

CANADA / JUDGMENT

R. v. Sipes

2012 BCSC 716

COURT

Supreme Court of British Columbia

DECIDED

8 March 2012

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2012 BCSC 716 R. v. Sipes IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Sipes, 2012 BCSC 716 Date: 20120308 Docket: 66431-2 Registry: Kelowna Regina v. Dale Gordon Sipes, Leslie Podolski, Sheldon Richard O'Donnell Peter Manolakos and Douglas Corey Brownell Pursuant to s. 486.5 of the Criminal Code, R.S.C. 1985, c. C-46, information that could identify certain witnesses may not be published or broadcast in any manner. The content of these Reasons for Judgment has been redacted to comply with the existing publication bans. Corrected Judgment: This judgment was corrected on the front page on December 24, 2012 Before: The Honourable Mr. Justice Smart Trial Transcripts for William Mastop Reasons for Judgment Counsel for the Crown: D.A. Jardine, P.M. Favell, G.G. Matei, D. McLaughlin, J.M. Robinson, A.S. Burton, C.G. Giles, M.M. Salaysay, S. Nahal Counsel for William Mastop: R. Fernyhough Counsel for the Accused Sipes: M.K. Woodall, M.A. Nathanson, G. Ng Counsel for the Accused Podolski: R.C. Claus, M.R. Jetté, G. Docolas Counsel for the Accused O'Donnell: G. Orris, Q.C., C.L. Bauman Counsel for the Accused Manolakos: R.A. (Sandy) Ross, P. Doherty, A. Rinaldis Counsel for the Accused Brownell: C.R. Purves, B.L. Hickford Place and Date of Judgment: Vancouver, B.C. March 8, 2012

- [1] William Mastop applies for an order permitting transcripts of witnesses in this trial to be delivered to his counsel at his expense and permitting his counsel to provide a copy of those transcripts to him for his review in preparation for his trial in R. v. Mastop, Vancouver Reg. No. 25279-1.
- [2] The Crown opposes the application in part. It submits that Mastop's counsel may be provided transcripts forthwith but not Mastop personally. The Crown points to safety concerns for its witnesses and, in particular, its incarcerated witnesses for whom I have imposed a ban of publication of any information which could identify them. The Crown prepared a draft order setting out what the Crown submits would be appropriate:
- [3] The draft order reads as follows:
1. Transcripts of the evidence of witnesses in the trial proceedings in R. v. Sipes . . . may be delivered to counsel for Mr. Mastop;

2. The transcripts will only be used by counsel for Mr. Mastop in preparation for and in the court proceedings of Regina v. Mastop . . . (3. The contents of the transcripts may not be discussed with Mr. Mastop, and no copies of any transcripts may be left with him;)
4. At the conclusion of the lawyers' involvement with the case of Regina v. Mastop, all copies of the transcripts will be returned to the Registrar of the Supreme Court of British Columbia. Any copies that are marked up or annotated shall be in a sealed envelope. The envelope [shall] be marked that is for the attention of Mr. Justice Smart;
5. Any . . . distribution of the transcripts beyond what is set out in this order cannot be done without further order of Mr. Justice Smart. At the conclusion of the trial or at a point where we know for a fact that he [Mastop] will not testify term #3 shall be changed so it reads as follows:
3. The contents of the transcripts may be discussed with Mr. Mastop, but no copies of any transcripts may be left with him;
- [4] There is no dispute with conditions 1, 2, 4 and 5. It is condition 3 that is in issue.
- [5] Counsel for Mastop argues that as proposed, condition 3 would unduly restrict Mastop's ability to properly prepare for his trial, particularly given that he resides and works in Vernon and his counsel is in Vancouver. His counsel addresses the safety concerns raised by the Crown by pointing to the fact that Mastop already has disclosure of the witness statements, police reports, and other documents on a hard drive and there has been no suggestion that he has improperly used or disclosed this material to anyone.
- [6] The Crown responds that the risk of harm to witnesses who have testified at this trial and who may also testify at Mastop's trial would be increased by disclosure of actual trial transcripts as opposed to witness statements. It notes, for example, that there is considerable evidence given at this trial concerning immunity agreements entered into by the inmate witnesses and these documents are not part of the disclosure provided to Mastop or the accused in this trial. Further, trial transcripts will leave no doubt to the reader as to who are Crown witnesses at the Sipes trial.
- [7] Counsel for the accused take no position with respect to Mastop's application other than counsel for Sipes who opposes Mastop reviewing evidence from this trial until it is clear that he will not be a witness at this trial.

