

CANADA / JUDGMENT

R. v. Schirmer

2020 BCSC 2259

COURT

Supreme Court of British Columbia

DECIDED

27 October 2020

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2020 BCSC 2259 R. v. Schirmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2020 BCSC 2259

Date: 20201027

Docket: 173568-3

Registry: Victoria

Regina

v.

Horst Francisco Schirmer

Ban on Publication: Pursuant to s. 648(1) of the Criminal Code, R.S.C. 1985,

c. C-46. This ban restricted the publication, broadcasting, or transmission,

in any way, of any portion of the trial at which the jury was not present.

The publication ban applied until the jury retired to consider its verdict.

Before: The Honourable Madam Justice S. Matthews

Oral Ruling on Voir Dire #2

Counsel for the Crown:

A. Russell

C. Fast

Counsel for the Accused:

R. Horne

Place and Date of Trial/Hearing:

Victoria, B.C.

October 22-23 and 26, 2020

Place and Date of Judgment:

Victoria, B.C.

October 27, 2020

Overview

- [1] Horst Francisco Schirmer is charged with five counts of possession for the purpose of trafficking contrary s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The five counts relate to possession of cocaine, heroin and fentanyl, MDMA, GHB, and methamphetamine.
- [2] Mr. Schirmer challenged the search and seizure undertaken by the Nanaimo RCMP, pursuant to a warrant, on May 4th, 2017. I previously ruled that the warrant was valid, the search was reasonable, and the initial seizure was reasonable. I ruled the ongoing retention of the things seized violated Mr. Schirmer's s. 8 Charter rights because the Nanaimo RCMP did not file a report, as required by s. 487.1 of the Criminal Code, R.S.C. 1985, c. C-46, within the time required by that subsection which is no later than a period of time within seven days after the warrant was executed.
- [3] Mr. Schirmer seeks to have the evidence that the Crown seeks to introduce into evidence at trial and that was seized on that search, namely mobile phones from which data has been extracted, excluded pursuant to s. 24(2) of the Charter on the basis that admitting the evidence will bring the administration of justice into disrepute.
- [4] At this stage I am only addressing the admissibility issues that arise from Mr. Schirmer's application to exclude the cell phones pursuant to s. 24(2) of the Charter based on the s. 8 Charter breach I found. The Crown will be bringing an application to address the admissibility of the data extracted from the cell phones at which the Court will be considering other admissibility issues. I am not addressing those other issues on this application.
- [5] I gave these reasons orally. I have edited the transcript without changing the substance.

Legal Principles - Section 24(2) of the Charter

- [6] The issues to be addressed to determine the admissibility of evidence obtained in breach of an accused's Charter rights are set out addressed in *R. v. Grant*, 2009 SCC 32:
- (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.
- [7] On considering these factors the court must determine whether on balance the evidence obtained in breach of Charter rights would bring the administration of justice into disrepute. The analysis is long-term in perspective and undertaken from the perspective of a reasonable person considering the repute of the justice system. It is not about punishing the police or compensating the accused: *Grant* at paras. 66-70 and 85-86.
- [8] The *Grant* analysis forms the issues to be addressed on this application.

The Seriousness of the Charter-Infringing State Conduct

- [9] Section 487.1(9) requires the peace officer to whom a warrant was issued file a written report that discloses when the warrant was executed, what was seized, where it is being held, and if anything other than what was provided for in the warrant was seized, within a period not exceeding seven days after the execution of the warrant. The warrant also included a seven-day reporting requirement in its terms.
- [10] The Crown asserts that the courts have characterized breaches of the reporting filing requirement in s. 487.1(9) to be technical, that is, on the low end of seriousness. In addition, the Crown submits that the circumstances in this case are that the breach was a result of an oversight which also diminishes its seriousness.
- [11] Mr. Schirmer argues that the Supreme Court of Canada has questioned whether such breaches can be characterized as technical and has held that that, depending on the circumstances, they can be a serious.
- [12] The Nanaimo RCMP made the s. 487.1(9) report on May 10, 2017, six days after the search warrant was executed. However, the registry file stamp date is May 30, 2017, indicating the Registry stamped it as being filed 26 days after the search warrant was executed and 19 days after it was required to be filed. There is no evidence as to why it was filed late.
- [13] A deliberate breach is not determinative of the seriousness of the police conduct. In *Grant*, at para. 75, the court held that while good faith will reduce the need for the court to distance itself from the state conduct, where the Charter breach takes place in the context of police ignorance of Charter standards, the court must not reward or encourage ignorance, negligence, or wilful blindness by equating them with good faith or allowing the evidence to be admitted.

