

CANADA / JUDGMENT

R. v. Van Buskirk

2023 BCSC 2162

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Supreme Court of British Columbia

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2023 BCSC 2162 R. v. Van Buskirk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Van Buskirk,

2023 BCSC 2162

Date: 20231205

Docket: 32959

Registry: Vancouver

Between:

Rex

And

Brent William Van Buskirk

Corrected Judgment: The front page of the judgment was corrected on February 12, 2024.

Before: The Honourable Madam Justice Murray

Oral Reasons for Judgment on Voir Dire #3 re: Standing:

Accused's Expectation of Privacy in Information Provided by CSC to Police

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Place and Dates of Hearing:

Vancouver, B.C.

November 15-17 and December 5, 2023

Place and Date of Judgment:

Vancouver, B.C.

December 5, 2023

INTRODUCTION

- [1] The accused, Mr. Van Buskirk seeks standing to claim a breach of his s. 8 Charter right to be free from unreasonable search and seizure in regard to the information obtained by police from the Correctional Service of Canada ("CSC").
- [2] On November 17, 2020, the accused was arrested and charged with possession of fentanyl for the purpose of trafficking and possession of nine firearms. At the time of his arrest and during the whole of the police investigation the accused was on parole for first degree murder and conspiracy to commit murder and was subject to conditions of release.
- [3] CSC worked cooperatively with police during their investigation, providing them with information. The accused takes the position that the fact that CSC shared this information with police without a judicial authorization constitutes an unreasonable search.
- [4] I will refer to Mr. Van Buskirk by name or as the accused throughout these reasons.

BACKGROUND

- [5] On May 6, 2020, the Victoria Police Department began investigating the "Dobell group" for drug trafficking. The primary targets were Vu Bao Nguyen and Byran Balla. While conducting surveillance on July 29, 2020, police officers observed Mr. Nguyen meet with an unknown male in Vancouver. Police believed that the unknown male was supplying the target group with drugs. They further believed that the unknown male may be Mr. Van Buskirk.
- [6] On August 9, 2020, police emailed CSC stating that they were involved in an active drug investigation involving several known targets but one unknown male. Police advised that they had "some indication" that Mr. Van Buskirk is the unknown male and requested that CSC provide them with his parole photo "and related information" so they could confirm the unknown male's identity. That same day, CSC provided the accused's photo and Standard Profile which contained information regarding Mr. Van Buskirk's parole conditions, previous convictions, height, weight, eye and hair colour, phone number, place of employment, the

number of hours he worked per week, names, addresses and phone numbers of his friends and family and a description of the vehicle that was available to him.

- [7] From the CSC photo, police were able to confirm that Mr. Van Buskirk was the male who met with Nguyen.
- [8] On August 24, 2020, apparently unprompted, a community parole officer took an updated photograph of the accused and sent it to police who used it in a target sheet so officers conducting surveillance could identify him.
- [9] On September 25, 2020, police again contacted CSC advising that Mr. Van Buskirk is involved "to some extent" in an active investigation and requesting confirmation of the phone number he provided to them as well as his billing/ subscriber information. Police advised CSC that they intended to use the information in authorizations if they determined that grounds existed. CSC provided the requested information.
- [10] In addition to the above, CSC provided police with other information including lists of the accused's identified phone contacts from jail, lists of contacts that had been cleared to visit him in custody and how many times they visited, known contacts on parole, travel authorizations that had been granted while on parole, a synopsis of institutional incidents and highlights of his preventative security file which include who he associated with in custody. According to Crown submissions, this information was not used by police in any authorizations nor will it be evidence at trial.

ISSUE

- [11] In order to claim a s. 8 breach Mr. Van Buskirk must first establish that he has a reasonable expectation of privacy in the subject matter of the search. If he is successful he will then have standing and the court will proceed to decide whether the search was unreasonable.
- [12] This ruling addresses the standing issue only. The issue is whether Mr. Van Buskirk has satisfied the threshold burden that he had a subjective expectation of privacy in the information that is objectively reasonable: *R. v. Marakah*, 2017 SCC 59 at para. 10.

THE LAW

- [13] The purpose of s. 8 is "to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state"; that is, "information which tends to reveal intimate details of the lifestyle and personal choices of the individual." The closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy: *R. v. Plant*, [1993] 3 S.C.R. 281 at page 291; *R. v. Cole*, [2012] 3 S.C.R. 34 at para. 36; and *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 26.

[14] In assessing whether a reasonable expectation of privacy has been established the court must consider, on the totality of the evidence, four factors:

1. What was the subject matter of the alleged search?
2. Did the claimant have a direct interest in the subject matter?
3. Did the claimant have a subjective expectation of privacy in the subject matter?
4. Was the claimant's subjective expectation of privacy objectively reasonable?

