
CANADA / JUDGMENT

R. v. Pepper

2010 BCSC 611

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2010 BCSC 611 R. v. Pepper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Pepper,

2010 BCSC 611

Date: 20100305

Docket: 24476

Registry: Vancouver

Regina

v.

Richard Sean Pepper

Before: The Honourable Mr. Justice Bowden

Oral Reasons for Judgment

Counsel for the Crown:

E. Laurie

Counsel for the Accused:

L. Fumano

Place and Date of Hearing:

Vancouver, B.C.

February 5, 2010

and March 3, 2010

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2010

Introduction

- [1] Following the first stage of what the Supreme Court of Canada in *R. v. Pearson*, 1998 3 S.C.R. 620, has described as a two-stage trial, I found Mr. Pepper guilty of five counts of trafficking in cocaine. This is my ruling following the second stage where I heard evidence and argument regarding a claim of entrapment by the accused. I would first like to thank both counsel for their clear and well thought out submissions in this case. The issue is whether Mr. Pepper was entrapped by the police into committing the drug-trafficking offences.

Background Facts

- [2] I will review the underlying facts. On November 7, 2006, Corporal Dhot, a member of the RCMP who was working undercover, telephoned a cell phone number that had been given to him by Staff Sergeant Murphy. Mr. Pepper answered the phone. Thus began the chain of events leading to Mr. Pepper's arrest and the trafficking charges.
- [3] Murphy was a senior officer in what was described as Project E Part, an RCMP operation aimed at curbing drug trafficking in Burnaby, British Columbia. Murphy described how the phone number had come to his attention. On October 17, 2006, he received a tip from Crime Stoppers. As with all tips from Crime Stoppers, Murphy said it was anonymous. The tip was that a person in a white sports car bearing licence plate number 660JGN was seen trafficking rock cocaine in the Burnaby area. Murphy assigned this matter to Corporal Dhot who opened a file. Dhot checked the licence plate number and determined that the plate was assigned to a Nissan 350Z convertible registered to a lessee named Brendan Mulhern. He discussed this with Murphy. No further investigation took place until November 2006.
- [4] In early November 2006, Constable Kurtz provided Murphy with information from a confidential police informant. The information was that drugs could be purchased by calling a particular cell phone number, 778-388-6441, and that a male was trafficking from a white 350Z vehicle. Murphy testified that although a Nissan 350Z convertible is not a particularly rare vehicle, in his 23 years of experience with the RCMP, he had not been aware that one was used by a drug trafficker.
- [5] Murphy said that the reliability of the information from Crime Stoppers was unknown. Murphy also said that the reliability of the police informant had not previously been tested, although he took some comfort from the fact that the information would have been given to Kurtz in a face-to-face meeting with the informant. Murphy said that nevertheless the information was believed by him to be reliable because the Crime Stoppers tip had

mentioned the same vehicle which to his knowledge had not been used before in a dial-a-dope operation.

- [6] Murphy decided that with both the Crime Stoppers tip and the information from the informant describing drug trafficking associated with a person in a white Nissan 350Z convertible that he would direct Corporal Dhot to investigate further in an undercover capacity.
- [7] That led Dhot to telephone the cell phone number provided by the police informant. When Pepper answered, Dhot introduced himself as Jay and said, "Can we hook up?" Mr. Pepper said he did not know Jay and asked who had given Dhot the phone number. Dhot told him that he got the number from Mike. Pepper asked if they had met before and Dhot said that Pepper had met with Mike near Kingsway and Willingdon when Dhot was there. Pepper then said, "That's great because I don't know anyone named Mike." Dhot then said Mike and he had met Pepper when he was in his white convertible car. Pepper asked when that was and Dhot said that it had been about two weeks before. Pepper asked Dhot where he had been for two weeks and Dhot said he had been here and there. Pepper said that Dhot should call other people and when he could not reach them, then he should call Pepper. Dhot said he would call Pepper from then on. Pepper asked him if he had, "picked up from Max before". Dhot agreed that he had. Pepper then asked if Max was a small guy. Dhot said that Max is a tall guy like five-foot-ten.
- [8] Pepper then agreed to meet in the area of Wilson Avenue between Kingsway and Grange in Burnaby. Pepper asked Dhot what he wanted. Dhot said "Hard and soft." Pepper did not ask what he meant by hard and soft and said he did not have soft at that time. Dhot said he would pick up hard now and soft later. They agreed to meet again in 10 minutes. Pepper asked him what he was driving and Dhot said a white car. That was the end of the telephone conversation. After leaving the police detachment, Dhot received a call from Pepper asking how long he was going to be. Dhot said he would be a couple of minutes. Dhot arrived at the agreed meeting place near Wilson and Grange, met the accused, and purchased a quantity of crack cocaine from him. The circumstances of that and other meetings are detailed in my reasons for judgment following the first stage of this trial.

