
CANADA / JUDGMENT

R. v. Stein

2008 BCSC 1909

COURT

Supreme Court of British Columbia

DECIDED

4 July 2008

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2008 BCSC 1909 R. v. Stein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Stein,

2008 BCSC 1909

Date: 20080704

Docket: 78740-2

Registry: Kamloops

Regina

v.

William Michael Stein

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment

July 4, 2008

Counsel for the Crown:

A. Varesi

Counsel for the Defence:

J. Jensen,

agent for J.W. Conroy Q.C.

Place of Trial/Hearing:

Kamloops, B.C.

- [1] THE COURT: William Michael Stein stands charged with a two-count information related to the Ashcroft RCMP detachment takedown of an outdoor marihuana grow operation on the 30th of August 2005, at a rural location of 16 Mile, which is a small and unincorporated community north of Ashcroft/Cache Creek, on Highway 97 in the interior of British Columbia. The first count of the information charges the accused with possession of a controlled substance, cannabis marihuana, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. The second count of the information charges the accused with production of a controlled substance, cannabis marihuana, contrary to s. 7(1) of the Controlled Drugs and Substances Act.
- [2] The outdoor marihuana grow operation came to the attention of the RCMP initially on the 29th of August 2005. On that date, Staff Sergeant Dave McCulloch of Kamloops was travelling via RCMP helicopter from Kamloops to Clinton, and in the process was following along Highway 97. On his way to Clinton, he noticed, from what he viewed at that time, a suspicious piece of property which he thought was possibly an outdoor marihuana grow operation. This was at 1:00 p.m. on that day. On his way back from Clinton to Kamloops later that day, at about 4:00 p.m., he again flew over the property in question near 16 Mile and confirmed his suspicions that a marihuana grow operation was taking place. He made a GPS notation of the location and then flew back to Kamloops.
- [3] Armed with information as to the GPS location and armed with his suspicions, on the 30th of August, 2005, Staff Sergeant McCulloch and Constable Glen Beattie of Kamloops, attended at the RCMP Ashcroft detachment. At that time, Sergeant Fiddick and Constable Tunbridge, both of the Ashcroft RCMP detachment, attended in the helicopter with Staff Sergeant McCulloch and Constable Beattie. The evidence of Staff Sergeant McCulloch suggests that they left the Ashcroft detachment at approximately 9:40 a.m. and flew directly to the site in question, arriving over the site approximately 5 to 10 minutes later. There was in evidence a video recording of the flyover of this property on the morning of the 30th of August 2005, the video footage being of the initial flyover, as well as a subsequent flyover later that day.
- [4] Staff Sergeant McCulloch provided evidence at trial. He personally noted two vehicles departing from a residence located at the property and heading towards Highway 97. It was his evidence that the people departing in the vehicle were rapidly departing, appeared to be loading the vehicle with supplies from a residence on the property, and then heading to Highway 97 in a hurried fashion. It was his suggestion in the evidence that it was likely the occurrence that those on the ground became aware of the helicopter circulating overhead and were fleeing the scene. He described hurried packing of the vehicles and exiting of the vehicles from the property.
- [5] Additionally, Staff Sergeant McCulloch noted from his vantage point in the helicopter the vehicles that he saw leaving the residence being stopped by a police car on Highway 97. In addition to Staff Sergeant McCulloch's recollection, the video evidence also shows, prior to

the packing and hurried leaving, a certain vehicle on the property, a grey truck. This grey truck was on what I will call an interior road on the property. The grey truck appears on the video to be approaching an intersection on the lands in question, at which time a left-hand turn would direct the vehicle towards Highway 7, and a right-hand turn would direct the vehicle towards the residence on the property. Though the video does not disclose this vehicle making that turn, the evidence is strongly suggestive that the grey vehicle in question turned right, went to the residence, and then left the residence with other persons, having done, as was suggested, a hurried packing.

