: 177352

Registry: Victoria

Rex

v.

Hong Dinh a.k.a. Carrie Dinh

Before: The Honourable Justice G.C. Weatherill

Oral Ruling on Voir Dire No. 1 - Application to Exclude from Trial Evidence All Items Seized On the Basis of Breach of the Accused's s. 9 Charter Rights

Counsel for the Crown:

G.L. Angrove

T.C. Johnson

Counsel for the Accused:

R. Alberto

Place and Dates of Trial/Hearing:

Victoria, B.C.

March 21 and 22, 2023

Place and Date of Judgment:

Victoria, B.C.

March 22, 2023

- [1] THE COURT: The accused seeks an order pursuant to ss. 24(1) and 24(2) of the Charter of Rights and Freedoms [Charter] excluding from evidence at trial all items seized by the police from the accused's vehicle on May 3, 2019. She says that, at the time of her arrest, the police did not have reasonable and probable grounds to believe that she had committed an offence, in violation of her rights under s. 9 of the Charter.

Evidence on the Voir Dire

- [2] The only evidence on the voir dire was provided by Sgt. Bryan Rowan. Sergeant Rowan has been a member of the Saanich Police Department since 2000 serving in various roles, including as a uniformed police officer, as a member of each of the Street Crime Unit, the Regional Crime Unit, and the Major Crime Unit. Since 2019, he has been a sergeant assigned to the Street Crime Unit.
- [3] Over the course of his career with the Saanich Police Department, Sgt. Rowan received training and gained experience in the investigation of drug crimes. He testified that he has witnessed in excess of 100 drug transactions from those at street level to those involving high-level suppliers. He testified that the source of the majority of drugs that end up in the Victoria area is from the Lower Mainland of BC.
- [4] Sergeant Rowan testified that on April 23, 2019, he was advised by another Saanich police officer, Sgt. Jansen, that the department had received a tip from Crime Stoppers that the accused was involved in the transportation of illicit drugs from the Lower Mainland of Vancouver to Vancouver Island. Sergeant Rowan was advised that the tipster provided the make and the model of the accused's vehicle, a white Honda Civic, as well as its licence plate number ("Honda"). Sergeant Rowan assigned another Saanich police officer, Cst. Ma, to lead the investigation related to the tip, including conducting background checks of the accused.
- [5] Sergeant Rowan testified that Cst. Ma determined that the Honda described in the Crime Stoppers tip belonged to the accused, compiled a "target sheet" (or a "target pack") containing relevant information regarding the accused, including her photograph, her residential address in Saanich, and that she had been arrested in 2016 after arriving at the Swartz Bay ferry terminal with two kilograms of drugs in her possession. Sergeant Rowan testified that the police file in respect of that incident had been "privatized" and the Saanich Police were unable to obtain access to it.

- [6] Sergeant Rowan testified that the target sheet also listed the names of two individuals with whom the accused was associated, both being known drug traffickers in the Victoria area.
- [7] On cross-examination, Sergeant Rowan acknowledged that Crime Stoppers tips are not always reliable and that he was not provided with a transcript of the tip itself. However, he testified that the information obtained by Cst. Ma, as set out in the target sheet, confirmed in his mind that the tip was worthy of investigation.
- [8] On May 2, 2019, the Saanich Police began surveillance of the accused commencing at approximately 8 a.m. at her residence and ending at approximately 5 p.m. at a shopping mall. Each of Sgt. Rowan and Cst. Ma was involved in the surveillance from time to time during that time. Sergeant Rowan testified that nothing suspicious or of investigative note was observed during the surveillance, other than that the team was able to confirm the accused's use of the Honda.
- [9] At 8:20 a.m. on May 3, 2019, the Saanich Police resumed the surveillance at the accused's residence. The Surveillance Team comprised seven police officers, including Sgt. Rowan and Cst. Ma, in four separate vehicles (the "Surveillance Team"). Although the Honda was not at the accused's residence when the surveillance began, it was observed by the Surveillance Team being driven by the accused a short time later, driving in the vicinity. It was followed by the Surveillance Team as it headed in the direction of the Swartz Bay ferry terminal. Although the Surveillance Team lost visible contact of the Honda on several occasions in residential neighbourhoods, sight of it was reacquired relatively quickly, still being driven by the accused.
- [10] Sergeant Rowan testified that he concluded there was a strong possibility that the accused intended to travel to the mainland by ferry from the Swartz Bay terminal. He sought and obtained authorization from his staff sergeant to continue the surveillance on the ferry and into the Vancouver area.
- [11] Sergeant Rowan's hunch proved to be correct. The Honda was observed by the Surveillance Team to arrive at the Swartz Bay ferry terminal where it and the accused, as well as the Surveillance Team, boarded the 11 a.m. ferry to Tsawwassen.
- [12] During the crossing, the Surveillance Team continued to observe the accused, who spent most of the time in the Honda. Sergeant Rowan testified that he observed the accused in the Honda using her cellphone, but he spent most of his time aboard the ferry liaising with Sgt. McKinnell of the Delta Police Department and making arrangements with him for the assistance of his officers with the surveillance of the accused after she disembarked from the ferry. He testified that the purpose of the ongoing surveillance was to determine whether the purpose of the accused's trip was to meet someone as part of a drug transaction. He understood that Sgt. McKinnell assigned five to eight officers in four vehicles to assist in this regard.

