

CANADA / JUDGMENT

R. v. Pelgrom

2020 BCSC 2310

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2310 R. v. Pelgrom IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Pelgrom, 2020 BCSC 2310 Date: 20201208 Docket: 177308 Registry: Victoria Regina v. Roy Joseph Pelgrom Before: The Honourable Mr. Justice Steeves Oral Ruling on Voir Dire #1 (Re Sections 7, 8, and 9 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 and 8, 2020 Place and Date of Judgment: Victoria, B.C. December 8, 2020

- [1] THE COURT: The defendant, Roy Pelgrom, is charged with six counts of possession for the purpose of trafficking in drugs contrary to s. 5(2) of the Controlled Drugs and Substances Act and four weapons offences contrary to ss. 86, 91, and 95 of the Criminal Code. He now challenges his warrantless arrest under s. 79 of the Motor Vehicle Act. This is contained in his application filed September 8, 2020, in which he relies on ss. 7, 8, and 9 of the Canadian Charter of Rights and Freedoms.
- [2] The background is that, in July 2019, Mr. Pelgrom was the object of a drug investigation and of surveillance. He was known to the police from previous contact with them including gang activity and guns. As part of the preparation for the drug investigation, the police learned that Mr. Pelgrom was prohibited from driving a motor vehicle pursuant to s. 95 of the Motor Vehicle Act. As part of the surveillance, he was observed by Sergeant Jorgensen driving a vehicle on July 2, 2019, as Sergeant Jorgensen testified in this trial. Another peace officer, who did not testify, observed Mr. Pelgrom driving on July 3, 2019, and reported this to Sergeant Jorgensen.
- [3] When he commenced work on July 4, 2019, Sergeant Jorgensen learned that the RCMP were investigating an incident between Mr. Pelgrom and his former girlfriend. The allegation was that he had threatened to kill her and had driven his car into her car. There was damage noted to Mr. Pelgrom's car that was observed that day that had not been there before.
- [4] Sergeant Jorgensen testified that he was attempting to balance keeping his drug investigation going with the need to protect the public, including the former girlfriend of Mr. Pelgrom. Sergeant Jorgensen decided to favour protecting the public and he set in motion the arrest of Mr. Pelgrom. He 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. Further, the arrest was to be before Mr. Pelgrom got into his car to reduce the risk of him fleeing.

- [5] On July 4, 2019, Mr. Pelgrom was arrested walking on the street outside his apartment walking to his car. He was told the arrest was for driving while prohibited. A standard pat-down search incidental to the arrest revealed a large amount of cash in one pocket and a small amount of what the arresting officer believed to be cocaine in the other pocket. A second arrest took place and a search warrant for the residence of Mr. Pelgrom was obtained. A search then revealed the drugs that are the basis for the drugs and weapons that are the basis of the 10 counts here.
- [6] I set out s. 79(a) of the Motor Vehicle Act, the basis for the arrest of Mr. Pelgrom, as follows:
- 79 An officer or constable of the Royal Canadian Mounted Police or of the police department of a municipality may arrest without warrant
- (a) a person who the officer or constable finds driving a motor vehicle, and who the officer or constable has reasonable and probable grounds to believe was driving in contravention of section 95 or 102 and may detain the person arrested until he or she can be brought before a justice to be dealt with according to law.
- [7] As can be seen, it is two parts, one, a peace officer finds a person driving and, two, there are reasonable and probable grounds to believe the person was driving in contravention of s. 95 or s. 102 of the Motor Vehicle Act. It is s. 95 that is the relevant one here. A 2008 Court of Appeal decision considered similar language to s. 79 in the citizen's arrest provision of the Criminal Code, s. 494(a); that is *R. v. Abel and Corbett*, 2008 BCCA 54. It states that: Any one may arrest without warrant
- (a) a person whom he finds committing an indictable offence
- [8] Justice Frankel reviewed a number of authorities and concluded that s. 494(a) of the Criminal Code: connotes a situation where the arresting party comes upon someone in the very act of committing an offence. [para. 31, see also para. 45.]
- [9] This conclusion was taken from a number of other cases including the following statements of the scope of a citizen's arrest. A citizen may arrest a person when the offence is apparent and in the course of perpetration by the offender, para. 38. The offence should be committed in the officer's presence and when the peace officer "himself" finds a situation in which a person is apparently committing a crime; that is paras. 46 and 51.
- [10] In this case, I note that, on July 3, Sergeant Jorgensen received information about the driving of Mr. Pelgrom from another peace officer. That is not information received by himself directly. A citizen's arrest is also triggered by the detection of a crime in progress. The equivalent language in the French version of the Criminal Code was also reviewed in the *Abel* decision. The translation is, "caught in the act, caught red-handed." Justice Frankel summarized that as being the "detection of a crime in progress."

