

CANADA / JUDGMENT

R. v. Ellison

2022 BCSC 2399

COURT

Supreme Court of British Columbia

DECIDED

9 March 2022

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2022 BCSC 2399 R. v. Ellison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ellison,

2022 BCSC 2399

Date: 20220309

Docket: 42656

Registry: Courtenay

Regina

v.

David Joseph Ellison

Tyler Alexander Nolan

Before: The Honourable Mr. Justice Baird

Oral Ruling on voir dire

Re: ss. 8, 9 and 10 Charter rights

Counsel for the Crown:

N. Grabe

Counsel for the Accused, Ellison:

B. Movassaghi

Counsel for the Accused, Nolan

C. Hodson

Place and Dates of Trial:

Courtenay, B.C.

January 31 - February 4, 2022

Place and Date of Judgment:

Nanaimo, B.C.

March 9, 2022

INTRODUCTION

- [1] David Ellison and Tyler Nolan are before the court on a multiple count indictment alleging a variety of criminal offences, the most serious of them having to do with the possession of loaded firearms in a motor vehicle. All charges arise from an impromptu investigation conducted by the RCMP near Black Creek, British Columbia, in the early morning hours of November 8, 2020.
- [2] This is a ruling on a voir dire dealing with Charter applications brought by each accused on similar terms. Each of them alleges that his rights guaranteed by ss. 8, 9, and 10 of the Charter were infringed or denied during the course of the investigation in question. The Crown called two witnesses on the voir dire, Constables McSeveny and Dormuth. Neither accused called any evidence.

BACKGROUND

- [3] On November 8, 2020 at 1:40 a.m., Cst. McSeveny was travelling south on Macaulay Road in Black Creek, British Columbia, when he observed a 2008 Ford Escape parked on the opposite side of the road facing north in front of a group of Canada Post mailboxes. The light inside the Escape was illuminated but its headlights and taillights were off.
- [4] Cst. McSeveny noted that there were three occupants in the vehicle: a female driver, a male in the front passenger seat, and a male in the back seat on the passenger side. He testified that the area in question is rural, mostly farmland. Footage taken from his dashboard camera confirms this. I was told that Macaulay Road farther to the north is a dead-end. In order to get out of the area one has to go south.
- [5] Cst. McSeveny stopped his vehicle beside the Ford Escape and turned on his emergency lights. He thought it was odd that a vehicle should be parked in that location at that hour of the day. This, it seems clear enough to me, was his only reason for detaining the vehicle in question or questioning its occupants. He decided to perform a vehicle check, or so he said, to ensure that the driver was sober and that she was properly licensed and insured. He said he also wanted to satisfy himself that the vehicle was not stolen. He claimed to be concerned, as well, about the possibility of theft from the nearby mailboxes. He recorded

none of these factors for detaining the vehicle and its occupants in his contemporaneously made police notes.

- [6] Cst. Dormuth was in a second police vehicle behind Cst. McSeveny. The two of them were returning to Campbell River after assisting the Courtenay RCMP on an unrelated call. They are both highway traffic officers with long careers behind them. Cst. Dormuth parked directly in front of the Ford Escape. He specified both in his testimony in chief and in cross-examination that he did this "in case [the people in the vehicle] decided to run".
- [7] Cst. McSeveny got out of his vehicle and approached the Ford Escape to speak to the driver. Cst. Dormuth joined him. Both police officers testified in plain terms that their reason for approaching the vehicle was really to find out who the occupants were and what they were up to. They had received no information concerning any crime committed anywhere in the area. They had no reason to suspect that the occupants were involved in any specific criminal activity.
- [8] The female driver told Cst. McSeveny that she was there to collect her mail but had forgotten her mailbox key. Cst. McSeveny asked her where she lived, and she gave an address that was quite some distance away. Cst. McSeveny's suspicions were aroused by this. He doubted that any of the mailboxes could possibly be hers, and when he asked her about this, that is, if this is where she got her mail, her answer was "I don't know".
- [9] Cst. McSeveny felt that the driver was not being straight with him. He asked her to produce her driver's licence. She did not have one, but she gave him a BC Service Card with her picture on it. Cst. McSeveny returned to his squad car and made an inquiry on his computer. It revealed that the driver had identified herself correctly, that she had a valid class 5 driver's licence, and was properly insured. It was immediately obvious to him, he said, that the driver was not intoxicated. The vehicle had not been reported stolen.
- [10] Cst. McSeveny testified that he could not remember if he bothered to look at the nearby mailboxes to see if they had been tampered with, but Cst. Dormuth investigated this possibility and found nothing amiss. All of the questions - all of the concerns referred to, that is, by either officer in detaining this vehicle and its occupants in the first place, were cleared up within a matter of minutes.
- [11] Cst. McSeveny told Cst. Dormuth that everything checked out with the driver and Cst. Dormuth thought that this meant that their interaction with the occupants was over and that they would shortly be leaving. But Cst. McSeveny carried on with his investigation. I repeat that Cst. McSeveny's squad car was equipped with a dashboard camera with audio capability, and much of what he said and heard was played in open court.
- [12] The video footage had a time clock display by which I was able to monitor the length of the interaction in question. It was at about 30 seconds into the video that Cst. McSeveny turned on his emergency lights and pulled over. Not quite six minutes elapsed before the inquiries about the driver revealed that she had a valid driver's licence. Cst. McSeveny had received

