
CANADA / JUDGMENT

R. v. Unger

2013 BCSC 185

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 185 R. v. Unger

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Unger,

2013 BCSC 185

Date: 20130206

Docket: 57680

Registry: Chilliwack

Regina

v.

Rodney Allen Unger

Before: The Honourable Madam Justice B.J. Brown

Voir Dire Ruling re: Charter Breaches

and Exclusion of Evidence

Counsel for the Crown:

A. Turton

Counsel for the Accused:

S. Paterson

Place and Date of Hearing:

Chilliwack, B.C.

December 17 - 20, 2012

Place and Date of Judgment:

Chilliwack, B.C.

February 06, 2013

I. Introduction

- [1] Mr. Unger is charged with possession of methamphetamine for the purpose of trafficking and three counts of possession of a firearm without a licence. Mr. Unger says that his ss. 8 and 9 Charter rights were breached and asks for an order excluding certain evidence pursuant to s. 24(2) of the Charter.

II. Evidence

- [2] On April 7, 2011, police attended the residence of Mark Perkins to execute a warrant for his arrest. The property is in a remote rural area near Chilliwack, British Columbia. Police knocked on the door. No one answered, although the officers could hear movement within and assumed that the occupants were avoiding answering the door.
- [3] In the evening of April 7, one of the officers, Constable Godard, received a tip that people were moving around on the property using flashlights with the house lights turned off and that a vehicle had pulled onto the property with its lights also turned off.
- [4] Constable Godard assembled a team to attend at the residence, as he believed that Mr. Perkins could be there. He and three other police officers attended the property to arrest Mr. Perkins. It was late night, close to midnight. They parked their police vehicles some distance from the property, as they did not want their lights or the sound of a vehicle to alert the residents. Constable Godard and his partner, Constable Lane, continued on foot. Constable Godard carried a Forward Looking Infra-red device, which he used to locate what he believed to be two people in the driveway. He could hear metal on metal, which he believed to be the sound of something being moved. He could also see a vehicle. The headlights on the vehicle came on and the vehicle started to move.
- [5] Constable Lane said that as they walked toward Mr. Perkins' property, he could hear voices and could see a beam of light from a flashlight. Someone appeared to be rummaging around inside a pickup truck. He surmised that there was a person in the bed of the truck.
- [6] Constables Godard and Lane retreated. Constable Lane saw the driver get out and close the gate. The inside of the vehicle was lit and Constable Lane could see the shadow of a passenger in the truck, although he could not tell if the second person was male or female. The driver re-entered the truck and drove down Lookout Road toward Chilliwack.