See *R. v. Cole*, 2012 SCC 53 at para. 40 and *Marakah* at para. 11.

[15] With respect to the first factor, the subject matter of a search, the court should consider whether the information in question is personal and whether it supports inferences about other personal information about the accused. Another way of putting this issue is to ask "what were the police really after": *R. v. Biring*, 2022 BCSC 3 at para. 25; *Marakah* at para. 15.

[16] The third factor, the claimant's expectation of privacy, which has been described as "not a high hurdle", is an important but not determinative factor. In the absence of direct evidence on the issue, the court must decide whether an expectation of privacy may be inferred: *R. v. Flintroy*, 2018 BCSC 1692 at para. 13.

[17] The fourth and most important factor is whether a "reasonable and informed person in the position of the accused would expect privacy": *Cole* at para. 35. This question must be answered having regard to the norms of conduct in our society. The normative component was discussed by Doherty J.A. in *R. v. Orlandis-Habsburgo*, 2017 ONCA 649:

[41] ...the court, in determining whether the claimant has demonstrated a reasonable expectation of privacy, is not engaged in a factual inquiry in the usual sense. The court must, in examining the relevant facts, make a determination that is not purely fact driven, but is also reflective of fundamental societal values. A finding that a claimant has a reasonable expectation of privacy is not only a description of a specific constellation of factual considerations, but is also a declaration of societal aspirations and values.

[Emphasis added and citations omitted.]

[18] It has been recognized that the right to privacy is not absolute, but rather must be balanced against society's interest in safety, security and crime prevention. This balancing was discussed by the Supreme Court of Canada in *Tessling*:

17 At the same time, social and economic life creates competing demands. The community wants privacy but it also insists on protection. Safety, security and the suppression of crime are legitimate countervailing concerns. Thus s. 8 of the Charter accepts the validity of reasonable searches and seizures. A balance must be struck, as held in *Hunter v. Southam*, supra, at pp. 159-60, per Dickson J.:

... an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

18 The notion of the "balance" was also canvassed by Sopinka J. in advocating a "contextual approach" in *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293:

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated allows for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement.

[Emphasis added.]

POSITIONS OF THE PARTIES

The Accused

- [19] The accused submits that he had a reasonable expectation of privacy in all of the information shared by CSC. He stresses that the information was held in a "closely guarded" database and included "every private detail" about his life.
- [20] The accused submits that the Court must look at the totality of the circumstances and not examine each piece of information individually. The question for this Court is whether an expectation of privacy is maintained in the information as a whole as opposed to piece by piece. The accused says the police were after the identity of the unknown male as well as all available information pertaining to him. That is clear from the fact that once they identified the accused as the male in question they obtained a production order and tracking warrant for his phone using the information gained from CSC.
- [21] The accused stresses that while a parolee has a lesser expectation of privacy, they still have one. The Court must be mindful that the information in question was gathered by compulsion; that is, Mr. Van Buskirk had to provide the information by virtue of his parole requirements.
- [22] In support of his argument that he has an expectation of privacy in the information shared by CSC, the accused relies on a number of cases in which the Court held that the accused had a reasonable expectation of privacy in information that was obtained by police from various agencies. In *R. v. Alkalil*, 2019 BCSC 1801 and *R. v. Kang*, 2020 BCSC 1237 the Court found there to be a reasonable expectation of privacy in information obtained from a rental car agency including the accused's name, date of birth, address, phone number and driver's licence number. In *Kang and Flintroy*, the Court found a reasonable expectation of privacy in passport photos obtained from Immigration, Refugees and Citizenship Canada (in the case of Kang) and Citizenship and Immigration Canada (in Flintroy). In *R. v. Roudani*, 2018

BCSC 1101, the Court found that the accused had a reasonable expectation of privacy in information obtained by the Bar Watch program at a nightclub including a photograph of the accused, his name and age. In *R. v. Latimer*, 2020 BCSC 488 the accused was found to have a reasonable expectation of privacy in images taken in the apartment building in which he lived and in his tenancy agreement. In *R. v. Kim*, 2019 BCSC 2150 the Court reached the same conclusion even though the accused was not a resident. Finally, in *Biring*, Justice Schultes found there to be a reasonable expectation of privacy in video surveillance of a parking and storage space rented by the accused.

The Crown

[23] The Crown responds that the accused had no reasonable expectation of privacy in the information collected and shared by CSC and as such, does not have standing to assert a s. 8 breach.

