
CANADA / JUDGMENT

R. v. Hill

2005 BCSC 531

COURT

Supreme Court of British Columbia

DECIDED

8 April 2005

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2005 BCSC 531 R. v. Hill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hill,

2005 BCSC 531

Date: 20050408

Docket: 66097-2

Registry: New Westminster

Between:

Regina

And

Warren Hill

Before: The Honourable Madam Justice D. Smith

Voir Dire Ruling

Counsel for the Federal Crown:

M. Namazi

Counsel for the Accused:

B. Jackson

Date and Place of Trial/Hearing:

March 24, 29-31, 2005

April, 4-6,2005,

New Westminster, B.C.

- [1] Warren Hill is charged with one count of possession of a controlled substance, to wit, cannabis marijuana, in an amount exceeding three kilograms, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19.
- [2] He challenges the admissibility of 105 pounds of marijuana seized pursuant to a search warrant obtained following a warrantless entry and search of his residence which resulted in the detection of the marijuana. He submits the evidence was obtained in a manner that breached his s. 8 Charter right and pursuant to s. 24(2) its admission into evidence would bring the administration of justice into disrepute.
- [3] A warrantless search is prima facie unreasonable. The burden is on the Crown to establish on a balance of probabilities that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner: R. v. Buhay, [2003] 1 S.C.R. 631, 2003 SCC 30 at ¶32.
- [4] For the reasons set out below, I am satisfied the Crown has met that burden, that Mr. Hill's s. 8 Charter right was not breached and that the evidence is admissible at the trial.

Background

- [5] On June 3, 2002, at 9:54 a.m., the Ridge-Meadows RCMP detachment received a 911 call reporting a gunshot coming from the direction of Mr. Hill's residence. Mr. Hill resides on a five acre parcel in the rural area of the District of Maple Ridge. The complainant lives on a neighbouring five acre parcel immediately to the west of Mr. Hill's property.
- [6] The complainant and her husband have lived at that location for about 14 years. She had no recollection of making any prior complaint regarding Mr. Hill and denied there was any "bad blood" between them. The police believed her complaint to be sincere and legitimate.
- [7] Sergeant Wakely (now Staff Sergeant Wakely) was the officer in charge of the detachment when the complaint was made. He had been the head of the strike force unit responsible for serious drug and property crimes between 1995 and 1999. He no longer was involved in general duty matters but could be called in if manpower was needed to investigate a serious complaint.
- [8] That morning he was made aware of the 911 gunshot call when he was contacted by an officer from another detachment who said he had learned of the complaint involving Mr. Hill's residence. The background check conducted by the dispatch operator who had taken the 911 call revealed a CPIC entry that appeared to direct that this officer be contacted upon receipt of a complaint involving Mr. Hill. It also indicated that Mr. Hill had only one criminal conviction on a minor matter that was dated.

- [9] The inquiring officer told Sergeant Wakely that he had an interest in Mr. Hill. Sergeant Wakely assumed the officer had called because of a possible involvement by Mr. Hill in drugs. Mr. Hill's name had come up when Sergeant Wakely had been head of the strike force unit. He also suspected Mr. Hill had an association with the Hell's Angels. However, the conversation was brief and there was no reference to drugs. The officer did not ask to become involved and Sergeant Wakely merely confirmed with him the nature of the complaint.
- [10] Two general duty police officers, Constable Sundher and Constable Herbranson, were dispatched to investigate the complaint. They were given Mr. Hill's address and directed to an area east of the intersection of 112th and Bosonworth to a residence which had a helicopter pad. They were advised to approach with caution.
- [11] On one prior occasion, Constable Sundher had responded to a helicopter complaint involving the Hill residence. He was familiar with its location but had never met Mr. Hill.
- [12] Constable Sundher arrived at the intersection at 10:10 a.m. Constable Herbranson followed about a minute later. Their original plan was to attend at Mr. Hill's residence to inquire about the gunshot complaint. Reports of gunshots were not unusual in rural areas but they were never treated casually. Caution was always taken when investigating such a complaint.
- [13] Shortly thereafter, the complainant's husband drove up. He was en route to downtown Maple Ridge and stopped to speak briefly with the officers. He confirmed that his wife had made the 911 call and that he too had heard the gunshot. Constable Sundher asked him if the gunshot had originated from the residence with the helicopter pad and he replied that it had.
- [14] Constables Sundher and Herbranson drove further east along Bosonworth and stopped about two properties east of the Hill residence where Bosonworth narrows to a single lane. They remained in their vehicles except for brief sojourns out to discuss how they were going to approach the residence.
- [15] At about 10:45 a.m. Corporal Milne joined them. He was the senior general duty officer at the scene.
- [16] They were discussing the gunshot report when at 10:52 a.m. Constable Herbranson heard the sound of a muffled gunshot coming from the east. He told officers Sundher and Milne what he had heard but they had not heard the gunshot. He then reported it over the police radio.

