
CANADA / JUDGMENT

R. v. Howell

2020 BCSC 1731

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2020 BCSC 1731 R. v. Howell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Howell,

2020 BCSC 1731

Date: 20200929

Docket: 68928-2, 68928-3

Registry: Chilliwack

Regina

v.

Bryan David Howell

Before: The Honourable Mr. Justice Basran

(Appearance via teleconference)

Oral Reasons for Judgment

Counsel for the Crown:

C. Arnason

Counsel for the Accused:

R. Dhanu

(as Agent for R.J.K. Gill)

Place and Date of Trial/Hearing:

Chilliwack, B.C.

September 14-16, 2020

Place and Date of Judgment:

Chilliwack, B.C.

September 29, 2020

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Overview

- [1] Bryan David Howell is charged with three counts of possession for the purposes of trafficking pursuant to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. He seeks an order for the exclusion of evidence based on s. 8, 9, 10 and 24 of the Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].
- [2] Specifically, he asserts that on November 23, 2017, police violated his rights under s. 9 of the Charter by unlawfully arresting him because there were insufficient objective reasonable grounds for his arrest.
- [3] He further asserts that his rights under s. 8 of the Charter were violated by the police because the search that occurred incident to the arrest was done without proper authority and pursuant to an unlawful arrest.

- [4] The Crown concedes that Mr. Howell's Charter s. 10(a) right to be informed of the reasons for his arrest and s. 10 (b) right to retain and instruct counsel without delay were violated.
- [5] For the reasons that follow, I have concluded that Mr. Howell's s. 9 and s. 8 Charter rights were also violated. I have determined that the evidence obtained from Mr. Howell's backpack will be excluded from the evidence at trial pursuant to s. 24(2) of the Charter.

The Investigation and Arrests on November 23, 2017

- [6] On October 30, 2017, Detective Toews of the Abbotsford Police Department ("APD") began a drug trafficking investigation of Brian McDonald and others who lived with him. Mr. McDonald resided at 33278 Robertson Avenue in Abbotsford, BC (the "Robertson Avenue Residence") with Jennifer Weston, Jason Richardson and his two sons, Caitlin Howell and Bryan Howell, the accused in this matter. The investigation was prompted by several overdose deaths in Abbotsford that were allegedly linked to drug trafficking purportedly conducted by Mr. McDonald. It included surveillance of the residents of the Robertson Avenue Residence on the theory that they were all involved in the drug trafficking taking place at this location.
- [7] The investigation also included surveillance of a storage facility located at 3210 McCallum Road, in Abbotsford B.C. (the "Storage Facility"). Mr. Howell was seen at that location twice on November 8, 2017 but there was no evidence that he went to a particular locker in the Storage Facility. After one of the occasions when he visited the Storage Facility, Mr. Howell was seen at the residence of an individual in Abbotsford who certain unnamed members of the APD believe is involved in the drug trade.
- [8] On November 22, 2017, a police officer conducting surveillance saw Mr. Howell conduct a "hand-to-hand" drug transaction with an unidentified male. This officer did not testify during the hearing. Detective Toews recounted this observation as reported to him by this other officer.
- [9] During the course of the investigation, Detective Toews discovered that Mr. Howell was wanted in Alberta on outstanding warrants relating to 26 counts of fraud. By November 22, 2017, Detective Toews knew that Mr. Howell could be arrested in British Columbia on these Alberta warrants.
- [10] The investigation came to a head on November 23, 2017. The APD obtained warrants to search the Robertson Avenue Residence and the Storage Facility. According to Detective Toews, they intended to arrest all of the residents of the Robertson Avenue Residence including Mr. Howell.
- [11] At 6:00 am that morning, members of the APD drug team executed the search warrant at the Storage Facility. They found fentanyl, MDMA precursor drug material, crack cocaine, and approximately \$48,000 in cash.