information that the driver was the subject of a court order - either bail or probation, it was not clear which - including a condition that the driver was banned from having a firearm in a motor vehicle.

- [13] Cst. Dormuth was then heard to say on this video recording, "I'm going to run these two guys", referring to the male passengers. Cst. McSeveny told Cst. Dormuth that he thought they were "dealing with a whole pile of pieces of shit". Cst. Dormuth asked the two male passengers for their names. Mr. Nolan identified himself correctly, but the accused Ellison said that his name was "Kevin Schnell". Mr. Nolan's identity was confirmed on CPIC but there were no "hits" on the system for "Kevin Schnell".
- [14] Cst. McSeveny made no bones about it: from this point forward, his investigation focused exclusively on the identity of the front seat passenger. He also confirmed, and I agree with him, that he had no reason to think that this person or either of the other occupants of the vehicle were committing or had committed any criminal offence. A half hour and more elapsed during which the suspect vehicle's occupants remained in their seats while Csts. McSeveny and Dormuth continued checking the name "Kevin Schnell".
- [15] None of the occupants was advised of any reason for their detention or advised of their s. 10(b) Charter right to retain and instruct counsel without delay. Eventually, Cst. McSeveny removed the female driver from the car because, he said, in his experience "it was easier to get people to tell the truth when separated rather than when together". He asked the female driver who was sitting up front with her, and she responded that his name was "Kevin". Cst. McSeveny pressed her for a minute or so, and finally she admitted that his name was "Dave Ellison" and that he was 41 years old.
- [16] Thereafter, Mr. Ellison was arrested for obstructing a peace officer. On the dashboard audio Cst. Dormuth can be heard telling him this. By that time the video camera clock showed 28:12 seconds - in other words, the detention or investigation had been ongoing for close to half an hour. Both police constables started peppering Mr. Ellison with questions, telling him that they knew he was lying about his name and that he should come clean. He carried on insisting that his name was Kevin James Schnell, but at 30:23 seconds on the video he finally coughed up the name David Joseph Ellison. He said that he had lied because he was afraid of the police.
- [17] At 30:38 seconds the dashboard video recorded Cst. McSeveny ordering Mr. Ellison to lean forward, followed immediately by the question "What's this?" Cst. McSeveny said that he saw a "raised object" between Mr. Ellison's shoulder blades which felt hard to the touch. He lifted up Mr. Ellison's hoodie to discover that the "object" was a plastic clasp attached to straps that looked like a shoulder holster.
- [18] Suspecting that Mr. Ellison might be armed, Cst. McSeveny forcibly removed him from the vehicle, shoved him to the ground, and searched him. The harness that he was wearing was, indeed, a shoulder holster assembly but the holster was empty. Cst. Dormuth removed Mr. Nolan from the rear of the vehicle and secured him, unhandcuffed, in his squad car. Then

he searched the Ford Escape for weapons. He found two loaded handguns underneath the front passenger's seat, one closer to the front where Mr. Ellison had been, the other closer to the rear where Mr. Nolan had been. These items, as I have said, are the subject of the most serious charges in the indictment.

- [19] Both accused were arrested for possession of restricted firearms. By now it was just after 2:30 a.m. or around 50 minutes from first contact. Each accused was read his Charter s. 10 rights from a card. Each requested to speak to a lawyer. No access to counsel was granted at the scene. Mr. Nolan was put in Cst. Dormuth's vehicle. He was kept at the scene for about another half hour. Cst. Dormuth said that this delay had something to do with waiting for another RCMP member to attend to escort the female driver to her home. Then he took Mr. Nolan to the Campbell River RCMP detachment where he was finally granted access to counsel at 3:54 a.m.
- [20] In the meantime, Mr. Ellison was locked away, snoring loudly, in Cst. McSeveny's vehicle. His handcuffs had been loosened at his request. Cst. McSeveny called a tow truck to take the suspect vehicle back to Campbell River. The tow truck did not arrive until 3:30 a.m. After the vehicle was hitched and taken away, there was a 40-minute drive to the Campbell River RCMP detachment where photographs of Mr. Ellison were taken, showing the holster and so on. Only after that, and various other booking-in activities were performed, was he granted access to counsel, by which time it was approximately 4:40 a.m., or three hours since his first contact and dealings with Cst. McSeveny.

