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R. v. Kim

2020 BCSC 2027

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kim,

2020 BCSC 2027

Date: 20201218

Docket: 27841

Registry: Vancouver

Regina

v.

Billie Onare Kim

Before: The Honourable Madam Justice Devlin

Reasons for Judgment - Application to Exclude Evidence Pursuant to s. 24(2) of the Charter

Counsel for the Crown:

A. Rice and

T.J. Lattimer

Counsel for the Accused Kim:

M.P. Klein, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

December 3, 2020

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

Vancouver, B.C.

December 18, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 18, 2020

Introduction

- [1] The accused, Billie Onare Kim, is charged with several offences under the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA], as well as several weapons offences under the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The charges arise as a result of a search of unit 1204, 5177 Brighouse Way, Richmond, British Columbia ("Brighouse Way") on September 14, 2017. Mr. Kim was originally charged together with two others, Mr. Latimer and Mr. Pereira, who disposed of their matters prior to the hearing of this application.
- [2] On this application Mr. Kim has applied under s. 24(2) of the Charter to exclude various evidence obtained by the Delta Police Department ("DPD") at Brighouse Way. In earlier rulings, I found that the DPD committed three breaches of Mr. Kim's rights under s. 8 of the Charter. In a ruling indexed as R. v. Kim, 2019 BCSC 2150 [Kim #1], I determined that Mr. Kim had an expectation of privacy in the 12th floor hallway at Brighouse Way, and as such, his images captured on the covert camera installed by the police in that hallway breached his s. 8 Charter rights. In a ruling indexed as R. v. Kim, 2020 BCSC 1064 [Kim #3], I determined that Mr. Kim had standing to challenge the admissibility of material that was obtained from Brighouse Way, consisting of still images obtained from the CCTV footage of the parking garage area and the key fob access records for unit 1204 ("Brighouse Material"). In a ruling indexed as R. v. Kim, 2020 BCSC 1075 [Kim #4], I determined that Mr. Kim had standing to challenge the admissibility of the covert physical surveillance conducted in the 12th floor hallway of Brighouse Way.
- [3] Mr. Kim takes the position that the police showed a pattern of indifference to his right to privacy, that they negligently, recklessly, and flagrantly breached his reasonable expectation of privacy, and that their actions demonstrated a clear disregard for his privacy rights. Further, these breaches both individually and cumulatively constitute serious breaches, and to admit this evidence would bring the administration of justice into disrepute.
- [4] The Crown opposes Mr. Kim's application to exclude evidence.
- [5] On December 18, 2020 I advised counsel of my decision with reasons to follow. These are those reasons.

Evidence on the Voir Dire

- [6] In support of their application to exclude evidence, the defence called Sgt. Boyce. Sgt. Boyce was the primary investigator on the file and was responsible for the decisions taken by the police with respect to their actions at Brighthouse Way.
- [7] Sgt. Boyce explained the process he undertook to ensure that any investigative steps taken by his team inside the Brighthouse Way building were done in compliance with the Charter. Sgt. Boyce explained that he reviewed the leading cases of *R. v. Webster*, 2015 BCCA 286 [Webster] and *R. v. White*, 2015 ONCA 508 [White] dealing with searches inside multi-unit buildings, reviewed a blog on search and seizure written by a Crown lawyer, and sought advice from Crown counsel. Sgt. Boyce understood that it was permissible to enter onto the property if the police obtained permission from the property manager, and if permission was not granted, then they should seek a general warrant. Sgt. Boyce also understood that a reasonable expectation of privacy was dependent on the circumstances, and concluded that an individual would have a greater expectation of privacy in the hallway outside their residential unit than in the common areas of the building. He also concluded that it would not be feasible to have a plainclothes officer standing in the hallway making observations. Therefore, he decided that they should apply for a general video warrant in order to install a covert camera on the 12th floor hallway. Sgt. Boyce understood that a Provincial Court judge could issue a general video warrant and believed that they had obtained a properly authorized warrant.
- [8] With respect to the Brighthouse Material (fob records and the CCTV still photographs), Sgt. Boyce believed that the police could properly obtain this material because the building manager had provided permission. Similarly, Sgt. Boyce believed that the permission from the building manager allowed Cst. Cessford to conduct physical surveillance in the 12th floor hallway.

The Legal Principles - Section 24(2) Analysis

- [9] 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.

- [10] Both Crown and defence counsel agree on the general legal principles governing the exclusion of evidence. There are two stages in an analysis under s. 24(2): first, there is a threshold analysis, wherein the court must determine whether there is a nexus between the breach of the Charter right and the evidence obtained through the breach that is sought to be excluded; second, there is an inquiry that utilizes the framework established in *R. v. Grant*, 2009 SCC 32 [Grant]. I can easily dispose of the threshold analysis. It is clear that the impugned evidence was obtained in connection to the Charter violations.

