
CANADA / JUDGMENT

R. v. Du Temple

2020 BCSC 2202

COURT

Supreme Court of British Columbia

DECIDED

9 December 2020

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2020 BCSC 2202 R. v. Du Temple

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Du Temple,

2020 BCSC 2202

Date: 20201209

Docket: 85710

Registry: Nanaimo

Regina

v.

Anjanette Marie Du Temple

Alana-Lee Bennett

Robert John Harper

Before: The Honourable Madam Justice Iyer

Oral Ruling on Voir Dire #1

Counsel for the Crown:

B. Lansdowne

Counsel for the Accused Du Temple:

S.D. Taylor

For the Accused Bennett:

No appearance

Counsel for the Accused Harper:

K. Waugh

Place and Date of Hearing:

Nanaimo, B.C.

December 8, 2020

Place and Date of Judgment:

Nanaimo, B.C.

December 9, 2020

- [1] THE COURT: I am going to give you my ruling on Voir Dire #1 which is the s. 9 voir dire. I reserve the right to make any minor editorial changes to correct errors and so forth, but I will not change anything of substance.

Introduction

- [2] Alana-Lee Bennett, Anjanette Du Temple, and Robert Harper are charged with possession of various illegal drugs for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act. As Ms. Bennett did not appear at the trial, I severed the counts relating to her and the trial proceeded on the counts against Ms. Du Temple and Mr. Harper. Both seek the exclusion of certain evidence under s. 24(2) of the Charter based on alleged infringements of their s. 8, 9, and 10(b) Charter rights. This voir dire addresses Ms. Du Temple's and Mr. Harper's s. 9 claim that their rights to be free from arbitrary detention were infringed when they were arrested without a warrant by Corporal Muir in the early morning of August 8th, 2018. Corporal Muir testified about the circumstances of the arrests he made. He gave his evidence in a straightforward manner. He acknowledged when he could not remember details or had not made notes of them. He was a credible witness.

Legal Principles

- [3] The law applicable to warrantless arrests is well settled. While ultimately the onus is on the Charter claimant to prove a Charter breach on the balance of probabilities, in the case of a warrantless arrest, the Crown must first prove that the arrest was lawful, *R. v. Grant*, 2009 SCC 32. Section 9 of the Charter requires the arresting officer to have reasonable and probable grounds. There is a two-part test for determining whether there are reasonable and probable grounds. First, the arresting officer must have a subjective personal belief that there are reasonable grounds for the arrest; second, the officer's subjective belief must be objectively justified based on the totality of the circumstances, *R. v. Messina*, 2013 BCCA 499, at paragraph 20. The objective justification can include observations made after the officer

formed their subjective belief but before they made the arrest and their special knowledge or expertise may be considered, *R. v. Pope*, at paragraph 56 to 57. The standard for the objective assessment is more than a suspicion, but less than the civil standard of proof on the balance of probabilities. In *R. v. Glendinning*, 2019 BCCA 365, Justice Newbury of the Court of Appeal put it this way at paragraph 32:

the officer must have grounds that tend to support his or her subjective belief -- i.e., that make the belief more likely or more "probable" than it would otherwise be -- and that those grounds must be objectively defensible, such that the line between "mere suspicion" and "reasonable belief" is crossed. The officer must be able to explain what objective factors, when considered through the "lens" of his experience and training, led to the belief.

- [4] In light of this, I must decide whether Corporal Muir had a subjective belief that he had reasonable grounds to arrest either of Ms. Du Temple and Mr. Harper and that those beliefs are objectively justified.