Submissions by the Accused

- [9] I will turn now to the defence submissions. The accused argues that the police did not have a reasonable suspicion that he was engaged in drug trafficking when they called his cell phone number. He relies on the recent decision of the Court of Appeal of British Columbia in *R. v. Swan*, 2009 BCCA 142, as authority for his position that he was entrapped when the police called him without such reasonable suspicion. The accused says that the facts in *Swan* are reasonably analogous to the case at bar. In *Swan*, the police had received a number of phone numbers from various sources. The phone numbers were understood by the police to be associated with drug traffickers, but had come from various anonymous sources.

- [10] As in *Swan*, the accused says that in this case all the police had was a mere suspicion, as that term is used in *Swan*, that he was involved in drug trafficking. In that case *Swan* was asked by the undercover officer, "Are you working?" In the case at bar, Mr. Pepper was asked, "Can we hook up?" He submits that that phrase is capable of different meanings. If it is considered to relate to the drug trade, then it could mean, "Can we meet for a drug transaction?" The accused says the phrase should be viewed as Corporal Dhot giving the accused an opportunity to commit a trafficking offence. When that meaning is given to the question, "Can we hook up," the accused argues that the police did not have a reasonable suspicion that he was a drug trafficker before Dhot telephoned him and offered him the opportunity to commit an offence.
- [11] The accused says that without a name or description of him, the police were acting on a mere suspicion or a mere assertion as that phrase is used by the Court of Appeal in *R. v. Cahill*, 1992 CanLII 2129. Referring to a decision of the Ontario Supreme Court, *R. v. Peters*, 2002 CanLII 49629, the accused submits that where the suspicion is based on information from an informant whose reliability is unknown, as in the case at bar, without any context or explanation as to why the source knew it to be true and no aspect of the allegation was investigated or verified, it is no more than a mere assertion. I note that in *Peters*, the Crown conceded that before the officer made the first call to the suspect, he only had a mere suspicion.
- [12] At the end of this trial, the accused presented arguments in relation to a decision of the Ontario Superior Court of Justice in *R. v. Imoro* (2008), 235 C.C.C. (3d) 86. After the completion of argument, that decision was overturned by the Court of Appeal for Ontario which is reported at 2010 ONCA 122. Subsequently, both counsel appeared before me and made further submissions on the implications of that decision.
- [13] In *Imoro*, the Court of Appeal of Ontario considered the issue of entrapment in relation to a drug-trafficking offence. In that case, the police began an undercover operation based only upon an anonymous tip that a man was selling drugs on the 12th floor of an apartment building on Jane Street in Toronto. When an undercover officer went to that location and was getting out of the elevator, Mr. Imoro approached him and said, "Come with me." The undercover officer asked, "You can hook me up?" Imoro answered, "Yeah, man." The officer and another man in the elevator with him were led to Imoro's apartment where Imoro sold some marihuana to the other man. Then Imoro asked the officer what he needed and the officer said, "Hard," meaning crack cocaine. Imoro said he only had soft, meaning powder cocaine. The officer then purchased a bag of powder cocaine from Imoro for \$40 resulting in the charge before the court.
- [14] The Ontario Court of Appeal decided that the question, "Can you hook me up" was simply a step in the police investigation of an anonymous tip and was to determine if the person was a drug dealer. In that court's view, it did not amount to giving Imoro an opportunity to traffic in drugs. Although the factual basis for that finding is not clear, the accused says in this case that if the question, "Can we hook up" is not considered as an offer to commit an offence,

then that offer was made by Dhot when he said, "Hard and soft" in response to the accused asking him what he wanted. The accused argues that even at that point Dhot did not have a reasonable suspicion that the accused was trafficking in drugs. He says that the police did nothing to corroborate any of the information they had received before that point. Further, the accused says that the discussion between him and Dhot would not have created such a reasonable suspicion. That conversation was consistent with someone who was merely trying to determine who was calling them. It is not necessarily associated with a drug dealer. Relying on the trial decision in Imoro, the accused also argued that if entrapment is found in relation to the first drug transaction, then all subsequent transactions between Dhot and the accused are tainted.

