
CANADA / JUDGMENT

R. v. Perri

2022 BCSC 1665

COURT

Supreme Court of British Columbia

DECIDED

25 August 2022

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2022 BCSC 1665 R. v. Perri

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Perri,

2022 BCSC 1665

Date: 20220825

Docket: 179819-2

Registry: Victoria

Regina

v.

Nicholas Benjamin Michael Perri

Corrected Judgment: The text of the judgment was corrected on the cover page on October 20, 2022.

Before: The Honourable Associate Chief Justice H. Holmes

Oral Reasons for Judgment re Entrapment

Counsel for the Crown:

M. Adams

Counsel for the Accused

(by video-conference)

E. Holzman

J. Karlsen

Place and Date of Trial:

Victoria, B.C.

August 9-11, 2022

Place and Date of Judgment:

Victoria, B.C.

August 25, 2022

INTRODUCTION

- [1] After a one-day trial, I found Mr. Perri guilty of possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The reasons are at 2022 BCSC 1664.
- [2] Cst. Jennifer Gilroy, posing as a potential purchaser, had contacted a telephone number thought to be used for dial-a-dope purposes. Mr. Perri answered, and she had two telephone conversations with him in which he seemed to agree to sell drugs to her, and then an exchange of text messages to arrange the time and place where they would meet. When Mr. Perri arrived as arranged, he was arrested by other members of the police team, and was found to be in possession of 0.3 g. of crack cocaine.
- [3] Mr. Perri now applies for a stay of proceedings based on abuse of process. He claims that he was entrapped by Cst. Gilroy in the first telephone conversation.
- [4] Given the governing case law, the facts of the case, and the parties' positions, the main issue is whether Cst. Gilroy's first words to Mr. Perri, "Hey, can you help me out, I'm looking for 80", offered him an opportunity to commit an offence.
- [5] I will briefly outline the law that presents the issue in this way, before then applying the law to our facts.

THE APPLICABLE LAW

- [6] In *R. v. Ahmad*; *R. v. Williams*, 2020 SCC 11, the Supreme Court of Canada in its majority reasons rejected the invitation to revise the framework for analyzing potential police entrapment in, specifically, suspected dial-a-dope operations. Instead, the majority confirmed the legal standard from *R. v. Mack*, [1988] 2 S.C.R. 903 as still applying uniformly to all situations in which entrapment is raised.
- [7] The Mack framework, as described in summary by the majority in *Ahmad* (at para. 15, citing *Mack* at p. 959), has two alternative branches, either of which is sufficient to ground a claim of entrapment and consequently justify a stay of proceedings:

There is, therefore, entrapment when: (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides* . . . or, (b) having a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.

- [8] In the majority's view, this framework continues to balance and reconcile the important public interests at play: the rule of law and the protection of privacy interests and personal freedom from state overreach, on one hand, and the state's legitimate interest in investigating and prosecuting crime, on the other (Ahmad, para. 22). In particular, the standards required by the framework prevent the random virtue testing that would unacceptably increase the likelihood of people committing crimes, especially vulnerable or otherwise marginalized people (Ahmad, para. 28).
- [9] Where the police are alleged to have entrapped a person who answers a suspected dial-a-dope telephone, the first branch of the Mack framework is most commonly engaged. The issue is typically whether the police offered that person an opportunity to commit an offence without the police having first formed a reasonable suspicion that the person answering, or the phone number, were engaged in criminal activity.
- [10] This is the main issue in this case, as I have noted. However, to situate that issue in its context, I will first explain what is meant by a reasonable suspicion, even though that concept will require relatively little discussion in my later analysis because Crown and defence counsel largely (though not entirely) agree about when that threshold was reached on the facts of this case.
- [11] The majority in Ahmad explained that a reasonable suspicion is grounded on objectively discernible facts that stand up to independent scrutiny. A reasonable suspicion must give reasonable cause to suspect that a certain kind of crime is being committed by a particular person or in a particular place, which may include a telephone number (Ahmad, para. 46). This standard permits meaningful judicial review of whether the police had legitimate reasons for targeting an individual or the people at a location (Ahmad, paras. 44-5).
- [12] In this case, the police had suspicions about both Mr. Perri and the telephone number itself. Counsel made their submissions with their main focus on the suspicions relating to Mr. Perri, and my analysis will take that focus also. The facts as I found them do not allow for a reasonable suspicion in relation to the telephone number unless there is also a reasonable suspicion in relation to Mr. Perri.
- [13] The reasonable suspicion standard is not "unduly onerous". It requires only a possibility of criminal activity, not a probability. It does not require the police to undertake further investigation to rule out innocent explanations or exculpatory information (Ahmad, para. 47). As a lower standard than reasonable grounds, reasonable suspicion is intended to give the police flexibility in enforcing the law and preventing crime (Ahmad, para. 45).