Circumstances Leading to the Arrests

- [5] Corporal Muir was on duty in Nanaimo in the early morning of August 8th, 2018. He responded to a radio call about a citizen's report of a possible theft of or from a vehicle near 100 Bing Kee Street. Corporal Muir is the head of the Nanaimo RCMP Police Dog Section and drives a large unmarked non-standard police truck equipped with a full set of police emergency lights. He drove his truck to the scene, saw a gray Chevy Malibu, and parked about 15 feet in front of it with his headlights on. He saw a man in the driver's seat later identified as Mr. Harper, a woman in the passenger seat, and another woman later identified as Ms. Du Temple leaning in close to the driver's side window which was down. Corporal Muir noted that the car's headlights and engine were off and that the back seat was full of clutter. He did not see anything exchanged between Ms. Du Temple and Mr. Harper.
- [6] Corporal Muir testified that the situation did not look to him like a theft of or from a vehicle, but he suspected that there was some criminal behaviour going on. He turned on his emergency lights to see how the three people would react. He described the reaction of all three as "panic." His attention was mostly on Ms. Du Temple as she was outside the vehicle. He saw her look from side to side and he expected her to flee. To his surprise, she walked briskly towards the front of the Malibu and therefore closer to Corporal Muir. He saw that she did not have a purse and noted one or two "dropping motions" from her hand and she looked from side to side and walked towards and along the front of the Malibu towards the passenger side. Corporal Muir reacted quickly. As a highly trained police dog and emergency response officer, he is an expert in tactical situations. He said that he was "laser-focused" on Ms. Du Temple and on her hands because he suspected that she might have a weapon or be dropping a weapon. He got out of his truck as the woman dropped the first item. By then, she was walking towards the rear of the Malibu. As Corporal Muir "closed the distance" between them, he saw her lean down towards her right and drop something close to the rear of the Malibu. Corporal Muir said, "Stop, police." He put his arm on Ms. Du

Temple and his flashlight briefly illuminated what he said was a baggie of what he believed was an illegal drug on the ground. He arrested her for possession of a controlled substance and handcuffed her.

- [7] Although Corporal Muir's primary focus was on Ms. Du Temple, he noticed that when he turned the police emergency lights on, both of the Malibu's occupants lowered their heads and shoulders. As Corporal Muir brought Ms. Du Temple along the passenger side of the Malibu towards his police truck, he told the two people in the car that they were under arrest, to show their hands and not to move. They complied.
- [8] These events occurred very quickly. Corporal Muir estimated that four to five seconds passed between the time he parked his truck and when he put on the police emergency lights. He estimated that, in total, 60 to 90 seconds elapsed between his arrival at the scene and arresting Ms. Du Temple.

Did Corporal Muir have a subjective belief that he had reasonable grounds to arrest Ms. Du Temple and Mr. Harper?

- [9] Corporal Muir confirmed that he had no prior knowledge of Ms. Du Temple, Mr. Harper, or the vehicle. The only information he had before he arrived at the scene was that this was a possible theft from a vehicle and that is the situation he was anticipating. Corporal Muir testified that when he arrived at the scene, his first impression was that this was not a car theft or break and enter, but some other criminal behaviour. On cross-examination by counsel for Mr. Harper, Corporal Muir said that he suspected a possible drug transaction when he saw how the individuals in the car reacted to the police emergency lights and he saw Ms. Du Temple's first dropping motion. That was when he decided to arrest her and the occupants of the vehicle. He did not consider any alternatives to a drug transaction. When he saw the baggie of what he believed were drugs on the ground at the rear of the Malibu right after Ms. Du Temple made a dropping motion, he considered his suspicions confirmed.
- [10] Ms. Du Temple did not challenge Corporal Muir's subjective belief that he had reasonable grounds to arrest her for possession of a controlled substance. In my view, Corporal Muir's observation of Ms. Du Temple's dropping motions as she walked around the Malibu and, in particular, the third instance when he was approaching her and saw her lean down and drop something close to the Malibu which he then saw was a baggie of white powder was sufficient to satisfy the subjective belief test.
- [11] I reach a different conclusion with respect to Corporal Muir's subjective belief that he had reasonable and probable grounds to arrest Mr. Harper. As Ms. Waugh demonstrated through her effective cross-examination of Corporal Muir, he did not see anything exchanged between Mr. Harper and Ms. Du Temple. He did not consider what Mr. Harper could see from inside the vehicle and did not turn his mind to the question of whether Mr. Harper had possession, in the legal sense, of a substance found outside the car.

