
CANADA / JUDGMENT

R. v. Nguyen

2017 BCSC 105

COURT

Supreme Court of British Columbia

DECIDED

20 January 2017

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2017 BCSC 105 R. v. Nguyen

N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2017 BCSC 105

Date: 20170120

Dockets: 78026-3; 78026-4

Registry: New Westminster

Regina

v.

Quang Dong Nguyen

Before: The Honourable Mr. Justice Greyell

Oral Reasons for Judgment

Counsel for the Crown:

J.A. Cramer

P.A. Eccles

Counsel for the Accused:

J.R. Ray

Place and Date of Trial/Hearing:

New Westminster, B.C.

November 21, 2016

Place and Date of Judgment:

New Westminster, B.C.

January 20, 2017

- [1] Mr. Nguyen is charged with one count of conspiring to export a controlled substance, methamphetamine, and one count of conspiring to produce a controlled substance, methamphetamine, contrary to sections 6(1) and 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, between December 10, 2012 and February 25, 2013, and with three firearms/prohibited device offences alleged to have occurred February 25, 2013.
- [2] These reasons concern an application by Mr. Nguyen pursuant to section 24 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter], to exclude from evidence any information or evidence obtained by Constable Khalif from Mr. Nguyen during a traffic stop in Surrey, BC, on January 16, 2013 on the basis that the traffic stop violated his rights under sections 9 and 10(a) and (b) of the Charter.

Background facts

- [3] The background facts are not disputed and were given in evidence by Constable Khalif, the only witness called on the voir dire.
- [4] On January 16, 2013 Constable Khalif was a member of the Surrey BC detachment of the RCMP, employed as a general duty officer.
- [5] Constable Khalif testified that at 11:56 a.m. on the morning of January 16, 2013, he responded to a radio dispatch call from the RCMP Drug Section requesting an officer to stop a vehicle identified as a Toyota Tundra with a licence plate number DCO 263 and to identify the driver of the vehicle.
- [6] As Constable Khalif was close to the location which was provided for the vehicle, he responded to the call. He testified he located the vehicle within 30 seconds and followed it as it proceeded to make a right turn from 104th Street onto King George Boulevard in Surrey. Constable Khalif testified he followed the vehicle. He said he knew he "needed grounds" to pull it over and stop it. He testified that as the vehicle proceeded on King George Boulevard it twice overlapped the adjacent lane from the curb lane without signaling at which time Constable Khalif testified he initiated a stop of the vehicle for a dual purpose: to check the sobriety of the driver, because he considered he had grounds to stop the vehicle under ss. 151 (a) and (c) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], and to obtain the identity of the driver pursuant to the request from the Drug Section.

- [7] The above-noted sections of the MVA make it an offence for the driver of a vehicle to change lanes unsafely and to change lanes without signalling.
- [8] Constable Khalif approached the driver at the driver's side window of the vehicle and advised him that he had pulled him over for overlapping into the adjacent lane. He did not tell him he had been requested by the Drug Section to pull him over to obtain his identity. Constable Khalif asked the driver to produce his driver's license which he did. The constable noted the driver's name as Quang Dong Nguyen. He testified that the driver said he would be more careful in the future. He said his conversation with the driver lasted for about 20 seconds and that he decided not to issue the driver a ticket.
- [9] The constable said the driver was polite, cooperative when he spoke to him and appeared sober - that is, he showed no signs of intoxication. He looked inside the vehicle and said he searched the glove box as a safety precaution.
- [10] Later that day at 1:43 p.m. (within two hours of the traffic stop), Constable Khalif sent an e-mail to Corporal Harrash of the Drug Section which read (in part):

As the vehicle continued to drive it overlapped into the #2 lane twice, contrary to the Motor Vehicle Act and a traffic stop was conducted to assess the sobriety of the driver.

The driver and lone occupant was advised of the reason for the stop, he was polite, apologized and advised it was probably because he was driving a large truck.

The driver when asked produced BCDL which identified him as Quang Dong NGUYEN, DOB 1973-09-18, of Vancouver. Constable KHALIF was satisfied with his identification.