- [17] While he was on the radio, at 10:55 a.m. officers Sundher and Milne heard the sound of a second gunshot. Corporal Milne described it as having the ringing echo of a gunshot. Although neither could pinpoint its exact location Constable Sundher thought it came from about 200 to 400 meters to the east. Corporal Milne believed it came from a north east direction in the vicinity of the Hill residence. They reported the second gunshot to the police dispatcher.
- [18] Each of the officers had experience with firearms; each believed what they heard were gunshots.
- [19] After hearing the two additional gunshot reports, Staff Sergeant Harris advised the officers at the scene to remain where they were and not to approach the Hill residence. Constable Sunder was directed to a nearby residence that had a view of the Hill residence where he remained until after Mr. Hill's arrest.
- [20] Staff Sergeant Harris phoned the complainant to follow up on the gunshot report. She advised him that she had just heard two further gunshots, which she described as muffled and sounding different from the first. She believed they too had come from the Hill residence.
- [21] Staff Sergeant Harris and Sergeant Wakely found the complainant to be credible. Based on her report, they believed they had a public duty to ensure no one in the Hill residence had been shot, injured or killed.
- [22] Officer safety was the guiding principle on a gunshot complaint. Staff Sergeant Harris and Sergeant Wakely decided to engage a team of local members with Emergency Response Team ("ERT") training, along with some general duty members, all under the supervision of Corporal Walsh who was the head of ERT for the North Fraser area, to look into the complaint. Corporal Walsh had been involved in over 100 gunshot calls and had significant experience with ensuring officer safety.
- [23] Corporal Walsh was paged at 10:20 a.m. He was off duty that day and in downtown Vancouver at a meeting. He ignored the first page but responded to the 911 page at 10:30 a.m. He was advised of the gunshot complaint involving the Hill residence and indicated that he would attend as soon as he could. However, he had to return to Maple Ridge from Vancouver and because he was off duty had to pick up his emergency equipment from his office.
- [24] Corporal Walsh said gunshot complaints were a high priority. Officer safety was the primary focus even if it took two to three hours to secure. While the protocol was to have an ambulance stand by on such complaints, none had been called on this occasion.
- [25] Corporal Walsh considered the initial gunshot complaint as a priority matter even before learning of the two subsequent reports. In his mind, the later gunshot reports only added credibility to the initial complaint.

