

CANADA / JUDGMENT

R. v. Sipes

2012 BCSC 134

COURT

Supreme Court of British Columbia

DECIDED

27 January 2012

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2012 BCSC 134 R. v. Sipes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sipes,

2012 BCSC 134

Date: 20120127

Docket: 66431-2

Registry: Kelowna

Regina

v.

Dale Gordon Sipes, Leslie Podolski, Sheldon Richard O'Donnell

Peter Manolakos and Douglas Corey Brownell

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Before: The Honourable Mr. Justice Smart

CROSS-EXAMINATION OF RACQUEL WORSLEY

Reasons for Judgment

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Place and Date of Judgment:

Vancouver, B.C.

January 27, 2012

I. INTRODUCTION

- [1] On January 19, 2012, counsel for Mr. Sipes applied to cross-examine Racquel Worsley with respect to a polygraph examination (the "polygraph") the RCMP conducted of a witness in 2006.
- [2] Mr. Woodall gave notice of this application just prior to the commencement of Worsley's direct examination. He made his application prior to commencing his cross-examination and renewed it during his cross-examination. I denied the application and gave a brief explanation for my decision. I have concluded that I should give further reasons to explain my decision, as well as give directions with respect to future applications.

II. BACKGROUND

- [3] This is the third occasion that the admissibility of this evidence has been argued. The first occasion was months before the trial when the Crown applied for an order prohibiting the accused from cross-examining the witness about the polygraph. The accused argued that it was premature to decide the question and I agreed and dismissed the application: *R. v. Sipes*, 2010 BCSC 1364.
- [4] The second occasion was during the third day of Mr. Woodall's cross-examination of the witness. No notice was given of the application. Mr. Woodall made his application to cross-examine the witness about the polygraph just after the morning break. The jury was excused until after lunch. At 2:00 p.m. I gave my decision dismissing the application. Following this, Mr. Woodall stated that he needed overnight to consider the effect of my ruling on his remaining cross-examination. As a result, the jury was excused until the next morning.
- [5] The effect of the timing of his application was that the jury was kept waiting and eventually sent home having only heard a little over an hour of evidence that day. I provided written reasons for my decision on December 22, 2011: *R. v. Sipes*, 2011 BCSC 1764.

III. THE WORSLEY APPLICATION

- [6] Worsley was scheduled to testify on Thursday, January 12, but had to be rescheduled to Thursday, January 19, because one of the jurors was ill during the week.
- [7] Worsley's evidence commenced at 9:30 a.m. on January 19 in an effort to complete her evidence that day. A few minutes before direct examination commenced, Mr. Woodall advised the court and the Crown that he was going to apply to cross-examine Worsley about the polygraph. No notice had been given. In response to questions from the court, Mr. Woodall provided brief submissions concerning the relevance of this evidence. The Crown then commenced its direct-examination of Worsley, completing it just after the morning break.
- [8] Mr. Woodall was the first defence counsel to cross-examine Worsley. He advised, in the absence of the jury, that he required a ruling concerning his application before he commenced his cross-examination. The jury waited in the jury room while I heard Mr. Woodall's application.
- [9] Mr. Woodall explained that, according to Worsley's statements to police, following the polygraph, the witness told her that: (i) he had taken a polygraph; (ii) during the polygraph he denied [Content Redacted]; and (iii) to his surprise, the police believed him and told him that he "passed".