- [14] Nonetheless, a "bare tip" will not ground a reasonable suspicion, because that would be effectively no bar at all. It would do nothing to protect people from virtue testing based on malice, rumour, or gossip (Ahmad, para. 32), which is one of the harms the Mack framework aims to prevent.
- [15] But a bare tip may be corroborated by other information together with which it may ground a reasonable suspicion. The police may acquire sufficient corroborating information either before they phone the telephone number given in the tip, or during their call to the number, so long as the police acquire that additional information before they offer an opportunity to commit an offence. When acquiring sufficient information during the call, the police are, however, "on thin ice" (Ahmad, para. 54), and must take care to confine their remarks to exploratory inquiries and not to offer an opportunity to commit an offence.
- [16] What, then, will amount to offering an opportunity to commit an offence?
- [17] The answer will be informed by the definition of the offence in issue, and the context of the police action (Ahmad, paras. 63-64). In the context of a suspected dial-a-dope operation, the definition of the offence is extremely broad, because the CDSA defines drug "trafficking" to include not only selling, transporting, and administering illegal drugs, but also making an offer to do so (Ahmad, para. 65).
- [18] As a result, the majority confirmed that, in a police call to a suspected dial-a-dope number, "an opportunity will be established when an affirmative response to the question posed by the officer could satisfy the material elements of an offence" (Ahmad, para. 63). This formulation is recognized as the test, in this context, of when an opportunity is offered.
- [19] The effect of the test is that the police can legitimately make exploratory requests of the target. They can even ask outright whether the target sells drugs (Ahmad, para. 66). But the police may not make requests that are so specific that the target who answers "yes" would be committing an offence (namely trafficking by offering to sell).

ANALYSIS

There Was No Reasonable Suspicion Before the First Phone Call

- [20] As mentioned earlier, there is no suggestion that, before she placed the first call, Cst. Gilroy's suspicion that Mr. Perri was drug trafficking, or her suspicion that the telephone number was being used for that purpose, had reached the level of being a reasonable suspicion, as described in the guiding case law. Nor is there any suggestion that any other members of her team had a suspicion reaching that level.
- [21] Before I discuss the evidence, I should note that Cst. Gilroy was the only witness to testify in the entrapment hearing, but it was agreed that the evidence given in the trial by Cst. Gilroy and by two other police officers should also be considered in relation to this application.