NGUYEN advised the truck belonged to his uncle and that he was in Surrey visiting friends. A shaker cup with brown liquid was noted in the center console along with a coffee cup and NGUYEN advised it contained protein and that he was working out. NGUYEN also stated he was on the way to Church's Chicken prior to the traffic stop.

Identification and insurance was returned to NGUYEN he was advised to be more careful when driving, as to not get side swiped.

NGUYEN when asked stated he understood and did not have any questions for police.

- Of note the second time police came back to the vehicle to return BCDL and Insurance NGUYEN had Asian music blaring showing that he was not too concerned with the traffic stop, he also did not appear nervous or paranoid during police interaction with him.

NGUYEN was then allowed to proceed.

- [11] The information obtained by Constable Khalif during the traffic stop on January 16, 2013 was used by Corporal Sabo when he swore an Information to Obtain (inter alia) a Search Warrant on February 22, 2013 wherein he stated at para. 193.3:

As the grey Tundra continued to drive it overlapped into the middle lane twice, contrary to the Motor Vehicle Act and a traffic stop was conducted to assess the sobriety of the driver. The driver and lone occupant was advised of the reason for the stop, he was polite, apologized and advised it was probably because he was driving a large truck. The driver when asked produced a drivers license which identified him as Quang Dong NGUYEN, born September 18, 1973, of Vancouver. Cst. KHALIF was satisfied with his identification. NGUYEN advised the truck belonged to his uncle and that he was in Surrey visiting friends. Identification and insurance was returned to NGUYEN he was advised to be more careful when driving, as to not get side swiped.

- [12] Mr. Nguyen says the Crown has breached his rights under ss. 9 and 10(a) and (b) of the Charter.
- [13] The accused argues the traffic stop was made under the ruse of a motor vehicle offence being committed while the true reason for the stop was the request of the Drug Section to stop the vehicle to obtain the identity of the driver. The accused referred to the request made by the Drug Section to stop the vehicle; to the tenuous connection between the driving observed by Constable Khalif and the offences set out in the sections of the MVA relied on by Constable Khalif; to the fact that no ticket was issued by the constable; and to the close relationship between the time of the traffic stop and the subsequent e-mail sent by the constable to the Drug Section. The defence says it is clear the real reason for the stop was the request by the Drug Section to stop the vehicle and identify the driver.
- [14] The accused relies on *R. v. Vukelich*, (1996), 108 C.C.C. (3d) 193 (B.C.C.A.); *R. v. Goldman*, [1980] 1 S.C.R. 976; *R. v. Stanton*, 2010 BCCA 208, *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Lauriente and Catalano*, 2008 BCSC 187 [Lauriente], *aff'd* 2010 BCCA 72; and *R. v. Hugh*, 2014 BCSC 1426.
- [15] The Crown says the traffic stop was a valid stop that was based on Constable Khalif's observations that Mr. Nguyen committed offences under the MVA and that while he may have had a primary motivation to stop the vehicle to identify the driver, he would not have done so absent observing a driving offence. The Crown says such an offence occurred and hence there is no improper police purpose in detaining Mr. Nugyen, relying on *Brown v. Durham Regional Police Force*, 131 C.C.C. (3d) 1 (Ont. C.A.).
- [16] The Crown also relies on *R. v. Humphrey*, 2011 ONSC 3024; *R. v. Kaddoura*, 2009 BCCA 113; *R. v. Morris*, 2011 ONSC 5142, *aff'd*, 2013 ONCA 223; *R. v. Nolet*, 2010 SCC 24; and *R. v. Waldron*, 2003 BCCA 442.

Has there been a breach of the Accused's s. 9 and/or s. 10(a) or (b) Charter Rights?

- [17] Section 9 of the Charter protects a person from arbitrary detention; s. 10 (a) and (b) provide that a person, upon detention, has the right to be informed promptly of the reasons for such detention and to be informed of his or her right to instruct and retain counsel without delay.

