
CANADA / JUDGMENT

R. v. Sundman

2018 BCSC 2040

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sundman,

2018 BCSC 2040

Date: 20181119

Docket: 42212

Registry: Prince George

Regina

v.

Darren Caley Daniel Sundman, Kurtis Riley Sundman and

Sebastian Blake Martin also known as Sebastian Blake Thomas

Before: The Honourable Mr. Justice Williams

Voir Dire Ruling: Martin Search

Counsel for the Crown:

J. Temple

A. Norlund

Counsel for the Accused,

Darren C. D. Sundman:

J. Gustafson

Counsel for the Accused,

Kurtis R. Sundman:

B. Smith

Counsel for the Accused,

Sebastian B. Martin:

J. Heller

Place and Date of Trial/Hearing:

Prince George, B.C.

March 20-24, 27-31, 2017;

April 3-7, 10-12, 18-21, 24-27, 2017;

and May 15-19, 2017

Place and Date of Judgment:

Prince George, B.C.

November 19, 2018

- [1] Sebastian Blake Martin applies for an order of the Court finding that the police violated his ss. 8 and 9 rights under the Canadian Charter of Rights and Freedoms Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 by arbitrarily detaining, searching and seizing items from him when they apprehended him in Vanderhoof, BC and transported him in custody to his home before and during the execution of a search warrant on February 25, 2015.

The Background Circumstances

- [2] Mr. Martin and two co-accused persons, Darren Sundman and Kurtis Sundman, are charged with having committed the first-degree murder of Jordan McLeod in January 2015 at or near Prince George, BC. Their trial, before a jury, is scheduled to commence in October 2017.
- [3] In the course of the investigation leading up to the charges being laid, police executed a search warrant on the residence where Mr. Martin lived. That house was located on the Stoney Creek Reserve near Vanderhoof, BC.
- [4] Mr. Martin does not challenge the validity of the warrant that was used to authorize the search. Rather, he challenges the admissibility of the proceeds of the search on the basis of other related dealings that the police had with him at and around the time of the search. In his submission, his Charter rights were violated in those dealings, and the appropriate remedy is an order that the Crown not be permitted to adduce the proceeds of the search.

- [5] On February 25, 2015, police prepared to execute the warrant. They had officers attend at the residence on the Stoney Creek Reserve.
- [6] Among the items being sought by the police were the boots worn by Mr. Martin, as it was believed that they might match footprints found at the scene of the murder. The police also wanted to seize any cellular telephone that Mr. Martin might have in his possession.
- [7] In fact, the police were uncertain that Mr. Martin would be present at the residence when they attended to execute the warrant and, because they wanted to search his person as well, they devised an alternate plan.
- [8] Their alternate plan was that, if Mr. Martin was not at the residence when the police attended, they would refrain from immediately executing the warrant. Instead, they would make efforts to locate him. They believed that he would likely be in or around Vanderhoof and would not be difficult to find.
- [9] When the police arrived at the residence, they saw a man leaving the premises. That person, who also lived there, spoke with the officers and indicated to them that Mr. Martin was not present at the time. Accordingly, the police decided to shift to their alternate plan.
- [10] The police held off entering the home or executing a warrant. Instead, officers were directed to attempt to locate Mr. Martin in Vanderhoof. He was located in fairly short order, by the side of the road and apparently hitchhiking a ride. When the police saw him, they pulled over, confronted him and detained him. On the basis of the evidence on this voir dire, it is clear that the police strategy did not involve arresting Mr. Martin at this time. Instead, they wanted to secure him temporarily and search him for the items they sought.
- [11] One of the officers, Cpl. Smith, advised Mr. Martin that he was being detained. He provided a s. 10 warning. The police also conducted a search of Mr. Martin; specifically, they searched the backpack that he had with him.
- [12] With respect to access to counsel, Mr. Martin indicated he wanted to speak to a lawyer. Accordingly, a call was made from a cellular telephone from the roadside. The call was placed to a lawyer in Prince George, Mr. LeBlond, as requested by Mr. Martin. Mr. LeBlond was not in his office when the call was made nor was any other lawyer available. The receptionist advised the police that someone would be available later in the day, probably shortly after 4:00 p.m.
- [13] Cpl. Smith then asked Mr. Martin if he wished to contact Legal Aid. Mr. Martin indicated that because he understood his detention would be brief he would not do that. He reiterated that it was Mr. LeBlond with whom he wished to speak.
- [14] The police then transported Mr. Martin to the residence on the reserve, the site of the intended search. On arrival, the execution of the warrant began.

