

CANADA / JUDGMENT

R. v. Pelgrom

2020 BCSC 2311

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Pelgrom,

2020 BCSC 2311

Date: 20201211

Docket: 177308

Registry: Victoria

Regina

v.

Roy Joseph Pelgrom

Before: The Honourable Mr. Justice Steeves

Oral Ruling on Voir Dire #1

(Re Section 24(2) of the Charter)

Counsel for the Crown:

M. Adams

Counsel for the Accused:

M. Munro

Place and Dates of Trial/Hearing:

Victoria, B.C.

December 7 - 9, 2020

Place and Date of Judgment:

Victoria, B.C.

December 11, 2020

- [1] THE COURT: Mr. Pelgrom has been charged with six counts of possession for the purposes of trafficking in drugs contrary to s. 5(2) of the Controlled Drugs and Substances Act and four weapons charges contrary to the Criminal Code. On December 8, 2020, I allowed Mr. Pelgrom's application under s. 9 of the Charter. I found that his arrest on July 4, 2019, was contrary to s. 79 of the Motor Vehicle Act and therefore it was arbitrary. Mr. Pelgrom now applies under s. 24(2) of the Charter to exclude evidence seized from him when he was arrested.
- [2] The background is that, in July 2019, Mr. Pelgrom was the subject of a drug investigation including police surveillance. He was known to the police through previous contact with them including associations with gangs and weapons. As part of their investigation, the police learned that Mr. Pelgrom was prohibited from driving a motor vehicle under s. 95 of the Motor Vehicle Act. Sergeant Jorgensen with the Victoria City Police headed up the investigation and he found the information about the driving prohibition. He also observed Mr. Pelgrom driving on July 2, 2019, and another peace officer told him that Mr. Pelgrom was driving on July 3, 2019.
- [3] On the morning of July 4, 2019, Sergeant Jorgensen learned that the RCMP in West Shore were investigating a domestic incident between Mr. Pelgrom and his former girlfriend that occurred very early that morning. The allegation was that Mr. Pelgrom had threatened to kill the woman and that he had driven his vehicle into her car. Damage to Mr. Pelgrom's car was observed that day that had not been there before. Sergeant Jorgensen testified that he believed he had to balance his ongoing drug investigation with the need to protect the public, including the former girlfriend of Mr. Pelgrom. He decided to favour protecting the public and set in motion the arresting of Mr. Pelgrom. Sergeant Jorgensen was clear in his evidence that the arrest was intended to be, and ultimately was, under s. 79 of the Motor Vehicle Act. It was not under s. 495 of the Criminal Code. The arrest was also to be made before Mr. Pelgrom got into his car to reduce the risk of his fleeing and a chase.
- [4] Mr. Pelgrom was arrested by Constable Kirkwood on the street while walking towards his vehicle. He was wearing a tank top or undershirt, pants. He was carrying a backpack and a shopping bag. Constable Kirkwood knew Mr. Pelgrom from previous incidences. Mr. Pelgrom was told the arrest was for driving while prohibited and he was handcuffed. Constable Kirkwood testified that he was cooperative and he believed that was because Mr. Pelgrom was told he would be released which was the plan. Constable Kirkwood conducted a standard pat-down search incidental to arrest and a large roll of cash was found in one pant pocket. In the other pocket of Mr. Pelgrom, there was a small amount of white powder

Constable Kirkwood believed was cocaine.

- [5] A second arrest was made and a search was made of the backpack and the bag carried by Mr. Pelgrom. That search revealed an unloaded Walther PPQ nine millimetre handgun, two boxes of nine millimetre ammunition, 31 rounds of loose 9 millimetre ammunition, empty plastic bags, a significant amount of cash, and documents with Mr. Pelgrom's name on them. There were also drugs including 18 grams of cocaine, 82 grams of fentanyl, four fentanyl patches, 69 grams of methamphetamine, three grams of a fentanyl/cocaine mix, 52 grams of a heroin/fentanyl mix, and 29 grams of ketamine. These weights included small amounts taken up by the packaging of the drugs.
- [6] Mr. Pelgrom challenged the search and seizure contrary as being contrary to s. 7, 8, and 9 of the Charter. As above, on December 9, 2020, I allowed his application under s. 9. The basis of my conclusion on s. 9 was that the arrest was made under s. 79 of the Motor Vehicle Act. That provision authorizes an arrest of someone who is in the very act of committing an offence. A Court of Appeal decision described equivalent language in the Criminal Code as requiring the person being arrested to be caught "red-handed." That is *R. v. Abel*, 2008 BCCA 54.
- [7] Here, Mr. Pelgrom was arrested on July 4, 2019, when he was not driving. He was observed driving on July 2 and the assertion of his driving on July 3 was on information and belief. I previously concluded the arrest was not authorized by s. 79. It was therefore arbitrary and it was a violation of s. 9 of the Charter.
- [8] Mr. Pelgrom now applies under s. 24(2) of the Charter to exclude the evidence seized after he was arrested. I set out s. 24(2) here:

