

CANADA / JUDGMENT

R. v. Russell

2013 BCSC 68

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 68 R. v. Russell IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Russell, 2013 BCSC 68 Date: 20130116 Docket: 25023 Registry: Vancouver Regina v. Daniel Ronald Russell, Yong Sung John Lee, Dilun Heng Barzan Tilli-Choli, Karwan Ahmet Saed, Ion Kroitoru also known as John William Croitoru Before: The Honourable Madam Justice Dillon Ban on publication pursuant to s. 648(1) of the Criminal Code until jury renders verdict Reasons for Judgment Re: Voir Dire No. 4: Karwan Saed re Warrantless Searches of March 22 and 23, 2008 Counsel for the Crown: H.J.R. Reiner Q.C., R.G. Keefer A.M. Mandell, P.F. Sebellin, M. Barrenger S. McCallum, R.L. Storey Counsel for Daniel Russell: R.A. Cairns Q.C., L.R. Fleming, B.D. Vaze Counsel for Yong Lee: J. Esson, V.M. Williams Counsel for Dilun Heng: B.V. Bagnall, J.D. Jevning Counsel for Barzan Tilli-Choli: L. Smith, M. Daneliuk, C. Strong Counsel for Karwan Saed: J.W. Hogan, J.D. Banks, K. Bradley Counsel for Ion Kroitoru: J.B. Turner, D. Gaffar, J. Rutherford Place and Dates of Hearing: Vancouver, B.C. January 9, 10, and 14, 2013 Place and Date of Judgment: Vancouver, B.C. January 16, 2013

Introduction

- [1] On March 22, 2008, police stopped a vehicle driven by the applicant, Karwan Saed ("Saed"), and then searched the vehicle. Police found what was believed to be illegal drugs in the vehicle and arrested Saed for possession for the purposes of trafficking. Police then conducted a search of Saed's person and located three cell phones in his possession. These were eventually placed with Saed's possessions at the Burnaby RCMP detachment where Saed had been taken upon arrest. When Saed was released without charges in the early morning hours of March 23, 2008, his phones were not returned to him as were his other possessions. Instead, on the evening of March 23, 2008, Detective Constable Chan ("Chan") of the Integrated Gang Task Force of the Vancouver Police Department attended at the Burnaby detachment and searched the Sony Ericsson cell phone to ascertain the phone number for the phone and the contact list. This information was then turned over to investigators to assist in the preparation of an affidavit in support of wiretap authorization P10/2008 which targeted Saed.

- [2] The Crown conceded that the searches of the vehicle and the cell phone were warrantless searches. As such, the Crown has the burden of showing that the searches were, on a balance of probabilities, reasonable (*R. v. Head*, 52 B.C.A.C. 121, [1994] B.C.J. No. 2522 (*Head*)). This issue arose in the context of a Garofoli review of authorization P10/2008. Both the Crown and the defence requested that this Court determine the legality of the searches prior to argument on the Garofoli review. Many of the facts were established by Admissions of Fact pursuant to section 655 Criminal Code, R.S.C. 1985, c. C-46. Background Facts
- [3] Saed was a known person to investigators in the Organized Crime Agency of British Columbia and had been named as a known person who was suspected of involvement in cocaine trafficking by Detective Timothy Rayner of the Combined Forces Special Enforcement Unit in an affidavit sworn on March 6, 2008 in support of wiretap authorization P5/2008 (P5/2008 Affidavit/Information to Obtain at para. 295 ("P5 ITO")). 4182 Dawson Street in Burnaby had been the location of surveillance of two of the targets of P5/2008 (P5 ITO at para. 157) and police had intercepted communications from an unknown male associated to telephone number 604-779-7767 that were believed to be related to payment for drugs (P5 ITO at para. 153).
- [4] On March 22, 2008, at about 23:28 hours, police received a 911 call from a person residing at 4182 Dawson Street. The following was recorded: Time of Entry 23:28:41 In front of the location (4182 Dawson Street), are two expensive vehicles and about six males who are fighting each other. 23:29:37 Four males have approached a vehicle with two males inside. They are up in each other's faces. 23:29:51 Complainant states that they are drug dealers. 23:30:35 One vehicle is a dark SUV and the other vehicle unknown. 23:30:48 Males are pushing each other around. 23:31:16 Complainant states that one male in his 20's lives in the building and is a drug dealer. 23:32:51 Four SOC's (suspects of complaint) are in the parking lot of 4182 Dawson. 23:33:43 Four other SOC's have gotten into their vehicle and left the parking lot. 23:33:55 Complainant could not give description of vehicle. As a result of the call, at 23:30 hours, Officers Dominie, Sidhu, Dabiri, Callaghan, and Robertson of the Burnaby RCMP were dispatched to the location. The details of the 911 call were broadcast to the officers.
- [5] Cst. Dominie arrived at 23:35 hours, about the same time as Cst. Sidhu and Cpl. Dabiri, with the other officers arriving within a minute. Cst. Dominie observed a dark coloured SUV/mini-van "trying to leave the area" in the area of the cul-de-sac in front of 4182 Dawson Street. At the same time, Cst. Sidhu arrived at the entry to 4182 Dawson Street, did not observe anything untoward, but saw Cst. Dominie talking with multiple persons and a vehicle parked in the roundabout outside the front entrance to the building. Cpl. Dabiri saw no evidence of a fight and no victim was located.
- [6] Upon arrival at the location, Cst. Dominie engaged his emergency equipment to stop the vehicle. He intended to identify the occupants of the vehicle to ascertain if they were the same ones as from the complaint. He also wanted to ascertain whether anyone was injured. There is no evidence that Cst. Dominie specifically made any observation linking the vehicle