[18] Mr. Nguyen's counsel relies on Lauriente, the facts of which are similar to the facts of the case at bar. In Lauriente, Madam Justice Koenigsberg found a traffic stop of the accused for speeding was a "ruse for obtaining evidence" to be used against the accused in support of charges relating to the production and possession of a controlled substance in relation to a marihuana grow operation. She said at paragraph 39:

Here, certainly, the lawful purpose of detention of an individual for speeding is at the very least on shaky ground. The evidence of speeding in the mind of the constable who stopped Mr. Lauriente was not sufficiently solid to support issuing a ticket. Thus, the most reasonable inference is that the only real purpose for stopping Mr. Lauriente was to obtain evidence to further the investigation of a marihuana grow operation. Constable Draude did not stop Mr. Lauriente for a Motor Vehicle Act, R.S.B.C. 1996, c. 318, violation to ensure public safety. He stopped him to provide information for an investigation.

[19] After referring to the leading case of Brown and R. v. Bui (2005), 132 C.R.R. (2d) 219 (Ont. S.C.) she stated:

[40] Here, there cannot reasonably be found to be a lawful purpose, that is a purpose related specifically to the Motor Vehicle Act concern for public safety, in the stopping of Mr. Lauriente for allegedly speeding when no ticket was even issued. In my view, this stop for speeding was a ruse for obtaining evidence to be used against Mr. Lauriente. It was therefore a clear breach of his s. 9 Charter rights.

[41] Mr. Lauriente's s. 10(a) right was also breached in that he was at no time advised that the reason for the stop was investigative purposes in relation to the possibility of a grow-op. It is no surprise that Mr. Lauriente was not advised of the reason for the stop, but that in no way takes away from the duty of a police officer to advise a person who is detained of the actual reason for the detainment. Thus, Mr. Lauriente's s. 10(a) rights were breached in this instance.

[20] In Hugh, relied upon by the defence, Mr. Justice Schultes considered facts similar to those in the present case. In Hugh, an officer made a traffic stop of a vehicle being driven by the accused who was under investigation for drug-related offences. The traffic stop was made at the request of investigators of the drug offences who had requested assistance and wanted the driver identified. The officer was told by the investigators the driver had been "driving poorly" and that if the driver drove in the same manner "they wanted it pulled over". When the officer was able to catch up to the vehicle he was advised by the investigators (who were covertly following the vehicle) it had changed lanes several times without signaling. He stopped the vehicle and told the driver he was being stopped for making lane changes without signal. The driver responded he had taken a call on his cell phone. The officer issued him a ticket for driving with an electronic device. In evidence the officer testified the ticket was issued based on the "totality of the vehicle stop".

[21] Mr. Justice Schultes said at paras. 77 - 81:

- [77] I do not think that Lauriente and Brown support as strong a proposition as the defence puts forward. A specific finding of fact in Lauriente was that the stop was a ruse - a mere pretext to advance the drug investigation. The trial judge doubted its very legitimacy because no ticket was issued for it. Nor did Lauriente or Brown establish that a violation of motor vehicle legislation that presents no danger in its specific circumstances cannot form a legitimate basis for a police stop. In fact, in Brown, the very section relied on by the police for the stop did not require any specific offence to be committed, but merely empowered the police to stop vehicles to pursue inquiries related to highway safety.
- [78] To say that the particular infraction in this case was minimal, which it certainly seems to have been, is not the same as saying it did not occur or that the resulting stop was a mere ruse. Cst. Strikwerda observed a lane change in violation of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 and relayed that to Cpl. Hayes. It appears that he did not relay the left turn onto Number 5 Road, because Cpl. Hayes recalled only hearing about lane changes.
- [79] The defence has referred to s. 170 of the Motor Vehicle Act which requires that "traffic may be affected" by the turning of a vehicle for there to be an offence, but that section deals with turns, which was not Cpl. Hayes's basis for the stop. The violation that he was informed of and could act on would have been of s. 151(c) of the Motor Vehicle Act, which involves driving from one lane to another without signalling, and which contains no requirement that the public be endangered.
- [80] Finally, Cpl. Hayes' decision to ticket for a different offence than he had been told about is not analogous to the failure in Lauriente to ticket for the very offence that allegedly supported the stop. If anything, his decision to issue for a different offence after discussions with Mr. Hugh show that he was exercising independent judgment by looking into the causes of the violation of which he had been informed, and not acting as a mere tool of the drug investigators.
- [81] As a result, I do not find any Charter violation based on this stop.
- [22] In the present case Constable Khalif testified he knew he needed a reason to initiate a motor vehicle stop other than a request from drug section investigators to stop the vehicle and ascertain the identity of the driver. That is, he was aware he needed to observe some driving or MVA infraction before stopping the vehicle. He testified he observed the driver cross the line demarking the adjacent lane several times. He testified he was also concerned with the sobriety of the driver.
- [23] Section 151(a) and (c) of the MVA provide:
- 151 A driver who is driving a vehicle on a laned roadway
- (a) must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle,