- [12] Later that day, Mr. McDonald was seen leaving the Robertson Street Residence by car. He was arrested on McCallum Road. Around that time, Mr. Howell left the Robertson Street Residence. As Detective Toews was in the process of arresting Mr. McDonald, he saw Mr. Howell walking towards the scene of this arrest. Detective Toews confirmed Mr. Howell's identity then told him he was under arrest for warrants from Edmonton, Alberta. Detective Toews did not provide any further details about the charges in Alberta. He asked Constable Boyes to handcuff Mr. Howell and she did so. Detective Toews then returned his attention to Mr. McDonald and completed the process of arresting him.
- [13] Constable Boyes confirmed that she was with Detective Toews when Mr. Howell walked towards them. She recalled that Detective Toews identified Mr. Howell, arrested him, and asked her to handcuff him, which she did. He was compliant and she had no concerns for her safety.
- [14] Constable Boyes conducted a pat down search of Mr. Howell and then placed him in the police transport vehicle. Next, she searched a backpack that Mr. Howell was wearing when he approached them at the scene of the arrest. She said that the purpose of the search was to look for weapons and because of safety concerns. She opened the main pouch of the backpack and saw what she described as a large quantity of drugs. A subsequent analysis of these drugs concluded that these drugs included fentanyl and carfentanil.
- [15] Constable Boyes told Detective Toews that she found drugs in Mr. Howell's backpack. She told him this while Detective Toews was still in the process of arresting Mr. McDonald.
- [16] After completing the arrest of Mr. McDonald, Detective Toews returned his attention to Mr. Howell. He read what he described as a generic arrest script to Mr. Howell. He had several of these generic scripts with him. His intention was that he and his colleagues would read these scripts to the individuals they arrested and fill in their names and the times of the arrests in order to document what had been done. Confusingly, Detective Toews testified that the script he used for Mr. Howell did not contain Charter warnings because initially, he was being arrested on outstanding warrants. He assumed that the appropriate Charter warnings would be subsequently provided to Mr. Howell based on the Alberta warrants but he did not provide them when he initially arrested Mr. Howell.
- [17] The arrest script he read to Mr. Howell was delivered after the search of his backpack and after Constable Boyes told him that she found drugs in this backpack. After reading this arrest script to Mr. Howell, Detective Toews testified that he told Mr. Howell that he was being arrested for possession for the purpose of trafficking and advised him of his right to counsel. Mr. Howell indicated that he wanted to call a lawyer.
- [18] After reading the arrest script to him, Detective Toews did not have any further dealings with Mr. Howell on that day. He did not instruct anyone to ensure Mr. Howell received access to counsel and he did not ensure that details of the Alberta warrants were provided to Mr. Howell.

- [19] Constable Boyes transported Mr. Howell to the APD detachment. Her responsibility on this day was the transfer of those arrested to the cells at the APD. She was not involved in the arrest or Charter warnings of anyone, including Mr. Howell. She did not make any efforts to facilitate access to counsel before transporting Mr. Howell to the APD detachment and did not take any steps in this regard once they arrived.
- [20] Mr. Howell was held pursuant to the warrants from Alberta and subsequently transported to Edmonton to address those charges.

Section 10(a) and 10(b) breaches conceded by the Crown

- [21] Section 10(a) of the Charter requires that an accused be promptly informed of the reasons for his arrest or detention. Section 10(b) provides accused individuals with the right to retain and instruct counsel without delay and to be informed of that right.
- [22] In this case, the Crown concedes that Mr. Howell's s. 10(a) Charter rights were violated because during the first arrest of Mr. Howell, Detective Toews did not tell him any details of the warrants in Alberta. He did not tell him that he was being arrested in respect of 26 counts of fraud. He merely said that he was being arrested pursuant to the warrants in Alberta.
- [23] The Crown also concedes that Mr. Howell's s. 10(b) right to counsel was violated because he was not advised of his right to counsel when first arrested for the Alberta warrants. Furthermore, the police took no steps to facilitate Mr. Howell's right to counsel after the second arrest. He was not given an opportunity to call counsel at the scene of the arrest. Detective Toews testified that he thought someone would provide this access at the police station but neither he nor Constable Boyes took any steps to ensure this happened.

Was the first arrest of Mr. Howell lawful?

- [24] Section 9 of the Charter states that "Everyone has the right not to be arbitrarily detained or imprisoned". The onus is on the Crown to prove that Mr. Howell's arrests were lawful. This must be shown on a balance of probabilities.
- [25] Section 495(1)(a) of the Criminal Code permits a peace officer to arrest without warrant a person who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence.
- [26] Justice Kent summarized the relevant law on "reasonable grounds to believe" in *R. v. Wong*, 2017 BCSC 1170 at para. 7:
- [7] Section 495(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46 ("the Code"), permits a peace officer to arrest without warrant a person who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence. With respect to the requirement of "reasonable grounds to believe" the relevant law can be summarised as:

