
CANADA / JUDGMENT

R. v. Hendrickson

2018 BCSC 343

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 343 R. v. Hendrickson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hendrickson,

2018 BCSC 343

Date: 20180302

Docket: 66284

Registry: Chilliwack

Regina

v.

Dylan Ross Hendrickson

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment

Counsel for the Crown:

M. Reinhart

Counsel for the Accused:

P.A. McDermick

Place and Date of Hearing:

Chilliwack, B.C.

February 28, 2018 and

March 1, 2018

Place and Date of Judgment:

Chilliwack, B.C.

March 2, 2018

I. INTRODUCTION

- [1] Dylan Ross Hendrickson is charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 ["CDSA"]. The charge arises out of an August 9, 2015 encounter between Mr. Hendrickson and members of the Mission RCMP during their investigation into a dropped 911 call.
- [2] At trial, the accused applied to have the evidence, including the bag of cocaine, excluded on the basis that it was obtained in violation of ss. 8, 9 and 10 of 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 [Charter]. On February 28, 2018, I ruled that at the time the police commenced a safety search there was no lawful basis for detaining the accused, his detention was arbitrary and infringed his rights under s. 9 of the Charter. Consequently, the search of the accused and his man-bag constituted an unreasonable search and seizure contrary to s. 8 of the Charter and the failure of the police to advise the accused of his right to counsel breached his s. 10 Charter rights. I rejected the argument that the accused's s. 8 Charter rights had been breached when the police officer first spoke to the accused and asked for his name. I also rejected the argument that the accused had an expectation of privacy over the clear plastic bag of cocaine located in the parking lot. My reasons are indexed at 2018 BCSC 288 (the "Ruling").
- [3] The issue before the court at this stage of the voir dire is whether the breach of Mr. Hendrickson's ss. 8, 9 and 10 Charter rights should lead to the exclusion of evidence pursuant to s. 24(2) of the Charter. Specifically, Mr. Hendrickson seeks to exclude the clear plastic bag which contained approximately 13 grams of cocaine. These are my reasons on the accused's application to exclude the seized evidence and should be read in conjunction with my earlier Ruling.

II. POSITIONS OF THE PARTIES

- [4] The accused described the Charter violations as very serious. In doing so, he relies on the comments in *R. v. Mann*, 2004 SCC 52 at para. 35 [Mann] which recognized that individual liberty interests are fundamental to the Canadian constitutional order. The focus of the accused's argument is the evidence of Cst. Jones which he describes as troubling and thoughtless. In particular, Cst. Jones testimony "we pat down everybody" as an explanation as to why he detained the accused demonstrates his cavalier attitude towards Charter rights and his thoughtless approach to the situation as it presented itself. The accused argues it is

this cavalier approach to the Charter which resulted in multiple breaches and demonstrates a pattern of disregard for the accused's Charter rights. The accused urges me to exclude the cocaine particularly considering it was located contemporaneously with his unlawful detention.

- [5] The Crown argues that the cocaine should not be excluded despite my having found multiple breaches of Mr. Hendrickson's Charter rights. The Crown takes the position that Cst. Jones was engaged in a dynamic situation and the breaches were short in duration, minimally intrusive and all connected to the unlawful detention. Further, the Crown maintains that the seizure of the clear plastic bag of cocaine was independent of the infringing conduct and therefore society's interest in the adjudication of the case on its merits should favour the admission of the evidence.
- [6] Both counsel referred to a number of cases during their submissions. I have considered all of them although they may not be referenced in the reasons which follow.

III. THE LEGAL FRAMEWORK

- [7] Section 24(2) of the Charter provides:

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

- [8] Both Crown and defence counsel agree with the general legal principles governing the exclusion of evidence. There are two stages in a s. 24(2) analysis, the threshold analysis, which determines whether there is a nexus between the breach of the Charter right and the evidence sought to be excluded, and the second analysis utilizing the framework established in *R. v. Grant*, 2009 SCC 32 [Grant]. The Crown concedes that there is a temporal nexus between the breach of Mr. Hendrickson's ss. 8, 9 and 10 Charter rights and the evidence sought to be excluded. Therefore, the focus of my analysis will be on the application of the Grant framework for determining whether evidence obtained in breach of the Charter must be excluded under s. 24(2).

The Grant Analysis

- [9] In *Grant* the Supreme Court of Canada articulated three lines of inquiry for determining whether evidence obtained in a Charter-infringing manner should be excluded under s. 24(2) of the Charter. The factors to consider and weigh are (at para. 71):
- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
 - (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and

(3) society's interest in the adjudication of the case on its merits.