- [22] I will briefly outline the three main sources of information that Cst. Gilroy did have before the call.
- [23] The first came from an encounter she had with Mr. Perri less than a week before the offence. This took place in and around the parking lot of the Travel Lodge at 123 Gorge Rd. The Travel Lodge was being used as a temporary shelter for the vulnerable unhoused. Cst. Gilroy testified that the area was a high crime area, and she was patrolling in her police vehicle in a proactive fashion. She came across Mr. Perri, who had arrived driving a BMW, and she asked him if he was living there. Mr. Perri responded that he was not, he lived on a different street that he named. Cst. Gilroy testified that when she then asked him who he was visiting at 123 Gorge, Mr. Perri did not want to answer.
- [24] Cst. Gilroy testified that this encounter caused her to suspect that Mr. Perri was trafficking drugs. This was in part because Mr. Perri evidently did not live at 123 Gorge: he said he was visiting the shelter and that he had housing elsewhere, he appeared more affluent than those living in the shelter, in that he was driving a BMW (which Cst. Gilroy ascertained was registered to his mother), and he was dressed fairly well. Also, Mr. Perri was arriving in a high crime area, he was carrying a cross-body satchel, and he was unwilling to say whom he was visiting.
- [25] In my view - and the Crown does not suggest a different conclusion - the various pieces of information Cst. Gilroy gleaned from the encounter at 123 Gorge were not sufficient, singly or in combination, to ground a reasonable suspicion. Although Cst. Gilroy described the area of 123 Gorge as a high crime area, she did not identify it as one where drug offences in particular were prevalent or of specific concern. Rather, she testified that the crimes committed there ranged widely, and included assaults, weapons offences, property offences, and driving offences, and that arrests were also made there on outstanding warrants. The facts that Mr. Perri was visiting a shelter housing people less affluent than he appeared to be, that he was unwilling to identify whom he was visiting, and that he was carrying a satchel, gave rise to no more than a hunch that he was drug trafficking.
- [26] Cst. Gilroy's second source of information about Mr. Perri was from the police database PRIME, which she consulted after her encounter with Mr. Perri at 123 Gorge. She testified that from PRIME she learned that Mr. Perri was being investigated by the West Shore RCMP for CDSA-related trafficking. Her evidence included no further details about the number, precise focus (type of drug) or status of the investigation(s), or the extent or reliability of the information in support. Before I comment on this second source of information, I will briefly describe the third source.

- [27] The third source was information from Cst. Ewington, who contacted Cst. Gilroy when he saw the entries in PRIME she had made after her encounter with Mr. Perri at 123 Gorge. Cst. Gilroy testified that Cst. Ewington, who had transferred from the Victoria Police Department to the West Shore RCMP, told her that he had reasonable grounds to believe that Mr. Perri was trafficking in crack cocaine, and he gave her the cellular telephone number that she later called to reach Mr. Perri, as I have described.
- [28] Counsel agree that the information from Cst. Ewington must be treated as analogous to a "bare tip", because there was no evidence about its basis. Cst. Gilroy believed that Cst. Ewington received the information from a confidential informant, but she knew nothing at all about that person, or their relationship with Cst. Ewington, to allow an assessment of the reliability of the information they gave, and there was no other evidence to allow such an assessment to be made.
- [29] Cst. Gilroy took no steps - and there was no evidence of any other officer taking any - to investigate the information Cst. Ewington had given her, except by discussing it with another officer, with whom she then assembled a team to make the approach to Mr. Perri that led to the charge. She had no information about Mr. Perri or the telephone number Cst. Ewington had given her, apart from the three sources of information I have described.
- [30] As I have said, the information from Cst. Ewington must be treated as a bare tip.
- [31] The information from PRIME similarly stands bare, without any basis on which the Court can assess its reliability.
- [32] On the evidence, the various sources of information known by the police may have properly caused Cst. Gilroy to suspect that Mr. Perri was trafficking drugs at 123 Gorge and elsewhere. However, and as the Crown agrees, they did not, singly or in combination, meet the standard of providing a reasonable basis for such a suspicion.
- [33] As a result, when Cst. Gilroy made the first call to Mr. Perri, she did so without a reasonable suspicion that he (or the number she was calling) were engaged in drug trafficking.
- [34] I will next consider whether Cst. Gilroy's opening remark to Mr. Perri in that first call gave him an opportunity to commit an offence.
- [35] In its secondary position, the Crown submitted that Cst. Gilroy had the basis for a reasonable suspicion when Mr. Perri answered the first call by saying "hello", because she recognized his voice at that point, the Crown submits, and she therefore confirmed his identity. That secondary position I will address later, if it is necessary to do so.
- [36] I turn then to discuss Mr. Perri's position that Cst. Gilroy's first remark offered him an opportunity to commit an offence.