- [15] The first matter to arise was that there was no ready access to the house and it was locked. The police asked Mr. Martin to assist them in making entry so that no damage would be done. Mr. Martin did not have a key but he agreed to open the door with a screwdriver.
- [16] The police then asked him which room was his and asked him if there were any firearms present. The thrust of the inquiry was along the lines of "this can be easy or this can be hard". Mr. Martin indicated that there were no firearms present and that there were no cell phones. He also pointed out his room.
- [17] For a portion of the time that the search warrant was being executed, Mr. Martin was held outside the residence, confined to the backseat of a police car. At one point, the police took him inside and sought to examine his clothing. That entailed having him remove his garments one by one and photographs were taken of that process.
- [18] At some point in the time that he was with the police, Mr. Martin indicated that he had to go to the bathroom. The officer suggested that he could go outdoors, along the side of the house. It is not clear as to why he was not allowed access to the bathroom in the house.
- [19] Also while Mr. Martin was with the police, Cpl. Smith attempted to elicit a statement about the matter under investigation. Mr. Martin declined.
- [20] After some time had passed, the search was completed and Mr. Martin was allowed to go on his way. Because the police had taken his footwear, he was given access to some sandals. The evidence is that they were not his sandals. The footwear he was provided appears to have been quite inappropriate for the circumstances, especially given the cold, inclement February weather.
- [21] In the course of the search of the residence, items were seized. My understanding is that three of those items are relevant to the prosecution:
1. a large portable lamp;
 2. score sheets and other materials indicative of drug dealing; and
 3. 2 cellular telephones.

Positions of the Parties

- [22] The Crown makes clear that it does not seek to lead any evidence of what was obtained in the search of Mr. Martin's person. The Crown only seeks to lead evidence of certain items found inside the house, including the three items noted above, obtained pursuant to the warrant. Similarly, the Crown does not seek to lead any evidence of the conversation between Mr. Martin and the police officers during the course of this transaction.
- [23] Mr. Martin challenges the admissibility of the evidence obtained in the search of the house. While he acknowledges there was a valid warrant for the search, he says that the particulars of how the search was conducted and how he was dealt with, including what are alleged to

be a number of breaches of Mr. Martin's Charter rights, in the course of the events I have described, constitutes a basis for the Court to conclude on a balance of probabilities that the manner in which the search was executed was unreasonable. Accordingly, if such a finding is made, the defence contends that a fair application of the criteria of s. 24(2) should result in the exclusion of the evidence.

Discussion

a) Sections 8 & 9

- [24] Mr. Martin says that the detention was at best a botched procedure. The detention was lengthy and curiously resulted in Mr. Martin being transported by the police, essentially in custody, to the site of the actual search, and then being treated almost as though he had been found there at the outset.
- [25] In Mr. Martin's submission, the appropriate course would have been for the police to arrest him and, had they done so, he would have been provided with the full and appropriate spectrum of rights that accrue upon arrest. Alternatively, he suggests that it was open to the police to obtain a general warrant if they wished to effect a search of his person to see if he had the shoes that they were interested in or a telephone. He submits that the searches which were made of his person and his backpack were substantially in excess of any right of search that the police would have pursuant to an investigative detention.
- [26] Also, with regard to his initial dealings with the police, Mr. Martin says that the manner in which his s. 10 rights were afforded was inadequate.
- [27] Once he had been transported to his residence, Mr. Martin submits that he was treated improperly, and that he was conscripted to assist the police in their search efforts by enabling them to gain entry to the residence and by providing them with specific information as to which was his room.
- [28] Additionally, Mr. Martin says that the manner in which he was treated at the residence, particularly by being asked to relieve himself outside the house, was offensive and improper. He says as well that the police search of his person, that is, examining his clothing and requiring him to remove each item while being photographed, was unreasonable and not within the power of search that the police had in the circumstances. Finally, he says that the efforts by the police to interview him when they knew full well that he was awaiting contact with counsel was a breach of the police obligation to hold off until he had actually consulted with counsel.
- [29] In short, Mr. Martin's position is that he was mistreated in a number of ways, that the detention went on far longer than any legitimate notion of investigative detention envisions, and that the search which was executed on his person exceeded any authority the police had in the circumstances. He says the police were at best cavalier with respect to his s. 10 rights.

