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CANADA / JUDGMENT

## R. v. Hollaman

2022 BCSC 2323

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COURT

Supreme Court of British Columbia

DECIDED

27 May 2022

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2022 BCSC 2323 R. v. Hollaman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hollaman,

2022 BCSC 2323

Date: 20220527

Docket: 91727A-2, 91727A-4

Registry: Kelowna

Regina

v.

Kyle Hollaman

Before: The Honourable Mr. Justice Wilson

Oral Ruling on Voir Dire - Application for Exclusion of Evidence

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused:

E. Holzman

Place and Date of Trial/Hearing:

Kelowna, B.C.

May 17, 2022, B.C.

Place and Date of Judgment:

Kelowna, B.C.

**May 27, 2022**

- [1] THE COURT: This is the accused's application to exclude from evidence certain items seized from his residence at 505 Valley Road in Kelowna.

## **Background**

- [2] I previously provided my decision on voir dire number two (2022 BCSC 2322) wherein Mr. Hollaman argued that he was not provided with a copy of the search warrant obtained by the Kelowna detachment of the RCMP on December 19, 2018. I rejected the accused's argument that the police had failed to provide a copy of the search warrant upon request contrary to s. 29(1) of the Criminal Code. In ruling that there had been no breach of s. 29(1) of the Code, I concluded that the police had a copy of the warrant with them and that no copy was requested either by or on behalf of the accused.
- [3] However, I found, and indeed it was conceded, that there was a breach of s. 487.1(7) of the Criminal Code that requires that a copy of a telewarrant be provided as soon as practicable to a person who is in ostensible control of the premises.
- [4] The Crown concedes that a failure to provide a copy of the telewarrant under s. 487.1(7) constitutes a breach of s. 8 of the Charter. At issue on this application is whether admission of the evidence obtained as a result of that breach would bring the administration of justice into disrepute.
- [5] The search warrant was obtained by Constable Diachok by way of an application to the JJP Centre in Burnaby. The search warrant itself was executed at 505 Valley Road at approximately 7:30 p.m. Although the original plan had been to proceed by way of a hard entry, the police found that the door from the carport into the foyer of the residence was unlocked upon arrival. There were at least four occupants in the residence located in the master bedroom, including the accused. There is no suggestion that the police acted in a manner that was inconsistent with the warrant. Certain items consistent with drug trafficking were located on the premises, including quantities of methamphetamine, cocaine and fentanyl, together with drug paraphernalia, including scales. The police also found cash and a taser for which Mr. Hollaman did not have a valid licence.

## **Legal test**

- [6] Section 24(2) of the Charter provides that where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter the evidence will be excluded if it is established, having regard to all of the circumstances, that its admission would bring the administration of justice into disrepute.

- [7] The purpose of excluding evidence as a result of an application under s. 24(2) is grounded in the preservation of the reputation of the administration of justice. It is not intended to punish or deter the police, but rather it is focussed on whether the police conduct is such that the court cannot condone it, even if the result is that evidence that is crucial to the Crown's case is excluded and the accused is acquitted.
- [8] The legal principles governing an application under s. 24(2) are not disputed. Evidence is presumed admissible unless the accused can show that it ought to be excluded. The analysis for consideration of an application under s. 24(2) is a three pronged test as outlined by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32. The factors the court must consider are:
- (1) the seriousness of the Charter-infringing state conduct;
  - (2) the impact of the Charter-protected interests on the accused; and
  - (3) society's interest in the adjudication of a case on its merits.

I will address each of these factors.

### **Seriousness of the Charter-infringing state conduct**

- [9] The analysis of the seriousness of a Charter breach will often be placed on a continuum of a technical or inadvertent breach at one end, and a wilful disregard of the accused's rights at the other. The accused argues here that the breach in this case is at the more serious end of the spectrum. He points to the following factors:
- a) the police involved were experienced officers;
  - b) this was a residential search, something that is frequently done by specialized members of the drug unit of the Kelowna detachment of the RCMP;
  - c) there were no extenuating or unusual circumstances here that would have taken this particular matter outside normal operations; there was no particular reason in this case to delay providing the accused with a copy of the warrant;
  - d) there was no forced entry required;
  - e) there were no uncooperative occupants; and
  - f) this is not a grey area where the state of the law was unclear that s. 487.1(7) is mandatory.
- [10] I agree with the accused that there is no good reason as to why a copy of the telewarrant was not provided to a person in apparent control of the residence, which presumably in this case would have been the accused.
- [11] All of that said, I am satisfied that the breach in this case was more of an oversight. While Corporal Carroll, the senior officer involved in the investigation was a very experienced officer, Constable Diachok, who was the officer who swore the Information to Obtain and

was the one officer who had a copy of the warrant with him, was less experienced. Had the search warrant been obtained in the normal course involving personal appearance before either a judge or a judicial justice, there would have been no obligation to provide a copy absent a request for one. For reasons that are not abundantly clear, the Criminal Code requires that a telewarrant be provided to a person in control of the premises, whereas no such requirement exists if the warrant were obtained in other circumstances.