- [26] He understood that he had been asked to become involved in order to make the necessary tactical decisions on how to enter the Hill residence safely and efficiently. He assumed from the nature of the complaint and the fact that he had been called in that a decision to clear and search the Hill residence had already been made. While he was not aware of whether Mr. Hill had a criminal record, he said that a criminal record was irrelevant to any decision to clear and search a residence. He understood that Mr. Hill was believed to have an association with the Hell's Angels, which he said elevated the risk to officer safety. However, that belief only impacted his decision as to how they would approach the Hill residence, not the decision to enter it.
- [27] Like Constable Sundher, Corporal Walsh had also attended a prior helicopter complaint involving the Hill residence but had never met Mr. Hill.
- [28] En route to the Ridge-Meadows detachment, Corporal Walsh inquired if attempts had been made to obtain a phone number for Mr. Hill so that he could be contacted about the complaint. He was advised by Corporal Milne that they had been unable to obtain one. When Corporal Walsh picked up his emergency equipment, including his bulletproof vest and M16 assault rifle, he also grabbed a police loud hailer with a siren.
- [29] The purpose of contacting Mr. Hill was to gain his cooperation in clearing and searching his residence in order to resolve the complaint. Even if Mr. Hill had been successfully contacted, the officers believed they had a duty to clear and search the residence in order to satisfactorily prove or disprove the complaint. That duty continued, in their view, regardless of any explanation for the gunshot that might be provided by Mr. Hill.
- [30] Corporal Walsh arrived at the Ridge-Meadows detachment at 11:20 a.m. Following a brief meeting between himself, Inspector Dingwall, Staff Sergeant Harris and Sergeant Wakely, an action plan was agree upon to attend at the Hill residence and try to establish contact with Mr. Hill or any occupant in order to determine if anything was amiss. Mr. Hill's residence would then be cleared and searched.
- [31] At about 11:55 a.m. Corporal Walsh, Constable Raine and Constable Isaiah, (two local officers on the strike force unit with ERT training) and Staff Sergeant Harris and Sergeant Wakely (the "Walsh team"), arrived at the location on Bosonworth where Constable Herbranson and Corporal Milne had remained. There was a brief five minute meeting in which the approach to the Hill residence was discussed. The plan was to enlist Mr. Hill or the occupant's cooperation to clear the residence before searching it.
- [32] At 12:15 p.m. the Walsh team, along with Corporal Milne, approached the Hill residence. Each was wearing a bulletproof vest and carrying a firearm. They walked in pairs along the 300 meters to the residence, hugging the tree line for cover. Constable Herbranson remained behind. Corporals Milne and Walsh were the first to reach the gate of the residence. Beside the gate was an intercom with a buzzer. A surveillance camera was elevated to their right.

- [33] Corporal Milne rang the buzzer three times but received no response. He used the loud hailer three times, announcing that the police were outside and asking Mr. Hill and any occupants to come out. He again received no response. He also used the siren on the loud hailer for two to three minutes but still received no response.
- [34] He and Corporal Walsh decided to enter onto Mr. Hill's property. They went around the gate and covertly crept up and hid behind a vehicle in the driveway. This time Corporal Walsh took the loud hailer and called out for Mr. Hill and anyone inside the residence to come out. He also activated the siren. Shortly thereafter a male person looked out the front door and was motioned to come out.
- [35] The male identified himself as Mr. Hill. Corporal Walsh advised Mr. Hill the police were there in response to a shots fired complaint. Mr. Hill initially suggested the shots may have come from a neighbouring residence but was advised that the complainant had reported the shots as coming from his residence. He then pointed to a yellow plastic container near the house with a firecracker device inserted into it, commonly referred to as a "bear scare", and suggested that it may have caused the noise.
- [36] Neither Corporals Milne nor Walsh believed the sounds they heard had been caused by the bear scare. Corporal Walsh said his suspicions were elevated because of the different explanations for the gunshot sound that were given by Mr. Hill. However, regardless of Mr. Hill's explanations Corporals Walsh and Milne, and Sergeant Wakely, all agreed that they had to clear and search the Hill residence to resolve the complaint. It was not an option for them to do nothing.
- [37] Mr. Hill was asked if there was anyone else inside the residence. He said there was a female. From the front door, she was observed to be watching T.V. in the living room. She was asked to come out. Corporal Walsh then advised Mr. Hill the police had to clear and search the residence for any possible victims of a gunshot. He told Mr. Hill they would leave following their cursory search.
- [38] Mr. Hill consented to the police entering his residence for that purpose. However, even without his consent the officers said they would have searched his residence to determine if anyone was in harm's way.
- [39] While Corporal Milne remained outside on the front porch with Mr. Hill and the female, Corporal Walsh and Constable Rain entered and searched the residence. The other officers remained positioned outside.
- [40] No one expressly ordered Corporal Walsh to clear and search the residence. It was a mutual decision reached by Corporal Milne, the senior general duty officer at the scene, and the Walsh team. All the officers who testified agreed that given the nature of the call and the subsequent gunshots heard coming from the vicinity of the Hill residence, they had to clear and search the Hill residence regardless of Mr. Hill's explanations and the lack of anything amiss about the residence and the occupants.