- [11] Therefore, the focus of my analysis will be on the application of the Grant framework to determine whether evidence obtained in breach of the Charter must be excluded under s. 24(2).

The Grant Analysis

- [12] 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.
- [13] These factors do not operate as a disjunctive 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 [Harrison] at para. 36. The balancing mandated by s. 24(2) is "qualitative in nature and therefore not capable of mathematical precision": *Grant* at para. 140. Rather, courts must assess and balance 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, as assessed from the objective perspective of a reasonable person, informed of all the circumstances and the values underlying the Charter: *Grant* at paras. 68, 85-86.
- [14] The *Grant* factors look to the public's overall, long-term faith in the justice system: *Grant* at para. 68; *Harrison* at para. 36. The focus of s. 24(2) is also prospective - it 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 admitting the impugned evidence will do further damage to the reputation of the justice system: *Grant* at para. 69. Finally, s. 24(2) has a societal focus, and is aimed not at punishing the police or compensating the accused, but rather at systematic concerns, focusing on the broad impact of the admission of the evidence on the long-term reputation of the justice system: *Grant* at para. 70.
- [15] Having set out the analytical framework established in *Grant*, I turn to an application of the three avenues of inquiry that it set out.
- (i) Seriousness of Charter-infringing state conduct

- [16] 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.
- [17] In considering this, 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 "inadvertent or minor": Grant at para. 74; and at the other end of the spectrum are those that involve wilful or reckless disregard of Charter rights and that can be characterized as "abusive", "deliberate", or "egregious": Grant at paras. 74, 133. Although wilful or flagrant violations are undoubtedly more serious than unintentional ones, negligent, wilfully blind, or careless violations that demonstrate insufficient regard for Charter rights may also undermine the public's confidence in the rule of law: Grant at paras. 74-75. The greater the level of state misconduct, the greater the need for the court to disassociate itself from that conduct: Grant at para. 72; R. v. Reddy, 2010 BCCA 11 at para. 92.
- [18] The accused argues that the s. 8 violations in this case demonstrate a pattern of disregard for his Charter rights. With respect to the covert camera, he submits the police ought to have known that they required a Supreme Court authorization to install a covert camera and were negligent in their actions. In support of his position, the accused refers to the decision of R. v. Edwardsen, 2017 BCSC 1578 [Edwardsen] wherein the Crown conceded that a Supreme Court warrant was necessary in order to install a covert video surveillance camera on private property. Mr. Kim submits that since the Edwardsen matter was argued in June 2017, the police ought to have known of the Crown concession at the time they applied for the general warrant in August 2017. However, I note the Edwardsen decision was not released until September 2017 - after the general warrant had been issued in this matter. At the point in time that the warrant was applied for and issued, the law with respect to the jurisdiction to issue a warrant pursuant to s. 487.01(4) was unsettled (See: R. v. Ha, 2009 ONCA 340; R. v. Li, 2013 ONCA 81 [Li]).
- [19] I note the decision of R. v. Acciaoli, 2018 ONCJ 969 [Acciaoli] (released November 29, 2018) wherein the court considered a situation quite similar to the one here. At issue was the admissibility of footage obtained from a covert camera installed in an apartment hallway in the context of an investigation into a high-scale drug trafficking operation after a general warrant authorizing video surveillance was granted by an experienced provincial court-level judge (on June 30, 2015). The accused in that case cited Li and argued, inter alia, that the general warrant should have been signed by a judge from the superior court, not by a provincial court-level judge. .
- [20] In Li, at trial, the accused challenged general warrants issued by a provincial court-level judge on the grounds, inter alia, that they were issued by a judge without jurisdiction. The argument was that only a superior court judge can issue a general warrant under s. 487.01 permitting the use of video surveillance. The trial judge concluded the general warrants were invalid because they had been issued by a judge without the authority to do so: Li at

para. 82. The trial judge then proceeded to consider admissibility under s. 24(2), and in admitting the evidence obtained under the warrants, he found (among other things) that the police had acted in good faith throughout: Li at para. 83.