- [30] The Crown submits that in fact, the police had made inquiries with legal counsel in anticipation of finding Mr. Martin by the roadside. The officer testifies that this legal counsel told the police that the detention model outlined above would be appropriate.
- [31] The evidence of the legal advice was not developed in any meaningful way in the voir dire and, in the totality of the circumstances, I am unable to find that aspect of the matter is of any redeeming effect.
- [32] Significantly, the officer who was nominally in charge of this operation, Cpl. Smith, fully and quite abjectly conceded in cross-examination that much of what was done seemed, certainly with the benefit of hindsight, to have been ill advised and of dubious propriety.
- [33] Notwithstanding the officer's concession, the Crown submits that there is solid authority for the proposition that where the police believe that evidence of an offence will be found, they have the right to search for that evidence. The Crown submits that is what happened in this case, and the detention was but an incident of the search. In support of its position, the Crown relies upon two decisions of the Supreme Court of Canada, *R. v. MacKenzie*, 2013 SCC 50 and the companion case *R. v. Chehil*, 2013 SCC 49.
- [34] Having considered those authorities, it is my view that they do not stand for the broad proposition that the Crown claims. I note that each of those were dog sniffer cases, and I understand the Court's pronouncement to be limited to such cases.
- [35] The overarching, foundational principle regarding s. 8 searches authorized by law is that these search must be executed in a reasonable manner: *R. v. Fearon*, 2014 SCC 77 at para. 120 citing *R. v. Collins*, [1987] 1 S.C.R. 265 at 278; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 161.
- [36] In my view, the relevant authority regarding the reasonableness of the search is *R. v. Mann*, 2004 SCC 52. In that case, the Court concluded that there was a power of search incidental to investigative detention but it is limited to a "pat down search". The Court noted that such a right of search does not exist as a matter of course. The officer must believe on reasonable grounds that his or her safety or the safety of others is at risk. I do not understand the Court to have concluded that the authority to detain for investigative purposes endorses an incidental search in all circumstances. The Court made clear that the officer's decision to search must be reasonably necessary in light of the totality of the circumstances.
- [37] The Court's summary conclusion is found at para. 45. In short, the detention should be brief, the detainee is not obliged to answer questions, and the search power is circumscribed.
- [38] In the result, it is my view that the so-called detention in the matter at hand exceeded what the law provides and the search which accompanied it was in excess of the authority that the law grants.

- [39] With regard to Mr. Martin's contention that the proper course of action was for the police to obtain a general warrant, I do not find it either necessary or useful to make a definitive pronouncement on that.
- [40] In my view, there were a number of significant irregularities in the manner in which the police conducted their investigation, and that those resulted in breaches of Mr. Martin's Charter rights. Specifically, I find that the search of Mr. Martin's person and his backpack exceeded the authority that the police had in the circumstances. Once he had been transported to the residence, and recognizing that the police knew that he had not been able to consult with counsel, even though he had indicated that he wished to do so, it was improper for the police to have enlisted his assistance to make entry to the residence and to provide them with information about the residence. Furthermore, it was clearly inappropriate for the police to seek to elicit a statement from Mr. Martin, knowing that he had not spoken to counsel. This was a clear breach of the police duty to hold off their questioning.
- [41] Additionally, I am troubled by what I consider to be treatment of Mr. Martin that verged on callous. Specifically, I referred to the police requiring him to relieve himself outside the home, by the side of the house, and the matter of taking his footwear. The police took no steps to provide him with something appropriate to wear at the conclusion of his involvement with the police. Instead, he was in the position of being outdoors, in the cold winter weather, wearing a pair of sandals.
- [42] My conclusion is largely informed by the constellation of events that occurred, each of them constituting a disquieting disregard for the legal rights of Mr. Martin. While I did not find that the evidence of the police establishes a malice or specific intention to treat him improperly, the police conduct can, at best, be described as a benign disregard for Mr. Martin's rights which warrants judicial censure.
- [43] In the circumstances, I conclude that Mr. Martin's Charter rights under ss. 8 and 9 were violated. As regards the search of the residence, while it was conducted under the authority of a valid search warrant, the totality of the surrounding activities is relevant and satisfies me the manner in which the search was executed was unreasonable.
- b) Section 24(2)
- [44] Where, as here, the Crown proposes to adduce evidence which is obtained by way of a breach of an accused's Charter rights, the Court is required to conduct an analysis under s. 24(2) to determine whether or not the evidence should be excluded. As stated in *R. v. Grant*, 2009 SCC 32 at para. 71, this determination involves a consideration of three factors:
1. the seriousness of the conduct that infringed the Charter right;
 2. the impact of the breaches on the Charter protected interests of the accused; and
 3. society's interest in the adjudication of the case on its merits.