[10] These factors do not operate as a three-part test. There are no particular findings under the three lines of inquiry that mandate particular results, and it "is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case": *R. v. Harrison*, 2009 SCC 34 at para. 36 [Harrison]. The balancing mandated by s. 24(2) is "qualitative in nature and therefore not capable of mathematical precision": Grant at para. 140. Rather, the court must weigh its considerations under all three factors to determine whether, on balance and having regard to all the circumstances, admitting the impugned evidence would bring the administration of justice into disrepute in the long-term, from the perspective of a reasonable person: Grant at paras. 68 and 85-86.

[11] The Grant factors look to the public's overall, long-term faith in the justice system: Grant at para. 68; Harrison at para. 36. Section 24(2) starts from the proposition that damage has already been done to the public's confidence in the administration of justice by the Charter violation or violations that gave rise to the s. 24(2) analysis. The Grant analysis concerns itself with whether further damage will be done by admitting the impugned evidence: Grant at para. 69.

[12] The phrase "if it is established that " in s. 24(2) places the burden upon the applicant seeking exclusion of the evidence to persuade the court on the balance of probabilities that admission of the evidence would bring disrepute to the justice system: *R. v. Collins*, [1987] 1 S.C.R. 265 at 280.

[13] Having set out the analytical framework established in Grant, I will proceed to consider those factors.

(i) Seriousness of the Charter-infringing state conduct

[14] This first factor requires the court to consider the gravity of the state's offending conduct and whether the court should dissociate itself from that conduct by excluding the evidence: Grant at paras. 72-73.

[15] Under this factor, the court must examine both the qualitative seriousness of the state conduct as well as the level of knowledge on the part of the offending state actors. At one end of the spectrum are those breaches that are "technical or trivial": Harrison at para. 3, "inadvertent or minor": Grant at para. 74 or result from "an understandable mistake": Harrison at para. 22. At the other end of the spectrum are those that can be characterized as "brazen" or "flagrant": Harrison at para. 23, "abusive", "deliberate" or "egregious": Grant at para. 133. Although wilful violations are undoubtedly more serious than unintentional ones, reckless or careless violations that demonstrate insufficient regard for Charter rights also inevitably undermine the public's confidence in the rule of law: Harrison at para. 24; Grant at paras. 74-75.

- [16] Cst. Jones testified that the reason he directed Mr. Hendrickson to place his hands on the police car was "we pat down everybody". Once the pat down search was complete he directed the accused to remain with Cst. Peck while he went to check the area where he had earlier observed the accused appear to place something on the ground. There was no evidence that Cst. Jones ever turned his mind to the impact of his actions on the accused's constitutional rights. The Crown argues that while the accused was detained, it was brief in duration and non-invasive. Further, the search was merely a pat down search which has been recognized in cases such as *Mann* as appropriate in certain circumstances. The Crown also argues the breach of s. 10 was simply a result of the detention and not as serious as situations in which an accused's access to counsel is delayed. In summary, the Crown argues that when examined in the proper context the detention and consequential breaches were minor.
- [17] I do not agree. Rather, I agree with counsel for Mr. Hendrickson, that the conduct of Cst. Jones that led to the Charter breaches represented a blatant disregard for Mr. Hendrickson's Charter rights. Critical to my assessment of the seriousness of the state conduct is that Cst. Jones was not operating in circumstances of legal uncertainty. As stated in *Grant*, at para. 133 "while police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is". In *Harrison*, the Court held that when considering the seriousness of the state conduct under this factor one must consider whether "the police knew (or should have known) that their conduct was not Charter-compliant": *Harrison*, para. 22. Similarly, in *R. v. Reddy*, 2010 BCCA 11 [Reddy], the Court noted the more well-established the law governing a Charter right is, the more serious the court should consider state conduct which breaches it.
- [18] It was evident from his testimony "we pat down everybody" that Cst. Jones was not confused about the scope of his powers, rather he was oblivious to well-established legal principles which place restrictions on those powers. During his testimony Cst. Jones demonstrated a casual attitude towards Charter values and, while he was polite and respectful to Mr. Hendrickson during their encounter, he never turned his mind to the impact of his actions upon Mr. Hendrickson's Charter rights. Indeed, he appeared to view his power to detain citizens as unbridled. In this case, as in *R. v. Bohn*, 2000 BCCA 239 [Bohn] the cumulative breaches are "demonstrative of the inattention of the police to the rights of the appellant": para. 45. In *Bohn*, the Court of Appeal confirmed that consideration of cumulative Charter breaches is appropriate when undertaking a s. 24(2) analysis because it may show a pattern of disregard of the Charter.
- [19] While I acknowledge that these breaches occurred in the context of a very brief encounter I cannot accept the Crown's characterization of these breaches as minor. Indeed, as stated in *Mann* "police officers do not have carte blanche to detain": para. 35. In my view these breaches are serious and militate in favour of exclusion.