[24] The Crown relies on three factors:

- a) As a person on parole, the accused had a significantly reduced expectation of privacy;
- b) The information was shared by CSC with police for a purpose consistent with the purpose for which it was gathered (the consistent use doctrine); and
- c) The information shared did not convey information about the accused's "biographical core".

ANALYSIS

[25] I will follow the four factors set out above.

(1) Subject Matter of the Search

[26] Beginning with the subject matter of the search, the Supreme Court of Canada has emphasised that the court must take a broad, functional approach to this question and look not only at the nature of the information sought but also at the nature of the information it reveals: *R. v. Spencer*, 2014 SCC 43 at para. 26. In issue in *Spencer* was the disclosure of an IP address that enabled the police to gain information about the internet usage of people living at a specific address.

[27] The Ontario Court of Appeal recently dealt with the determination of the subject matter of the search in *R. v. El-Azrak*, 2023 ONCA 440. In *El-Azrak*, police were investigating the accused, a pharmacist, for fentanyl trafficking. The Ontario College of Pharmacists provided police with the accused's drug usage report. The accused argued that when that report was combined with cell data, the police were able to draw private inferences. In holding that the subject matter of the search is focussed on what the information in question reveals and what if any inferences can be taken from it, not what the police were able to prove directly or inferentially at the end of the investigation, the court stated the following:

38 In determining the subject matter of the search, we apply a functional and holistic approach, one that derives from the actual circumstances of the case. Undoubtedly, this approach requires that we look beyond the actual information provided and ask whether, with that information in hand, something further is revealed about the individual to whom the information relates: Spencer, at paras. 26, 31 and 47; R. v. Gomboc, 2010 SCC 55, [2010] 3 S.C.R. 211, at paras. 14-15, 35-39. This requires consideration of not only the raw data that the state came to possess, but also the nature of the information that could be inferentially derived from that raw data: Ward, at para. 93; Marakah, at paras. 14-15; Orlandis-Habsburgo, at para. 75; and Spencer, at para. 26.

39 The fact is that the Drug Usage Report, as captured in the excerpt shown earlier in these reasons, contained what can only be described as bland information, which included the dates on which fentanyl was "prescribed", the "prescription" number, and the strength and quantity of fentanyl dispensed. The inferences that could be drawn from that data include that the appellant's pharmacy was dispensing fentanyl patches, of varying strengths and sometimes in large numbers. That is all.

40 Here, the subject matter of the search did not engage in any meaningful way with personal privacy. While the appellant tries to bolster the sensitivity of the subject matter of the search by injecting a hypothetical scenario involving more sensitive medications and a means by which to infer who was receiving those medications, that is not the scenario here. Indeed, determining the subject matter of a search should not take on hypothetical dimensions. It must remain rooted in reality: what is the subject matter of the search in this case? Focussing where we should, the fact is that the circumstances of this case involve a significantly edited Drug Usage Report, which is singularly focussed upon the distribution of fentanyl and contains no identifying information.

41 While it is true, as the appellant argues, that the police were able to infer from Mr. Imerovik's cell records that he was possibly using the appellant's pharmacy to obtain fentanyl patches, an inference drawn from the location of his phone on days fentanyl was dispensed from her pharmacy, this inference did not change the essential nature of the subject matter of the Drug Usage Report. That subject matter was the raw data reflected in the Drug Usage Report and the immediate inferences that could be drawn from that data.

42 An example of the subject matter including these kinds of inferences can be found in Doherty J.A.'s decision in Orlandis-Habsburgo. There, the raw data revealed total energy consumed in a home over a lengthy period of time and hourly energy consumption over a two-month period. This data, particularly the hourly pattern of usage data, directly gave rise to a "strong inference" that a grow-op was being operated in the residence: at para. 75. Therefore, the subject matter of the search included both the raw data "and the inferences that [could] be drawn from that data about the activity in the residence": at para. 75.

43 The appellant contends that in calibrating the subject matter of the search, one must look not only to the raw data and the inferences that arise from that data, but also to the inferences that can arise from comparing that data with other investigative information. In this case, the appellant says that such information includes Mr. Imerovik's cell phone data. When comparing

the Drug Usage Report with that cell data, the police were able to draw more private inferences, including about Mr. Imerovik's whereabouts on days that fentanyl was being dispensed. This "indirect information", the appellant argues, must also be included in the subject matter of the search.

44 The appellant also relied on Spencer for support. Yet Spencer is of no assistance to her argument.

45 In Spencer, the police identified an Internet Protocol ("IP") address corresponding to someone's use of a computer to access and store child pornography through an online file-sharing program. The question was, who had done so? The way to answer that question was to obtain the subscriber information directly associated with that IP address. In other words, to replace the IP address with a name, so as to unlock the anonymity of the person connected to this very specific and known online activity.