- [21] The Ontario Court of Appeal in Li upheld the trial judge's decision to admit the evidence, and declined to address whether the trial judge's conclusion that only a superior court judge has the authority to issue general warrants that include video surveillance was correct. At para. 105, Watt J.A. stated that nothing in his reasons should be taken as affirmation of the correctness of the trial judge's determination that that only superior court judges have the authority to issue general warrants permitting video surveillance. Thus, after this decision, this jurisdictional question was still very much up in the air.
- [22] In Acciaioli, the court reviewed Li. The accused in Acciaioli submitted that the decision in Li should have made it clear to the police that the jurisdiction of an Ontario Court of Justice ("OCJ") (i.e., provincial court-level) judge to sign a video surveillance warrant was very much an open question, and so it was incumbent on the police to avoid the possibility of taking their application before the wrong court (i.e., they should have brought it before a superior court judge). The court rejected this submission, accepting instead the Crown's submission that Watt J.A. in Li provided numerous comments supportive of the right of an OCJ judge (i.e., provincial court-level judge) to sign a video surveillance warrant, and that therefore, the police could not be faulted for going to an OCJ judge: Acciaioli at para. 50.
- [23] The court in Acciaioli went through a detailed analysis at paras. 43-66 of whether a provincial court-level judge can sign a general warrant authorizing surreptitious video surveillance, and concluded that such a warrant can only be issued by a superior court judge. When it went on to consider whether the evidence should be excluded, the court considered that the state of mind of the affiant and investigators regarding the application was one of "complete good faith" (at para. 103), and ultimately found the video footage derived from the video warrant to be admissible.
- [24] I note all of this to demonstrate that the law with respect to this jurisdictional issue at the time the general warrant was applied for and issued in this case was neither settled nor clear. Even in November 2018 - over a year after the application and issuance of the warrant in this case - the judge in Acciaioli stated at para. 51 that "[h]aving toiled with the enabling sections of the Code that touch on this jurisdictional question", he had to "concede that the answer is not an obvious one", and that "[t]he police can hardly be faulted for deciding to take their initial general warrant Application" before a provincial court-level judge. I agree.
- [25] Critical to my analysis is the fact that the general warrant was issued by an experienced Provincial Court judge. The police believed they had obtained a valid warrant to install the covert camera in the 12th floor hallway. There is no merit in the submission that the police were negligent when they decided to make their application before a Provincial Court judge. As I have noted, the police cannot be faulted for deciding to take their application before a Provincial Court judge. The jurisdictional issue here was certainly not settled law. I note the

comments of McLachlin C.J. and Charron J. at para. 133 in *Grant* that, "[w]hile police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is." This is a case where the law was far from clear or settled at the relevant time, and where the police could not have been expected to "engage in judicial reflection on conflicting precedents". The fact that the experienced Provincial Court judge in this case issued the warrant demonstrates the existing uncertainty at the time. In my view it would be both unfair and unreasonable to hold the police to a higher standard of legal knowledge than that of an experienced judge.

- [26] These circumstances are properly characterized as a jurisdictional error and militate in favour of the admission of the evidence. I also mention parenthetically that there is nothing to indicate that the warrant would not have been issued but for the jurisdictional error.
- [27] With respect to the Brighthouse Material and the covert physical surveillance, the accused argues these warrantless seizures fall on the more serious end of the spectrum, as they demonstrate a reckless attitude on the part of the DPD with regard to his Charter rights. The accused argues that in deciding not to obtain a warrant for the Brighthouse Material or to conduct physical surveillance, the police chose the least onerous path, which was precisely the type of state action subject to criticism in *R. v. Fearon*, 2014 SCC 77 at para. 94. I do not agree. As set out earlier, Sgt. Boyce took steps to inform himself as to the legal requirements to conduct the investigation inside the Brighthouse Way building. He had reviewed the decisions in *Webster* and *White* and took what he believed to be the necessary steps to ensure the police actions complied with the Charter. As I discussed in *Kim* #4, the law regarding the reasonable expectation of privacy within multi-unit residential buildings was evolving at the time of the violation. The leading case in British Columbia at the time of the impugned search was *Webster*, wherein the Court of Appeal found that in the context of that case, the trial judge was correct to conclude that the accused had no reasonable expectation of privacy in the common areas of his condominium complex. The law has since evolved: see *R. v. Pipping*, 2020 BCCA 104. I accept that Sgt. Boyce was acting in what he reasonably believed were permissible limits. Given the state of the law at the time, and the steps taken by Sgt. Boyce prior to conducting the search, there is nothing to suggest that the conduct of the police amounted to a wilful, flagrant, or reckless disregard for the accused's Charter rights.
- [28] Having considered all of the circumstances on this factor, I find that they militate in favour of the admission of the evidence gathered from the covert camera, the one-time observation by Cst. Cessford of Mr. Kim on the 12th floor, and the Brighthouse Material obtained from the property manager.