- [11] Returning to s. 79 of the Motor Vehicle Act, it again requires two steps. The first step is in the present tense as reflected in the use of "finds". I adopt the reasoning in Abel and conclude that this requires a peace officer to find a person in the very act of committing an offence under s. 95 or s. 101 of the Motor Vehicle Act and, as above, the peace officer must have direct knowledge of the offence. The second step in s. 79 requires the peace officer to have reasonable and probable grounds to believe the person "was" driving in contravention of s. 95 or s. 101 [sic, 102]. It is true that "was" is in the imperfect tense rather than a present tense as in the first stage of s. 79. However, in my view, that is necessary in order to capture that the person being arrested had a contravention at the time of the arrest. That is, "was" refers to the reasonable and probable grounds which have to be believed by the peace officer before the person is driving and, of course, before any arrest.
- [12] On the evidence here, Mr. Pelgrom was not arrested when he was found driving a vehicle. He was walking on the street. The only time he was observed driving was on July 2, 2019, the only time he was directly observed. However, for the reasons given above, I conclude this was not when he was driving for the purposes of s. 79. If Mr. Pelgrom had proceeded to his car and then drove it and then was arrested while driving, that could well have been a valid arrest under s. 79.
- [13] I add that I do not conclude that an arrest under s. 79 can only be valid when a person is behind the wheel and has just been stopped. The language of s. 79 supports a short time period between the arrest and the driving, but I do not agree that any authority to arrest on July 4 continued from observations made on July 2, 2019.
- [14] Overall, I conclude that the application by Mr. Pelgrom under s. 9 of the Charter must be allowed. His arrest was contrary to s. 79 of the Motor Vehicle Act. It was, therefore, unlawful and arbitrary.
- [15] I should hear further from counsel with respect to s. 7 and s. 8 of the Charter as well as s. 24(2).
- [16] CNSL M. ADAMS: Well, My Lord, with regard to s. 7 and s. 8, I'm not sure if my friend wants to now renew his application with regard to s. 8.
- [17] THE COURT: If you are talking --
- [18] CNSL M. ADAMS: So -- sorry, My Lord.
- [19] THE COURT: Yes, yes.
- [20] CNSL M. ADAMS: So Your Lordship asked to hear submissions on s. 7 and s. 8. I'm not sure if -- obviously, in submissions initially, s. 8 was something that my friend was going to argue. Now that Your Lordship has found that the arrest is unlawful, the Crown's position is that the search incidental to arrest is also unlawful.
- [21] THE COURT: Yes --

- [22] CNSL M. ADAMS: So -- so I think that puts that issue to bed.
- [23] THE COURT: -- and I mean I raised it to talk again because I think your friend said a similar thing in submissions --
- [24] CNSL M. MUNRO: Right.
- [25] THE COURT: -- which is to say he left himself a bit of wiggle room, but he was not vigorously pursuing the s. 8 issue.
- [26] CNSL M. MUNRO: In terms of level of intrusiveness, but I agree with what my learned friend just said which is it naturally falls with the finding under s. 9. Any search following an arbitrary detention or arrest is prima facie unreasonable and a violation of s. 8, and similarly, in terms of the liberty interests under s. 7 which is an overarching section, that would also be captured in the defence submission based on the fact that this is found to be an arbitrary detention because it's an unlawful arrest and so the liberty interests protected by s. 7 also fall and I'll -- I'm happy to hear my learned friend on that, but I believe that there is a bit of a domino effect in that sense.
- [27] THE COURT: Right, right. I get that for s. 8. Section 7, I spent four years on s. 7 so I know something about it.
- [28] CNSL M. MUNRO: Yes.
- [29] THE COURT: That may be a different matter and, in fact, it may not be necessary.
- [30] CNSL M. MUNRO: Fair enough, yeah.
- [31] CNSL A. ADAMS: Yes, My Lord, well, if Your Lordship's been through several years with this section, all the Crown would say is that typically, in the Crown's experience, breaches of s. 9 do typically result in infringements of s. 7, as well.
- [32] THE COURT: Right.
- [33] CNSL A. ADAMS: I think that ultimately these -- these issues can be addressed in submissions on s. 24(2) --
- [34] THE COURT: Correct.
- [35] CNSL A. ADAMS: -- and the level of interference with Mr. Pelgrom's Charter-protected interests.
- [36] THE COURT: All right. So just to -- just to bring closure, technically, I am allowing the s. 7 and s. 8 application, as well.
- [37] CNSL A. ADAMS: Yes, My Lord, I think that that would be proper.
- [38] THE COURT: Right. "J. J. Steeves, J." The Honourable Mr. Justice Steeves

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