

CANADA / JUDGMENT

R. v. Donovan

2024 BCCA 213

COURT

British Columbia Court of Appeal

DECIDED

7 June 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCCA 213 R. v. Donovan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Donovan,

2024 BCCA 213

Date: 20240607

Docket: CA49059

Between:

Rex

Respondent

And

Justin Thomas Gary Donovan

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated June 30, 2022 (R. v. Donovan, Nanaimo Docket 89204-1).

Counsel for the Appellant:

D. McKay

Counsel for the Respondent:

J. Walker

Place and Date of Hearing:

Victoria, British Columbia

April 18, 2024

Place and Date of Judgment:

Vancouver, British Columbia

June 7, 2024

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

Summary:

The appellant appeals his conviction for two counts of unlawful possession of a controlled substance for the purpose of trafficking. Among other things, the appellant argues that the controlled substances were discovered during a search that should not have yielded evidence admissible in a criminal proceeding, while he was improperly detained. HELD: appeal dismissed. The search was conducted pursuant to statutory authority and was reasonable. The appellant is not permitted to advance new arguments concerning his arrest and detention on appeal in the face of strategic concessions made at trial.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

- [1] This appeal from conviction concerns the admissibility of evidence discovered by police in the course of taking an inventory of the contents of a vehicle being impounded under the provisions of the Motor Vehicle Act, RSBC 1996, c 318 [MVA]. The appellant requires an extension of time for the bringing of this appeal, to which the Crown consents. I would grant the extension.
- [2] In the early morning hours of December 12, 2020, in Nanaimo, BC, RCMP Constable Viger pulled over a car driven by the appellant, who was not the registered owner. Constable Viger had done a proactive query of the vehicle's plates on his computer. He learned that it had been impounded a month earlier because the driver (who turned out to have been the appellant) was prohibited from driving. After stopping the car, he asked the appellant

whether he was the person who had been caught driving while prohibited on the previous occasion, to which the appellant answered that he was. When Constable Viger checked the records and learned that the appellant was still prohibited at the time of this second stop, he placed him under arrest for driving while prohibited. This meant that the car had to be impounded.

- [3] During the course of a search of the vehicle that followed under circumstances to be described in more detail below, the police discovered, among other things, a propane tank on the back seat, a large orange bucket on the floor behind the driver's seat containing a hot, steaming liquid substance that proved to be GHB (4-hydroxybutanoic acid), a propane burner, multiple cooking supplies, house-cleaning supplies, 4 kg of lye, two funnels, and distilled water. A later search turned up a package of methamphetamine.
- [4] The appellant was charged with two counts of unlawful possession of a controlled substance for the purpose of trafficking, being the methamphetamine and the GHB. At his trial, he challenged the admissibility of the evidence the police located in the vehicle he was driving on the ground that (1) there had been improper questioning by Constable Viger that breached his section 10 Charter rights (by asking a question that would require a self-incriminating answer), and (2) the search of the vehicle breached his section 8 Charter right (unreasonable search and seizure). Accordingly, the appellant argued, the evidence should be excluded under section 24(2) of the Charter. He also challenged the admissibility of the Crown's expert report, going to the element of possession for the purpose of trafficking. The appellant conceded that if all the evidence were admitted, there would be no defence argument. He did not pursue other Charter breaches he alleged in his Charter notice.
- [5] The trial, then, consisted primarily of two voir dieres into the admissibility of the evidence: one concerning the evidence found in the car, and a second concerning the expert report. The judge concluded that all of the evidence was admissible, and convicted the appellant on both counts.
- [6] On appeal, the appellant submits that the trial judge's reasons were inadequate in that the judge failed to analyse the evidence appropriately, coming to summary conclusions without addressing concerns that arose on the evidence.
- [7] What the appellant describes as the "heart of the appeal" and his "primary thrust" is the proposition that, while it may have been lawful for the police to undertake an inventory search of the vehicle prior to impounding it under the MVA, it was contrary to the Charter for the evidence they found to be admitted and then used against him in a criminal proceeding. He submits that the judge failed to grapple with what constituted a lawful search in the circumstances, failed to address inconsistencies in the evidence, and failed to consider how the evidence found could be used.