- [41] The search of the residence was completed in six minutes. A tag team search was made of each room. Any place where a person might be hidden was checked.
- [42] The 105 pounds of marijuana was discovered in a small room in the basement. Two firearms were also found but were later discovered to be replicas. Nothing was found to be amiss either inside or outside the residence or with any of its occupants.
- [43] Constable Walsh came out of the residence and advised Mr. Hill they had found a large supply of marijuana and that he was under arrest for possession for the purpose of trafficking. At about 1:00 p.m. Constable Sundher was directed to transport Mr. Hill to the detachment.
- [44] Corporal Walsh, Sergeant Wakely and Constable Rain returned to the detachment to prepare the Information to Obtain a search warrant. At the detachment, Sergeant Wakely was contacted by another officer from an outside detachment who asked to participate in the execution of the search warrant. Sergeant Wakely refused his request not wanting to involve an outside member in the investigation.
- [45] At 5:18 p.m. the officers returned to the Hill residence with the search warrant. They videotaped their search of the residence. During the search they seized the marijuana and firearms, as well as \$6,000 in \$100 bills along with some additional cash from a kitchen drawer, and several Hell's Angels' leather jackets.
- [46] The officers involved in the initial clearing and search of Mr. Hill's residence testified that their purpose in entering Mr. Hill's residence was to ensure the safety of anyone who might have been placed in harm's way because of the gunshots. They said they were not there to search Mr. Hill's residence for drugs.
- [47] The police witnesses were cross-examined on why they did not search the wooded area surrounding Mr. Hill's residence because the gunshots had not been pinpointed to the residence. All stated they reasonably believed there had been gunshots originating from Mr. Hill's residence which could have caused harm to any occupant and that based on the totality of the information they had that day they had a duty to clear and search Mr. Hill's residence. They denied any ulterior motive to search Mr. Hill's residence for the purpose of investigating for drugs. Most were surprised to find that Mr. Hill had drugs on his premises.

Discussion

- [48] A warrantless entry into an individual's home is *prima facie* unreasonable. It is an obtrusive interference with a person's right to the security and privacy of their own home. If a warrantless entry is determined to be unlawful, then any items seized on the execution of a search warrant based on information obtained during the warrantless entry would be inadmissible as fruits of the unlawful search: *R. v. Silveira*, [1995] 2 S.C.R. 297, 97 C.C.C. (3d) 450.

- [49] The sanctity of the home is a carefully guarded right in our society. It is not, however, an absolute right. The common law duties of the police permit a warrantless entry for the "preservation of the peace, the prevention of crime, and the protection of life and property": *Dedman v. The Queen*, [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97 at pp. 11-12. These duties authorize the police to respond to exigent circumstances in a manner necessary to effectively address the emergency.
- [50] It is not disputed, in this case, that the common law duties to protect life and the safety of individuals are reasonable. At issue is whether the warrantless entry into Mr. Hill's home constituted unjustifiable police conduct in the circumstances.
- [51] In *R. v. Godoy*, [1999] 1 S.C.R. 311, 131 C.C.C. (3d) 129, the court adopted the test set out in *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.), and applied by Doherty J.A. in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), for determining whether the police have acted within the scope of their common law duties to protect life and property (the "Waterfield test"). The Waterfield test was summarized by Lamer C.J.C. (as he then was) in *Godoy* at ¶12:

If police conduct constitutes a *prima facie* interference with a person's liberty or property, the court must consider two questions: first, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty.