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.

- [9] The onus is on Mr. Pelgrom to show both that the evidence seized was obtained in a manner that infringed his rights and that the admission of the evidence would bring the administration of justice into disrepute. I found previously that the evidence at issue, the backpack and the bag with their contents of drugs and the handgun/ammunition, was obtained in a manner that infringed Mr. Pelgrom's s. 9 Charter rights. That is, there was a nexus between the Charter violation and the evidence.
- [10] I, therefore, turn to the second part of s. 24(2), whether the evidence here should be excluded because its admission would bring the administration of justice into disrepute. This requires consideration of what are sometimes called the Grant factors from the leading case, *R. v. Grant*, 2009 SCC 32. Grant also set out some general considerations when applying s. 24(2). The focus is not on the immediate reaction to an individual case, but instead it looks objectively at whether the overall reputation of the system would be affected over the long term

by the admission of the evidence. The focus is also prospective in the sense of preventing further damage to the reputé of the justice system. The concern is societal interests and it is not aimed at the police, but at systemic concerns (Grant, paras. 67-70). The Grant factors are as follows:

1. the seriousness of the Charter-infringing conduct;
2. the impact on the, in this case, Mr. Pelgrom's Charter-protected rights; and
3. society's interest in adjudication of the case on its merits.

That is in Grant at para. 71. My review of those factors follows.

- [11] Looking at the first factor, the seriousness of the Charter-infringing state conduct, a spectrum is set out in Grant. At one end is an inadvertent or minor violation and at the other end is a willful or reckless disregard for Charter interests. The task is to situate the police conduct on a scale of culpability.
- [12] In the case of Mr. Pelgrom, he was arrested on the street outside his apartment. The arrest was not aggressive so that, for example, the uniformed arresting officer introduced himself by saying, "Hi, Roy." Mr. Pelgrom was told he would be released and he was cooperative. The pat-down search incidental to the arrest led to the discovery of the drugs, weapons, and ammunition. Sergeant Jorgensen, the peace officer overseeing the drug investigation and who ordered the arrest, was very clear in his evidence that the arrest was under s. 79 of the MVA. I concluded that the arrest, when Mr. Pelgrom was not in the act of driving, was contrary to s. 9 of the Charter.
- [13] However, I do not agree with the submissions on behalf of Mr. Pelgrom that the arrest under s. 79 was a ruse because the drug investigation was not being productive as described in Mr. Pelgrom's application. In my view, Sergeant Jorgensen genuinely believed that Mr. Pelgrom could be arrested on the grounds that he was driving two days before while prohibited from driving.
- [14] I note that arrests under s. 79 of the Motor Vehicle Act are not at all common. Counsel could not find any previous cases and they had no previous experience in a s. 79 case. Sergeant Jorgensen knew the arrest was under s. 79, but he apparently believed it could be done in the same way as an arrest under the Criminal Code. That was incorrect, but the standard under s. 24(2) does not require perfection of the police when they make judgments, especially in new areas of the law.
- [15] There is also the evidence that Sergeant Jorgensen was motivated to effectively end his drug investigation in favour of the s. 79 arrest because he was concerned about Mr. Pelgrom being at large when there was a report of him threatening the life of his girlfriend. The report also described Mr. Pelgrom damaging his girlfriend's vehicle with his vehicle and new damage to Mr. Pelgrom's car supported that report. The motive of protecting the public is not Charter-infringing conduct and I think the public would prefer that kind of activity to continue. It

follows that I do not agree with the submission on behalf of Mr. Pelgrom that Sergeant Jorgensen was acting willfully and negligently and that he believed his authority was higher than what the law said. He did not turn a blind eye to s. 79, but believed he had grounds to arrest under that provision, albeit mistakenly.