1. The "reasonable grounds to believe" standard requires something more than mere suspicion; it is a standard of "reasonable probability". It is not equated with the "proof beyond a reasonable doubt" standard, or even the requirement of a "prima facie case." Indeed, it is a standard less than that applicable in civil cases, namely, proof on the balance of probabilities. The phrase "reasonable belief" approximates what is required and envisions a practical, non-technical, common-sense assessment of the totality of the circumstances at the time the arrest decision was made.
 2. The arresting officer's subjective belief that he or she has the requisite reasonable grounds is insufficient by itself for an arrest under s. 495(1)(a) of the Code to be lawful. Those grounds must also be justifiable from an objective point of view.
 3. Determining whether the arresting officer's grounds for belief were objectively reasonable involves an assessment of the factual matrix existing at the time the arrest was made. Whether other information, had it been available, might have strengthened or weakened those grounds is not a relevant consideration.
 4. A police officer's training and experience can play an important role in assessing whether the reasonable belief standard has been met. Police officers are trained to detect criminal activity. That is their job. They do it every day. Matters which may have no significance to the layperson may attract considerable significance in the eyes of a trained and experienced police officer.
 5. The assessment of whether objectively reasonable grounds for arrest existed involves placing a reasonable person in the position of the officer and having that person assess the circumstances through the lens of someone who has the same experience, training, knowledge and skills as the officer. If that reasonable person would reach the same conclusion as the police officer, then the grounds for arrest will be considered to be objectively reasonable.
 6. The expertise and experience of a police officer must never be an excuse for arbitrary arrest, even if the subsequent search of an accused uncovers evidence of a crime. The fact that incriminating evidence is subsequently found will not give any more substance to the officer's grounds for belief. Something in the pre-arrest circumstances observed or learned by the officer, placed in appropriate context, must lend objective justification or verification to the officer's belief. Without this objective component, the scope of the police power to arrest would be defined entirely by the police officer's subjective perceptions. Where the police officer has nothing but hunch or suspicion and no legal way to obtain other evidence, it follows that the officer must leave the suspect alone and not charge ahead to obtain evidence illegally or unconstitutionally.
- [27] In respect of the first arrest of Mr. Howell based on the Alberta warrants, I am satisfied that Detective Toews had reasonable grounds to believe that he could arrest Mr. Howell. He was aware of the fraud allegations in Alberta and knew that warrants had been issued in British Columbia for Mr. Howell's arrest on those charges. This was part of the factual matrix at the

time he arrested Mr. Howell on the Alberta warrants. As previously discussed, Detective Toews violated Mr. Howell's s. 10(a) Charter rights by failing to disclose the reasons for the arrest because he did not tell Mr. Howell that he was being arrested on fraud charges. However, I am satisfied that Detective Toews objectively had reasonable grounds to believe that he could arrest Mr. Howell on the Alberta charges.

Was the second arrest of Mr. Howell for possession for the purpose of trafficking lawful?

- [28] Detective Toews also believed that he had reasonable grounds to arrest Mr. Howell for possession for the purpose of trafficking based on the two visits to the Storage Facility on November 8, 2017, the hand-to-hand drug transaction on November 22, 2017, and because he lived at the Robertson Street Residence, where drug activity was allegedly taking place.
- [29] Detective Toews confirmed that Mr. McDonald, not Mr. Howell, was the focus of the investigation. He also verified that he did not witness the hand-to-hand transaction that Mr. Howell was alleged to have participated in on November 22, 2017.
- [30] He confirmed that there is no direct evidence that Mr. Howell attended the storage locker, only that he was in the Storage Facility for a few minutes on two occasions, on November 8, 2017.
- [31] Mr. Howell was under surveillance on numerous occasions throughout the investigation and with the exception of the aforementioned activities on November 8 and November 22, there was nothing to suggest that he was involved in trafficking drugs. In fact, information from a confidential informant indicated that Mr. Howell was not involved in drug trafficking.
- [32] Merely residing in a residence where drug activity is taking place is insufficient to establish objectively reasonable grounds for arresting someone for possession for the purposes of trafficking. As the British Columbia Court of Appeal decided in *R. v. Whitaker*, 2008 BCCA 174 at para. 60: "The police are not entitled to arrest first and then determine whether the person arrested is connected to the offences under investigation."
- [33] The short visits to the Storage Facility on November 8, 2017 do not establish that Mr. Howell attended the storage locker. I also do not consider a lone purported hand-to-hand drug transaction, in the absence of direct and more detailed evidence, to be objectively sufficient to justify arresting Mr. Howell for possession for the purpose of trafficking. Considering these factors individually and together, I am not satisfied that Detective Toews had reasonable grounds to believe he could arrest Mr. Howell for possession for the purpose of trafficking.
- [34] Furthermore, when first presented with the opportunity to arrest Mr. Howell, as he voluntarily walked towards him and Constable Boyes, Detective Toews did not arrest him for possession for the purpose of trafficking. He arrested him based on the Alberta warrants. If Detective Toews was satisfied that he had reasonable grounds to arrest Mr. Howell for possession for the purpose of trafficking, in the midst of arresting Mr. McDonald on drug charges, and in the overall context of a month long drug investigation, I believe he would

have done so at first instance. It was only after the search of Mr. Howell's backpack that Detective Toews arrested Mr. Howell for possession for the purpose of trafficking. While I am satisfied that Detective Toews had subjective grounds to arrest Mr. Howell for possession for the purpose of trafficking, I am not satisfied that those grounds were objectively reasonable. Mr. Howell's s. 9 Charter rights were violated because the second arrest for possession for the purpose of trafficking was not lawful.