- [45] It is important to note the precise wording of s. 24(2):
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
- [46] Accordingly, the remedy is related to the issue of whether evidence was obtained in a manner that infringed or denied any Charter rights or freedoms. In this case, that is not perfectly straightforward. It is more a matter of there having been Charter breaches found in the surrounding conduct of the police vis-à-vis Mr. Martin.
- [47] Nevertheless, I am not of the view that strict causation is necessary for a remedy to be available. In this regard, I find the comment of Doherty J.A. in *R. v. H.* (T.G.), 2014 ONCA 460 at para. 52 informative:
- [52] The breach of the appellant's s. 10(b) rights was not causally connected to the evidence gathered during the execution of the general warrant. There is no suggestion that "but for" the breach of s. 10(b) the police would not have executed the warrant and obtained the photographs. There is, however, a clear temporal and transactional link between the breach, the execution of the warrant, and the retrieval of the evidence. That connection is enough to bring the exclusionary power of s. 24(2) to bear on the evidence gathered in the execution of the general warrant: see *R. v. Strachan*, [1988] 2 S.C.R. 980 (S.C.C.), at pp. 1000-06; *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.), at paras. 44-45.
- [48] In my view, that analysis has application to the matter at hand. Accordingly, the three Grant factor are applicable to determine the admissibility of the evidence.
- [49] I find that the seriousness of the police misconduct was both protracted and significant. As my reasons indicate, there were a series of cascading improprieties. The matter of the search at the roadside, the transport of Mr. Martin to the residence, the matter of enlisting his assistance to affect the search, and the attempt to interview him, knowing that he wished to speak to counsel and knowing that he had not done so, all are troubling.
- [50] In his submissions, Mr. Martin urges the Court to find that the events demonstrated, at best, a police nonchalance with respect to his rights, and that the police demonstrated a casual indifference about his dignity.
- [51] I consider those observations to be valid. In my view, the protracted and successive number of breaches, bearing upon his person, lead me to conclude that the police misconduct was serious.

- [52] With respect to the impact of the breaches on the Charter protected interest of Mr. Martin, it is relevant that the Crown does not propose to tender any evidence that was seized from his person nor any statement that he made in the course of his detention. Nevertheless, the Crown does seek to tender into evidence physical items that were found in the search of his residence.
- [53] Each of the items are capable of having significant impact on his defence of the charge. In that regard, admission of the evidence could have a serious detrimental impact on the Charter protected interests of Mr. Martin.
- [54] The third element of the analysis is concerned with society's interest in adjudication of the case on its merits.
- [55] In this regard, Mr. Martin concedes that this branch of the test favours inclusion, particularly in light of the seriousness of the offence. At the same time, he submits that the evidence at issue is by no means the whole of the Crown case, and in fact the Crown's case will not be significantly adversely affected by exclusion. That is, excluding the evidence would not seriously imperil society's interest in an adjudication of the case on its merits. Rather, the trial would be fairer because it would not be tainted by the admission of evidence obtained in the course of an unreasonable conducted search.
- [56] Based upon my understanding of the case and the evidence available, I accept Mr. Martin's characterization and proceed on the understanding that exclusion of the evidence will not seriously hamper a fair adjudication of the case on its merits.
- [57] In all the circumstances, it is my view that the evidence at issue should be excluded.

"J. Williams J."

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