- [14] In *R. v. Craig*, 2016 BCCA 154, the police did not file the s. 487.1(9) report. The responsible officer testified that was due to a complete oversight on her part. The Court of Appeal explained that the reporting requirement plays a role in ensuring judicial supervision of things seized at paras. 157-161. The court characterized the failure to file the report as "troubling," at para. 189.
- [15] In *R. v. Reeves*, 2018 SCC 56, the delay in reporting was of a seizure that was not judicially authorized and so the report was required to be filed "as soon as practicable but the Crown did not file a report for four months. The majority noted that such requirements are important because "they mandate police accountability for seizures that have not been judicially authorized". I note that the reporting requirement for an unauthorized search and seizure is more immediate than in an authorized search, but surely the reporting requirement for an authorized search is equally important.
- [16] Justice Côté in dissent on *Reeves*, but not on this point, stated that "[i]n light of the clear and detailed framework established by Parliament for the seizure of property -- a framework that is not at all new -- these breaches were not merely trivial ". Justice Côté also said she would hesitate to describe such a breach as technical.
- [17] When considering *Reeves*, it is important to note that the seizure in issue was not judicially authorized, but rather was undertaken on the basis that the accused's common law spouse had reported that her spouse had child pornography on his computer and consented to the seizure of the computer. The Supreme Court of Canada held that the unauthorized seizure was in breach of the s. 8 Charter rights and the police should have known that it was, notwithstanding the consent of the spouse. The late filing was after a four-month delay and followed by an Information to Obtain (a warrant was subsequently sought) that was characterized as "goal-oriented" and contained a "selective presentation of the facts." These combined breaches were found to be serious. That is not comparable to a single breach of the filing requirement by being 19 days late in filing.
- [18] In *R. v. Montgomery*, 2016 BCCA 379, at para. 187, the Court of Appeal held that a three-day delay in filing the report was, at most, a technical violation of the Charter.
- [19] From these cases, I conclude that the reporting requirement is important. The difference in characterization of the various breaches depends on the reason for the breach, the duration of the breach, and whether the breaches were part of a cluster of breaches around the search and seizure. Breaches that have been explained as oversights and those breaches that were very short in duration have been described as technical or de minimus. Lengthy failures to file, those that accompanied other breaches in relation to the search and seizure, or failures to file on time with no explanation, have been characterized as serious.
- [20] This report was made on time, which reduces the concern that the police were not attentive to the reporting requirement. The report was filed 19 days late. The late filing is not explained which prevents a finding that it was simply overlooked and is a matter of concern.

- [21] Based on all of the circumstances, I conclude the seriousness of the breach is more than technical but still on the lower end of the seriousness spectrum.

Impact of the Breach on the Charter Protected Interests of the Accused

- [22] Under this branch of the test, the court must consider the breach from the perspective of the accused: *R. v. Harrison*, 2009 SCC 34 at para. 28.
- [23] Late filing affects the rights of Mr. Schirmer with regard to the things seized in relation to their ongoing seizure, in particular the ongoing seizure during the 19 days when a report should have been filed but was not: *Craig*.
- [24] In late filing cases, the nature of the thing seized and the privacy interests in the thing seized are important. In *Reeves*, the thing seized was a computer. The majority cited *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 2 and 105 and observed, at para. 65, that a seizure and search of a personal computer is an extreme invasion of privacy given the private nature of the data that the computer may contain.
- [25] The things seized in this case were three mobile phones. They were seized from the residence that Mr. Schirmer lived in with several other people. The Crown's position is that one of the phones belongs to Mr. Schirmer. In my view, the type of data that mobile phones may contain is such that the privacy interests are similar to those in *Reeves* and *Morelli*.
- [26] However, in *Reeves*, the breach was a failure to file over four months, during which a search of the devices was conducted and the initial search and seizure was not authorized by a warrant. Given those features, the impact on Mr. Reeves was much more significant than in this case where the delay was 19 days and the data was not extracted from the cell phones during that time.
- [27] In *R. v. Gracia-Machado*, 2015 ONCA 569, the report was filed late but the Ontario Court of Appeal held that had it been filed on time, the detention would undoubtedly have been granted given that it was granted when a late report was filed. The Ontario Court of Appeal also held that the trial judge erred in not considering that the initial seizure was authorized by warrant and so a justice had already balanced the privacy interests at stake against the interests of the state in investigating the offence. The thing seized in that case was the accused's blood, which obviously has an extremely high privacy interest generally speaking, but the Court held that given the warrant, he had a minimal residual privacy interest in it when the reporting period lapsed. The Court also considered that delayed compliance, as opposed to non-compliance, attenuated the impact on the accused's privacy rights.
- [28] There are some factors in that case that are different from this case. In *Garcia-Machado*, the court considered that the blood was used for the purpose for which it was seized under a warrant. Here, the phones were seized under a warrant issued to a different investigating police force for the investigation of a different offence. There is no evidence of the method by which the phones were provided to the Victoria City Police Department or the Crown for