- [12] In a Provincial Court case coincidentally named *R. v. Harper*, 2016 BCPC 0254, an officer arrested the driver of a vehicle for possession of a controlled substance based on his observation of a piece of tinfoil with the characteristics of heroin use on the driver's side floor. The judge found that the officer's evidence went to the element of control in that the drug he believed was on the tinfoil was close enough to be within the accused's control. However, the judge found this evidence insufficient to establish knowledge at paras. 21 and 23 to 25:
- [21] I conclude that the proximity to Ms. Harper was not offered by Constable Kornicki to suggest that he believed at the time of arrest that she knew, or even may have known, that it was there. That, of course, is because he never turned his mind to her knowledge.
- [23] The question is not simply whether Constable Kornicki had an honest belief that he had reasonable grounds. It would be the very rare case where the arresting officer would testify that he did not believe that to be the case. But it also includes an examination of that subjective belief.
- [24] In *R. v. Brownridge*, [2000] B.C.J. No. 1549 (B.C.S.C.), a case involving the smell of marijuana during a vehicle stop, Mr. Justice Halfyard examined the strength of the police officer's own evidence on the issue of his subjective belief regarding the possible knowledge of the accused and concluded it amounted to no more than mere suspicion. In case he was wrong, however, Mr. Justice Halfyard went on to examine the objective basis for the subjective belief and also found that lacking.
- [25] Possession requires both control and knowledge. In this case, Constable Kornicki did not even turn his mind towards Ms. Harper's knowledge, inferred or otherwise, in forming his grounds. Therefore, I find that the subjective belief for the reasonable grounds to arrest is not met.
- [13] The same reasoning applies with greater force in this case. Corporal Muir did not have any evidence that Mr. Harper either had knowledge of or control over the item Corporal Muir believed to be drugs dropped by Ms. Du Temple. It is not enough that Corporal Muir subjectively believed that he had reasonable and probable grounds to arrest Mr. Harper for something. He had to turn his mind to the elements of the offence he was arresting him for, *R. v. Harms*, 2020 BCCA 242, at paragraph 54.
- [14] I conclude that Corporal Muir did have the requisite subjective belief to arrest Ms. Du Temple, but did not have the subjective belief to arrest Mr. Harper.

Was Corporal Muir's subjective belief objectively justified?

- [15] Corporal Muir identified the following as the factors he took into account in arresting Ms. Du Temple and Mr. Harper:

- (a) the initial complaint reporting suspicious activity;

- (b) the time of day and location, 5:00 a.m. in an area of town associated with drugs, theft, and prostitution;
- (c) Ms. Du Temple initially leaning in towards the open driver's side window;
- (d) reaction to the police emergency lights of shock and panic;
- (e) Ms. Du Temple's non-work attire;
- (f) the clutter in the vehicle which included a bike frame or frames;
- (g) Ms. Du Temple's apparent disposal of the items, the dropping motions; and
- (h) the baggie of powder on the ground right after Ms. Du Temple made a dropping motion.

[16] Although Corporal Muir initially testified that Ms. Du Temple started to flee, he acknowledged that this is what he expected her to do and he was surprised when she did not. Although mentioned in the Crown submissions, I find that Ms. Du Temple did not flee and this was not a factor that Corporal Muir took into account.

[17] I agree with defence counsel that this is an atypical drug offence case. Corporal Muir was not involved in any ongoing investigation, let alone a drug investigation. His primary duties were not investigative but tactical, as a police dog officer and as an Emergency Response Team member. He was responding to a call about a possible theft involving a vehicle. As he arrived at the scene, he quickly dismissed that possibility. The initial complaint, time of day, and location do not objectively justify anything more than a suspicion of possible criminal activity of some kind. As such, they do not objectively justify Corporal Muir's subjective belief that he had reasonable grounds to arrest for drug possession.