- [7] From his vantage point, Constable Godard heard the vehicle stop and a door open. Someone "tinkered at the gate" and the vehicle subsequently departed. Constable Godard decided to stop the vehicle, believing that Mr. Perkins could be in it. Given Constable Godard's failed efforts earlier in the day to arrest Mr. Perkins at his residence, he believed that Mr. Perkins was evading arrest.
- [8] The two police vehicles followed the truck for a short distance, when it suddenly pulled over to the side of the road. The first police vehicle, carrying Corporal Bosnell and Constable Nicholson, pulled in front of the truck, while the second vehicle, carrying Constables Godard and Lane, pulled in behind, boxing it in.
- [9] The police officers left their vehicles. Corporal Bosnell and Constable Nicholson moved toward the driver's door. Constables Godard and Lane went toward the passenger door.
- [10] Corporal Bosnell testified that he quickly got out of his vehicle because he was concerned about Mr. Perkins escaping. He was blinded by the headlights of the truck and he did not know who was in the vehicle. The engine of the truck was still running as he approached it, prompting him to yell at the driver, "Police! Turn off the vehicle!" He drew his firearm because he was concerned about the driver using the truck as a weapon. He continued to yell at the driver to turn the vehicle off, but the driver did not comply. Since the driver failed to comply with multiple direct orders to turn off the vehicle, Corporal Bosnell approached the driver's door and opened it for the purpose of disengaging the vehicle's engine.
- [11] As Corporal Bosnell opened the door, he recognized Mr. Unger as the driver. The passenger was a blonde female that he did not recognize. At the time, he did not know whether Mr. Perkins had jumped out or was not present. There was some communication to the effect of "He's not here...he's not here".
- [12] In addition, upon opening the door, immediately within Corporal Bosnell's line of vision were drugs in a storage area of the driver's door. The drugs were contained within a clear plastic bag and appeared to be crystal meth. He also saw baggies and a scale. The drugs were sitting almost flush with the top of the storage tray in the door, which was illuminated by the headlights of the police vehicle that had pulled behind the truck. Corporal Bosnell asked Mr. Unger to step out of the vehicle and took control of the drugs. Mr. Unger said, "It's just for personal use."
- [13] Corporal Bosnell concluded that the quantity of drugs and the other items were consistent with possession for the purpose of trafficking. The amount of the drugs was well beyond what a person would have for personal use, and there were several smaller one-by-one inch baggies which are typically used to repackaging the drugs for resale. With respect to the scale, Corporal Bosnell testified that users do not typically weigh their drugs. Corporal Bosnell advised Mr. Unger that he was under arrest for possession for the purpose of trafficking. He and Constable Nicholson then conducted a cursory search of Mr. Unger and found a pipe and \$130 in cash. Also, a cell phone rang in the truck. When Corporal Bosnell answered it, a male said, "Rod, looking for five...meet by Vedder River."

- [14] At 12:04 a.m., Corporal Bosnell read Mr. Unger his Charter rights and the police caution. Mr. Unger said that he understood his Charter rights and the caution and that he did not want to talk to a lawyer. Corporal Bosnell told Mr. Unger that the officers could try to reach a lawyer using a cell phone. Mr. Unger declined.
- [15] Constable Lane began searching the vehicle inside the cab, but did not find anything of significance. He then searched the back of the truck and found a blue backpack. Upon opening the backpack, he saw that it contained items which were wrapped. He reached into the backpack and could feel that one of them was a firearm.
- [16] Corporal Bosnell was with Mr. Unger a bit away from the truck while Constable Lane searched the vehicle. Corporal Bosnell observed that Mr. Unger became distracted when Constable Lane began to search the back of the truck. Mr. Unger eventually announced, "There are three guns in there". On his own evidence, however, Constable Lane did not hear Mr. Unger's statement before reaching into the backpack. Rather, shortly after reaching into the backpack, Constable Lane looked toward Mr. Unger, who then indicated that, in fact, there were weapons in the backpack and that he had already acknowledged the same to Corporal Bosnell.
- [17] After receiving this confirmation from Mr. Unger as to the nature of the items in the backpack, Constable Lane removed the covering and found three handguns which were all locked with trigger locks. Two were .357 Magnums and one was a .22 semi-automatic Ruger Mark II. Constable Lane was holding the blue backpack when Mr. Unger again said to Corporal Bosnell that it contained ".357 Magnums".
- [18] At 12:11 a.m., Corporal Bosnell arrested Mr. Unger for unlawful possession of three firearms. At 12:18 a.m., he read Mr. Unger his ss. 10(a) and (b) rights regarding these additional offences. Mr. Unger again said that he understood and that he did not want to speak with a lawyer. By 12:23 a.m., there was still no transport to take Mr. Unger to the police station and Corporal Bosnell asked Mr. Unger if he wanted to speak to a lawyer on his cell phone. Again, Mr. Unger declined. Mr. Unger was eventually transported by Constable Penner to the police station.
- [19] Mr. Perkins was not in the vehicle. The officers later discovered that Mr. Perkins had already voluntarily surrendered himself to the police.