Was the search of Mr. Howell's backpack lawful?

- [35] Section 8 of the Charter states that: "everyone has the right to be secure against unreasonable search or seizure."
- [36] The police may conduct a search incident to arrest to guarantee the safety of the police and the accused, prevent escape, or provide evidence against him: *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at para. 180-181.
- [37] A search incident to arrest must be for a valid law enforcement purpose: *R. v. Saeed*, 2016 SCC 24 at para. 37.
- [38] An inventory search falls outside the bounds of the legitimate purposes of search incident to arrest: *R. v. Caslake*, [1998] 1 S.C.R. 51.
- [39] A safety search is justified in circumstances where it is reasonably necessary to reduce an imminent threat to safety of the public or police: *R. v. Macdonald*, 2014 SCC 3 at para. 40.
- [40] After Mr. Howell was arrested on the Alberta warrants, Constable Boyes conducted a pat down search of Mr. Howell, placed him in a police transport vehicle, and then searched his backpack. Her evidence was that she did this search to look for weapons and for safety purposes because she was going to transport Mr. Howell to the APD.
- [41] Mr. Howell was handcuffed and detained in the police transport vehicle at the time she conducted the backpack search so he did not present a safety risk at the time she undertook this search. Furthermore, Mr. Howell was physically separated from his backpack and did not have access to it.
- [42] Constable Boyes was aware that Mr. Howell was arrested pursuant to the Alberta warrants. It is unclear if she knew that these warrants were on fraud charges, but in any event, she did not describe a reasonable basis to search for evidence in Mr. Howell's backpack. She also did not describe a specific need to do a safety search based on a possible imminent threat to her, another officer, or the public. Her testimony suggested that she did this search as a matter of course without considering whether the specific circumstances regarding safety considerations or the charges for which Mr. Howell was arrested, necessitated such a search.
- [43] In my view, Constable Boyes' backpack search was unreasonable in the circumstances because Mr. Howell did not pose a safety threat and there was no basis upon which she could have been trying to collect evidence in respect of the Alberta warrants. He was

handcuffed, detained in a police transport vehicle and separated from his backpack. There was no valid law enforcement reason for this search. In the absence of a legitimate safety concern, Constable Boyes was not entitled to search the backpack as a routine matter before transporting Mr. Howell to the police station.

[44] Constable Boyes' search of Mr. Howell's backpack violated his s. 8 Charter right to be secure against unreasonable search and seizure.

Should the evidence obtained from the backpack be excluded?

[45] In determining whether evidence should be excluded pursuant to s. 24(2) of the Charter, a threefold inquiry must be undertaken based on the court's decisions in *R. v. Grant*, 2009 SCC 32, *R. v. Suberu*, 2009 SCC 33, and *R. v. Harrison*, 2009 SCC 34:

- a) The seriousness of the Charter infringing state conduct;
- b) The impact of the breaches on the Charter protected interests of the accused; and
- c) Society's interest in the adjudication of the case on its merits

These three factors must be balanced. This is not a three-part test.

[46] The Crown properly conceded the s. 10(a) and 10(b) breaches of the Charter. This is because Mr. Howell was not promptly informed of the reasons for his arrest under the Alberta warrants, he was not informed of his right to counsel when first arrested, and his right to counsel was not facilitated despite his immediate request to speak to counsel.

[47] I found that the second arrest of Mr. Howell for possession for the purpose of trafficking was not lawful and breached his s. 9 Charter rights. I further concluded that the search of his backpack violated his s. 8 Charter rights against unreasonable search and seizure.

[48] The Crown properly admitted the temporal nexus between the s. 10(a) and 10(b) breaches of the Charter and the discovery of the drugs in Mr. Howell's backpack, which is the evidence sought to be excluded. I am satisfied that the s. 9 and s. 8 Charter violations also have a temporal nexus with this evidence.