Crown's Submissions

- [15] I will turn to the Crown's submissions. The Crown says that both subjectively and objectively the police had a reasonable suspicion that the accused was engaged in drug trafficking from the two pieces of information received by them before the phone call was made to the accused. They had the description of a somewhat unique vehicle associated with a drug trafficker which was confirmed from both sources. They had a licence plate number associated with that vehicle and they had a cell phone number of the alleged drug trafficker. On that basis alone, the Crown says the police had a reasonable suspicion and more than was present in the Swan case. However, if the phrase used by Dhot, "Can we hook up," is considered similar to, "Are you working," which was the phrase considered in Swan, then the Crown argues that the officer first offered the opportunity to commit the offence when, in response to Pepper's question, he said, "Hard and soft."
- [16] However, the Crown says that the reasonable suspicion that Mr. Pepper was engaged in drug trafficking arose before that time. The evidence the Crown points to in support of that submission is the nature of the conversation between Dhot and Pepper after Dhot asked, "Can we hook up?" Dhot's evidence was that he believed he was talking to a drug dealer because of all of the questions Pepper asked which Dhot had come prepared to answer. In considering the import of the conversation between Dhot and Pepper before drugs were mentioned, the Crown refers to a decision of the Ontario Court of Justice, *R. v. Townsend*, [1997] O.J. No. 6516.
- [17] In *Townsend*, Sharpe J. expressed the view that it was appropriate to consider the actions of the police at each stage of their operation to determine when they gave the accused an opportunity to commit the offence and whether or not at that time the police had a reasonable suspicion. In *Townsend*, the Crown conceded that the police did not have a reasonable suspicion at the time they first called Mr. Townsend. The court in *Townsend* described the comments by the police in the conversation with the accused as a heavily veiled reference to a possible drug deal and not random virtue testing. The subsequent conversation between the accused and the undercover officer provided the officer with a reasonable suspicion before the accused was given an opportunity to sell drugs.

- [18] In the case at bar, the Crown says the questions put to Dhot by Pepper indicated he was a drug dealer. Clearly, they were not friends because when Dhot said it was Jay calling, Pepper said he did not know any Jay. By asking the questions, Pepper was screening his calls in a way that it is reasonable to conclude that he was a drug dealer. After the screening questions, by saying, "What do you want," the Crown says it is reasonable to infer that Pepper was asking a drug-related question. Mr. Pepper distinguishes Townsend saying in that case there was some corroboration during the telephone call when the police confirmed certain elements of the tip prior to offering Townsend an opportunity to commit an offence.
- [19] The Crown refers to the interpretation of the phrase "reasonable suspicion" in Cahill where the Court of Appeal says at page 18:
- "a reasonable suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. "
- [20] The Crown says that "reasonable and probable grounds" itself has not been considered a high standard and refers to the Supreme Court of Canada's reference to that standard in *R. v. Debot* (1989), 52 C.C.C. (3d) 193. The Crown distinguishes Swan on the basis that the police could not say how the tip came to them in that case. The evidence in Swan was that numerous tips had come to the police from unknown sources. In the case at bar, the evidence of the sources of the information is clear.
- [21] The Crown referred to *R. v. Cook*, [1990] B.C.J. No. 37, where the Court of Appeal considered whether the police had reasonable and probable grounds to arrest Ms. Cook. In that case, a police constable on routine drug patrol received information from a person that he did not know that a female wearing a pink blouse was selling pills in a bar which was described. The subsequent arrest of Ms. Cook was held to be properly based on reasonable and probable grounds.
- [22] As to the accused's suggestion that the Crime Stoppers tip and information from the informant had come from the same person, the Crown says there was no evidence to support that and that that proposition was never put to Sergeant Murphy in cross-examination. The police evidence suggests that there were two separate sources of information and the burden is on Mr. Pepper to show that that was not the case.
- [23] With regard to the Imoro decision, the Crown says that even if the phrase, "Can we hook up" is interpreted to mean, "Can we meet to do a drug transaction," that is not an offer to commit an offence. Clearly, Corporal Dhot intended that question to suggest that they meet to do a drug transaction, but the Crown says that is not presenting an opportunity to commit an offence for the purpose of determining if there has been entrapment. The Crown says that Imoro makes it clear that the court can consider what transpired between the officer and the accused after such a question is asked to determine if the police had a reasonable suspicion. That is what, in fact, happened in Imoro. Here, the Crown says the nature of the conversation between the accused and Dhot would make it clear to Dhot, as he testified, that he was talking to a drug dealer.

[24] The Crown does not agree with the accused's position that if entrapment is found in relation to the first drug transaction with the accused that all subsequent drug transactions are tainted. The Crown says that the court should engage in a balancing of interests in respect of each transaction. The Crown also points out that on one occasion the accused provided Dhot with a new telephone number and thus could be said to have created the opportunity for a subsequent offence.