(ii) Impact of the breach on the Charter-protected interests of the accused

- [20] The second line of inquiry focuses on the seriousness of the state's Charter-infringing conduct from the accused's perspective. Under this head of analysis, the court must examine the interests engaged by the infringed right (here the focus is the unlawful detention) and the degree to which the Charter infringement impacts or intrudes upon those interests.
- [21] Counsel for Mr. Hendrickson argues the deprivation of the accused's liberty interest was severe. Mr. Hendrickson was polite and cooperative with Cst. Jones during their conversation regarding the 911 call. Once that conversation was finished, Mr. Hendrickson should have been allowed to leave without any further state intrusion into his liberty. Instead, Cst. Jones directed him to remain at the police car with Cst. Peck while he went to check out the area. As a result of the unlawful detention, Mr. Hendrickson was subjected to a search of his person and further detention which are all significant intrusions on his Charter protected interests.
- [22] The Crown's reliance on *R. v. Johnson*, 2013 ONCA 177 [Johnson] does not assist. In Johnson, the detention occurred in conjunction with a lawful traffic stop and the Court held the directive to the accused to keep his hands on the seat in front was a reasonable step in furtherance of officer safety. The discovery of the handgun sticking out of a backpack inside the car would have occurred independent of the unlawful search and asking for Johnson's name was not done intentionally to disregard Johnson's s. 8 Charter rights. As I understand their submissions, the Crown relies on Johnson in support of their argument that the cocaine seized in this case was independent of any Charter breaches just as the discovery of the gun in the case of Johnson. Therefore, despite the impact of the breach on Mr. Hendrickson's Charter rights, the cocaine should not be excluded.
- [23] I find that the unconstitutional conduct of Cst. Jones facilitated the opportunity for him to seek out the bag. I agree with counsel for Mr. Hendrickson that the action of locating the bag of cocaine was contemporaneous with the unlawful detention of the accused. While I have already determined that the bag was in plain view, it was not actually in Cst. Jones' view until he had detained the accused, conducted an unlawful pat down search, deprived him of his s.10 rights and directed him to remain at the scene. Following this series of Charter breaches, Cst. Jones located the bag of cocaine that was sitting in the parking lot in plain view. These circumstances are significantly different from those presented in Johnson. Further, I find the Crown's argument that the bag would have been discovered by Cst. Jones independent of the Charter breaches as completely speculative and of no assistance to my analysis.
- [24] In all of the circumstances, I find that the impact of the breaches on the Charter-protected interests of the accused militates in favour of exclusion.
- (iii) Society's interest in the adjudication of the case on its merits

- [25] This factor requires the court to consider "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": Grant at para. 79. This involves assessing the reliability of the evidence and its importance to the Crown's case. The exclusion of reliable and relevant evidence may render the trial unfair from the public's perspective, thus bringing the administration of justice into disrepute: Grant at para. 81.
- [26] However, a court analyzing this factor must be careful not to allow the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis because this would afford lesser Charter protection to those charged with more serious crimes: Harrison at paras. 34, 40. While the public has a heightened interest in seeing a case adjudicated on its merits where the offence charged is serious, the public "also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high": Grant at para. 84; see also Reddy at para. 94. Sometimes, the importance of maintaining Charter standards outweighs the "price paid by society for an acquittal": Harrison at para. 42. Society has an interest in ensuring state actors consistently respect Charter rights, regardless of the context.
- [27] I am cognizant of the fact that the cocaine seized in this case constitutes highly reliable evidence and society has an interest in the adjudication of the case on its merits. Without this evidence, the prosecution cannot proceed. However, I must also consider the Charter infringing conduct of the police which amounted to a serious impact on the accused's constitutionally protected rights, particularly the arbitrary detention. In my efforts to balance these two interests, I am guided by the comments in Harrison at para. 3: "these are protections that law abiding Canadians take for granted and courts must play a role in safeguarding them even where the beneficiaries are involved in unlawful conduct".
- [28] As stated in Grant ignorance of Charter standards must not be rewarded or encouraged. Further, the number of Charter breaches is a relevant factor in this analysis as noted at para. 75 in Grant:
- [75] ... It should also be kept in mind that for every Charter breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion.

IV. Conclusion ON s. 24(2) Analysis

- [29] Balancing all the factors, I conclude that, in the long term, the reputé of the administration of justice is best served by excluding the evidence in this case. As in Harrison, where a substantial amount of cocaine was excluded, in this case "the price paid by society for an acquittal is outweighed by the importance of maintaining Charter standards": para. 42.

V. DISPOSITION

[30] For the reasons provided, I have concluded that admitting the cocaine seized on August 9, 2015 would bring the administration of justice into disrepute within the meaning of s. 24(2) of the Charter. As such, the cocaine is excluded from evidence at trial.

"Devlin J."

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