- [8] Second, he argues that the judge failed to consider the manner of the appellant's arrest, which, he submits, far exceeded what was justified for the charge of driving while prohibited, so that the appellant was "over-arrested".
- [9] Third, the appellant submits that the judge erred in imputing knowledge to the appellant concerning the drugs and their amounts based on what was found in the vehicle--going to the question of whether the substances were in the appellant's possession.
- [10] The Crown submits that it is not open to the appellant to raise the second and third issues as the second was not raised at trial and the third is contrary to concessions the appellant made at trial.
- [11] The appellant did not pursue on appeal the position he maintained at trial that it was improper for Constable Viger to ask him whether he was the person who had been caught driving while prohibited the month before. Counsel conceded that as no use was made of the appellant's response to that question, the information was discoverable and discovered in any event through the police mobile data terminal, and the appellant was not questioned further until cautioned, it was of no importance.
- [12] For the reasons that follow, I would dismiss the appeal.

2. BACKGROUND

- [13] Once Constable Viger determined that the vehicle that had attracted his attention had previously been impounded because the driver was prohibited from driving, he pulled the vehicle over to see whether the driver on this occasion had a valid licence. He told the driver that he had been stopped because Constable Viger wanted to know whether he was prohibited and whether he had a license. He asked the appellant whether he was the driver who had been caught driving while prohibited a month earlier. The appellant said that he was and produced photo identification (not a driver's licence). During this exchange, Constable Viger noticed the propane tank on the driver's-side back seat and the orange bucket on the floor behind the driver's seat.
- [14] Constable Viger returned to his car where he confirmed through his mobile data terminal that the appellant remained prohibited from driving. He also learned that the appellant was subject to a weapons prohibition, and saw other information that raised his level of safety awareness. At about 2:00 a.m., he returned to the vehicle and arrested the appellant for driving while prohibited. He placed him in handcuffs, which the appellant now maintains was excessive in the circumstances, conducted a quick pat-down search to ensure safety, and told the appellant that he was under arrest for driving while prohibited. He provided the appellant with his s. 10(b) Charter rights and a warning from memory, and placed him in the rear of the police vehicle. The appellant now maintains that this, too, was excessive given the reason for the arrest. At the time, the appellant indicated that he did not feel it necessary to speak to a lawyer.

- [15] At this point, Constable Teel arrived on the scene. Constable Viger was about to conduct an inventory search of the car in preparation for impounding the vehicle under s. 251(1) of the MVA. Instead, he asked Constable Teel to search the vehicle.
- [16] During his search, Constable Teel lifted the lid off the orange bucket behind the driver's seat, and noted that steam was rising from an unknown liquid that was emitting a strong chemical smell. At this point, the search was suspended and Constable Viger called the fire department. Then, at 2:20 a.m., Constable Viger formally provided the appellant with his ss. 10(a) and 10(b) Charter rights and warning. He advised the appellant that he was under arrest for prohibited driving and was being detained for possession and production of a controlled substance. The appellant did not want to call a lawyer at that time.
- [17] On appeal, as noted, the appellant maintains that none of what Constable Teel and Constable Viger discovered in the inventory search of the vehicle was admissible against him in the criminal proceeding.
- [18] The fire department arrived at 2:27 a.m. They were unable to determine what the substance in the orange bucket was, but confirmed that its temperature was over 30°C. Constable Viger began to research on his mobile data terminal what the substance might be, but could not quickly find an answer. He therefore decided to take the appellant to the RCMP detachment, where they arrived at 3:33 a.m. At the detachment, Constable Viger searched the appellant for safety reasons, locating cash in six different envelopes totaling \$6,114.90, and two receipts, one of which was for the purchase of distilled water.
- [19] At 3:37 a.m. the appellant asked to speak to a lawyer, which he did at 3:41 a.m.
- [20] Constable Viger returned to the vehicle after 6:00 a.m. and was able to obtain confirmation that the substance in the orange bucket was GHB, and was ready for sale. While looking in the vehicle for keys, Constable Viger located a plastic bag containing 26.5 grams of methamphetamine. He returned to the detachment at 7:30 a.m. at which time he provided the appellant with his Charter rights in relation to possession for the purpose of trafficking. He released the appellant from custody at 7:42 a.m.

3. DISCUSSION

3.1 Was the evidence discovered during the inventory search admissible in the criminal proceedings?

- [21] In my view, it was.
- [22] While the onus is on an accused to establish Charter breaches, a warrantless search, which this was, is *prima facie* unreasonable. The burden therefore moves to the Crown to establish, on a balance of probabilities, that the search was authorized by law: *R v Caslake*, [1998] 1 SCR 51 at para 30.