- [6] The evidence before me also is strongly suggestive that the road on which this grey truck was located, the road at which the grey truck was driving down towards the intersection I described, was in fact a road which led to the marihuana grow operation further east on the property in question. Of note, this road does not appear at any time to connect with any other road or with any other property, and in fact does not exit the property itself.
- [7] Constable Joseph LaPointe also gave evidence on the behalf of the Crown. He was the officer who stopped the two vehicles leaving the lands in question on the morning of August 30, 2005, as they turned onto Highway 97 as noted and viewed by Staff Sergeant McCulloch. He testified to being aware of a potential takedown of a marihuana grow operation, and being aware that a helicopter had left the Ashcroft detachment for the purposes of attending at the outdoor marihuana grow operation. As a result of this happening, he chose to drive from the Ashcroft detachment that morning towards the location, along Highway 97 in a northerly direction. He was in radio contact with the helicopter. In his evidence, he advised that around 10 a.m. he approached the area in question and was in contact with those in the helicopter. He testified that he was advised by those in the helicopter that two vehicles were leaving the premises, and through communications with the helicopter, and the helicopter being able to visibly locate Constable LaPointe, he was advised of his location in regards to those two vehicles leaving the property.
- [8] Constable LaPointe's evidence was that a grey pickup truck followed by a green van left the property in question and turned onto Highway 97, heading south. As he was arriving at the scene at that time, he immediately pulled those two vehicles over. The grey pickup was a Toyota truck with a canopy, and it was the first vehicle pulled over. It was leading, essentially, the green van. He pulled the two vehicles over and appears to have parked somewhat in front of them. Constable LaPointe testified that he approached the grey Toyota pickup truck, and as he did he noticed an overpowering smell of grown marihuana. I am satisfied that from his years of experience he had the ability to distinguish between the smell of growing or grown marihuana and the smell of burnt or smoked marihuana.

- [9] Constable LaPointe approached the truck on the driver's side and noted within the grey truck four occupants, the driver of the truck being the accused Mr. Stein. There was a Mr. Fitzpatrick as a front passenger, a Ms. Lauter, a person sitting behind the driver, and a Mr. Hall, a person sitting behind the passenger. Constable LaPointe advised the parties after they were pulled over to remain in their truck and remain there when he approached the second vehicle.
- [10] As Constable LaPointe approached the second vehicle, he testified that he heard the pickup truck go into gear, and noted the pickup truck attempting to start to drive away. He testified that he felt the grey vehicle and the driver of the grey vehicle were attempting to leave the scene despite his instructions to stay put. He indicated that he yelled at them to stop, and though he was uncertain, he testified that he may have in fact pulled out his side arm in the process, to emphasize the point. Constable LaPointe then said, at that point, the driver of the vehicle, the accused Mr. Stein, stopped the vehicle and Constable LaPointe hurriedly returned to the vehicle and took the keys from the vehicle to prohibit what he viewed as any further attempts to flee the scene. At this point, Constable LaPointe went to the second vehicle and began to request ID and obtain information from the persons in that second vehicle, and he made notations of those IDs at that time.
- [11] After dealing with the second vehicle, Constable LaPointe, after back-up arrived, began processing the persons detained, including Mr. Stein. He arranged to arrest the persons two at a time and place them in RCMP vehicles. He searched and arrested the accused Mr. Stein and a Mr. Hall at the same time. When searching the accused Mr. Stein, Constable LaPointe testified to the smell of grown marihuana emanating from the clothing of both Mr. Stein and Mr. Hall at this point. He arrested them both and chartered and warned them for the offence of possession for the purpose of trafficking.
- [12] The vehicle driven by Mr. Stein, which as it turns out was a vehicle leased by Mr. Stein, was sent at the direction of the RCMP to Chanor Towing in Ashcroft, to a secure location, for a subsequent search.
- [13] Constable LaPointe, in cross-examination, did concede that there was a stronger smell of marihuana emanating from a Mr. Fitzpatrick, who was also an occupant of the grey Toyota truck and a front seat passenger in that grey Toyota truck in which Mr. Stein was also seated.
- [14] Constable Tunbridge of the Ashcroft RCMP also testified on behalf of Crown. Constable Tunbridge became the constable in charge of the takedown of this outdoor marihuana grow operation, and in his evidence he reviewed the numerous photographs taken at the location on Highway 97 at 16 Mile, the property at which the marihuana grow operation was found. Collectively, this evidence suggests a massive marihuana grow operation. In the subsequent evidence of the Crown by their drug expert Sergeant Joseph Patel, the wholesale street value of the marihuana seized on the 30th of August 2005 was estimated at three million dollars, and I note that this is a wholesale gross value. This was, it is clear, a very substantial marihuana grow operation. In fact, the RCMP expert Sergeant Patel, who has numerous