Analysis

[25] I will turn now to my analysis. The law of entrapment was discussed by the Supreme Court of Canada in *R. v. Mack*, [1988] 2 S.C.R. 903, and clarified in *R. v. Barnes*, [1991] 1 S.C.R. 449 . In *Mack*, the Supreme Court expressed the rationale for the law as the belief that the administration of justice must be kept free from disrepute and that disrepute may arise from judicial condonation of unacceptable conduct by investigatory and prosecutorial agencies, and referred to *R. v. Collins*, [1987] 1 S.C.R. 265, at page 281. In *Barnes*, Lamer C.J., as he then was, said at para. 23 and 24:

23 The basic rule articulated in *Mack* is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a bona fide investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a bona fide inquiry.

24 Random virtue-testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:

- (a) the person is already engaged in the particular criminal activity, or
- (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.

[26] In this case, the question is whether the undercover officer entrapped Mr. Pepper because he gave him an opportunity to commit a drug-trafficking offence without a reasonable suspicion that he was already engaged in such criminal activity. It was not argued that the phone call to Mr. Pepper was part of an investigation directed at an area where it was reasonably suspected that criminal activity was likely occurring.

[27] In *R. v. Imoro*, 2010 ONCA 122, the Ontario Court of Appeal said at paragraph 13 that:

To make out entrapment on the first scenario requires two findings: first, a finding that the police provided an opportunity to commit an offence; and second, a finding that the police did so without reasonable suspicion.

That approach is not inconsistent with the approach of the Court of Appeal of British Columbia in *Swan*. The main difference between the cases is that in *Swan*, our Court of Appeal decided that the police did not have a reasonable suspicion before the solicitation for drugs was made. In *Imoro*, the police officer said to Mr. Imoro, "Can you hook me up?" The trial judge had found that question provided Mr. Imoro with an opportunity to sell drugs. The Ontario Court of Appeal disagreed and said that the officer had really asked Mr. Imoro if he was a drug dealer and it did not amount to giving Imoro an opportunity to traffic in drugs.

[28] In the case at bar, Corporal Dhot, after introducing himself as Jay, asked Mr. Pepper, "Can we hook up?" The conversation then involved Pepper trying to determine if he knew Jay. Pepper then decided he would meet with Corporal Dhot and after that asked Dhot what he wanted. Dhot said, "Hard and soft." Pepper said he did not have soft at that time. They then agreed to meet in 10 minutes, at which time Dhot was able to purchase crack cocaine from Pepper. Dhot testified that Pepper's questioning after he had asked him if they could hook up was consistent with a drug dealer trying to determine if he was dealing with an undercover police officer. In my view, by asking Pepper, "Can we hook up," Corporal Dhot was not giving Pepper an opportunity to sell drugs and, similar to the finding of the Court of Appeal of Ontario in *Imoro* in relation to the phrase, "Can you hook me up," it was the first step in Dhot's investigation. Dhot did not give Pepper the opportunity to commit an offence until later in their conversation after Pepper asked, "What do you want," and Dhot responded, "Hard and soft."

[29] Putting it into the context of the drug trade, I would apply the approach of the Ontario Court of Appeal and conclude that Dhot was inquiring whether or not the accused was prepared to engage in a drug transaction. Considering it outside of the world of drugs, it is an ambiguous phrase and might simply be taken to mean by some people, "Can we get together?" In either case, the opportunity to commit an offence was not presented until Dhot said, "Hard and soft" to the accused. I have concluded that the critical time for determining whether the police had a reasonable suspicion is when Dhot said, "Hard and soft." That would be equivalent to the time in the *Swan* case when the undercover officer said, "I need 40 up."

[30] It must then be determined whether the police had a reasonable suspicion at that time that Pepper was a drug trafficker before presenting the opportunity for Pepper to commit the offence. In determining whether the police had such reasonable suspicion, Lamer J. in *Mack* said:

it is my opinion that as far as possible an objective assessment of the conduct of the police and their agents is required. The predisposition, or the past, present or suspected criminal activity of the accused, is relevant only as a part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the past conduct of the accused and the provision of an opportunity, since otherwise the police suspicion will not be reasonable. While predisposition of the accused is, though not conclusive, of some relevance in assessing the initial approach by the police of a person with the offer of an opportunity to commit an offence, it is never relevant as

regards whether they went beyond an offer, since that is to be assessed with regard to what the average non-predisposed person would have done.