ISSUES

- [21] As previously mentioned, each accused has brought an application alleging that he was arbitrarily detained, unlawfully searched, and denied the right to counsel. The focus of Cst. McSeveny's investigation, as it turned out, was Mr. Ellison, and he will also be the focus of this ruling. Mr. Nolan was really just along for the ride, as it were.
- [22] Crown counsel argues that the early interaction between police and the occupants did not constitute a detention; that a detention in the legal sense did not occur until Mr. Ellison was lawfully arrested for obstructing a peace officer; that the search of the vehicle was incidental to that lawful arrest; and that, in any event, neither accused had standing to challenge the reasonableness of the search as they had no reasonable expectation of privacy in a vehicle which belonged to neither of them and in which they were merely passengers.
- [23] Both accused argue that a detention of the suspect vehicle and its occupants occurred when Cst. McSeveny pulled up beside them with his emergency lights flashing, and Cst. Dormuth parked in front to prevent them from leaving. They say that this was a case of groundless and arbitrary investigative detention, accompanied by a failure to state the reasons for it, or to give advice about the right to retain counsel, followed by a lengthy and unwarranted interrogation about who they were and why they were in the area, a warrantless, unreasonable search of the vehicle, and an excessive and unjustifiable delay in granting

access to counsel as was required by well-known and well-established law.

DISCUSSION

- [24] The problem that Crown counsel must contend with on this hearing is that Cst. McSeveny, when it came down to it, testified that he was really only interested in the suspect vehicle and its occupants because he thought their presence in the area was "odd". There really was not much more to it, in my respectful view. He had no reason to think that any crime had been committed nearby or that any of the three people in the vehicle had engaged or were engaging in any type of unlawful activity.
- [25] Even if I were to accept that he embarked upon a limited inquiry about vehicle licensing, insurance, driver sobriety, and the possibility of theft from mailboxes, the plain fact is that he satisfied himself very quickly that there was no basis for concern about any of those things. But then, rather than allowing the female driver and her passengers to proceed on their way, as I think the law required of him, he detained the vehicle for over half an hour while he and Cst. Dormuth embarked on a groundless inquiry into the identity of the front seat passenger.
- [26] In my view, and with all of the greatest respect to those who think otherwise, there is not the slightest doubt that the vehicle and its occupants were detained from the very beginning. Cst. Dormuth parked his car directly in front of the Ford Escape and said expressly that he did so to ensure that it could not drive off. In my assessment, if the vehicle had reversed and departed the scene the police would infallibly have chased it down. In all of the circumstances, I am unable to accept the assertions to the contrary made by both police witnesses, namely that the driver and occupants were free to leave whenever they liked.
- [27] If Mr. Ellison in particular had walked away from the scene, he would most certainly have been arrested. In my assessment, especially on an isolated rural road, blocked off by Cst. Dormuth's vehicle, with another police vehicle alongside, its lights flashing brightly, and both officers persistently asking focused questions in an assertive and active manner, and investigating every answer given, there was most assuredly, at the very least, the sort of psychological detention discussed in *R. v. Suberu*, 2009 SCC 33, and in many other cases.
- [28] I would repeat, as well, that the avowed purpose of Cst. McSeveny's intervention on this occasion was for motor vehicle regulatory reasons. Such an inquiry by its nature involves not only a detention, but an arbitrary one, albeit that in most cases is justified on well-established legal principles. But as this court noted in *R. v. Woody*, 2018 BCSC 2275 at para. 35, in the absence of reasonable suspicion or grounds, the police cannot simply stop a motor vehicle and detain the driver or occupants for a general inquisition into possible criminal wrongdoing.
- [29] This was a case, I have decided, of an investigative detention without grounds. In cross-examination Cst. McSeveny freely conceded, and I am obliged to him for his candor, that within a couple of minutes of first dealing with the driver of the Escape, he was satisfied that

she was sober, licensed, insured, and that the car was not stolen. He agreed that his initial reasons for detaining the vehicle and driver had lapsed and that his focus shifted to the identity of the passenger. This was because he suspected that the occupants of the vehicle were linked to the "criminal subculture", which he said was a factor that he has become able to measure with some accuracy over his many years of policing.