[23] The appellant's argument rests entirely on what the Court went on to say at para 30 of Caslake, dealing with the respondent's argument that even if the search in question was not properly authorized as a search incidental to arrest, there ought to be an "inventory search exception" to s. 8, "for the protection of the accused's belongings". The Court dismissed that argument, on the ground that the inventory search was not authorized by law, and was extraneous to the criminal law:

The respondent was unable to find either statutory or common-law authority for inventory searches. Hence, for the purposes of this appeal, I would hold that the inventory search is not authorized by law and therefore violates s. 8 of the Charter. Whether such a law would be consistent with s. 8 need not be answered here. Suffice to say that an inventory search per se does not serve a "valid objective in pursuit of the ends of criminal justice" [citation omitted] in the context of an arrest such that it can be justifiably carried out under this warrantless common-law power. Its purposes relate to concerns extraneous to the criminal law. If the police feel the need to inventory a car in their possession for their own purposes, that is one thing. However, if they wish to tender the fruits of that inventory search into evidence at a criminal trial, the search must be conducted under some lawful authority.

[24] The appellant argues that the inventory search in this case similarly related to concerns extraneous to the criminal law so that the evidence discovered should not have been admitted.

[25] The appellant's argument ignores, however, the fundamental basis of the conclusion in Caslake, which was that the inventory search in question was not authorized by any statutory or common-law authority. The officer in Caslake testified that the sole reason for conducting the search was to comply with an RCMP policy. In those circumstances, the majority held that the inventory search violated s. 8 of the Charter. They did not find it necessary to determine whether a law that did authorize an inventory search would be consistent with s. 8.

[26] This appeal is different. In two cases decided after Caslake, this Court has held that inventory searches of vehicles about to be impounded were indeed authorized by law, being the provisions of the MVA that require the police to impound a vehicle in circumstances such as those that arose here, and impose on the police the duty to ensure the safety of the vehicle and its contents. The searches were therefore found to be reasonable: *R v Strilec*, 2010 BCCA 198 at paras 62-63; *R v Russell*, 2018 BCCA 330 at para 32.

[27] The appellant sought to distinguish this case from *Strilec* and *Russell*, and align it with *Caslake*, on the basis that there was an inconsistency between the evidence of Constable Viger and that of Constable Teel about the nature of the search Constable Teel conducted. The appellant asserts that the judge failed to deal with this inconsistency in coming to his conclusion that the search had been an inventory search authorized by law.

- [28] I disagree. Constable Viger was clear in his evidence that, as the responsible officer, he had decided to carry out an inventory search before impounding the car, but because Constable Teel turned up before Constable Viger started the search, Constable Viger instructed Constable Teel to do it. Constable Teel testified that Constable Viger told him to 'search the vehicle', rather than using the term 'inventory search'. I do not see this as an inconsistency. In any event, what matters is what was in Constable Viger's mind as the instructing officer. The judge accepted Constable Viger's evidence, as she was entitled to do.
- [29] In my view, this brings the case squarely within the ambit of Russell. It follows that the judge correctly found that the search conducted by Constable Teel was authorized by law and did not violate the appellant's rights under s. 8 of the Charter.
- 3.2 Should the appellant be permitted to raise the issue of whether the manner in which he was detained violated his s. 9 rights?
- [30] In my opinion, he should not.
- [31] The appellant maintains that as he was initially arrested for driving while prohibited, the proper course would have been for Constable Viger to issue him a ticket and release him, or have him stand outside the car uncuffed while Constable Viger obtained any further information he required. Instead, he handcuffed the appellant and placed him in the police car where he remained for nearly 20 minutes until the search had been carried out and he was re-arrested. The appellant says the police exceeded their lawful authority by managing the situation this way, and it rendered his detention arbitrary within the meaning of s. 9.
- [32] The Crown objects that this complaint was never pursued at trial, so that much evidence relevant to the issue was never adduced. For instance, Constable Viger was never asked why he handcuffed the appellant and placed him in the police car instead of letting him go with a ticket or allowing him to stand by the side of the road.
- [33] The Crown's objection is well-founded.
- [34] The initial Charter notice was premised on there having been no reasonable and probable grounds for the appellant's arrest, depriving him of his s. 7 rights, and resulting in a breach of his s. 8 rights when he was searched, and a breach of his s. 9 rights when he was detained. The onus was on the appellant to establish these breaches. How he would try to do so would only be revealed as the trial progressed. As it happened, the appellant pursued only two specific allegations.
- [35] Accordingly, during argument at trial, the Crown outlined the issues as twofold notwithstanding that the appellant's Charter notice originally spoke about sections 7, 8, 9, 10(a) and 10(b). The two issues the Crown articulated related to (1) the officer's question when he first spoke to the appellant in the vehicle (see para 11 above), and (2) the inventory search and whether it was authorized by law. Counsel for the appellant agreed that "[m]y friend has the gist of it". In his own argument, he addressed only those two issues: the question put by Constable Viger at the outset, and the matter of the inventory search.