[18] I reach similar conclusions with respect to Ms. Du Temple's attire and the three individuals' reactions of shock and panic in response to the activation of the police emergency lights. Corporal Muir described Ms. Du Temple's attire as suspicious because she was not wearing working clothes and, in his experience, people who are on the street for legitimate reasons at that hour of the morning are going to or from work. However, Corporal Muir could not recall what Ms. Du Temple was wearing and had no note of it. He described her clothes as akin to a street-involved person. When pressed, his best recollection was pants and a shirt. This observation does not support an inference of criminal activity, let alone possession of a controlled substance. Similarly, as Corporal Muir acknowledged, most people would be shocked and may appear to panic when suddenly confronted by a full set of police emergency lights blazing at them from a large truck. At best, this may support a suspicion of some unspecified criminal activity.

[19] Absent any evidence of an exchange, Corporal Muir's observation of Ms. Du Temple leaning in towards the driver's side window does not support an inference of criminal activity. It is just as plausible that they were simply conversing. The clutter Corporal Muir observed in the vehicle is also innocuous. Although Corporal Muir observed a bike frame or frames and said that they can be used as currency in the drug trade, bikes are frequently the subject of

property crime. Of course, bikes may be in a car without any connection to criminal conduct.

- [20] That leaves Ms. Du Temple's dropping motions and the baggie of white powder Corporal Muir saw with his flashlight right after Ms. Du Temple made a dropping motion at the rear of the Malibu. I reject Ms. Du Temple's submission that the arrest occurred before Constable Muir saw the baggie as Corporal Muir's evidence was to the contrary. However, I find that Corporal Muir's observation of the dropped item was fleeting. He described it as a baggie containing white powder. The photograph taken later shows two baggies, a lighter, and a folded \$10 bill. From the height and distance at which Corporal Muir made his observation, it would be very difficult to determine that the contents of the baggies were powder.
- [21] As I have said, I must consider the totality of the circumstances. These include objective factors that do not support Corporal Muir's belief. Corporal Muir had no prior knowledge of any of the three individuals including any history of their involvement in the drug trade. The information he was acting on was a suspected theft, not a drug transaction. Further, the primary source of Corporal Muir's current knowledge about how to identify drugs is from samples that he receives to train his dog. He is mostly a tactical, not an investigative, officer. In my view, while Corporal Muir may have had objective grounds for detaining Ms. Du Temple for investigative purposes, his decision to arrest her for possession was not objectively justified. He did not actually see her drop anything. Finding the baggie on the ground close to her right after she made a dropping motion supports the inference that she had dropped the item, but there is nothing to support the element of knowledge. Corporal Muir's supposition that the baggie contained a drug was simply based on his hunch that he had interrupted a drug transaction. That suspicion was not based on having observed any exchange at all.
- [22] While such determinations are highly fact-specific, I have found it helpful to review Pope and the decisions cited therein as well as R. v. Chong, R. v. Luong, and R. v. Barnes and Plant. In my view, the evidence in the cases where objective justification was not found is stronger than in this case.
- [23] If I am wrong in my conclusion about Corporal Muir's subjective basis for arresting Mr. Harper, I would have no difficulty concluding that his subjective belief was not objectively justified for the same reasons. Corporal Muir did not see any exchange between Mr. Harper and Ms. Du Temple. There is no evidence Mr. Harper could have seen what Ms. Du Temple was doing outside the car. There is nothing to connect him to any items in Ms. Du Temple's possession.
- [24] In conclusion, I find that Corporal Muir's arrests of Ms. Du Temple and Mr. Harper infringed their rights under s. 9 of the Charter.

"Iyer J."

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