- [30] I know what he means, of course. He is talking about intuition, and it may be that his intuition is perfectly sound. However, Cst. McSeveny, with all the greatest respect for a senior and experienced police officer, gave no reason, no persuasive or concrete rationale for his inklings in this direction. He called it a "gut feeling" based on his experience. His evidence was that he wanted to make sure that the occupants of the vehicle were in the area for legitimate reasons, that everything was on "the up and up", and that there was no "hanky-panky going on". He testified that "they could have been doing drugs, they could have been there to steal, they could have been there to break into a nearby home." But, on the other hand, he said, they may have been "looking at deer" or engaged in some other completely innocent activity. He did not really know, he said.
- [31] In short, Cst. McSeveny had no reason to think that any of the three vehicle occupants were committing or had committed any specific crime. The Supreme Court of Canada decision in *R. v. Mann*, 2004 SCC 52 has made it clear that an investigative detention without grounds is unlawful, whatever its duration. The grounds for such a detention were never present in this case and yet the vehicle in question and its occupants were detained for over half an hour while inquiries made were made about Mr. Ellison's identity. He was never told why he was being detained because, in my view, there was not any lawful reason for it. He was not advised of his right to counsel. In fact, he was not granted access to counsel until hours later.
- [32] Instead, the attending officers continued questioning him. It is quite true, as Mr. Grabe reminded me, that police are entitled to question people, even people suspected of criminal activity, without detaining them. But, as I have said, in my view there was clearly a detention here. It is also my firm view that this was not a "traffic stop" in the ordinary sense of that term. Cst. McSeveny approached the vehicle, not because he observed a moving violation or because a tail lamp was broken or any of that kind of thing, but because it was parked on a rural road in circumstances that he thought were "odd". He concluded, to use his words, that Mr. Ellison was likely a "shit rat" and he was determined to figure out what he was up to.
- [33] By the end of the inquiry into Mr. Ellison's identity, for emphasis, the police had been dealing with this vehicle and its occupants for over half an hour. Their expressed reasons for doing so had long since lapsed. The question, or part of it, is whether the police were within the acceptable scope of their police duties in asking Mr. Ellison to identify himself without any cause, and to keep him under detention for this length of time in order to investigate the matter, especially in the absence of telling him why he was being detained or advising him of his right to counsel.

- [34] In my view, the answer is, quite clearly, that this was an arbitrary detention and a denial of Mr. Ellison's right guaranteed by s. 9 of the Charter. There was, quite simply, no lawful basis to detain Mr. Ellison in the circumstances. The whole investigation was based on a hunch. It was never connected to any specific criminal activity. I have concluded that, as a matter of law, the police were not acting in the course of lawful duty when detaining and investigating Mr. Ellison's identity because, by their own frank admission, they had no reason at all to think that he had done anything wrong.
- [35] In my view Mr. Ellison's subsequent arrest was similarly unlawful, having proceeded directly and causally from an arbitrary and groundless initial investigative detention. The search of his person and the vehicle in which he had been travelling was unreasonable as having been conducted incidental to an unlawful arrest and constituted a violation of his s. 8 Charter rights. Wrongful or not, this arrest triggered a police responsibility to facilitate contact "forthwith and without delay" when the accused asked for it. This responsibility was discharged only hours later, and no persuasive attempt has been made to explain or justify this lengthy hiatus. This was a violation of Mr. Ellison's s. 10(b) Charter rights.
- [36] As far as Mr. Nolan is concerned, for greater clarity, the same observations apply with respect to what I consider to be his lengthy detention without grounds while the police zeroed in on Mr. Ellison's identity. Mr. Nolan's arrest followed and was causally related to the unlawful detention and arrest of Mr. Ellison, and the handguns were discovered as a result of a search incidental to that unlawful arrest. Mr. Nolan was likewise not advised of the reason for his detention or advised of his right to speak to a lawyer immediately. In any event, after he was finally arrested it was hours before he was granted access to counsel and without any plausible explanation for the delay.
- [37] In my view, the Crown's argument about the standing of either accused to challenge the vehicle search is not sound. The only authority for undertaking the search was as an incident to the arrests, which I have determined to have been unlawful. It is not a matter of their expectation of privacy as passengers in a vehicle owned by somebody else. In my view, it is beyond question that the accused have a legally sufficient interest in the matter and are eligible to be considered for a s. 24(2) remedy for this breach, in combination with the others that I have described.
- [38] In short, I am satisfied on all of the evidence taken on the course of this voir dire that each of the accused has established that during the described interaction with Csts. McSeveny and Dormuth their rights guaranteed by ss. 8, 9 and 10 of the Charter were infringed or denied, and the focus of the inquiry will now shift to whether the evidence obtained after those breaches should be excluded or admitted into evidence under s. 24(2) of the Charter.

"Baird J."

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