
CANADA / JUDGMENT

R. v. Flintroy

2019 BCSC 90

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 90 R. v. Flintroy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Flintroy,

2019 BCSC 90

Date: 20190124

Docket: 27279

Registry: Vancouver

Regina

v.

Charleen Teresa Flintroy

Dennis Alexander Halstead

Jason James Heyman

Cameron Mak

Corrected Judgment: The text of the judgment was corrected at paragraph 18 on May 22, 2020

Before: The Honourable Mr. Justice Williams

Ruling for Voir Dire #8

(Re: Manner of Entry)

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Place and Date of Trial/Hearing:

Vancouver, B.C.

October 3, 4, 9-11, 2018

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2019

- [1] On March 11, 2015, members of the RCMP Emergency Response Team ("ERT") executed a search warrant at the residence of Jason Heyman located at 6 - 13536 King George Boulevard in Surrey, BC. The manner of execution was a "dynamic" or "hard" entry. The officers did not employ the more standard method of knocking and announcing their presence.
- [2] The applicant, Mr. Heyman submits that his section 8 right to be secure against unreasonable search under the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter") was breached by the police in the manner in which they affected the entry.

Circumstances

- [3] In the latter part of 2014 and the early months of 2015, the Vancouver Police Department ("VPD") Organized Crime Unit conducted a large-scale investigation into the activities of a drug trafficking organization. On March 11, 2015, the project was in its final phase. A number of search warrants had been obtained for a total of seven premises in greater Vancouver. One of those was an apartment located at 6 - 13536 King George Boulevard in Surrey, BC. That was known to be the residence of the applicant Mr. Heyman. He was considered to be a high-level member of the organization.

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- [4] Although this was a VPD investigation, well in advance of the takedown the RCMP were enlisted in the warrant execution because the premises were located in Surrey, a jurisdiction policed by the RCMP. Because investigators believed that the execution had a higher risk aspect, it was decided that the ERT should be involved. I note that certain other of the search sites were executed with ERT support.
- [5] The apartment in question is on the second floor of a mixed use building. The main floor is occupied by commercial tenants. The second floor has approximately 8 residential units.
- [6] On the morning of the execution, members of the ERT held a briefing at RCMP headquarters in Surrey, following which they travelled to the site. There were 6 members in the entry group. As well, a police service dog handler and another ERT member, acting in the capacity of an observer/sniper, were present at the scene and positioned themselves with a view of the rear of the building - that is, the side opposite from where entry would be made.
- [7] The decision had been made that the team would make a dynamic entry. A dynamic entry is a procedure whereby police members belonging to a specialized unit, specially trained and equipped, position themselves at the door of the subject premises, preferably in a manner whereby they are not detected. To make their entry, there is a loud announcement of police presence and the purpose of the presence, and simultaneously members of the tactical team attack, usually forcibly, the door so as to make immediate entry. Police officers then rush into the premises, confronting and dealing with all persons present. The object of the tactic is to have an element of surprise and to move pre-emptively so as to minimize or avoid the risk of resistance from the occupants or the destruction of any evidence. The aim of the officers is to clear and secure the premises - that is, to take the occupants under control. At that point, in a situation such as the present case where the entry team is no part of the actual investigation, the premises are then turned over to the investigative agency.
- [8] In the circumstances at hand, the glass door leading into the main level of the building was locked and the police had no keys to allow access. Because of that, one member of the ERT "breached" the door, that is he forcibly broke the glass by striking it with a hammer, then reached in and opened the door to allow the other team members to enter, which they did.
- [9] After gaining entry to the ground floor, the officers made their way to a stairway and then ascended to the second floor, emerging in the corridor. They went down the hall to the door of Unit 6.
- [10] Upon arrival at the door of the suite, the officer at the front of the group who were going to make the entry paused briefly to listen for sounds of activity inside. Nothing of consequence was heard. The police then simultaneously announced their presence and one of the officers struck the door with a heavy ram device which disabled the lock mechanism and allowed the door to be entered. Officers then proceeded inside.
- [11] The apartments at issue is a small one bedroom unit.
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- [12] The first officer who entered described that there was a bathroom doorway near the front door. He saw a man there, apparently emerging from a shower. This was Mr. Heyman. Mr. Heyman retreated into the bathroom but another officer came and quickly took control of him. The other members of the team proceeded down the corridor and into the living room area. In that area the lead officer saw a woman. This was Ms. Van Norren, Mr. Heyman's common-law spouse. He said she had her hands out and he directed her to a prone position, that is, on her stomach on the floor with her hands and feet out. She complied with that instruction.
- [13] All 6 of the team members entered the apartment in short order. The bedroom was "cleared", that is, it was checked to see that there was no one else present. At that point, the ERT contacted the investigating officers who came to the scene and took control of both Mr. Heyman and Ms. Van Norren, as well as the premises themselves.
- [14] That was the conclusion of the ERT involvement in the execution of the warrant.