(ii) Impact of the breach on the Charter-protected interests of Mr. Kim

- [29] The second line of inquiry focuses on the seriousness of the state's Charter-infringing conduct from the accused's perspective. Under this analysis, the court must examine the interests engaged by the infringed right and the degree to which the Charter infringement

impacts or intrudes upon those interests: Grant at para. 77. A search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans their dignity, is more serious than one that does not: Grant at para. 78. The more serious the impact on the accused's protected interests, the greater the risk that the admission of the evidence may send a signal that Charter rights count for very little, bringing the administration of justice into disrepute: Grant at para. 76.

- [30] With respect to the covert hallway camera, the accused argues that the impact on his reasonable expectation of privacy was extremely serious. I do not agree. In Kim #1, I found that the accused had a low but reasonable expectation of privacy in the 12th floor hallway because the hallway was more private than public (at para. 42). There are a number of other factors which attenuate the impact of this breach on the accused's expectation of privacy. The camera was situated to minimize intrusion and only captured the activity outside of the 12th floor elevator and the hallway towards unit 1204. It did not capture the front door of that unit or any other units on the floor. The accused was neither the owner nor the tenant of unit 1204. While the camera footage captured the details of his comings and goings, allowed the police to gather evidence regarding his associations, patterns, descriptions, and activity in the area of the suite, and potentially gave them the ability to review and cross-reference his actions with other sources of information, it had no impact on the accused's bodily integrity or personal dignity. These considerations militate in favour of admission.
- [31] The accused acknowledges that the fleeting physical surveillance in the hallway on one occasion is not as serious as his image being captured by the covert camera, but submits it does impact significantly on his reasonable expectation of privacy. As stated above, I have found that the accused had a low expectation of privacy in the hallway. For the reasons discussed above, I find that the impact on the accused's privacy by Cst. Cessford's one-time observation of the accused on the 12th floor hallway was minimal, and that the circumstances militate in favour of the admission of this evidence.
- [32] With respect to the Brighthouse Materials, I come to a similar conclusion. The CCTV still images captured the accused in the area of the parking garage elevator on seven occasions. As I found in Kim #4, this area was more public than private because it was an area accessible to all residents within the Brighthouse Way complex (at para. 36). The images are similar to those captured by the covert camera in that they reveal associations, patterns, descriptions, and activity of the accused, but they had no impact on the accused's bodily integrity or personal dignity. I find these still images minimally impacted the accused's Charter rights. While I appreciate that the fob records and still images could be cross-referenced to provide some additional information regarding the accused's activity, I find the breach is at the low end of the spectrum. Accordingly, the circumstances militate in favour of the admission of this evidence.

(iii) Society's interest in an adjudication of the case on its merits

- [33] 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: Grant at paras. 81, 83. 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. The analysis is prospective and must take into account the long-term effect of the ruling on the repute of the justice system: Grant at paras. 68, 84; R. v. Sunner, 2017 BCSC 2444 at para. 30.
- [34] 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. 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.
- [35] As I have noted, two considerations under this branch of the Grant analysis are the reliability of the evidence and the importance of the evidence to the Crown's case: Grant at paras. 81, 83; Harrison at para. 33. The evidence is both highly reliable and important to the Crown's case. While exclusion of this evidence may not "gut" the Crown's case, it would nonetheless have a significant impact on the viability of the prosecution. The accused is charged with serious drug and firearm offences. While the police actions in this case did impact the accused's constitutionally guaranteed privacy interests, I found the intrusion was at the low end. I conclude that in this case, society's interest in the adjudication of this case on its merits weighs strongly in favour of admitting the impugned evidence. There is a significant societal interest in having a trial adjudicated on its merits, and I find that the truth-seeking function of the trial would be better served by the admission of the evidence than by its exclusion: see Grant at para. 79.

Conclusion on 24(2) Analysis

- [36] In support of his application for exclusion of evidence, the accused relies on R. v. Lauriente, 2010 BCCA 72 [Lauriente]. He argues that due to the cumulative effect of the breaches by the DPD, this Court should conclude that the police action merits exclusion of the evidence: see Lauriente at paras. 27-34. Mr. Kim says that the police conduct in this case amounted to a pattern of indifference to his right to privacy, and that the cumulative effect of the breaches weighs heavily in favour of exclusion. While the police actions in this case did result in several breaches of the accused's Charter-protected right to privacy, there is nothing about the police conduct, viewed individually or cumulatively, that would support a finding that

their actions constituted a wilful, flagrant, or reckless disregard for the Charter.

[37] In assessing and balancing the three avenues of inquiry as required in Grant, and considering the nature of the impugned evidence, I have concluded that the overall reputability of the justice system, viewed in the long term, will not be adversely affected by the admission of the evidence; rather, to exclude the evidence would bring the administration of justice into disrepute.

[38] Accordingly, the accused's application to exclude the evidence pursuant to s. 24(2) of the Charter is dismissed.

"Devlin J."

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