years of experience as an expert and as someone involved with marihuana grow operations noted that this is one of, if not the largest, marihuana grow operation that he had ever seen.

- [15] Getting back to the photographs, collectively they show a massive and sophisticated grow operation. The grow operation appears to be arranged in such a way to provide as much cover for the marihuana grow operation from surrounding trees as is possible. There is an established sprinkler system and watering system for the grow operation, including what appears to be soaker hoses running through the base where the plants would be. There appears to be timers as well. There is evidence of fertilization, and there is evidence that the grow operation was being attended to on a daily basis by virtue of a system of covers over the marihuana grow operation which would have to be placed over the grow on a regular basis. Sergeant Patel explained the reason for this, the reason being that in order to get marihuana plants to bud appropriately you would have to minimize the light and create a situation of a shorter day, to cause or inspire the marihuana plants to in fact bud.
- [16] The photographic evidence shows that in addition to this grow operation, there was a residence at the property in question. There was, in the carport area of this residence, a substantial amount of marihuana being dried in the carport area on screens and on what appears to be poly tarps, the suggestion being that in addition to the seized grow operation there was evidence of an earlier crop. The earlier crop evidence also appears from attending at the site of the growing marihuana operation, in that there appeared to be an area of marihuana grow which had already been harvested.
- [17] The residence on location was described by Constable Tunbridge as a flophouse. There are numerous pictures of the interior of this residence, and I agree with that conclusion. There is clearly evidence of persons occupying the premises, by way of food and other general requirements for living, and there is some evidence in the photographs of at least temporary sleeping quarters, although it is uncertain as to whether or not this location was in fact anyone's actual residence. The pictures, as I have indicated, suggest that this was more of a flophouse than an actual residence. Seized at the residence was an overnight bag with an identification tag on it. The overnight bag is a small black bag, which had apparently clothes within the bag. The tag on the bag indicates the name of the accused, Mr. Stein, as well as a civic address in North Vancouver.
- [18] Returning to the vehicle after the takedown of the operation, at Chanor Towing, the vehicle of Mr. Stein was thoroughly searched. Constable Tunbridge noted that when he opened the back canopy of the vehicle, a canopy which would have been sealed during the time that it was at Chanor Towing, a strong and overwhelming smell, again, of growing marihuana emanating from the back of the seized vehicle.
- [19] In the back compartment of this grey truck, leased by Mr. Stein, was found a box. In that box, in addition to dog food, there was a small cloth bag containing within it numerous plastic baggies, which it is suggested in the evidence would be used to package marihuana. The baggies in themselves are not conclusive of that; however, this small cloth bag is sitting

in a box, and on top of the small cloth bag is a small scale, which is suggestive of a scale being used to weigh marihuana for the purposes of packaging. Also in the back of the truck was a Tupperware container containing what appeared to be a small amount of marihuana bud.