Positions of the Parties

- [15] Mr. Heyman says that the dynamic entry into the apartment was an unjustified departure from the required "knock and announce" rule that governs police conduct in such circumstances. Specifically, he says the Crown has failed to discharge its burden of providing an evidentiary framework on the record to support a dynamic entry. Further, even if the evidence that has been proffered is accepted, it fails to support the exigency necessary to conduct a dynamic entry.
- [16] The Crown accepts that in ordinary circumstances, the police are required to make an announcement before entering a dwelling house. The Crown also says that there is a latitude for the police to depart from that approach in exigent circumstances, and says that it has shown that such circumstances existed in the matter at hand, such that the entry as effected was not unreasonable.

Analysis

The Law

- [17] The controlling authority with respect to this issue is *R. v. Cornell*, 2010 SCC 31 [Cornell]. There the court examined the issue in detail, including having reference to earlier relevant authorities, most particularly *Eccles v. Bourque*, [1975] 2 S.C.R. 739 [Eccles] and *R. v. Genest*, [1989] 1 S.C.R. 59 [Genest]. The main question is whether the police had reasonable grounds for concern to justify use of an unannounced forced entry: Cornell at para. 22.
- [18] The applicable principles are, to my understanding, the following:

1. To be reasonable under section 8 of the Charter, a search must be authorized by law, the authorizing law must itself be reasonable, and the search must be conducted in a reasonable manner: *R v. Collins*, [1987] 1 S.C.R. 265 at 278.
 2. The onus is on the party alleging a breach of his Charter rights to prove that the search contravened section 8 of the Charter: Cornell at para. 17.
 3. Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give: (i) notice of presence by knocking or ringing the door bell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry: Cornell at para. 18, citing *Eccles* at 747.
 4. Where the police depart from this approach, there is an onus on them to explain why they considered it necessary to do so. If challenged, the Crown must lay an evidentiary framework to support the conclusion that the police have reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence. The greater the departure from the principles of announced entry, the heavier the onus on the police to justify their approach: Cornell at para. 20.
 5. The evidence to justify such behaviour must be apparent in the record and available to the police at the time they acted. The Crown cannot rely on ex-post facto justifications.
 6. As per Chief Justice Dickson in *Genest*, what must be present is evidence to support the conclusion that "there were grounds to be concerned about the possibility of violence".
 7. The decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be: Cornell at para. 23.
 8. Section 8 of the Charter does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present: Cornell at para. 20.
- [19] Overall, courts must permit police a certain degree of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require. In assessing the manner in which a search has been conducted, it is important for the court to appropriately balance the rights of suspects with the requirement of safe and effective law enforcement, and not to become a "Monday morning quarterback": Cornell at para. 24.