- [16] It is also submitted that obtaining the warrant was available as an alternative to arrest. I accept it was an alternative, but a warrant may not have been obtained the same day and the objective of protecting the public would have been compromised. Standing down to research the nature of an arrest under s. 79 carried the same risk. I conclude that Sergeant Jorgensen subjectively believed he was acting lawfully. This was objectively not the case, but in my view, it places the culpability of the police at the lower end of the spectrum. The breach of the Charter was not merely technical, but there is a strong element of good faith and good intention.
- [17] The second factor in *Grant* is the impact on the Charter-protected interests of Mr. Pelgrom. Another spectrum is set out from *Grant* from fleeting and technical to profoundly intrusive (*Grant*, paras. 76-78).
- [18] I accept that the detention of Mr. Pelgrom negatively affected his liberty. I note the detention related to the unlawful arrest was of a very short duration once the cash and drugs were found on Mr. Pelgrom from a routine pat-down. The situation then developed into a second arrest and a search of the backpack and bag. As well, no search was done to the upper body of Mr. Pelgrom. He was wearing something like a tank top in the summer weather, and only the two pant pockets were searched after a pat-down. There was no highly intrusive body search.
- [19] It is submitted that the arrest has led to Mr. Pelgrom being held in custody ever since, about 18 months, and that is an extreme interference with his liberty. As a mathematical exercise, that is a correct calculation and it has some initial appeal. However, the reason Mr. Pelgrom has been in custody since July 2019 is the result of the judicial interim release system. There were apparently reasons to keep Mr. Pelgrom in custody and appeals available in that system. As well, if that was a reason to exclude evidence, logically, it would mean that people who are released on bail would be less likely to have evidence excluded.
- [20] I next turn to the third *Grant* factor, society's interest in adjudication on its merits. The question here is whether the truth-seeking function is better served by admission or exclusion of the evidence. The reliability of the evidence and its importance to the Crown's case are to be considered. As well, physical evidence is generally reliable and will not be related to a Charter breach and there will be a more negative impact on the administration of justice when excluding the evidence guts the prosecution (*Grant*, paras. 79, 81-83, and 115). In the subject case, the evidence seized is physical. It is also significant in quantity and variety and the handgun is also physical evidence. I accept the Crown's submission that to exclude the evidence would gut their case.

- [21] Finally, there is the task of balancing the three Grant factors. This has been the subject of some discussion in the cases. The following by Chief Justice McLachlin is useful in setting out the consideration (*R. v. Harrison*, 2009 SCC 34, at para. 36; cited in *R. v. Ahmed-Kadir*, 2015 BCCA 346, at para. 102):

The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term reputé of the administration of justice that must be assessed.

- [22] I also note that the third factor in Grant should not be "neutered" so that the safety of the public is compromised (*Grant*, paras. 81-83 and 115). On the other hand, where the first Grant factors make a strong case for exclusion, the third factor will seldom, if ever, tip the balance to admissibility (*R. v. Le*, 2019 SCC 34, at para. 192). On the evidence here, there was Charter-infringing conduct that produced the evidence at issue. It was not trivial, but also not on the high end of the spectrum. I do not agree the arrest was a willful and reckless exercise of unlawful authority. The arrest was the result of a subjectively held, but objectively unsupportable, arrest directed at protection of the public.
- [23] Nor is it accurate to say there is nothing exigent to support the arrest. Mr. Pelgrom was prohibited from driving, but he was not driving when he was arrested. The arrest negatively affected Mr. Pelgrom's liberty and Charter interests, but this was short in duration. The search was at first incidental and a pat-down one. What was found then led to a second arrest and finding the drugs and firearm. There is no evidence that the whole exercise was a ruse following the drug investigation that was underway and which had not been successful to that point. The evidence seized was physical evidence and it was, therefore, reliable. There is no question the backpack and bag were in the possession of Mr. Pelgrom. Clearly, not admitting the evidence will gut the Crown's case.
- [24] Overall, I accept that, almost by definition, an unlawful arrest leads to the infringement of Charter rights. The admissibility of the evidence obtained by means of a Charter infringement can be excluded under s. 24(2) of the Charter and the Grant factors if it would bring the administration of justice into disrepute. However, for the above reasons, I conclude that Mr. Pelgrom has not proven that the evidence seized should be excluded under s. 24(2) of the Charter. His application is dismissed.

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

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