- [13] The ferry docked at the Tsawwassen terminal at approximately 12:30 p.m. The accused was observed by the Surveillance Team to drive the Honda directly from the terminal to a large retail parking lot in Langley, BC, which provided parking for customers of several retail outlets, including a Cineplex theatre complex. The Surveillance Team observed the accused drive the Honda to a section of the parking lot that was separated from the main section by a roadway and which was removed from the general activities of others who were using the main parking lot. The accused was observed to drive the Honda into a parking spot near a standalone Montana's restaurant building that appeared to be vacant. The parking spot was in front of several bushes.
- [14] Although Sgt. Rowan saw the Honda park near the vacated Montana's restaurant, he drove his vehicle to another area of the parking lot that was out of sight of the Honda from which location he received information of what was occurring from other members of the Surveillance Team over the Saanich Police communication system. He testified he believed that a drug transaction was about to take place and asked the Delta Police Surveillance Team to focus on any other vehicle that might become involved.
- [15] Sergeant Rowan testified that he was advised by a member of the Surveillance Team, Cst. Akbar, that he, Cst. Akbar, observed the accused retrieve a blue bag (the "blue bag") from the trunk of the Honda which Sgt. Rowan understood had been opened by the accused remotely from inside the Honda, and put the blue bag on the front passenger seat of the Honda, and then return to the front driver's seat. Sergeant Rowan agreed on cross-examination that the existence of the blue bag and its placement by the accused on the front passenger seat was significant in him forming the view that a drug transaction was taking place.
- [16] Sergeant Rowan testified that Cst. Akbar advised him that a white Ford 150 pickup truck was seen to circle the parking lot and park in a space on the opposite side of the Montana store from where the accused had parked. The pickup was then observed to move towards the Honda and park next to it, nose first, in a driver's door to driver's door configuration. Sergeant Rowan testified that he was informed by another member of the Surveillance Team, Cst. Prill, that the accused was observed to exit the Honda carrying the blue bag and walk around to the pickup truck's passenger door, leave the blue bag in the pickup truck, and walk back to the Honda carrying a black bag with green writing on it (the "black bag"), that appeared to be weighted down, and put it in the trunk of the Honda. The pickup truck then departed.
- [17] Sergeant Rowan testified that Cst. Ma ran the licence plate of the pickup truck and informed him of the name of the registered owner, who did not appear to have a criminal record.
- [18] Sergeant Rowan testified that the entire transaction between the accused and the driver of the pickup truck took less than one minute. He testified that another member of the Surveillance Team, Cst. Prill, captured the interaction on a video camera.

- [19] Sergeant Rowan testified that he asked the Delta Police to continue surveillance of the pickup truck. He was later advised by Sgt. McKinnell that the driver of the pickup truck had been observed by the Delta Police Surveillance Team in possession of the blue bag.
- [20] The Surveillance Team continued its surveillance of the Honda, observing it leaving the parking lot, stop at a Shell gas station in Langley, and then travel directly towards the Tsawwassen ferry terminal.
- [21] Sergeant Rowan testified that, based upon his experience, as well as the totality of the evidence available to him, including his observations during the surveillance of the accused, the information he had received from the other members of the Surveillance Team, the Crime Stoppers tip, the target sheet, and the 2016 arrest of the accused, he formed the view that the accused had been involved in a drug transaction with the driver of the pickup truck and that the sole purpose of the accused's trip was to obtain drugs in the Lower Mainland and transport them to Vancouver Island. He authorized the arrest of the accused by the Surveillance Team and arranged for uniformed officers from the Delta Police Department to be present.
- [22] On cross-examination, Sgt. Rowan conceded that he relied for his decision to arrest on what had been transmitted to him by the various members of the Surveillance Team over the Saanich Police communication system, rather than on his own observations of what had occurred. He also conceded that he did not know how far away Cst. Prill was from where the Honda and pickup truck were parked when he made the observations he had reported to Sgt. Rowan, although Sgt. Rowan testified that from the detail of those observations as reported, he understood that Cst. Prill had been relatively close.
- [23] When it was put to him on cross-examination that the transaction the Surveillance Team had observed between the accused and the driver of the pickup truck could have been nothing more than the exchange of goods that commonly occurs by way of online marketing, Sgt. Rowan responded that, in his experience, such exchanges usually take place between strangers who prefer that they occur in public, rather than in quiet and isolated parking lots.
- [24] Sergeant Rowan testified that he did not want to have the accused arrested until he had determined it would be safe to do so, and that the uniformed Delta Police officers were able to be present.
- [25] The accused was observed to drive the Honda into the parking lot of the Tsawwassen Mills shopping centre near the ferry terminal and was arrested by another member of the Surveillance Team, Sergeant Cripps, with the assistance of uniformed officers from Delta Police Department. The arrest took place at 2:39 p.m. and the accused was read her Charter rights during the period 2:39 p.m. to 2:43 p.m.