The seriousness of the Charter infringing state conduct

[49] There were multiple breaches of Mr. Howell's Charter rights on November 23, 2017. The evidence suggests that Detective Toews was surprised by the appearance of Mr. Howell during the arrest of Mr. McDonald. He arrested Mr. Howell without providing him with details of the reasons for his arrest. He also failed to advise Mr. Howell of his right to counsel until the second arrest. By his own admission, he was preoccupied with arresting Mr. McDonald, the central figure in the investigation. He did not have reasonable objective grounds to arrest Mr. Howell for possession for the purpose of trafficking and he did not do so until after the drugs were discovered in Mr. Howell's backpack. The search of this backpack violated Mr. Howell's s. 8 Charter rights because it was not undertaken for a valid

law enforcement or safety purpose but instead as a matter of course and/or an inventory search.

- [50] In my view, the qualitative and cumulative effect of the four breaches of Mr. Howell's Charter rights is serious. These were not inadvertent or minor mistakes. While they may not have been flagrant or abusive, they were certainly careless and demonstrated a disregard for Mr. Howell's Charter rights. By her own description, Constable Boyes conducted the search of Mr. Howell's backpack seemingly as a matter of course. On the evidence, it is clear that the s. 10(a) and 10(b) breaches occurred because Detective Toews was focused on Mr. McDonald, not Mr. Howell. Detective Toews was distracted by the unexpected appearance of Mr. Howell and demonstrated a disregard for Mr. Howell's Charter rights.
- [51] Cumulatively, these four Charter breaches were serious and favour exclusion of the evidence.

The impact of the breaches on the Charter protected interests of the accused

- [52] The second line of inquiry focuses on the seriousness of the Charter breaches from the accused's perspective. Mr. Howell willingly approached Constable Boyes and Detective Toews. He complied with their instructions and immediately sought access to counsel when advised of his right to do so. His access to counsel was not facilitated at the scene of the arrest and neither Constable Boyes nor Detective Toews took any positive steps to ensure that he was told about the details of the Alberta warrants or given access to counsel at the police station. His backpack was illegally searched and he was arrested for possession for the purpose of trafficking after this illegal search and otherwise in the absence of objective grounds.
- [53] From Mr. Howell's perspective, this was clearly heavy-handed state conduct that interfered with several of his Charter protected rights. I find that the impact of these breaches on Mr. Howell's rights favours exclusion of the evidence.

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

- [54] 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.
- [55] The exclusion of reliable and relevant evidence may make the trial unfair from the public's perspective, thus bringing the administration of justice into disrepute: Grant at para. 81. However, a court considering this factor must not allow the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis because doing so would result in lesser Charter protections to those charged with serious crimes: Harrison at para. 34 and 40.

- [56] In some circumstances, the importance of maintaining Charter standards outweighs the "price paid by society for an acquittal": Harrison para. 42. Police officers must consistently respect Charter rights.
- [57] I am aware that the drugs seized from Mr. Howell's backpack constitute highly reliable evidence. I also recognize the scourge and insidious danger of the drugs, especially fentanyl and carfentanil, found in Mr. Howell's backpack. I must consider this against the backdrop of the numerous violations of Mr. Howell's Charter rights. The number of these breaches is relevant and significant. As the Supreme Court of Canada stated "these are protections that law abiding Canadians take for granted and courts must play a role in safe-guarding them even where the beneficiaries are involved in unlawful conduct": Harrison at para. 3.

Conclusion on Section 24(2)

- [58] In balancing the three relevant factors, and considering the four breaches of Mr. Howell's Charter rights, I conclude that the reputation of the administration of justice is best served by excluding the evidence in this case. As the Supreme Court of Canada stated in Harrison, where a substantial amount of drugs was excluded, "the price paid by society for an acquittal is outweighed by the importance of maintaining Charter standards": para. 42.

Disposition

- [59] For these reasons, I have concluded that admitting the drugs seized on November 23, 2017 from Mr. Howell's backpack would bring the administration of justice into disrepute within the meaning of s. 24(2) of the Charter. This evidence is excluded from evidence at trial.
- [60] MR. ARNASON: Now, My Lord, for the record, Arnason, first initial C., I am counsel for the Public Prosecution Service of Canada. That concludes the evidence of the voir dire and the Crown has no further evidence to call on the trial.
- [61] MR. DHANU: And, My Lord, for the record, Dhanu, first initial R., D-h-a-n-u, appearing by telephone, based upon the Crown's position, I would invite the court to acquit.
- [62] THE COURT: That is so granted, Mr. Dhanu. Mr. Howell is acquitted.
- [63] MR. DHANU: Thank you, My Lord, for the reasoned judgment, and thank you, my friend.
- [64] MR. ARNASON: Thank you, My Lord.
- [65] THE COURT: Thank you.
- [66] Madam Clerk, that concludes this matter.

"Basran, J."

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