Did Cst. Gilroy's First Remark Offer an Opportunity to Commit an Offence?

[37] At this point, I reproduce the evidence about the words spoken by Mr. Perri (NP) and Cst. Gilroy (Cst. G.) respectively:

NP: Hello

Cst. G: Hey, can you help me out, I'm looking for 80

NP: Who's this?

Cst. G: Kat

NP: How do I know you?

Cst. G: You don't . . . Sara gave me your number.

NP: Okay, do you want powder?

Cst. G: No, hard.

NP: I have to load up, I'll call you back in 45 minutes.

[Emphasis added.]

[38] As to the meaning of her opening question "can you help me out?", Cst. Gilroy testified that she was trying to portray herself as vulnerable and in need of drugs. Cst. Scott Hourston, who testified as an expert witness in the trial, testified to similar effect that, in the language of the drug sub-culture, "can you help me out?" is a request to purchase drugs.

[39] As to her intended meaning of "I'm looking for 80", Cst. Gilroy testified that she was referring to \$80/worth of drugs. She testified that she did not intend to refer to a specific drug because she wanted the person answering her call to "engage first", meaning to offer to supply drugs to her. Cst. Hourston testified to similar effect about the meaning of "looking for 80", namely that it means to be looking for \$80/worth of drugs, without referring to any specific drug in particular. Cst. Gilroy's and Cst. Hourston's evidence on this point was not challenged or contradicted.

[40] I pause to note Cst. Hourston's evidence about the meaning, in the drug sub-culture, of some other terms used in the first conversation: namely, that "powder" means powdered cocaine, "hard" means crack cocaine, and "load up" means to replenish the vendor's supply.

[41] Cst. Gilroy was "on thin ice" (Ahmad, para. 64) in making the call to the number given in the tip without already having a reasonable suspicion that Mr. Perri or the telephone number were involved in drug trafficking. Further, her opening request ("can you help me out, I'm looking for 80") was more detailed than the police officer's request in Ahmad ("you can help me out?"), which the majority (in upholding the trial judge's conclusion that this did not offer an opportunity to commit an offence) described as "an extremely close call" (Ahmad, para. 76). Finally, the police officer's request in Williams ("I need 80") was almost identical to Cst. Gilroy's, and the majority upheld the trial judge's conclusion that the request there did offer an opportunity to commit an offence (Ahmad, para. 79).