III. Positions of the Parties

- [20] Mr. Unger filed an application to exclude evidence pursuant to s. 24(2) of the Charter, asserting that his ss. 8, 9 and 10 Charter rights were violated.
- [21] During argument, however, I was advised that Mr. Unger did not take issue with respect to the voluntariness of any statements that he made and that he was no longer asserting that his s. 10 Charter rights were breached. Accordingly, the focus of this voir dire is only on the alleged ss. 8 and 9 Charter rights violations.

- [22] Mr. Unger first argues that he was arbitrarily detained. When the truck left Mr. Perkins' property, police hoped that Mr. Perkins was within the vehicle. But Mr. Unger says that they had no reason to believe that he was. He argues that the door to the vehicle was opened by Corporal Bosnell illegally and without a warrant; and without the door having been illegally opened, it is highly unlikely that anyone would have seen drugs in the door of the vehicle in the available light. Also, Mr. Unger says the police had no reason to believe that Mr. Perkins was in the vehicle, as they must have known by that point in time that Mr. Perkins was not present. Moreover, Corporal Bosnell acknowledges that Mr. Unger said to him at some point "he's not here". He argues that, in the circumstances, there was no reason to think that the person driving the truck would suddenly drive into the police car or attempt to escape the police. He says that police should wait at least one whole minute for the engine to be turned off before making any attempts to disengage the engine themselves. Had they followed such a protocol, none of this would have happened.
- [23] He also argues that the manner in which the police stopped the vehicle and approached it, with guns drawn, was unnecessary and improper. Mr. Unger says that once Corporal Bosnell saw that it was him driving the truck, there was no reason to detain him or search the vehicle or arrest his passenger, Ms. Gribbin.
- [24] He says that there were no objective criteria to support detention. It was mere speculation that Mr. Perkins would be present in the vehicle.
- [25] He argues that the case is outlandish and brings the administration of justice into disrepute.
- [26] The Crown argues that Mr. Unger's ss. 8, 9 and 10 Charter rights were not violated.
- [27] With respect to s. 9, the Crown argues that Mr. Unger was detained, but his detention was not arbitrary. Police reasonably believed that Mr. Perkins could have been in the vehicle. The vehicle left Mr. Perkins' residence. Police were there to locate Mr. Perkins on an outstanding warrant. They had very recent information of unusual activity at the property, taking place late at night. They also reasonably concluded, based on the events at Mr. Perkins' residence earlier in the day, that Mr. Perkins had been avoiding arrest. Mr. Perkins and Mr. Unger were known to be associates, so police could reasonably expect Mr. Perkins to be found in Mr. Unger's truck. There were reasonable grounds to detain Mr. Unger and to investigate whether Mr. Perkins was in the vehicle.
- [28] As for the manner in which the detention was carried out, because of the remoteness and the time of night, the Crown says police reasonably had concerns for officer safety. Corporal Bosnell opened the door of the vehicle for safety reasons, that is, to control the situation. The driver was not complying with police requests to turn off the engine and the idling vehicle posed a threat as a potential weapon that could be used against the officers and their vehicles.

- [29] Regarding s. 8, the Crown says that once the door was opened, the drugs were in plain view. Had they not been visible and had Corporal Bosnell not seen the drugs, the detention would have ended. Once the drugs were located, however, the arrest was lawful. Corporal Bosnell had reasonable and probable grounds to arrest the driver after seeing the drugs, scale and plastic baggies.
- [30] Thereafter, police searched the vehicle incidental to arrest. Mr. Unger was in care and control of the vehicle, and it was entirely appropriate to search the vehicle.
- [31] With respect to s. 10, the Crown says that Mr. Unger was advised of the reasons for his arrest and was provided with his Charter rights and access to counsel forthwith after each of the charges.
- [32] The Crown further argues that if I conclude that there were Charter breaches, then the exclusion of the evidence would bring the administration of justice into disrepute because this is real evidence that is crucial to the Crown's case and there is no evidence of bad faith on the part of the officers. Further, even if the detention were arbitrary, it was very brief, lasting only seconds before the lawful arrest. Accordingly, the Crown says all of the circumstances weigh in favour of admission of the evidence.