- [52] In *Simpson*, Doherty J.A. described the "justifiable" use of police power at p. 499 as follows: the justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.

- [53] In *Godoy*, the police forcibly entered an accused's apartment in response to a disconnected 911 distress call regarding a domestic assault. There was no issue that their common law duty included responding to the 911 distress call. At ¶11 Lamer C.J.C. stated:

In my view, public policy clearly requires that the police *ab initio* have the authority to investigate 911 calls, but whether they may enter dwelling houses in the course of such an investigation depends on the circumstances of each case.

- [54] The issue in *Godoy* involved the application of the second branch of the Waterfield test, namely, whether the police conduct involved an unjustifiable use of their common law duties. The court held that the warrantless entry was justified as there was no other reasonable alternative to ensure that the disconnected caller received the necessary assistance in a timely manner. The court stated the police were not obliged to accept the word of the person who answers the door without further investigation. At ¶25 it referred to Finlayson J.A.'s comments in the Ontario Court of Appeal, that the police had the power to enter a private dwelling where "they reasonably believe that the occupant is in distress and

entry is necessary not to make an arrest, but to protect life, prevent death and prevent serious injury" (pp. 453-54). It cautioned, however, that such an interference of liberty must be limited to the protection of life and safety.

- [55] Similarly, in *R. v. Jamieson*, 2002 BCCA 411, the court dismissed an appeal from a conviction following the dismissal of an application to exclude the evidence seized as a result of an alleged s. 8 Charter breach. A warrantless entry of a private residence was conducted after a victim emerged from the residence with acid burns covering his face. The residence was found to have contained a clandestine lab for illicit drugs. A number of drugs were in plain view were subsequently seized pursuant to a search warrant based on observations made during the warrantless entry. A challenge to the entry was made on the ground that its purpose was to investigate a suspected crime rather than for the protection of public safety. However, the court accepted the trial judge's finding of fact that there were sufficient objective criteria to support the police officers' subjective belief that the safety of others necessitated the warrantless entry.
- [56] A number of cases involving warrantless entries of a private residence following a 911 call of a crime in progress have admitted evidence subsequently obtained pursuant to a search warrant, particularly where the call had been made by a credible and reliable complainant: *R. v. Johnston*, [2004] B.C.J. No. 473, 2004 BCCA 148; *R. v. Dreysko*, [1990] A.J. No. 982, 110 A.R. 317 (Alta. C.A.); *R. v. Hern*, [1994] A.J. No. 83 (Alta. C.A.); *R. v. Gibson*, [2003] B.C.J. No. 2405, 2003 BCSC 1572; and, *R. v. Neubert*, [2001] B.C.J. No. 393, 2001 BCCA 88.
- [57] Other cases have excluded such evidence where the court has concluded the warrantless entries were made primarily for an investigative purpose or the complainant was of unknown reliability: *R. v. Mann*, [2003] B.C.J. No. 2603, 2003 BCSC 1725; *R. v. Kirkham*, [2004] B.C.J. No. 1808, 2004 BCSC 1150; *R. v. Guilbault*, [2001] B.C.J. No. 1379, 2001 BCPC 118; and *R. v. Vickers*, [2002] B.C.J. No. 2187, 2002 BCPC 389.
- [58] In the circumstances of this case, I am satisfied the police had an honest belief regarding the legitimacy of the 911 gunshot call. That belief was supported by a number of objective criteria including three independent reports of gunshots originating from the vicinity of Mr. Hill's residence and a corresponding concern that any occupant might have been placed in harm's way by the gunshots. The reasonableness of the belief was also supported by the credibility of the complainant and her husband who appeared to have no ulterior purpose to harm the accused.
- [59] Although much was made of the rural nature of this area and the fact that many of the residences are surrounded by woods, there was nothing to suggest to the police that the initial gunshot report had originated anywhere other than at or around Mr. Hill's residence. On that basis they concluded an occupant of the residence could be in distress or at risk and therefore the residence had to be cleared and searched for public safety concerns. In that regard, the Walsh team was engaged to ensure a safe and efficient entry into the Hill residence.