- [20] A further search of the canopy of the truck -- the seating area of the truck, this being a crew cab of sorts, there was found immediately behind the driver's seat what I will describe as a small leather briefcase. Within this leather briefcase was found a chequebook with cheques and stubs in the name of the accused Mr. Stein, with the same North Vancouver address on the cheques. Also in that leather briefcase was found a pad of paper. On one side of the paper was a sketch map, which I am satisfied is a sketch map of the property in question, showing some of the buildings and other structures on the property, and showing a number of what appear to be growing areas for marihuana, which are consistent, in my view, with the geography and at least the partial set-up of this marihuana grow operation.
- [21] On the back side of the pad of paper was a number of written instructions in regards to marihuana grow operations, which were entitled, "Two-man, two-part system." The notations suggest shade and light considerations, and suggest locations of beds related to the sun's profile and the like, and suggest two running or growing times of either seven or eight weeks. Of note, the harvest time for the cycles, depending on either a seven or eight week cycle, were noted as September 8th or September 15th. This is of particular note because Sergeant Patel, the expert called by the Crown, indicates that the grow operations seized and taken down on the 30th of August 2005 was one or two weeks away from completing its cycle or being ready for harvest. One or two weeks from August 30th, 2005, is September 8th or 15th, 2005, a date consistent with the notes on the pad of paper. In addition to the briefcase and the contents found in the cab of the truck, there was also found in the cab of the truck, although on the passenger's side, not the driver's side, a book, which is in evidence, on how to grow marihuana.
- [22] The evidence of the Crown in this case is, not surprisingly, evidence that is circumstantial in nature. Suffice it to say that it is not uncommon that the Crown's case for a marihuana grow operation would be based on circumstantial evidence. It is no doubt uncommon that persons allegedly involved in the production of a marihuana grow operation would actually be caught in the process of harvesting or maintaining the grow operation. This may be particularly true of an outdoor marihuana grow operation.
- [23] The evidence of the Crown, circumstantial though it is, consists of a number of pieces of circumstantial evidence. These include the following. First off, a truck leased by the accused, later found driven by the accused, being first noted on the property driving away on a road which comes from the outdoor marihuana grow operation. This road appears, on the evidence, not to go anywhere but to the marihuana grow operation. It does not go anywhere but to the part of the property where the marihuana grow operation was set up.

- [24] Secondly, there is evidence of the accused driving the vehicle, leaving the location in what was described as a hurried attempt to flee the premises, once the occupants of the premises became aware of the helicopter surveying the property.
- [25] Thirdly, the accused is found driving a vehicle which is leased in his name, when pulled over by the RCMP. Emanating from the passenger area of the vehicle was noted a strong smell of marihuana, after the vehicle was pulled over.
- [26] Fourth, the accused, I am satisfied, attempted to flee from the police by engaging the vehicle in drive and only stopping when yelled at by the police to do so, possibly with the police officer having drawn his firearm. The action of attempting to leave or to flee was after being instructed by the RCMP not to leave.
- [27] Fifthly, on being arrested, again a strong smell of growing marihuana was emanating from the accused and from his clothing.
- [28] Sixthly, the accused's overnight bag and personal effects was found in the residence or flophouse, as it was described, on the property in question where the marihuana grow operation was found.
- [29] Seventhly, in the canopy of the accused's leased truck, 252 grams of marihuana bud was found. Also in the canopy of the truck was found a small cloth bag containing plastic baggies, and in the same box in which the cloth bag was found, a portable scale was found.
- [30] Finally, in the cab of the truck, behind the driver's seat, a briefcase is found with the accused's chequebook, and in this briefcase is also a sketch map of the operations of the property in question, and on the opposite side instructions entitled, "Two-man, two-part system," and in the cab as well is the book on marihuana forced flowering.
- [31] The accused did not call evidence in this matter.
- [32] Crown relies on the Supreme Court of Canada case of *R. v. Jackson*, [2007] S.C.J. No. 52. In that case, the accused and four others were arrested at a secluded marihuana plantation in a remote area of the forest. The accused was convicted, and the conviction upheld by the Quebec Court of Appeal. The Supreme Court of Canada also upheld the accused's conviction. The majority of the court found that the presence of the accused at the scene of a crime does not prove culpable participation in commission of a crime. However, a trial judge is entitled to convict an accused based on other factual circumstances other than his mere presence at the scene. In *R. v. Jackson*, the Supreme Court of Canada opined that the combined or cumulative effect of all the evidence were sufficient to allow the trial judge to conclude that the accused was in fact guilty for his culpable involvement in the illegal production of marihuana. In that case, the accused was found sleeping in a camouflaged tent at a site, the tent containing fertilizer, and the accused came out of the tent wearing rubber boots which he says belonged to someone else. Additionally, the accused's prolonged and unexplained presence on the marihuana plantation was the cornerstone of the Crown's case.

