

CANADA / JUDGMENT

R. v. Hayer

2022 BCSC 558

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 558 R. v. Hayer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hayer,

2022 BCSC 558

Date: 20220405

Docket: X083239

Registry: New Westminster

Regina

v.

Munroop Singh Hayer

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Before: The Honourable Madam Justice Devlin

Reasons for Judgment on Vukelich Application

Counsel for Crown:

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T. Paisana

M. Iyengar

Place and Dates of Hearing:

New Westminster, B.C.

March 24, 25, 28 and 30, 2022

Place and Date of Ruling given to Parties with Reasons to Follow:

New Westminster, B.C.

March 30, 2022

Place and Date of Judgment:

New Westminster, B.C.

April 5, 2022

Introduction

- [1] The accused, Munroop Hayer, is charged, together with Mr. Hothi and Mr. Bottomley, with the first degree murder of Andrew Baldwin, contrary to s. 235(1) of the Criminal Code, R.S.C., 1985, c. C-46. On November 11, 2019, Mr. Baldwin was found dead at the home of his friend, A.B., in Surrey, B.C.
- [2] Mr. Hayer filed a notice of application challenging the facial validity of an Information to Obtain ("ITO") filed in support of a production order for the phone number 604-799-0521. For the purposes of this application, Mr. Hayer relies on the Crown's theory that 604-799-0521 was his phone. The ITO contains a number of text messages between 604-799-0521 and Ms. MacDonald, the mother of the deceased, to establish the necessary grounds for issuance of the production order. Mr. Hayer takes the position that the text messages obtained from Ms. MacDonald's phone were obtained in breach of his rights under s. 8 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c. 11 [Charter] and therefore should be excised from the ITO. As a result of the excision, he submits the ITO is facially invalid; accordingly, he argues the production order should be set aside. In addition, he submits the text messages between 604-799-0521 and Ms. MacDonald should be excluded pursuant to s. 24(2) of the Charter from the trial proper.
- [3] The Crown takes the position that Mr. Hayer's application for a voir dire should be summarily dismissed because it has no realistic prospect of success on the threshold issue, relying on *R. v. Vukelich* (1996), [1996] B.C.J. No. 1535, 1996 CanLII 1005 (BCCA) [*Vukelich*] (leave to appeal ref'd: [1996] S.C.C.A. No. 461). They submit the circumstances under which the police came into possession of the text messages do not constitute state action and accordingly do not amount to a search and seizure as contemplated under s. 8 of the Charter. Further, they submit the applicant cannot establish that he had a reasonable expectation of

privacy in the text messages, which were threatening and harassing towards Ms. MacDonald. Similarly, with respect to the facial validity challenge to the ITO, the Crown submits the argument in support of excision is without merit. In addition, they submit there are sufficient grounds to support the issuance of the warrant without reliance on the text messages.

- [4] At the conclusion of submissions on the Vukelich application, I advised counsel that I was satisfied an evidentiary hearing was necessary with reasons to follow. These are those reasons.

Background Facts

- [5] For the purposes of this ruling, I will briefly set out the facts, relying on the notice of application, submissions of counsel, and application records filed on the hearing.
- [6] Ms. MacDonald had two sons, Keith and Andrew Baldwin. Keith Baldwin was shot to death on October 22, 2019. The applicant is charged in connection with the stabbing death of Andrew Baldwin on November 11, 2019.
- [7] On October 22, 2019 at approximately 7:30 a.m., Cst. Wiese and Cst. Micklefield of the RCMP, together with a victim services worker, attended Ms. MacDonald's residence to do a next-of-kin notification regarding her son Keith Baldwin. According to the Task Detail Report, Ms. MacDonald stated that she had been getting messages from a "Manny" or "Rup" who had been threatening to kill her boys if she didn't pay their drug debt. The Task Detail Report states that Cst. Micklefield was "given permission to review the text messages and record phone numbers for "Manny" or "Rup". The report also states that Ms. MacDonald "allowed" Cst. Micklefield to review her phone. Cst. Micklefield took 12 photographs of the text messages on Ms. MacDonald's phone from number 604-799-0521. Screen shots were also obtained from some of the text messages on Ms. MacDonald's phone.
- [8] At 12:59 p.m. on October 22, 2019, Cst. Stewart spoke to Ms. MacDonald at the Abbotsford Regional Hospital. Ms. MacDonald said she would fully cooperate with the police and allow them to search her phone. Cst. Stewart read the "Consent to Search Waiver" form for mobile devices, and Ms. MacDonald indicated she understood, signed the form, and provided her consent. Ms. MacDonald provided Cst. Stewart with her phone and PIN.
- [9] At 16:05 on October 22, 2019, Cst. Stewart turned the phone over to S/Cst. Baines of the Abbotsford Police Department, who prepared a Cellebrite Extraction report for Ms. MacDonald's phone. This report was prepared in connection with the homicide investigation into the death of Keith Baldwin.
- [10] On November 11, 2019, Andrew Baldwin was fatally stabbed at A.B.'s home in Surrey, B.C. RCMP Cpl. Sangha attempted to provide a next-of-kin notification to Ms. MacDonald but learned she was out of the country. On November 14, 2019, Cpl. Sangha spoke to Ms. MacDonald on the telephone. Their conversation was recorded, and a transcript was filed as