- [10] Mr. Woodall explained that, despite this, Worsley did nothing to correct the police's mistaken belief [Content Redacted]. Mr. Woodall argued that it is important for the jury to know the true circumstances under which Worsley learned from the witness [Content Redacted] and the reason the police believed him. He said the fact the police thought the witness passed the polygraph was important because the police consider it to be a persuasive, independent tool.
- [11] In my exchanges with Mr. Woodall, I questioned the probative value of the polygraph evidence with respect to what he was seeking to establish. I dismissed the application as being premature; however, Mr. Woodall was given leave to renew it depending on Worsley's evidence.
- [12] Mr. Woodall commenced his cross-examination and continued until approximately noon. At that time, he renewed his application in the absence of the jury. He repeated his earlier position concerning the value of the evidence and submitted that, without knowledge of the polygraph, the jury may wonder how Worsley knew the police believed the witness. Mr. Woodall also argued that it was necessary to refer to the polygraph to refresh her memory concerning a conversation she had with the witness. He referred me to a portion of one of Worsley's witness statements where she provides information concerning a conversation she had with the witness after he had taken the polygraph.
- [13] I again dismissed his application as I was not satisfied the evidence was necessary or of sufficient probative value. I suggested that Worsley's memory could be refreshed from her statement without reference to the polygraph. I again left open the possibility for Mr. Woodall to renew his application depending on Worsley's evidence and his efforts to refresh her memory. No further application was brought.
- [14] I will now expand upon my reasons for dismissing the application. I will not repeat what I said in my earlier reasons (R. v. Sipes, 2011 BCSC 1764); however, these reasons should be read in conjunction with them.
- [15] Worsley is an important witness. She testified in direct examination that the witness [Content Redacted]. This evidence, if accepted, is inconsistent with the defence theory of some of the accused concerning the Thom murder.
- [16] As stated, Mr. Woodall submitted that the polygraph is important evidence because:
- (i) it is part of the circumstances under which the witness told Worsley [Content Redacted];
 - (ii) it is part of the circumstances under which Worsley learned that the police believed the witness and [Content Redacted];
 - (iii) Worsley knew that the police belief was based on the polygraph and the police would place reliance on the results of the test; and
 - (iv) Worsley did not go to the police and correct the mistake.

- [17] Mr. Woodall explained that the polygraph evidence was necessary for him to establish this central point: that Worsley did nothing to correct the police's misapprehension, thereby permitting the police to continue to focus on [Content Redacted]. He said this point is significant to Worsley's character and credibility.
- [18] In my view, Mr. Woodall can establish his central point without reference to the polygraph evidence. In particular, he can lead from Worsley that: (i) the witness told her he had an interview with the police; (ii) during the interview, he denied [Content Redacted] and said [Content Redacted]; and (iii) to his surprise, the police believed him.
- [19] The reason the police were prepared to believe the witness is of little or no significance. Similarly, whether the police or Worsley placed confidence in the polygraph is somewhat speculative and adds nothing. The point is that the police apparently believed the witness was telling the truth and were pursuing someone else, and that Worsley knew this yet did nothing.
- [20] To conclude, evidence of the polygraph is of little or no probative value to Mr. Woodall's proposed examination. In my view, Sipes is not prejudiced if this evidence is ruled inadmissible. On the other hand, as explained in my earlier ruling, this evidence carries significant prejudice to the trial process. For these reasons, I dismissed this application.

IV. TIMING OF THE APPLICATION

- [21] As a result of the timing of this application, neither the Crown nor the court was provided notice and proceedings with the jury were delayed. While I acknowledge that there may be times where issues arise unexpectedly, this was not one of those times.
- [22] Mr. Woodall's response to why he did not bring this application in a timely manner is that an accused has no obligation to disclose his or her cross-examination.
- [23] In my view, this is putting the proposition too broadly. Certain types of evidence (e.g. alibi, expert, a complaint's sexual activity) and applications (e.g. Charter, O'Connor) commonly require an accused to provide some information concerning their intended defence or their intended cross-examination in order to establish prejudice or relevance.
- [24] In my view, there was no reason Mr. Woodall could not have provided timely notice of this application and no prejudice to his client had he done so. Timely notice would have: avoided keeping the jury and the witness waiting; permitted considered submissions from all counsel; and provided the court an opportunity to reserve its decision if necessary.
- [25] This is not the only application that has caused undue delays and inefficient use of court time in the past few months. As a result, I am issuing a number of directions to counsel that will govern future applications in this trial.

- [26] First, I am directing that counsel advise the court and other counsel in a timely way of any application concerning the admissibility of evidence they anticipate making. This will permit a more orderly management of the trial, including the scheduling of witnesses and the efficient use of the jury's time. If defence counsel are of the view that disclosing particulars of the application would be unfair to the accused, they should at least provide timely notice that an application will be made in order to permit a discussion as to the timing and length of the application.
- [27] Second, where an application is a request for reconsideration of a previous ruling, before submissions on the merits are allowed to proceed, counsel bringing the application will be required to demonstrate that the application is triggered as a result of a change in circumstance that could not have reasonably been anticipated (such as new disclosure) or some other appropriate reason. In the event this threshold is not satisfied, the application will not be heard. This will assist in ensuring that court time is spent wisely and efficiently.

"SMART J."

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