Discussion

- [20] In the facts at hand, there is no question that the entry did not comply with the knock and announce rule. Accordingly, I must examine the record to determine whether it provides an adequate basis to conclude the police had reasonable grounds to be concerned about the possibility of harm to themselves, the public or the occupants of the dwelling, or about the destruction of evidence. The Crown has the burden of establishing that the dynamic entry was reasonable in the circumstances.
- [21] One particular aspect of the analysis concerns the evidence which is available to be considered.
- [22] A component of Mr. Heyman's argument is that the Crown has failed to discharge its evidentiary burden, given that it is the obligation of the Crown to proffer admissible evidence for the Court to consider whether a dynamic entry is justified in the circumstances. In Mr. Heyman's submission, this evidence must be apparent "in the record".
- [23] In the case at hand, Mr. Heyman says the Court has not heard specifically from the officer who made the decision to conduct a dynamic entry. While the Court has heard from Detective Griffiths, the VPD member who communicated with the RCMP personnel, the applicant says that he was merely a conduit and his evidence is of little assistance in analysing the decision-making process. Similarly, Mr. Heyman says that the testimony of Constable Barata, an ERT member who was part of the entry team, is of no real value because he was not the decision-maker, but rather was simply following instructions. The applicant further notes that the risk assessment prepared by the ERT has not been provided to the Court, nor does it have other related documents such as criminal records, target sheets or other material possibly relied upon.
- [24] The bottom line of Mr. Heyman's position is that the Crown must justify the entry by admissible evidence and that, absent the viva voce testimony of the officer who made the decision, there simply is not sufficient evidence to decide the issue.
- [25] In my view, that is a somewhat restrictive approach to the matter.
- [26] While I must be cognizant of the deficiencies which have been noted, I am of the view that this Court may take into account reliable evidence as to what factors informed the decision to make the dynamic entry and the basis on which the decision is made. Here, there is evidence of what information was provided to the ERT by Detective Griffiths, of information that was made known to the members of the ERT who conducted the entry, and there is also evidence of the decision-making process that is applied by the ERT in such cases.
- [27] Accordingly, I do not see that there is a hearsay bar to the evidence being considered.
- [28] I agree that the best evidence to consider in deciding whether the decision was justified would include the testimony of the team leader who made the decision and the risk assessment report. However, the absence of that evidence is not necessarily fatal to the

justification. Deficiencies in the evidence will necessarily undermine the reasonableness of the decision that was taken. Nonetheless, there remains an evidentiary record in this case upon which I can determine what was known to the ERT and what considerations they took into account in executing the dynamic entry, most notably the testimony of Constable Barata. In my view, what was known to the ERT and knowing what considerations are relevant in the decision to make a forcible entry (from the evidence of Constable Barata and other ERT officers called at the voir dire) provides a sufficient basis to decide whether the police had reasonable grounds to take such an approach.

[29] In terms of the considerations known to police when they elected to utilize a dynamic entry, the following are relevant:

1. The VPD advised the ERT of Mr. Heyman's role in the offences under investigation: he was a member of a drug trafficking organization, dealing at a "kilo plus" level and it was believed that there was cocaine and heroin at the residence.
2. Mr. Heyman was known to have possession of 4 firearms. The police had intelligence that the firearms were being kept at another location in Maple Ridge, but the exact location of the firearms was not certain.
3. The VPD had limited information as to the building in question and its occupants and details. The VPD held the belief that the intelligence about the building was not readily available because it was small (and thus more difficult to gain entry and make enquires without the risk of being detected) and perceived to be unfriendly. One effort to surreptitiously obtain information from around the building had been met with a hostile challenge from a person attending an MMA training gym on the main floor.

[30] From that, it was reasonable to conclude that there was at least some real potential for violence and, similarly, some real potential that drugs being kept at the residence would be destroyed, likely by being flushed away, if there was any advance indication of a police search.

[31] It is also a reality that there were no means of entering the building and getting to the suite door without some likelihood of being seen or detected.

[32] Because the police would be unable to evacuate other residents on the second floor in advance of executing the search warrant, so as to minimize the possibility of harm to them from being in the area of the search which could potentially involve violence, there was a greater need to effect entry and containment quickly and with a reduced opportunity for confrontation.