- [12] While the breach in this case is clear, given the mandatory language of the section, this case does not approach the circumstances in *R. v. Bohn*, 2000 BCCA 239, and the numerous cases that have followed it since, wherein the police made a deliberate decision not to take a copy of the warrant with them at the time it was executed.
- [13] Neither counsel were able to point to any case where evidence was excluded solely as a result of a single breach of s. 487.1(7). In some of the cases to which I was referred, including *R. v. Fan*, 2013 BCSC 1534, there were numerous breaches of the accused's Charter rights, not solely a breach of s. 487.1(7), yet the evidence was not excluded.
- [14] The accused refers to *R. v. Mitchell*, 2013 BCPC 214. In that case, the Court concluded that a breach of s. 487.1(7) constituted a breach of the accused's Charter rights, finding that providing a copy upon release some hours later is insufficient and no substitute for providing a copy immediately as required under the section. However, in *Mitchell* there were four discrete breaches of the accused's Charter rights. While the judge in his discussion at paragraph 78 considered that the breach of s. 487.1(7) was sufficiently serious that it could be considered to bring the administration of justice into disrepute, his decision was based on the accumulation of breaches described at paragraph 81.
- [15] In all of the circumstances here, I find that the police ought to have known of the obligation under s. 487.1(7) and I am satisfied that the breach is not trivial. However, the failure on the part of the police to comply with it was inadvertent rather than intentional, and was not part of some overall scheme or plan to either disregard or deprive the accused of his Charter rights. Rather, it was a singular breach and was not part of a pattern of improper conduct.

### **Impact of the Charter-protected interests on the accused**

- [16] In *R. v. Fan*, Madam Justice Brown concluded that the impact of the accused's rights was a more serious breach than some of the others she found because it deprived the accused of the opportunity to satisfy himself that the search was authorized and that he was required to acquiesce.
- [17] Generally speaking, the focus of the analysis in the circumstances of a s. 8 breach is on the accused's privacy interests. The Court's focus in *Fan* was on the informational aspect of the requirement of s. 487.1(7) as distinct from privacy interests. Indeed this makes complete sense because although no copy of the telewarrant was provided in *Fan* as here, the search warrant had nevertheless been validly issued.

[18] The failure to comply with the mandatory requirement in the section does not render this a warrantless search wherein different considerations would apply. In this case, I previously in my decision in voir dire number two concluded that the accused had not requested a copy of the warrant. Even though I accept, as matter of principle, that the expectation of privacy is extremely high in a person's own home, and the search of a private residence is by its nature highly intrusive, the breach here was more technical in nature. In so saying, I note that if the warrant had been issued under s. 487 as opposed to 487.1 there would have been no Charter breach even though the police conduct would have been identical. Consideration of this factor militates against exclusion.

### **Society's interest in the adjudication of a case on its merits**

[19] The accused concedes that the crimes with which he stands charged are serious ones and that the evidence is physical or real evidence. He says, however, that the third step of the Grant test is not intended to serve as a rubber stamp for evidence that was improperly obtained.

[20] The third factor will generally militate in favour of inclusion of the evidence. The court must, in effect, consider whether the societal interest in ensuring those who break the law are brought to trial and dealt with in accordance with the law while balancing the inclusion of the evidence that will bring the administration of justice into disrepute.

[21] In this case, significant quantities of drugs were found in the accused's home and the evidence from the voir dire suggests that another party who was under surveillance was seen going directly from the home to a homeless shelter. The tragic impacts of the opioid crisis in this province are well-known and society as a whole has an interest in finding the truth on the facts of this case. Here, the evidence is real evidence and is therefore reliable.

[22] I acknowledge that the seriousness of the charges can cut both ways. While the societal interest in having more serious matters proceed to trial would militate in favour of inclusion, it would be contrary to Charter principles to find that those charged with more serious offences and therefore potentially subject to more significant sanctions were somehow entitled to less protection of their Charter rights. Members of the public would expect that the more serious the charges, the more rigorous and exacting the police would be in ensuring that their conduct was lawful and in compliance with the Charter.

[23] Taking all three prongs of the Grant test into account, I must consider whether the admission of the evidence obtained as a result of the Charter breach of failing to provide a copy of the telewarrant upon entering into the home would bring the administration of justice into disrepute. In this case, while the breach itself was serious in that it was not trifling, a valid warrant had nonetheless been issued. The failure to provide a copy of the warrant was inadvertent in circumstances whereby had the warrant been obtained in another way there would have been no obligation absent a request. The charges in this case are serious and society's interest in finding the truth when there are significant amounts of

fentanyl involved is of serious concern.

[24] The circumstances here do not satisfy me that the administration of justice would be brought into disrepute if the evidence were admitted, and the accused's application is therefore denied.

[25] That concludes my decision.

"Wilson J."

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