- [26] At approximately this time, Sgt. Rowan arrived at the scene of the arrest. He testified that he directed the search of the Honda incident to the arrest, focusing specifically on the contents of the trunk where the black bag was located at 2:44 p.m. The black bag contained a package that was wrapped in a manner similar to how drugs are typically packaged. The package was later determined to comprise one kilogram of fentanyl. Sergeant Rowan relayed this information to the Delta Police and requested that they arrest the driver of the pickup truck.
- [27] The accused was transported to the Delta Police detachment where she arrived at 3:15 p.m. The driver of the pickup truck was arrested by the Delta Police at 3:26 p.m.

Analysis

- [28] The assessment of an officer's grounds for making a warrantless arrest is what the officer knew at the time of the arrest and is conducted from the retrospective viewpoint of a reasonable person placed in the position of the arresting officer: *R. v. Latimer*, 2020 BCSC 685 at paras. 165-167. The test is whether a reasonable person standing in the shoes of the officer would have believed that reasonable and probable grounds to arrest existed.
- [29] The Crown submits that on the basis of the totality of the information Sgt. Rowan had at the time he made the decision to arrest the accused, a reasonable person placed in the position of Sgt. Rowan would have concluded that there were reasonable and probable grounds for the arrest. In other words, a reasonable person with the same lens would have come to the same conclusion as Sgt. Rowan did.
- [30] During his submissions, counsel for the accused conceded that Sgt. Rowan had reasonable and probable grounds for arresting the accused on a subjective basis. However, he submitted that the information Sgt. Rowan had available to him at the time he made the decision to arrest the accused would have raised no more than a suspicion of illegal activity in the eyes of a reasonable person standing in Sgt. Rowan's shoes, and that a mere suspicion does not meet the required objectively reasonable standard.
- [31] Counsel for the accused points to:
- 1) the Crime Stoppers tip not being specific regarding the date or time that the accused would be engaged in the transport of drugs;
 - 2) the May 2, 2019, surveillance resulting in nothing of investigative value; and
 - 3) the accused's activities in the Cineplex parking lot having taken place in broad daylight.
- [32] He submits that Sgt. Rowan's decision to make the arrest was jaded by tunnel vision formed by his knowledge that most of the drugs in the Victoria area are transported there from the Lower Mainland and from the accused's known association with two known traffickers. He submits that the arrest of the accused was not the result of investigation into or involvement in drug trafficking, but rather a means to an end, namely to obtain more evidence on the illegal activities of the two known associates.

[33] In my view, Sgt. Rowan's belief that he had reasonable and probable grounds to authorize the arrest of the accused as he did on May 3, 2019 was objectively reasonable:

- he was an experienced police officer familiar with the means by which drug trafficking occurs;
- he was aware that most of the illegal drugs that find their way into the Victoria area come from the Lower Mainland of BC;
- he had been advised of a tip received by Crime Stoppers that the accused was engaged in the transport of illicit drugs from the Lower Mainland of British Columbia to Vancouver Island;
- the tipster's information regarding the accused's vehicle and its licence plate number checked out;
- he was aware that the accused had been arrested in 2016 at the ferry terminal with a large quantity of drugs in her possession;
- he had been advised that two individuals with whom the accused associated were known drug traffickers, which in his mind added to the credibility and reliability of the Crime Stoppers tip;
- he had received contemporaneous reports from the members of the Surveillance Team of suspicious behaviour on the part of the accused and the driver of the pickup truck, which, in Sgt. Rowan's experience, was likely consistent with the accused receiving drugs in exchange for money; and
- his own observations of the accused's behaviour during the May 3, 2019 surveillance of her was indicative of the sole reason for her trip to the Lower Mainland being to obtain drugs and transport them to Vancouver Island.

Conclusion

[34] The accused's application for an order pursuant to s. 24 of the Charter excluding from trial evidence relating to all items seized from her vehicle on May 3, 2019 on the basis of her s. 9 Charter rights being breached is dismissed.

"G.C. Weatherill J."

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