and its occupants to the complaint except that it was a dark coloured van in the area of the complaint. Cst. Dominie "suspected that the vehicle could potentially be the same involved in the fight complaint".

- [7] Because Cst. Dominie reported that the vehicle was "trying to leave the area", it is assumed that the driver and passenger were in the vehicle when Cst. Dominie approached. There is no evidence that Cst. Dominie informed the driver that he was investigating a fight or that he gave any reason as to why he had stopped the vehicle. Nor is there any evidence that Cst. Dominie or any other officer investigated the fight reported in the 911 call beyond initial observation and stopping the vehicle. There is no evidence that Cst. Dominie had any reason to conduct a vehicle traffic stop, apart from information from the 911 call.
- [8] Cst. Dominie spoke with the driver and must have requested identification because Saed produced his driver's licence. The other occupant of the vehicle was identified by other officers on the scene as Michele Masi ("Masi"). There is no suggestion that the passenger produced identification, so police must have known Masi from previous dealings. Police at the scene flagged both occupants of the vehicle from the police system as armed and dangerous and members of the UN gang. The exact wording of the flag was not in evidence.
- [9] According to the Admissions of Fact, the nature of the detention changed at this point. It was no longer a matter of investigation of an alleged fight. Because of the complainant's report that the males that were fighting were drug dealers and that one of the males lived in the building at 4182 Dawson and was a drug dealer, and due to the "suspicious nature of the file", meaning reference to Saed and Masi as members of the UN gang, "Burnaby RCMP members at the scene attempted to obtain consent from Saed to search his vehicle".
- [10] However, there is no evidence that any of the officers present at the scene set about to obtain Saed's consent to search the vehicle. Cst. Dominie said that this was done by other officers, but lacked any knowledge as to how or by whom this consent was obtained. Cst. Sidhu overheard conversation between Saed and Cst. Dominie and assumed that consent had been given to search the vehicle. He heard Saed say to Cst. Dominie "If you find one you can keep it". However, the full context of this statement was not clear and Cst. Sidhu did not know what was meant by this. There is no evidence that a specific request to search was made to Saed or that he was given any information about the search or its consequences.
- [11] Cpl. Dabiri spoke with Saed in Farsi. He reported that Saed appeared somewhat agitated and he calmed Saed by saying that he should allow police to conduct their investigation and remain calm. He also told Saed that it was an offence to prevent police from investigating and that any evidence that was gathered unlawfully could not be used against him. Cpl. Dabiri could not recall who gave consent to search the vehicle or how the consent was obtained. Obviously, he did not consider that he obtained consent of Saed in this conversation.

- [12] Nor is there evidence to support a conclusion that a search was conducted out of concern for the safety of anyone. Although the Admission of Fact stated that "Both occupants of the vehicle were flagged armed and dangerous", Cst. Callaghan reported that he attended to provide extra protection because Saed was flagged as "possibly having gang affiliations". Cst. Callaghan thereafter stood by while Cst. Dominie completed his investigation. There were no specific safety concerns raised and eventually Cst. Callaghan left without bothering to make any notation of the event. No officer expressed concern for his or her safety or the safety of other officers or the public as the reason for conducting the search of the vehicle. There was no evidence of a fight. Saed remained cooperative and there was no behaviour or information that would have alerted police to a safety concern outside of information of a possible gang affiliation.
- [13] Cst. Dominie and Cst. Sidhu then searched the vehicle that Saed had told the officer was rented. At 23:50 hours, about 15 minutes after the vehicle had been stopped, Cst. Sidhu observed a plastic bag inside an opening in the dashboard usually reserved for a cup holder. Cst. Sidhu removed the bag that contained a handful of pills and gave the bag to Cst. Dominie who observed the pills to be stamped with the letters "TEC". Cst. Dominie must have then asked Saed about the pills as the Admission of Fact reported that "Saed did not have a prescription for the pills and stated that he could not produce one". Cst. Dominie thought that the pills were the drug ecstasy as they were listed on the police report as such.
- [14] Cst. Dominie arrested Saed for possession for the purposes of trafficking at 00:10 hours, on the morning of March 23, 2008. He was then read his Charter rights and Saed requested to speak to a lawyer. Cst. Dominie then conducted a search of Saed's person incidental to the arrest. Police located a quantity of cash and three cell phones, including a Sony Ericsson cell phone. A bag containing 4.5 grams of crack cocaine was seized, but the location of this seizure was not noted. Cst. Dominie then asked Saed about the phones and why he had so many. In response, Saed made a statement to the officer about his use of the phones which the officer told Saed was "highly suspicious and unusual".
- [15] Saed was transported to the Burnaby RCMP detachment. Masi was also brought to the detachment. Before he was given access to counsel, Saed asked to speak with Chan. Cst. Dominie called Chan at 00:30 hours, where he was working with the gang unit. Cst. Dominie advised Chan that Saed had been arrested for possession for the purposes of trafficking and told Chan that he was not sure at the time of the arrest what the pills were. However, he now thought that they were Tylenol 3's. He also told Chan that Saed wanted to talk to Chan because he wanted to get out of the charges. Cst. Dominie told Chan that the search of the vehicle could be called into question.
- [16] Saed was given access to counsel at 00:50 hours, and expressed satisfaction with the call. Cst. Dominie spoke with Saed's counsel at 01:00 hours about Saed's release from custody. There is no evidence about the details of this call.