the purpose of proving these charges. I make no comment on it except to say the phones are not being used at this trial for the purpose for which the Nanaimo RCMP search warrant was issued, i.e.: the investigation of a murder, and so it cannot be said that Mr. Schirmer's privacy rights in relation to this use of the phone were addressed by the judicial justice when the warrant was issued. In addition, in Garcia-Machado, the Ontario Court of Appeal observed the blood taken in the hospital was not something that the accused "missed" while it continued to be seized, unlike a "smart phone or a computer" (at para. 64). This case does involve a mobile telephone which I understand to be a smartphone.

- [29] Accordingly, several of the factors that attenuated the impact on the accused's rights in Garcia-Machado are present in this case. I find the reasoning in that case persuasive and I find those factors to significantly attenuate the seriousness of the impact on Mr. Schirmer's Charter rights, but not as completely as in Garcia-Machado where the breach "had no real impact on the respondent's Charter-protected interests" (at para. 68).
- [30] I conclude the impact on Mr. Schirmer's privacy rights was moderate, taking into account that the search and seizure was authorized, the breach period was short, the data extraction did not occur during the breach period, but the thing seized has a high privacy value and the use of the data extracted from it in this prosecution is not the purpose for which the search and seizure was authorized.

Society's Interest in the Adjudication of the Case on its Merits

- [31] Under this factor, the court considers the relationship between the inclusion or exclusion of the evidence and the public interest in the adjudication of the case on the merits. The reliability of the evidence and the importance to the Crown's case are important factors on this analysis: Grant at paras. 81-83.
- [32] While excluding reliable evidence that advances the truth-seeking function of the trial may bring the administration of justice into disrepute, the administration of justice includes maintaining the rule of law and upholding Charter rights. That is why the s. 24(2) inquiry must be informed by the long-term maintenance of the integrity of the justice system and public confidence in it: Harrison at paras. 34 and 36.
- [33] The Crown's case is based on the identification of certain quantities of the drugs described in the indictment and evidence linking those drugs to Mr. Schirmer. The Crown will argue that the data extracted from the cell phone is relevant to the issue of the possession of the drugs and supports an inference that Mr. Schirmer had possession of those drugs. The evidence in issue, subject to the admissibility of the cell phone data extraction report, is reliable.

- [34] I do not understand the Crown to be saying that the evidence is critical or that without it, the Crown's case will be gutted. However, the case against Mr. Schirmer is circumstantial and so the evidence is potentially important. The public has a moderate to strong interest in its admissibility in pursuit of the truth.

Balancing

- [35] In Harrison at para. 36, the Court explained that the balancing exercise mandated by s. 24(2) is qualitative. The appropriate approach is to weigh each of the inquiries. It is not appropriate to simply ask whether the majority of the relevant factors favour exclusion.
- [36] The interplay between the Grant factors was considered in R. v. McGuffie, 2016 ONCA 365, at para. 63. Doherty J.A., writing for a unanimous court, expressed the view that if the first and second Grant factors make a strong case for exclusion, the third inquiry will rarely tip the balance in favour of admissibility. That proposition was endorsed in R. v. Le, 2019 SCC 34:
- [142] The third line of inquiry, society's interest in an adjudication of the case on its merits, typically pulls in the opposite direction -- that is, towards a finding that admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown's case (see R. v. Harrison, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34), we emphasize that the third line of inquiry cannot turn into a rubber stamp where all evidence is deemed reliable and critical to the Crown's case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility (Paterson, at para. 56). Conversely, if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence.
- [37] I conclude that the seriousness of the breach provides weak support for exclusion. I conclude that the impact on Mr. Schirmer's rights provides moderate support for exclusion. The reliability of the evidence and the role it will play in the trial are such that the public has a moderate to strong interest in its admissibility. When I balance these factors, I conclude that together they provide more support for admissibility than exclusion. I conclude that the administration of justice will not be brought into disrepute by the admissibility of this evidence.

Conclusion

- [38] Mr. Schirmer's application to exclude the evidence seized during the Nanaimo RCMP search warrant is dismissed.

"Matthews J."

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