- [42] The difficulty for Mr. Perri is that the evidence in this case does not support his contention that "I'm looking for 80" was intended or understood to mean a request for a specific amount of cocaine. As I discussed, an opportunity is offered where the police request is framed in such a way that an affirmative response would amount to an offence. On the evidence in this case, "I'm looking for 80" meant a request for \$80/worth of drugs, without specifying the type of drug (except that it meant a drug that is subject to the CDSA). Neither Cst. Gilroy nor Cst. Hourston was challenged or contradicted on the evidence they gave to this effect, as noted, and there was no other evidence in the trial or the entrapment hearing on the point. Counsel appear to agree that for a trafficking offence to be committed, the particular drug must be identified. An opportunity has been provided "only when the terms of the deal have narrowed to the point that the request is for a specific type of drug and, therefore, the target can commit an offence by simply agreeing to provide what the officer has requested" (Ahmad, para. 66). On the evidence in this case, an affirmative response to "I'm looking for 80" would not have amounted to an offence, because it would not have been an offer to sell a particular prohibited drug.
- [43] That this deal had not narrowed to that point is underscored by Mr. Perri's question shortly afterwards, when he asked Cst. Gilroy if she was looking for "powder" - Mr. Perri evidently needed to clarify what type of drug Cst. Gilroy was seeking.
- [44] The challenges of "parsing" the language of a cell phone conversation in this way have been the subject of extensive and sometimes critical comment before and after Ahmad. Trotter J., as the trial judge in Williams, noted that the Mack framework requires careful attention of this nature to the details of what was said, and he made these insightful observations about the line between requests that offer an opportunity, on one hand, and legitimate investigative questions, on the other (R. v. Williams, 2014 ONSC 2370):
- 27 The distinction between statements such as "I need product"/"Can you hook me up?"/"Are you around?"/"Where are you?", on the one hand, and "I need 80"/"I need 40"/"I need 6 greens"/"I need half a B", on the other, might appear quite subtle. However, the latter statements, involving requests to purchase a specific quantity of drugs, are more definite and less exploratory. With the former, the possibility of a deal still needs to be explored and developed; with the latter, all the accused needs to say is say "yes." That is what happened in this case. That is where the line appears to be currently drawn.
- [45] It may seem incongruous that "I need 80", in Williams, fell on one side of the line, while "I'm looking for 80", in this case, falls on the other. The reason is that the evidence in this case is different from that in Williams about what is meant by asking for "80". As I have explained, in this case the uncontradicted evidence is that "80" refers to \$80/worth of an unspecified drug. In Williams, Trotter J. proceeded on the basis that "80" referred specifically to cocaine. This was how the majority in Ahmad (at para. 66) understood Trotter J.'s conclusion, in their observation that "I need 80", in the context of a tip that the individual was a cocaine dealer, was "a request for a particular quantity of that drug". The Ontario Court of Appeal in the recent case of R. v. Zakos, 2022 ONCA 121 similarly understood Trotter J. to have based his

decision on evidence that the request for "80" referred to a specific quantity of cocaine:

71 In the case of Mr. Williams, as soon as the target confirmed who he was, the officer presented an opportunity to traffic drugs by asking to purchase a specific quantity, "80", slang for a dollar amount of cocaine. Once Mr. Williams responded "Okay" the offence of trafficking by offer was complete: Ahmad SCC, at para. 79.

[46] I have been unable to find an express reference in Trotter J.'s reasons to evidence in Mr. Williams's case that "80" means, specifically, cocaine, although such a reference may well exist in reasons to which I was not directed during the hearing. However, even if the finding is not express, it is clearly implicit.

[47] Trotter J.'s conclusion may have been based in part on the fact that the police officer was acting on a tip that Mr. Williams was trafficking in cocaine. This was the context in which the police officer made the dial-up call and the request. Mr. Perri notes that in this case the tip relayed by Cst. Ewington was even more specific, namely that Mr. Perri was trafficking in crack cocaine. Should Cst. Gilroy's request be taken to have been coloured by the context of the tip such that it too was sufficiently specific to offer an opportunity to commit an offence?

[48] In my view, it should not. For the reasons I have given, the evidence in this case, which was clear, was that "80" referred to drugs generally, and not specifically to cocaine. Also, Mr. Perri's response, in asking whether Cst. Gilroy was looking for powdered cocaine, to some extent contradicts the reliability of the tip that he trafficked in crack (hard) cocaine, and Cst. Gilroy's further evidence that Cst. Ewington told her that Mr. Perri did not traffic in powdered cocaine.

CONCLUSION

[49] The evidence does not establish that Cst. Gilroy's opening remark ("Hey, can you help me out, I'm looking for 80") offered an opportunity to Mr. Perri to commit an offence. Mr. Perri was not entrapped by that remark.

[50] Mr. Perri agrees that by the time, later in the conversation, when Cst. Gilroy's remarks were specific enough to offer an opportunity to commit an offence, she had a reasonable suspicion that he was drug trafficking.

[51] It is therefore unnecessary to address the Crown's secondary position that Cst. Gilroy recognized Mr. Perri's voice when he first said "hello", and that this was sufficient, together with the information she had before the call, to ground a reasonable suspicion. I will say that it is not a strong position on the facts nor on the law.

ORDER

[52] The application for a stay of proceedings based on abuse of process through entrapment is dismissed.

"The Honourable Associate Chief Justice H. Holmes"

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