

CANADA / JUDGMENT

R. v. Stewart

2016 BCSC 2508

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 2508 R. v. Stewart IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Stewart, 2016 BCSC 2508 Date: 20160105 Docket: 26613 Registry: Vancouver Regina v. Colin Victor Stewart and Kevin James Jones Before: The Honourable Madam Justice Wedge Oral Ruling Voir Dire #7 Counsel for the Crown: D.A. Jardine, Q.C. M. Barrenger J.W. La Porte Counsel for the Accused C. Stewart: M. Tammen, Q.C. E. Purtzki Counsel for the Accused K. Jones: J.P.R. Desbarats Place and Date of Hearing: Vancouver, B.C. January 4, 2016 Place and Date of Judgment: Vancouver, B.C. January 5, 2016

- [1] THE COURT: This is the somewhat abbreviated ruling on Application 16, otherwise referred to by the parties as Voir Dire Number 7. I may provide more detailed reasons in due course, should that be necessary.
- [2] In this application the accused, Colin Stewart, brings a facial challenge to the DNA warrant granted on June 19, 2014, by a Provincial Court Judge. The issue is whether the authorizing justice could have granted the warrant in the absence of the information excised pursuant to my earlier ruling of December 11, 2015, on Voir Dire Number 5. Mr. Stewart submits that with those excisions the authorizing justice could not be satisfied that the statutory requirements for a DNA warrant set out in s. 487.05(1), and particularly s-s (c) of the Criminal Code, was met. It is common ground that the requirements described in s-s. (a), (b) and (d) were met.
- [3] The contentious element is s-s (c) which requires the authorizing justice to be satisfied there are reasonable grounds to believe that the "person targeted by the warrant was a party to the offence". It is also undisputed that the reasonable grounds standard in the context of the Criminal Code section is a standard of "credibly-based probability" or a "reasonable probability". This requires more than suspicion, conjecture, or hypothesis, but less than a balance of probabilities. The court reviewing the authorization must have regard to the totality of the circumstances. I will go no further into the legal analysis which is contained in earlier rulings, except to reiterate that I am mindful that the test is whether in this case, based on the excised ITO, the authorization could have been issued, not whether the reviewing court would have granted the authorization.

- [4] The Crown submits that there was some evidence meeting the reasonable probability standard on the basis of which the authorizing justice could be satisfied that Colin Stewart was a party to the murder. Section 21(1) of the Criminal Code describes a party to an offence. It is one who actually commits the offence, or does or omits to do anything for the purpose of aiding a person who actually commits the offence, or abets any person in the commission of the offence.
- [5] The Crown says there is overwhelming evidence set out in the affidavit, even after all the necessary excisions are made, that Jesse Adkins was a member of the UN gang and was paid to kill the intended target of the shooting, Randy Naiker. Further, Adkins was, at the time of the murder -- that is, in September of 2009 -- a resident of 518 Foster Avenue where Mr. Stewart lived. Adkins had been seen there by police on the night before the murder, along with the vehicle very likely used as the getaway car by the shooters in the Soomel murder. He was also seen driving away from the residence two or three days after the murder.
- [6] I accept the Crown's submission that there is ample evidence in the excised affidavit on which the authorizing justice could reasonably conclude that Jesse Adkins was a party to the Soomel murder, that he was a resident of 518 Foster Avenue during the material time, and that he was likely physically present at the residence the night before and only hours after the murder. However, the issue is whether the evidence of Colin Stewart's association with Jesse Adkins establishes a credibly-based probability that he was a party to the Soomel murder in any one of the three ways described in s. 21(1) of the Criminal Code.
- [7] I concluded in my December 11, 2015 reasons that the evidence of Stewart's association with Adkins fell well short of the standard required for the belief that he was a suspect in the murder. The evidence contained in the affidavit in support of the warrant at that time was that Adkins likely resided at 518 Foster Avenue at the material time, that his car was seen there both immediately before and shortly after the murder, and that Stewart was seen by police with Adkins in Adkins' vehicle some three weeks earlier. There was also evidence of one of the staffers at Dick Bell Irving Halfway House ("DBI") where Randy Naiker and Raj Soomel were living, that the day after Naiker became a resident, Adkins' vehicle was seen staking out the house. The car reportedly contained three Caucasian males.
- [8] The additional evidence contained in the affidavit supporting the June 19, 2014 DNA warrant after required excisions is as follows: first, that one of the two shooters was taller and slimmer than the other, perhaps as tall as six foot two which approximated Mr. Stewart's height and build; second, that one of the Caucasian males seen in the Adkins' vehicle by the DBI staffer had brown hair with a buzz cut similar to that of Mr. Stewart; thirdly and most significantly, the Crown relies on a new piece of evidence, which is that on September 17, 2009, police surveillance observed Colin Stewart with Jesse Adkins at an apparent lunch meeting with known UN gang members.

- [9] One of the UN members at the meeting was Cory Vallee, described in the affidavit as a person who would do work as a contract killer for the UN gang. Stewart was seen at one point having a cigarette with Mr. Vallee. Stewart was seen driving away from the café with Adkins, then returning to the café where they were seen briefly with another UN gang member. Stewart then again left with Adkins in his car.
- [10] The Crown submits that this meeting some three days after Naiker's impending release on parole was publicized in the local newspaper establishes a credibly-based probability that it was linked to the plan of the UN gang to kill Naiker, who was reputed to be a member of the Independent Soldiers. There was some evidence to the effect that there were bad feelings between the UN gang and the Independent Soldiers. There is evidence in the affidavit recounting information given by confidential informants that the target of the shooting was Naiker and not Soomel, and that Adkins was one of the participants in the murder.
- [11] I have reviewed the excised affidavit carefully with the position of the Crown in mind. I have looked for any evidence that would take the Crown's position beyond conjecture or hypothesis. It is a hypothesis certainly that such a meeting of high level UN gang members could be about a plan to murder Naiker, but that hypothesis is based almost entirely on the temporal connection between the newspaper article about Naiker's release and the attendance at the Cozmos restaurant of the UN gang members, Adkins and Stewart. The business of the UN gang is known to be primarily drug dealing.
- [12] One could equally hypothesize or conjecture that the lunch meeting was about a drug deal. On the surveillance evidence described in the affidavit it could well have involved a handing off of drugs. Paragraph 44(g), for example, recounts that moments after Adkins and Stewart returned to the rear parking lot of the café, a known UN gang member handed something he had removed from a clear plastic bag to Cory Vallee. Mr. Vallee and Mr. Stewart were seen standing by the driver's door of the gang member's car. However, there is no suggestion that anything was handed off to Stewart by Vallee. There is simply nothing on which one could conclude with reasonable probability that the meeting at the Cozmos restaurant had anything to do with the Soomel murder. It is conjecture or hypothesis without an evidentiary foundation.
- [13] I am satisfied the evidence of the association between Adkins and Stewart viewed in totality in the excised affidavit cannot meet the requisite test of reasonable probability. Accordingly, the June 20 DNA warrant must be set aside which means the taking of Mr. Stewart's DNA on June 20, 2014, was unlawful. The Honourable Madam Justice C.A. Wedge

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