IV. Discussion

[33] The issues in this case are:

- (i) Did the police arbitrarily detain Mr. Unger when they stopped his truck and ordered him to turn off the engine?
 - (ii) Did Corporal Bosnell violate Mr. Unger's s. 8 Charter rights by opening up the truck door with the intention of turning off the engine?
 - (iii) With respect to the narcotics found by Corporal Bosnell, does the "plain view doctrine" apply in these circumstances?
 - (iv) Did Constable Lane breach Mr. Unger's s. 8 Charter rights in these circumstances by searching the back of the truck and the backpack without a warrant?
 - (v) If there were Charter breaches in this case, should any of the evidence be excluded pursuant to s. 24(2)?
- [34] I have concluded that Mr. Unger's rights were not breached and that the evidence should not be excluded. I accept the evidence of the police officers as set out above. Although there are minor differences in the officers' accounts, their evidence is consistent in many respects and in the significant aspects; the inconsistencies are those found in recollections of honest witnesses.

A. Did the police arbitrarily detain Mr. Unger?

- [35] In my view, the officers did not arbitrarily detain Mr. Unger. There were reasonable grounds to detain for investigative purposes, subjectively and objectively. From the officers' testimony, it is clear that the police, in fact, believed Mr. Perkins may have been riding in the truck. Given the circumstances in this case, it was reasonable for police to suspect that Mr. Perkins may be found in a vehicle leaving his property. It was also reasonable for them to believe that Mr. Perkins was avoiding arrest, given the failure to answer the door earlier in the day and the clandestine activity on the property that night. This did not change when police recognized the pickup as one usually driven by Mr. Unger, given that they knew Mr. Unger to be an associate of Mr. Perkins. It was reasonable for them to detain Mr. Unger in order to determine if Mr. Perkins was in the truck.
- [36] I also find that the detention was conducted in a reasonable manner. I find that it was reasonable in these circumstances for the police to draw their weapons. Again, the officers did not know who was in the truck and had reasonable suspicion that the individual controlling the vehicle may decide to take evasive action, placing their lives in danger. The Court of Appeal recently acknowledged the high risk that police officers face when they enter into unknown and dynamic situations, particularly when approaching a stationary, occupied vehicle, even when that risk is not readily observable: *R. v. Crocker*, 2009 BCCA 388 at para. 63, leave to appeal ref'd [2009] S.C.C.A. No. 466. Had Mr. Unger turned the vehicle off as requested, the police likely would have quickly determined that Mr. Perkins was not in the vehicle and the detention would have ended. Instead, after pulling over in a dark and remote area, Mr. Unger disobeyed direct police orders, failing or refusing to turn off the truck, which only fuelled concerns for officer safety. Finally, the detention continued only when Corporal Bosnell saw the drugs in the vehicle.

B. Did Corporal Bosnell violate Mr. Unger's s. 8 Charter rights when he opened the truck door?

- [37] I accept Corporal Bosnell's evidence that he opened the door because he was concerned about safety and he thought that, with the engine still running, the driver might ram the police vehicle, allowing Mr. Perkins to flee. He repeatedly asked for the driver to turn the engine off before opening the door. In doing so, he did not intend to search the vehicle. In my view, opening the door does not constitute a search in these circumstances.
- [38] Even if opening the door did constitute a search, although a motorist does have some expectation of privacy, in this case, I have concluded that there were exigent circumstances, namely Mr. Unger's failure to disengage the truck's engine, which justified the opening of the door by Corporal Bosnell.
- [39] Lastly, I do not accede to the argument of counsel for Mr. Unger that, as a rule, police are required to wait one full minute for the engine to be turned off before making any attempts to disengage the engine. Police officers often face dangerous situations, and investigations are often carried out in dynamic and volatile circumstances. Accordingly, in conducting investigations, police are afforded significant discretion, which should not be unnecessarily fettered by arbitrary rules. Whether a search is reasonable requires a detailed analysis of all

the circumstances.