part of Mr. Hayer's application record. Ms. MacDonald stated that her son Andrew had been struggling with drug addiction and was scared because both Andrew and herself had been threatened by a person named Roop or Manny. Ms. MacDonald advised Cpl. Sangha that she gave her cell phone with the threatening messages to police on October 22. Ms. MacDonald stated "I don't mind giving you verbal permission to speak to the other IHIT um, people . they have um, several text messages and all of my phone um, things of being threatened verbally, like via text of putting my son in a casket". Later in the conversation, Ms. MacDonald confirmed that the IHIT team investigating Andrew Baldwin's murder could use the information from her phone, which was originally provided to the IHIT team investigating Keith Baldwin's murder. On November 30, 2019, Ms. MacDonald signed a second "Consent to Search" form for her cell phone.

- [11] On November 15, 2019, civilian member, Dale Sutherland, received and started reviewing a Cellebrite extraction report for Ms. MacDonald's phone, which was prepared earlier for the Keith Baldwin homicide investigation.
- [12] On November 21, 2019, Cst. Hong swore the ITO in support of an application to obtain a production order for the telephone number 604-799-0521.

Disputed Evidentiary Foundation

- [13] There is a fundamental disagreement between the parties as to how the police came into possession of Ms. MacDonald's text messages. The Crown submits the record clearly established that Ms. MacDonald voluntarily provided the police with the contents of her cell phone, including the text messages. They submit the Task Detail Report establishes that she did this voluntarily, without any prompting, and not in response to a request by the police. Therefore, they submit there is nothing in the record before the Court to support the applicant's request to have an evidentiary hearing. In addition, they argue the Court should only be concerned with the November 14, 2019 circumstances of Ms. MacDonald's voluntary offer to permit the police to review the cell phone records, which were already in their possession. The Crown argues that because the transcript of Ms. MacDonald's conversation with Cpl. Sangha establishes that Ms. MacDonald offered this information without any prompting or request by the police, there was no state action and hence no need to embark upon an evidentiary voir dire.
- [14] The applicant submits the manner by which the police first came into possession of the text messages, around the time of Keith Baldwin's death, is critical to the assessment. They argue the October 22, 2019 Task Detail report does not provide the necessary clarity and therefore an evidentiary hearing must be conducted. They submit it is necessary to determine what occurred in the conversation with Ms. MacDonald that resulted in Cst. Micklefield noting that Ms. MacDonald gave the police "permission to review the text messages". In addition to hearing from Cst. Micklefield and other officers involved, they submit it may be necessary to hear from Ms. MacDonald. At the time of the application, neither the Crown nor the applicant had taken any steps to acquire further information from either Cst. Micklefield or

Cst. Wiese to address this matter.

The Vukelich Threshold

- [15] Vukelich hearings serve as "an important trial management goal", as they filter out "proposed pre-trial applications where the circumstances, as disclosed by the submissions of counsel and references to supporting materials, are such that the remedy sought could not reasonably be granted" (R. v. McDonald, 2013 BCSC 314 [McDonald], para. 17). The discretion to deny a voir dire is "an important trial management power" that allows a trial judge to "control the course of proceedings and to not embark upon enquiries that will not assist the real issues in the trial": *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 255 [Trans Mountain] at para. 51; see also R. v. Johnston, 2021 BCCA 34 at para. 372 (leave to appeal granted: 2021 CanLII 122896 (SCC)).
- [16] In R. v. Cody, 2017 SCC 31 [Cody], the Supreme Court emphasized that trial judges have a positive duty to "use their case management powers to minimize delay", including by "asking defence counsel to summarize the evidence it anticipates eliciting in the voir dire and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily" (at para. 38). A trial judge's "screening function" is ongoing; the court is required to dismiss applications the moment it becomes apparent that they are frivolous (Cody at para. 38).
- [17] Although the Vukelich threshold has been "expressed in different ways at different times" (McDonald, para. 18), the fundamental question is whether the applicant can demonstrate a reasonable basis upon which their application could succeed, or a reasonable likelihood that it can provide assistance to the court (Cody at para. 38; R. v. Frederickson, 2018 BCCA 2 at para. 26; *Trans Mountain* at para. 52). As Justice DeWitt-Van Oosten explained in R. v. Orr, 2021 BCCA 42 (at para. 46), applicants are not automatically entitled to evidentiary voir dires whenever a Charter claim is raised; applications for Charter relief may be summarily dismissed if the Vukelich threshold is not met:
- [46] there is no automatic entitlement to an evidentiary voir dire in a Charter claim. As a result, where there is no reasonable likelihood that a voir dire can assist in determining the issues before the court, or no reasonable prospect of success in proving an infringement or obtaining the sought-after relief, a trial judge has clear jurisdiction to decline an evidentiary voir dire and to summarily consider and dismiss the application. (Vukelich; R. v. Greer, 2020 ONCA 795 at para. 108; *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 255 at paras. 49-52; R. v. Edwardsen, 2019 BCCA 259 at para. 62, leave ref'd [2019] S.C.C.A. No. 337; R. v. Vickerson, 2018 BCCA 39 at para. 61; R. v. Frederickson, 2018 BCCA 2 at paras. 11-14, 24, 26, 33, 39; R. v. Joseph, 2018 BCCA 284 at paras. 20-25; R. v. Cody, 2017 SCC 31 at para. 38; R. v. Mehan, 2017 BCCA 21 at paras. 43-47, 49; R. v. Pires, R. v. Lising, 2005 SCC 66 at para. 35.)
- [18] As Justice Fitch explained in McDonald, application of the Vukelich threshold is contextual and will depend on the facts of the specific case before the court:

- [21] The rigour with which Vukelich is applied and the way in which a trial judge exercises his or her discretion in relation to such an application is case-specific and highly contextual. Among the factors that will shape the exercise of that discretion are: the extent to which the facts or anticipated evidence underlying the alleged Charter breach are in legitimate dispute; the state and clarity of the law on the issue sought to be litigated; and the infinite variety of pragmatic considerations that will arise in a given case and suggest resolution of the application in one way or another. What underlies the inquiry is the need to balance an accused's fair trial interests with the public interest in the management of criminal proceedings by foreclosing lengthy and unnecessary pre-trial applications in circumstances where the remedy sought could not reasonably be granted.
- [19] In *R. v. Gill*, 2018 BCSC 661 [Gill] at para. 24, Justice Schultes provided some guidance when deciding the merits of the proposed application:
- [24] One thing the court must be careful not to do when deciding a Vukelich hearing is to inadvertently decide the actual merits of the proposed application. The only question for me at this stage is whether there are facts alleged, either in the notice or counsel's submissions, that if found in the defence's favour could support one of the remedies being sought. If there are such facts, the application should proceed to the next stage of a full hearing.

Discussion

- [20] On this Vukelich application, the Crown submits the applicant's request for an evidentiary hearing should be dismissed on a summary basis. They urge this Court to accept the evidentiary record regarding Ms. MacDonald's voluntary permission to allow the police to review the text messages, first in October and then again in November 2019. As I have discussed, the applicant submits the evidentiary record does not provide the necessary clarity for this Court to engage in the legal analysis required. Indeed, when pressed by the Court, the applicant was unable to identify facts to support his application because of lack of detail in the records. For example, he refers to the Task Detail report, which states the police were "given permission", as an example of one area he says needs to be clarified in order to consider the implications of the investigative steps taken by the police.
- [21] Having reviewed the material filed on this application, I am not satisfied that I have a complete evidentiary record. I have identified the factual controversies that exist based on submissions of counsel. If I dismiss the application summarily as suggested by the Crown, I would deny the defence the opportunity to demonstrate why their interpretation of the evidence should be preferred. As noted in *Gill* at para. 24, if the facts alleged by the defence could support the remedies sought, I must proceed to the next stage of a full hearing. Further, given the extensive submissions on the law made during this application, it is apparent that the legal issues are complex; accordingly, it is critical that the Court have a firm factual foundation upon which to analyze these issues.

- [22] Therefore, I am satisfied that the applicant has established a basis upon which the Court should embark upon voir dire and hold an evidentiary hearing. Cst. Micklefield, and if necessary, Cst. Wiese, may testify to explain why they noted in the Task Detail Report that Ms. MacDonald gave them permission to review the text messages on October 22, 2019. I am not satisfied, however, that it is necessary for me to hear from Ms. MacDonald; I find it is not reasonably likely that her evidence would assist in determining the issues before the Court. If the circumstances change as a result of hearing the evidence from the police officers, counsel will be permitted to make a further application to hear from Ms. MacDonald.
- [23] My decision to declare a voir dire and embark upon an evidentiary hearing is not a determination of the various legal issues that have been raised by the applicant. Following completion of the evidentiary hearing, counsel will be permitted to make further submissions. However, since counsel have already made extensive submissions over a four-day period, it is not necessary to repeat these; rather, further submissions should be focused on any novel issues raised by the testimony on voir dire.

Conclusion

- [24] The applicant has established a basis for this Court to embark upon an evidentiary hearing regarding how the police came into possession of text messages on October 22, 2019. The examination of the two police officers must remain focused on the relevant issue.
- [25] Accordingly, on these terms I grant Mr. Hayer's application for a voir dire.

"Devlin J."

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