- [17] Saed contacted Chan through the phone in the Burnaby cells. Chan then attended at the Burnaby detachment. The time of the call, the contents of this call, and the time of attendance are not in evidence. Chan spoke with Saed in the presence of Cst. Dominie. The details of that conversation are not in evidence.
- [18] Saed was released from custody on March 23, 2008, at 03:15 hours, without charge. He was given some but not all of his possessions. Cst. Dominie kept the cell phones pending further investigation. Masi was also released.
- [19] On March 23, 2008, at 19:30 hours, Chan re-attended the Burnaby detachment purposefully to look at the Sony Ericsson phone. He observed the number of the phone to be 604-779-7767 and took details of the contact list. The phone was then returned to Saed's personal effects. There is no evidence that Chan looked at the other phones, although presumably they were still there. It is not known why the Sony Ericsson was selected for examination.
- [20] In follow up, Cst. Dominie concluded that there was not enough evidence to support laying charges. The pills in the small bag found in the vehicle were analyzed to contain oxycodone, a controlled substance. The cocaine was also confirmed in subsequent analysis.

Analysis

- [21] After review of the cases cited to the Court, including: *R. v. Borden*, [1994] 3 S.C.R. 145, 92 C.C.C. (3d) 404 (Borden); *Head*; *R. v. Kennedy*, 2000 BCCA 362, 139 B.C.A.C. 281; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; and *R. v. Dhillon*, 2012 BCCA 254, 323 B.C.A.C. 28 (Dhillon), and after considering all of the circumstances here, I have concluded that the search of the vehicle and the search of the cell phone were obtained in violation of Saed's right to be secure from unreasonable search and seizure.
- [22] The initial stop of Saed's vehicle was in response to the 911 call with a description of a vehicle that reasonably matched the vehicle, location and time in which Saed's vehicle was found. Although Cst. Dominie may have had reasonable grounds to detain Saed initially in investigation of the 911 call concerning a fight between males, this purpose was swiftly swept away as it became readily apparent that there was no evidence of a fight or injury and the other vehicle had reportedly left the scene. Cst. Dominie made no further observations or investigation in relation to an alleged fight, but immediately focussed upon the information gleaned from identification of the driver and the other occupant of the vehicle and the suspicion of drugs.
- [23] There were no reasonable grounds to detain Saed in relation to drugs or to search the vehicle for that purpose. Indeed, Cst. Dominie had no subjective belief that Saed had been engaged in either a fight or in dealing drugs because he acted under the assumption that Saed consented to search the vehicle. He did not search the vehicle incidental to an investigative detention in relation to either of these offences.

- [24] The vehicle was searched because Cst. Dominie thought that someone had obtained Saed's consent to do so. There is no evidence that any information was given to Saed as to the purpose of the stop, or the purpose of the search, or as to Saed's right to refuse the search. No meaningful information was given to Saed prior to conducting the search. No words are attributed to Saed that can be construed as exhibiting consent. There was not a valid consent to search within the criteria established in *Borden and Dhillon*.
- [25] The search of the Saed's vehicle was an infringement of his s. 8 Charter right to be free from unreasonable search and seizure.
- [26] The same conclusion is reached with respect to the search of the cell phone. There was no ongoing investigation after Saed was released because all of the documentation established that no charges were laid or pending. The search of the cell phone on March 23, 2008 by Chan was an unjustified, warrantless search.

Conclusion

- [27] The initial stop of the Saed vehicle on March 22, 2008 in response to investigation of the 911 call concerning a fight between males was reasonable. However, the subsequent detention and search was in violation of Saed's s. 8 Charter rights because it was not in relation to the 911 call investigation and it was not pursuant to a valid consent to search. The search of the 604-779-7767 cell phone on March 23, 2008 was an unreasonable and unlawful search in violation of Saed's s. 8 Charter rights. "Dillon J."
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The Honourable Madam Justice Dillon

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