C. Does the "plain view doctrine" apply?

[40] In *R. v. Gibson*, 2003 BCSC 1572 at para. 18, Halfyard J. summarized the essential elements of the "plain view doctrine" as follows:

[18] I next consider the plain view doctrine. This rule of law permits the police to seize evidence that is in plain view if certain conditions are proved. As I read the authorities, the elements that are essential to the application of this doctrine are the following. (This is my paraphrasing.) First, that the police officer had lawful, prior justification for his or her intrusion into or presence at the place where the evidence was found. Second, that the police officer discovered the evidence inadvertently while in the course of exercising a lawful police power or performing a lawful police duty. Third, that the evidence was in plain view in the sense that it was detected through the unaided use of the police officer's senses. Fourth, that it must have been immediately apparent to the police officer that the evidence was probably connected with criminal activity.

[41] Here, as I have already found, the police had a lawful prior justification for opening the truck door. Once the door was opened, Corporal Bosnell could see the drugs on top of the storage tray, almost at his eye level, illuminated by the headlights from the police vehicle that pulled up behind the truck. It was immediately apparent to him that the drugs were packaged for the purposes of trafficking: there was a significant amount of methamphetamine, a scale, and the drugs and baggies were all contained in a plastic bag. The requirements of the plain view doctrine are met.

D. Did Constable Lane breach Mr. Unger's s. 8 Charter rights in searching the back of the truck and the backpack?

[42] The search of the back of the vehicle and the backpack was a warrantless search. A warrantless search is presumptively unreasonable and contrary to s. 8 of the Charter; and in the absence of a warrant, the Crown must establish on a balance of probabilities that the search was authorized by law, that the law itself is reasonable, and that the manner in which the search was carried out was reasonable.

[43] Here, the Crown argues that the search was lawful as incident to arrest. Searches conducted incident to arrest have been recognized as an exception to the rule that warrantless searches are *prima facie* unreasonable: *R v. Golden*, [2001] 3 S.C.R. 3 at para. 23

[44] In considering whether a search was "truly" an incident of the arrest, the police must be attempting to achieve one of the following purposes: (i) to ensure the safety of the police and the public; (ii) to prevent the destruction of evidence; or (iii) to discover evidence of the offence or offences for which the accused was arrested. Where the justification for the search is to find evidence, "there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested (Emphasis in original)": *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 22.

- [45] As noted by the Supreme Court of Canada in *Caslake* at para. 15, vehicles are legitimately the objects of search incident to arrest, as they attract no heightened expectation of privacy that would justify an exemption from the usual common law principles. This includes the trunk: *R. v. Alkins* 2007 ONCA 264. But again, the search must be based on, in the language of *Caslake* at para. 25, "some reason related to the arrest".
- [46] Courts have held that it is reasonable for police to conduct a search of a vehicle's trunk for the purpose of securing more narcotics after arresting a person for possession. In *R. v. Polashek* (1999), 134 C.C.C. (3d) 187 (Ont. C.A.), the accused was pulled over for a traffic violation. While the officer was speaking to the accused, he detected the smell of marijuana. The officer asked the accused to exit his vehicle and conducted a quick search of his person, finding Cannabis resin in his pocket. The officer arrested him for possession of marijuana. The officer then found over \$4,000 in cash on the accused upon a further search. Two officers then searched the interior of the car, including the glove compartment and the trunk. They found bags of marijuana, a scale and a small amount of L.S.D. in the trunk. The accused was arrested for possession for the purpose of trafficking. The court found that after the accused had been arrested for possession of marijuana, it was reasonable in the circumstances for the police to search his car to find more drugs.
- [47] When Constable Lane started his search, he knew that Mr. Unger had been arrested for possession for the purpose of trafficking and he believed that Corporal Bosnell had instructed him to search the vehicle and to look for more evidence with respect to that charge. Although Corporal Bosnell did not recall giving the instruction, I accept that Constable Lane understood that Corporal Bosnell had given this instruction.
- [48] I find that it was reasonable for Constable Lane to search the cab and the bed of the truck. In the circumstances of this case, where drugs and paraphernalia have been lawfully discovered in the interior of the truck, it is appropriate for an officer to search the back of that same truck with a view to discovering further evidence of possession for the purpose of trafficking. There was also a reasonable prospect of securing such evidence from a backpack in the vehicle.