Analysis

- [8] In my view, the Crown is properly concerned for the safety of its witnesses. Two individuals have been charged with obstruction of justice for allegedly threatening a Crown witness in this trial. My reasons for imposing a publication ban in this trial also disclose why the Crown's concern for witness safety is well founded: see R. v. Sipes, 2011 BCSC 1329 at paras. 148 and 149.

- [9] However, balanced against this concern is the need to ensure Mastop is able to make full answer and defence at his trial. Reviewing the evidence provided at the Sipes trial is an important component of preparing for his trial because there is close nexus between the two proceedings. As I explained at para. 14 of my reasons on the application for publication bans: Mr. Mastop's charge and the charges before me arise from the same RCMP investigation, Project E-Peccant, and the two proceedings are closely connected. For example: the disclosure provided to Mr. Mastop is essentially the same as that provided to the accused in this trial; some members of the Crown team prosecuting this trial are also prosecuting Mr. Mastop; the evidence the Crown anticipates leading against Mr. Mastop is, for the most part, some of the same evidence it intends to lead at this trial; and Witness A and Witness B are expected to be key Crown witnesses at both trials.
- [10] Mastop is a criminal lawyer and, no doubt, can assist his counsel in his defence. Like these accused, many of the witnesses in this case are persons he knew personally and/or professionally. Some of the witnesses provide evidence concerning the alleged criminal organization and Mastop's knowledge of and participation in this group. There are hundreds and hundreds of pages of transcripts of evidence. Witness A for example testified for [CONTENT REDACTED] days. Witness B will likely be as long, perhaps longer. Mastop needs to be able to review the evidence from this trial to prepare for his trial and instruct his counsel.
- [11] As Mastop lives in Vernon, if the trial transcripts are only available to him in Vancouver at his lawyer's office it will be much more difficult for him to read and re-read these transcripts over the coming months and relate the evidence to witness statements and other documents found in his electronic disclosure. This is a task that will take many hours to complete, likely hundreds of hours.
- [12] A crucial question I must address is: what is the incremental increase in risk to witness safety if Mastop has trial transcripts as opposed to witness statements and other documents that he has in his electronic disclosure? While there is a difference between Mastop having the trial transcripts and the Crown disclosure, the witness statements make it clear that the witnesses are co-operating with the Crown. Improper distribution of the Crown disclosure would create a similar risk to witness safety as improper disclosure of trial transcripts would.
- [13] In my view, the right balance between protecting witnesses and Mastop's constitutional right to make full answer and defence is to permit him to have a copy of the transcripts but place strict conditions preventing them from being copied, the contents shown to anyone or the transcripts left with anyone, other than his counsel. I also suggest that an undertaking should be prepared and signed by Mastop so there is no misunderstanding as to the terms and conditions of him receiving this information.
- [14] In addition, Mastop should not have copies of the evidence or have it discussed with him until after the evidence is completed in this trial. In other words, as the condition is stated in bracketed condition 3 of the Crown's draft order.

- [15] I will discuss with counsel the most secure way for providing the trial transcripts to Mastop: should they be on paper, on discs, by email, or on a hard drive like the Crown's disclosure?
- [16] I will leave it to counsel to discuss the terms and conditions of my order and a corresponding undertaking that will include these terms and conditions. If there is any further dispute please bring the matter back before me. "SMART J."
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