- [33] Counsel for the defence on behalf of Mr. Stein has provided numerous authorities, many of which related to indoor marihuana grow operations, where various courts in British Columbia were not satisfied as to the Crown proving the necessary level of possession and control required to convict someone for either possession of a controlled substance or possession for the purpose of trafficking. The authorities provided by the defence were helpful, but I do not find them either individually or collectively compelling. In all the cases provided by the defence, there was, in my view, not the collected weight of circumstantial evidence apparent in this case. There were some aspects of this case apparent in some of the cases, but none of the cases provided by the defence had the level of circumstantial evidence that I find to be present here.
- [34] In this case, we have the accused's vehicle, which he is later found to be driving, leaving the scene of the marihuana grow operation. He is also seen in this vehicle on a road that essentially leads nowhere other than from the marihuana grow operation. The accused leaves the residence a few minutes after his vehicle is first noted, in his truck, after what is described as a hurried exit by those who left in both vehicles. The building in which they left, which I have noted was correctly described as a flophouse, contained personal property of the accused, suggesting at least temporary occupation of it by the accused. When his vehicle is pulled over by the RCMP officer on Highway 97, and despite being advised not to do so, the accused initiates an attempt to leave. The overpowering smell of marihuana is noted emanating, by the police officer, from the cab in which four persons, including the accused, are sitting. And when the accused is personally arrested, a strong smell of marihuana is noted emanating from his clothing. In the back of the accused's truck is found a bag with numerous plastic baggies, and a scale, and a sufficient quantity of marihuana to suggest the use of the scale and baggies for packaging marihuana and for subsequent sale.
- [35] Of significant note, in the cab of the vehicle is a leather briefcase, in which the accused's chequebook as well as a sketch map of this property in question, with notations suggesting that the sketch is in fact drawn by someone who is the controlling mind of the operation. I say this because the sketch map suggests divisions of the area of the property into divisions of responsibility for those areas. In a number of the suggested grow areas on the map, which are consistent with what was actually found, are references to "D and N's area." There are references to existing water lines. There are references to a number of beds and/or plants, possibly to be used for grows in various designated areas. In addition to the sketch map found in the briefcase, which I am satisfied is the accused's briefcase, there is the notations for the two-man, two-part grow operation, a system of instructions which suggests considerations of topography as it relates to growing, considerations of sunlight as it relates to growing, and a growing schedule, which dates are not only consistent with the marihuana grow operation found at the property, which would require one to two more weeks to meet maximal capacity, but are also consistent with the suggestion of an earlier crop, for which there is also clear evidence of that occurring on the property. Finally, there is the book on growing and forcing of bud in marihuana plants, found in the accused's vehicle.

- [36] All these factors create a strong and overwhelming circumstantial case against the accused. Considering all the circumstantial pieces of evidence, and there being no evidence for a logical suggestion for the existence of the evidence to the contrary, I have concluded that the Crown has proved beyond a reasonable doubt that the accused William Michael Stein was in possession of the marihuana grow operation found by the RCMP on the 30th of August 2005, on property at 16 Mile, British Columbia, outside or near Ashcroft. There is no other rational explanation for the flight and for the presence of the accused and for the smell emanating from the accused's clothing, suggestive not only of ownership of the grow operation, but also suggestive of his working the grow operation for the purposes of production.
- [37] In the agreed statement of facts and admissions, it was agreed that the cannabis seized is sufficient for a finding that it was possessed for the purpose of trafficking. Having found the accused to have been in possession of the marihuana, I am satisfied, and I find the accused William Michael Stein guilty of Count 1, of possessing a controlled substance, cannabis marihuana, for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act. Additionally, based on all the evidence, particularly the evidence of a smell of marihuana emanating from his clothing, and the evidence of him, on the morning that the marihuana grow operation is taken down, driving his vehicle away from the cropped area, I find the accused Michael William Stein guilty of Count 2, production of a controlled substance, contrary to s. 7(1) of the Controlled Drugs and Substances Act.

"The Honourable Mr. Justice Groves"

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