- [60] Subsequent events only added to the reasonableness of their belief. The two later gunshots were heard by the same 911 caller who described them this time as muffled and again coming from the direction of the Hill residence. The muffled nature of the shots suggested that they could have originated from inside the residence. Constable Herbranson heard the first of the second set of gunshots while he was stopped two properties away from the Hill residence. He too described it as muffled and appeared to come from the east. Corporal Milne and Constable Sundher heard the second of the two gunshots which Corporal Milne described as having a ringing noise. Constable Sundher estimated the sound was about 200-400 meters to the east. Corporal Milne was less certain of the exact distance but believed it came from the north east and in the vicinity of the Hill residence. Both the descriptions of the sounds and their location suggested that they came from at or around Mr. Hill's residence. I am satisfied from this evidence that the officers had a reasonable belief that the gunshots came from Mr. Hill's residence. To start searching the woods in those circumstances would, in my view, have been a dereliction of their duty to ensure that no one had been harmed.
- [61] Attempts were made to contact Mr. Hill but no phone number for him could be found. He did not respond to a number of attempts to raise him through the intercom buzzer or over the loud hailer and siren. Finally, after many attempts, Mr. Hill came to his front door. When he was advised about the gunshot complaint he provided an initial explanation that it must have come from elsewhere and when told the complainant had said it had come from his residence attributed the noise to some bear scares lying about the yard.
- [62] These explanations did not assuage the concerns of the officers. Indeed, Constable Walsh said they increased his concerns. The officers who attended the residence agreed that given the circumstances they were facing they believed they had only one option for resolving the complaint, which was to clear and search the residence. Not to do so, in their opinion, would have been negligent.
- [63] Accepting the legitimacy of the complaint, and finding that the police conduct in making the warrantless entry was based on an honestly held belief supported by sufficient objective criteria that indicated gunshots were coming from, at, or around Mr. Hill's residence, I am satisfied their purpose in entering the residence was to secure the life and safety of anyone who might have been in harm's way and was not conducted for any ulterior motive to investigate a crime. This is supported by Sergeant Wakely's refusal to permit an officer from outside the detachment, who might have been pursuing other interests, from participating in the search of the Hill residence and Corporal Walsh's expressed surprise that Mr. Hill would have stored drugs at his residence.
- [64] The defence submitted that because Staff Sergeant Harris was not called by the Crown as a witness, there was no evidence that the senior officer who had authorized the warrantless entry held a reasonable belief in the need for that course of action. With respect, I am unable to accede to that submission. I am satisfied that collectively the Walsh team and Corporal Milne, who was the most senior general duty officer at the scene, held the

necessary reasonable belief that Mr. Hill's residence had to be cleared and searched in order to resolve the complaint.

Conclusion

[65] In all of the circumstances, I am satisfied the Waterfield test as outlined in Godoy has been met. The officers' conduct was justifiable based on their common law duty to protect life and prevent serious injury and death; their reasonable belief, even with Mr. Hill's explanations, that an occupant of his residence might have been in distress by reason of the gunshots; and the minimal scope of the interference with Mr. Hill's liberty being a six minute cursory search of his residence.

[66] The Crown has established that the warrantless entry and search was reasonable in the circumstances and accordingly the evidence seized from the subsequent search warrant is admissible at the trial.

"D. Smith, J."

The Honourable Madam Justice D. Smith

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Prepared on 27 October 2026 · Esheria