- (c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or approved mechanical device in the manner prescribed by sections 171 and 172,
- [24] When Cst. Khalif approached the driver he explained the reason he had been pulled over. The driver did not voice objection but rather, explained his driving behavior as resulting from his unfamiliarity with driving a large vehicle. While the officer did not issue a ticket, this fact in my view does not mean the traffic stop under the MVA was simply a ruse to detain Mr. Nguyen to obtain his identity. This distinguishes the case at bar from Lauriente.
- [25] The present case is similar to the facts considered by the British Columbia Court of Appeal in Kaddoura, where an officer stopped a vehicle apparently for the purpose of identifying the driver at the request of drug investigators. When the officer located the vehicle he discovered one of the taillights was malfunctioning in contravention of the MVA. The officer testified he pulled the vehicle over because of the problem with the light. The trial judge found that while the Constable felt he was able to pull the Toyota over because of the broken tail light, he broken tail light was not his motivation for doing so (see para. 10). Mr. Justice Groberman for the court, in allowing the appeal, stated:
- [12] In my view, the trial judge erred in law in finding the motor vehicle stop in this case to be an arbitrary detention contrary to section 9 of the Charter. Constable Gock had proper grounds for stopping the vehicle, as he had observed violation of the Motor Vehicle Act. He was fully entitled to stop the vehicle under that statute, and to request that the driver produce his licence and vehicle registration documents. The fact that the officer had other reasons to want to identify the driver does not transform a lawful stop into an unlawful one.
- [13] The accused's constitutional right is a right not to be arbitrarily detained. A roadside stop of a vehicle with a defective taillight is not an arbitrary detention. The accused did not have a Charter right not to be identified by the police - in requesting his driver's licence and recording the details of it, the police acted under statutory authority and committed no unlawful act.
- [26] He went on to say at paras. 22-24:
- [22] In cases such as the one at bar, where a violation of the Motor Veh[i]cle Act [sic] has been observed, the stop is not arbitrary, and does not constitute a prima facie infringement of section 9 of the Charter. There is, accordingly, no need to consider the affect of other motivations for the search on a section 1 analysis.
- [23] In this regard, I agree with the decision of the B.C. Supreme Court in R. v. Madill, 2005 BCSC 1564; where a police officer has a lawful and reasonable basis to stop a motor vehicle, the presence of additional reasons to effect a stop does not transform it into an arbitrary detention.

- [24] In summary, Constable Gock's decision to stop the accused's vehicle was not an arbitrary one; he had witnessed a violation of the Motor Vehicle Act, and was entitled to stop the vehicle, and obtain the driver's identification. The fact that he also wished to know who was driving for the purposes of a drug investigation did not transform the lawful detention into an arbitrary one. There is no suggestion that Constable Gock performed an unlawful search or otherwise violated Mr. Kaddoura's Charter rights after stopping him.
- [27] In my view Constable Khalif acted appropriately under the circumstances in this case when he stopped the vehicle Mr. Nguyen was driving for offences under the MVA and obtained the driver's identity. I find Mr. Nguyen's rights under ss. 9 and 10(a) and (b) of the Charter have not been violated.

"Greyell J."

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Prepared on 29 October 2026 · Esheria