[33] In my view, those considerations, on balance, albeit narrowly, support a conclusion that the decision to affect a dynamic entry was reasonable in the circumstances.

- [34] In the course of submissions, I was referred to a number of decisions of other courts dealing with situations of dynamic entry. To my mind, it is relevant that a number of those which find the entry to have been unreasonable include findings that the police were acting in accordance with what was essentially a blanket policy and without appropriate consideration of the facts of the specific situation.
- [35] In *R. v. Vadon*, [2000] B.C.J. No. 2081 (S.C.), the court held that a dynamic entry was unreasonable given that there was no suggestion of a basis to expect a violent response and, given that the target of the search was a marihuana grow operation, concluded that the evidence which was sought was not readily disposable. The court further concluded that the decision, in effect, reflected a standard police practice which was an unreasonable policy.
- [36] In *R. v. Ruiz*, 2018 ONSC 5452, in finding a dynamic entry to be unreasonable, the court concluded that the police had very little information about the situation and found no evidence of the issue of the manner of search having been meaningfully considered by the police in making their decision. The court ruled that there was no reasonable basis upon which the police could believe that weapons were present and there was only a mere possibility that evidence could be destroyed.
- [37] In *R. v. McKay*, 2017 SKPC 53, the court found a dynamic entry search executed at night on a house occupied by an accused and her children to be unreasonable. There was no evidence of any discussion by the police with respect to the reason for the dynamic entry. The court concluded that such entries were the policy of the police for all CDSA searches and that was based on simple boilerplate reasons of officer safety and prevention of destruction of evidence.
- [38] Lastly, in *R v. DeWolfe*, 2007 NSCA 79, the court allowed an appeal from a trial decision finding a Charter violation because of a dynamic entry search. The Court of Appeal found that even though dynamic entries were police practice for cocaine investigations in the particular area of the community, the actual factors of the search site, when considered, did not contradict the police decision to make a forced entry.
- [39] Mr. Heyman submits that the testimony of Constable Barata is that, effectively, the ERT considers dynamic entries to be the starting point in cases which involve perishable evidence such as drugs. The thrust of the submission, as I understand, is that the ERT approach is similar to a blanket policy, and that is a model that courts generally reject.
- [40] It is clear that the authorities (and the decisions discussed above) generally find that dynamic entries are unreasonable where they are conducted simply in accordance with a blanket policy and in the absence of a measured assessment of the facts of the particular case that is being considered.

- [41] In the matter at hand, I do not interpret Constable Barata's evidence as Mr. Heyman urges me to. Rather, I understand the ERT policy to entail looking at the specifics of the situation on their own merits. While the presence of a readily perishable drug exhibits is a factor, it is not automatically determinative. The totality of relevant factors will be taken into account.
- [42] The policy reasons to require knock and announce as a standard practice and to accept dynamic entry only where it is properly justified are well-founded and important. Dynamic entries are violent and shocking. They are at odds with the manner in which the community expects law enforcement personnel should conduct search incursions into the homes of citizens. In assessing the constitutional compliance of such searches, courts must apply a meaningful standard and ensure that dynamic entries are not "given a pass". At the same time, as the Supreme Court of Canada has made clear, courts must not be too quick to find a Charter violation in police operations where there are viable concerns for the reasonable possibility of violence and the destruction of evidence.
- [43] To be clear, in this case, it would have been preferable to have more evidence and better evidence. Furthermore, on the evidence adduced, the basis for the use of the dynamic entry was not overwhelming. However, on balance, I am not prepared to find that it was unreasonable.

Conclusion

- [44] It is my view that the police decision to utilize a dynamic entry in the execution of the search warrant at Mr. Heyman's residence was not unreasonable. For the reasons described earlier, I find the evidence demonstrated a reasonable explanation for the police decision to enter as they did. There were grounds to be concerned about the possibility of violence and, as well, there was a viable basis to be concerned that there was cocaine and heroin present which could be easily destroyed.
- [45] The application stands dismissed.

"Williams J."

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