- [31] As mentioned, the Court of Appeal of British Columbia has recently considered the law of entrapment in the context of a dial-a-dope offence in *R. v. Swan*. In *Swan*, the Court of Appeal allowed an appeal by the accused from a conviction for trafficking in cocaine and entered a judicial stay on the basis that the police conduct in relation to the accused amounted to entrapment. Mr. Swan had been arrested during an undercover Vancouver Police operation which targeted suspected dial-a-dope drug traffickers. The operation started with the officer in charge, Detective Constable Cratchley, compiling a list of telephone numbers which were suspected of being associated with persons involved in dial-a-dope transactions. The evidence was that the telephone numbers came from various police sources such as anonymous tips, Crime Stoppers tips, and the like. Those numbers were given to the police officers working undercover and those officers attempted to make a drug deal and arrest by calling the numbers and speaking to whoever answered the call.
- [32] The evidence of Cratchley as to the source of the telephone numbers is important in comparing the facts in *Swan* to the case at bar. After emailing the entire police department requesting names or phone numbers relating to dial-a-dopers, Cratchley said he received some 150 to 250 telephone numbers. They came to him in a variety of ways including by email, on matchbooks, napkins, or torn pieces of paper, and sometimes by way of a Crime Stoppers tip. He said that 95 percent or more of those tips involved an unknown person and everything about them was unknown. The Court of Appeal said that at best the information regarding the telephone number used to call Mr. Swan amounted to mere suspicion, not reasonable suspicion and thus the police behaviour amounted to random virtue testing.
- [33] As to whether the solicitation for drugs had been made by the police during the course of a bona fide investigation, the Court of Appeal was not prepared to impose geographical limits on an investigation involving cell phones which are inherently mobile. However, that court concluded that the police had overstepped the bounds of a bona fide investigation by proceeding only with a mere suspicion and the hope that their unknown targets would provide something more as a necessary precursor to the invitation to traffic in drugs.
- [34] In *Swan*, the police had nothing except a phone number which could have come from a variety of sources. In the case at bar, the police only proceeded with the undercover investigation involving the calling of a cell phone number after they had received or obtained the following information:
1. a Crime Stoppers tip that an individual was trafficking drugs from a white sports car bearing licence plate number 660JGN;
 2. the vehicle associated with that plate number was a Nissan 350Z convertible;
 3. information from a police informant that drugs could be purchased by calling cell phone number 778-388-6441 and that the individual was trafficking from a white 350Z vehicle.

- [35] While the reliability of the information received by Staff Sergeant Murphy was not known, in my view, the similarity of the information from the two sources considered objectively could properly lead him beyond a mere suspicion, which may have been all he had when he received nothing more than the Crime Stoppers tip, to a reasonable suspicion that the person with that cell phone number had been selling drugs. In addition, as Murphy testified, although the reliability of the confidential police informant has not been tested, the informant would have provided the information at a face-to-face meeting with his police handler. It seems to me that such information is then at least more than a mere anonymous tip. In addition, Corporal Dhot's conversation with the accused clearly supports his conclusion that he was talking to a drug dealer before he responded, "Hard and soft" to the question from the accused as to what he wanted. When the accused said, "Have you picked up from Max before," and whether Max was a small guy, it is reasonable to infer that he was asking if Dhot had acquired drugs from Max and checking to see if Dhot really knew who Max was. Dhot also corroborated the information in the tips regarding the white convertible vehicle when he told the accused he had seen him in it when he met him with Mike. The accused did not deny that he was in such a car and eventually agreed to meet with him which suggests to me that he agreed with the description of the vehicle.
- [36] The onus is on the accused to establish beyond a balance of probabilities that he was entrapped. In this case, I must balance an individual's interest in being left alone free from state intrusion and not being induced by the state to commit an offence with the state's competing interest in protecting society from crime. The Court of Appeal points out that in Barnes, the difference between the views of the majority of the Supreme Court of Canada and the dissenting judges turned on their different views as to where the balance of individual and state interests lies. Having weighed those competing interests in light of the information that the police had received and the nature of the conversation between the police and the accused, in my view, the police were not engaged in random virtue testing.
- [37] I have concluded that the police had a reasonable suspicion that Mr. Pepper was involved in drug trafficking before giving him the opportunity to commit a trafficking offence and that the evidence does not support a finding of entrapment. In view of this conclusion, it is not necessary to consider the implications of a finding of entrapment in relation to the series of drug transactions between the accused and the undercover police officer which followed their first contact.
- [38] Accordingly, a conviction on all counts will be entered and this matter will be adjourned for the purpose of sentencing.

"Mr. Justice Bowden"

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