E. If Mr. Unger's Charter rights were violated, should any evidence be excluded pursuant to s. 24(2)?

- [49] As set out in *R. v. Grant*, 2009 SCC 32, in deciding whether to admit or exclude evidence, a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system, having regard to:
- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
 - (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little); and

- (3) society's interest in the adjudication of the case on its merits.
- [50] With respect to the narcotics, as stated above, I have found that Mr. Unger was not arbitrarily detained, that opening the door did not constitute a search in these circumstances and that the drugs and paraphernalia, which were clearly visible once the door was opened, were discovered inadvertently in accordance with the plain view doctrine.
- [51] If I am wrong, and opening the door of the truck constituted a search, amounting to a breach of s. 8 of the Charter, in my view, applying the Grant framework, the evidence of the drugs and paraphernalia are properly admissible under s. 24(2) of the Charter.
- [52] With regard to the seriousness of the Charter-infringing state conduct, any breach was committed in good faith. There was no deliberate or flagrant disregard of Mr. Unger's rights. The officers approached the truck to determine if Mr. Perkins, who had an outstanding warrant for his arrest, was in the truck. Corporal Bosnell needed to open the door because Mr. Unger failed to follow direct orders to disengage the engine, causing concern for officer safety and that Mr. Perkins might flee.
- [53] As for the effect of the breach on Mr. Unger's rights, the impact of opening a car door on Charter-protected rights in these circumstances is minimal. It is well-established that there is a reduced expectation of privacy in a vehicle: *R. v. Belnavis*, [1997] 3 S.C.R. 341. Moreover, this is not a case such as *R. v. Bissonnette*, [2001] O.J. No. 3737 (S.C.J.), where an officer opened the driver's door to a car based only on a "hunch" that the person inside was engaging in illicit activity. Lastly, in this case, once the door was opened, the drugs were in plain view and no intrusive search was required to find them.
- [54] I also conclude that the weapons are properly admissible under s. 24(2) of the Charter.
- [55] Under the first line of inquiry with respect to state conduct, Constable Lane reasonably anticipated that a search of the vehicle may disclose evidence related to the trafficking charge. The additional search of the truck, as with the initial opening of the door, was conducted in good faith.
- [56] Under the second line of inquiry regarding the effect of the breach, the bag was found in the open back of a pickup truck, although hidden under other materials. Again, in my view, Mr. Unger would have a significantly reduced expectation of privacy in the open back of the pickup truck. Furthermore, although it is unclear on the evidence whether Mr. Unger readily made the statements regarding the weapons before Constable Lane reached into the bag or not — thus giving the police grounds to search the bag and making the breach more technical in nature -- if reaching into the bag amounted to a s. 8 breach, I do not find that it was a serious one here.

- [57] In each case, with respect to the third inquiry, the evidence is reliable and key to the Crown's case on the respective charges. In my view, applying the principles of Grant in this case, excluding such reliable evidence would impact more negatively on the repute of the administration of justice where the remedy effectively "guts the prosecution" than would including the evidence.
- [58] Any breaches of ss. 8 and 9 can be characterized as minor. In either case, the search was non-intrusive and was not conducted with utter disregard for Mr. Unger's Charter rights. In my view, excluding the evidence in these circumstances would bring the administration of justice into disrepute. Weighing the factors, I am persuaded that the evidence should not be excluded.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown

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