

CANADA / JUDGMENT

R. v. Montgomery

2014 BCSC 446

COURT

Supreme Court of British Columbia

DECIDED

19 February 2014

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2014 BCSC 446 R. v. Montgomery IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Montgomery, 2014 BCSC 446 Date: 20140219 Docket: 73426 Registry: Kelowna Regina v. Clifford Roger Montgomery, Tariq Mohammed Aslam and Salvador Ascencio-Chavez Before: The Honourable Madam Justice Beames Oral Ruling Re s. 503 of the Criminal Code and s. 9 Charter Breach Counsel for the Crown: C.W. Greenwood H. Magnin Counsel for the Accused, C.R. Montgomery: N.L. Cobb E. Lewis Counsel for the Accused, T.M. Aslam: J.W. Hogan, Q.C. J. Banks Counsel for the Accused, S. Ascencio-Chavez: K. Molle Place and Date of Trial/Hearing: Kelowna, B.C. February 12, 2014 Place and Date of Judgment: Kelowna, B.C. February 19, 2014

- [1] THE COURT: Clifford Montgomery was arrested at 12:08 p.m. on October 4, 2010, on charges of possession of cocaine for the purposes of trafficking, conspiracy to import cocaine, and conspiracy to traffic cocaine. He says that his s. 9 Charter rights prohibiting arbitrary detention were violated by way of the RCMP failing to comply with the obligations imposed by s. 503 of the Criminal Code. Section 503 provides that an accused person, who is not released by the police, must be: taken before a justice to be dealt with according to law
- (a) where a justice is available within a period of twenty-four hours after the person has been arrested without reasonable delay and in any event within that period.
- [2] If a s. 9 Charter breach is found, the accused intends to argue that it is part of a pattern of wrongful conduct on the part of the police, entitling him to relief pursuant to s. 24(2) of the Charter.
- [3] On the hearing of this matter, I have viva voce evidence from the witnesses previously called by the Crown during earlier voir dres and the trial proper, an affidavit from one of Mr. Montgomery's counsel at trial, and a number of documents which have been marked as exhibits, including log sheets and telephone log sheets from the RCMP detachment, the original record of proceedings, an electronic record of the record of proceedings, the Kelowna sheriffs' gaol slate, the "client identification card" form from the Ministry of Justice with regard to Mr. Montgomery, and correspondence between Crown and current counsel for Mr. Montgomery dated October 6, 2010, with regard to Mr. Montgomery's release.

- [4] From the evidence before me, I find that following Mr. Montgomery's arrest, which as I said was at 12:08 on October 4, 2010, he had access to counsel of his choice. He initially asked to speak to Mr. Geller, and efforts were made commencing at 1:25 p.m. to contact Mr. Geller with messages left for a call back. When Mr. Geller could not immediately be reached, Mr. Montgomery asked at 1:38 p.m. to speak to Mr. Cobb. Accordingly, a call was placed to Mr. Cobb's office and another message was left. Mr. Montgomery spoke to Ms. Lewis, a partner of Mr. Cobb's, at 1:56 p.m. At 4:33 p.m., Mr. Montgomery spoke to Mr. Geller. At 6:37 p.m., Mr. Montgomery spoke to Mr. Cobb. According to the telephone log, Mr. Montgomery spoke again to Mr. Geller at 7:28 p.m.
- [5] Between the time of the arrest and approximately midnight or shortly after midnight on October 4th, the police undertook a number of investigative steps, including a cell plant operation; the execution of a general warrant, which involved taking swabs of Mr. Montgomery's skin and photographs of Mr. Montgomery; and a warned statement.
- [6] Clearly the police are entitled to take or continue to take investigative steps after the arrest of a suspect. In *R. v. Butorac*, 2010 BCSC 1173, for example, the accused was arrested at 12:10 p.m. on December 29th, and the trial judge concluded that the police did not breach his s. 9 Charter rights, or fail to comply with s. 503, by interviewing him on the 29th, keeping him overnight, and interviewing him again on the morning of December 30th, until approximately noon on December 30th. She found that his detention did not become arbitrary or breach s. 503 until approximately noon on December 30th, when the police embarked on a third interview of the accused.
- [7] Detention for investigative purposes within a reasonable period is also recognized as legitimate in cases such as *R. v. Ansari*, 2008 BCSC 1492, at para. 55; *R. v. Precourt* as referred to in *Ansari*; and *R. v. Donnelly*, 2010 BCSC 1296 at para. 51.
- [8] It is also obvious, where practical and in keeping with s. 503, that it is preferable for an accused to be before a justice in person, rather than by telephone, for the reasons discussed in *Ansari* and referred to in *Donnelly*.
- [9] For these reasons, I am satisfied that detaining Mr. Montgomery overnight did not offend s. 503 or s. 9 of the Charter.
- [10] I turn now to the circumstances of October 5, 2010. No investigative steps were taken by the police with regard to Mr. Montgomery on the morning of October 5th or indeed at any time after sometime shortly after midnight on October 5. A police officer attended at the courthouse on the morning of October 5th to swear the information. At 9:53 a.m., Mr. Montgomery had a telephone call with Mr. Geller. At 10:01 a.m., he spoke by telephone to Ms. Lewis.
- [11] According to the original record of proceedings, which is the official court record, at 11:45 a.m., a Kelowna lawyer named Gavin Jones appeared before the Provincial Court's judicial case manager and represented to the court that he was appearing for Mr. Montgomery. Mr.