[36] The judge followed their lead:

[47] The primary basis for the Charter application is that Mr. Donovan was asked a question by the officer, "Were you the driver last month", which was inappropriate as it was designed to elicit an incriminating answer contrary to s. 10(a) and that the inventory search was not authorized under the common law nor was there legislated authority.

[37] The lawfulness of the appellant's arrest was not challenged, and the parties did not raise in their submissions whether there had been a s. 9 breach because of the manner in which the appellant was detained. It comes, therefore, as no surprise that the judge did not address the issue in her reasons.

[38] The onus was on the appellant to establish a breach of s. 9. He did not do so, because he did not choose to pursue that avenue at trial. When I look at the evidence as a whole, including what Constable Viger did say about his concerns arising from what he observed in plain sight in the vehicle when he first stopped the appellant, it seems evident to me that counsel for the appellant at trial (who was not counsel on appeal) made an appropriate strategic decision to confine the issues to the two that in fact were argued.

[39] As stated by this Court in *R v Gill*, 2018 BCCA 144, "[w]hether to hear a new issue on appeal engages the exercise of discretion [T]he discretion to hear new issues on appeal will be exercised 'rarely' or 'sparingly' and only where the interests of justice require it" (at para 10). In the circumstances, I do not consider it in the interests of justice to permit the appellant to raise that argument on appeal when his decision not to raise it at trial resulted in a record that would be inadequate for the purpose of considering it in this Court (see *Gill* at paras 9-11).

[40] It follows that I would not accede to this ground of appeal.

3.3 Should the appellant be permitted to raise the issue of whether the judge erred in imputing knowledge to the appellant based on what was found in the vehicle?

[41] The answer, as I see it, is yes, but I consider that the appellant has failed to establish any error.

[42] The Crown argues that the appellant should not be allowed to raise this issue because of concessions he made below.

[43] At trial, the Crown called an expert witness to give opinion evidence with respect to the element of possession for the purpose of trafficking. Initially, counsel for the appellant at trial indicated that he would be challenging only the assertion that the methamphetamine was necessarily for the purpose of trafficking. He conceded that element in relation to the GHB. Subsequently, just before the Crown's expert testified on the voir dire, counsel for the appellant further conceded that if the expert evidence were admitted, then, if the judge found that the substances were possessed by the appellant, there was sufficient evidence that the possession of both substances was for the purpose of trafficking. Those

concessions, together with the appellant's statement that there was nothing to argue once the evidence was admitted, is why the judge was able to give short reasons for judgment convicting the appellant on both counts.

- [44] The specific concession, then, concerned the element of the purpose of trafficking, not whether the appellant was in possession of the substances. Given the strength of the Crown's expert evidence, it seems evident to me, once again, that counsel made an appropriate strategic decision in making the concession he did.
- [45] Although the concession did not expressly include the element of possession per se, the fact remains that the appellant called no evidence on that issue and declined to advance any argument once the voir dires were decided against him. On the element of possession, the judge said this:
- [2] I am satisfied on the totality of the evidence that I have heard and which includes the evidence of the expert that, for the reasons both of you have stated, this is clearly a matter where Mr. Donovan had knowledge and possession and control of the items, the prohibited items, the GHB and the methamphetamine located in the motor vehicle.
- [3] The context of that evidence is an indication that there was a lot of paraphernalia in the vehicle, back seat, front seat, and the trunk, which indicate clearly that whomever was driving that vehicle, in this case, Mr. Donovan, had to have been aware of the fact that there are prohibited and illegal drugs in the vehicle, and that there is no argument other than establishing beyond a reasonable doubt that he had knowledge and control edges required pursuant to both Counts 1 and 2.
- [4] I am satisfied on the totality of the evidence and the submissions of Crown and defence that there is simply no other reasonable conclusion to draw other than he had full knowledge and control of the methamphetamine and the GHB and, accordingly, Mr. Donovan is found guilty on both Counts 1 and 2 as charged.
- [46] The appellant argues that these reasons are insufficient and display inadequate or improper analysis. In the particular circumstances of this case, I disagree. In my view, given the context of the strategic decisions and concessions made on behalf of the appellant, in particular declining to advance any argument to the contrary, these reasons are sufficient. They identify the evidence on which the judge relied and her conclusion is supported by that evidence. As such, I consider them to be free of reversible error.

4. DISPOSITION

- [47] For these reasons, I would grant the appellant's application for an extension of time to bring the appeal, but I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Abrioux"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/24/02/2024BCCA0213.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-donovan-2024>

Prepared on 28 October 2026 · Esheria