Jones has, according to the affidavit sworn in these proceedings by Ms. Lewis, no notes and no recollection of dealing with this matter. However, he does confirm that he was duty counsel that day, that there were approximately a dozen people in custody to be dealt with that day, which somewhat accords with the sheriffs' gaol slate which shows 13 prisoners in the courthouse cells on October 5th, plus Mr. Montgomery and one other who remained in the RCMP detachment cells, who had to be dealt with by the Provincial Court. Mr. Jones also, according to Ms. Lewis's affidavit, has confirmed that before involving himself on a file such as Mr. Montgomery's, he would have first ascertained if the person had counsel and he would have spoken to that counsel before speaking to the person in custody.

- [12] Although it is not said in the affidavit, I accept that before speaking to the matter in court, Mr. Jones would at least have had instructions from someone representing that he or she represented Mr. Montgomery or instructions directly from Mr. Montgomery. The former is more likely, in my view, in this case.
- [13] It is of some note that at least the Sheriff Service on the sheriffs' gaol slate had recorded that Mr. Montgomery's counsel as of October 5th was Mr. Geller.
- [14] In any event, at 11:45 a.m. on October 5th, Mr. Jones spoke to this matter, representing to the court that he was doing so on behalf of Mr. Montgomery. While Mr. Montgomery did not personally attend, having examined the original Provincial Court record of proceedings, I am satisfied that the record shows that it was represented to the court by counsel that there would be "No JIR by consent". The sheriffs' gaol slate records the same information. The record of proceedings says the matter was put over to October 7, 2010. All of that was said to have happened at 11:45 and presumably the minutes shortly thereafter on October 5th. At 12:03 p.m., according to the documents made exhibits in this matter, Mr. Montgomery spoke again by telephone to Mr. Geller, and at 12:20 p.m. he spoke by telephone to Mr. Jones. By 1:15 p.m., Mr. Montgomery was released from the RCMP cells into the custody of a deputy sheriff (DS 2001) for transport on the once-per-day shuttle from Kelowna to Kamloops Regional Correctional Centre. Had Mr. Montgomery not been placed on that shuttle, he would have, as counsel know from this case and its transport issues, had to spend another night in RCMP lockup.
- [15] On October 6, 2010, Ms. Lewis, of the law firm Mr. Montgomery eventually selected to represent him, wrote to Crown suggesting terms of release for Mr. Montgomery and suggesting that if Crown did not agree to his release, October 22, 2010 would be a convenient date for them to attend for a show cause hearing. Crown responded, opposing Mr. Montgomery's release and suggesting that dates for a show cause be canvassed with the judicial case manager on October 7th, when Mr. Montgomery was scheduled to attend court by video link from Kamloops Regional Correctional Centre. As it happened, the show cause hearing did not actually take place until November of 2010, and on November 10, 2010, a Provincial Court judge made a detention order. Mr. Montgomery was subsequently released on bail by an order of this court.

- [16] I return to the issues of s. 503 and arbitrary detention pursuant to s. 9. I do so bearing in mind the importance of arrested individuals being brought before the court within a reasonable time in order to have the issue of bail addressed. The attendance of a person before a justice can also have the effect of removing the accused person from the jurisdiction of the police and placing him within the jurisdiction of the court and under the "protection of the court", to use the language from Ansari (paras. 36-40 and 48). Further, for persons who have not had the benefit of counsel, an attendance before the court can bring an accused into contact with counsel, including duty counsel. If an accused is not released from custody on his or her attendance before a justice, the accused person in most jurisdictions will be transferred, following that first appearance, from police lockup to a proper remand facility, as happened in this case in the early afternoon hours of October 5th.
- [17] Everything which s. 503 is intended to protect and ensure actually happened in this case. I have concluded that the appearance by counsel within the 24-hour outer limit specified by s. 503, after Mr. Montgomery had six opportunities to speak with three different counsel of choice, where a full judicial interim release hearing was required to be scheduled at some later date in any event, was, in all of the circumstances, compliant with s. 503. Even if I had not so concluded, I would have found no breach of Mr. Montgomery's s. 9 rights, as I have concluded that at no time was his detention, or continued detention, arbitrary. Even if I had found a breach, I would have concluded that in these circumstances it was a minor and technical one which had no impact on either the investigation or on Mr. Montgomery's custodial status. "A.J. Beames J."

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