46 There is a world of difference between Spencer and what the appellant proposes in this case.

47 In Spencer, "the subject matter of the search [was] the identity of a subscriber whose Internet connection [was] linked to particular, monitored Internet activity": at para. 33. Here, the subject matter of the search was a Drug Usage Report. On its face, it largely showed when fentanyl was being dispensed from the pharmacy and in what quantity.

48 The subject matter of a search cannot be, as the appellant suggests, retroactively characterized according to what the information reveals after it has been combined with other investigative facts. If that were the analytical approach to determining the subject matter of a search, it would not be a stretch to suggest that virtually all information obtained by the police would ultimately result in privacy claims.

49 The whole nature of a police investigation is to thread together investigative facts that eventually provide a window into what is undoubtedly private. Indeed, such investigative techniques would not be necessary could the picture be obtained from the outset. The subject matter of the search cannot be characterized based on what the police conclude at the end of their completed investigation; it must be considered solely from the perspective of what the raw data reveals and what, if any, inferences can be taken directly from that data.

50 Respectfully, were it otherwise, society's legitimate interest in privacy and being left alone, as balanced against society's legitimate interest in "[s]afety, security and the suppression of crime", would quickly become skewed: Tessling, at para. 17; Hunter, at pp. 159-60; and Edwards, at para. 30. Professor Steven Penney refers to this as the "privacy versus security" debate and calls it "a perpetually polarizing dialectic": Steven Penney, "The Digitization of Section 8 of the Charter: Reform or Revolution?" (2014) 67 S.C.L.R. (2d) 505, at p. 506.

51 The normative approach asks what a reasonable person would expect in a free and democratic society. That reasonable person undoubtedly has an interest in not only protecting privacy, but also in ensuring the effectiveness of law enforcement. If the subject matter of a search could be characterized by every inference that could be taken from the raw data, when placed against all other investigative facts, this would result in anything but effective and efficient investigations.

52 This is not even to mention the fact that investigations evolve over time and the inferences that can be derived from raw data can morph with the evolution of further investigative facts. The police must be able to determine at the time they come into possession of information whether it is the subject of a reasonable expectation of privacy. If the subject matter of a search is constantly in flux and depends on the possibility that it may reveal important information after being combined with the results of other investigative steps - that may or may not be contemplated or even possible at the time of the original search - police cannot make informed decisions as to whether prior judicial authorization will be required. Such a procedure would be unworkable. Rather, the subject matter of the search must be fixed at the time of the search and the inferences that can be taken from the data must be ones that arise directly from that data.

53 As for the appellant's phone number, email address and home address, the trial judge said that while it was "clearly personal information", this was raw data that did not lend itself to further inferences.

54 While the appellant argues that her phone number and email address could have provided a window into all kinds of private information about her, it is not at all clear how this would be so. Again, this is entirely unlike *Spencer*, where the police knew about a course of Internet activity associated to an IP address; they simply needed the subscriber data for that IP address in order to strip the Internet activity of its anonymity. In this case, on the other hand, it is not clear how the police would use the appellant's phone number, which was actually wrong by two digits, or her email address to strip her of any anonymity. Indeed, this did not happen. The appellant also concedes that the email address was not used for anything.

[Emphasis added.]

[28] Turning to the present case, what were the police really after? Initially, police wanted the photograph of Mr. Van Buskirk in order to confirm the identity of the unknown man. I stress the word confirm. Police had a photograph of the man who met with target Nguyen. They also had informant information that "the Dobell group was being supplied pure fentanyl by Brent Van Buskirk who is on parole for a murder in Saanich". The photograph provided by CSC did not reveal intimate details of Mr. Van Buskirk. It is the face he shows to the world every day.

[29] Once the police identified the unidentified male as Mr. Van Buskirk they clearly wanted to advance their investigation. That intention however does not characterize the subject-matter of the search.

- [30] Police used the phone number to obtain authorizations. According to the Crown, they did not use any of the other information. What evidence those authorizations ultimately garnered does not define the subject matter of the search.
- [31] The question is what did the phone number and the rest of the information disclose to police? On its own, nothing. I agree with the Crown that the information provided to police by CSC did not disclose personal details nor did it allow police to draw inferences about Mr. Van Buskirk's personal life. It was not like an IP address that reveals a person's internet activity. Nor is it akin to a search of a person's cell phone that reveals personal texts, emails, photographs. Or a search of a person's home in which personal items are kept. It is as in El-Azrak, raw data. The most personal information was the accused's girlfriend's name, phone number and address. Notably her address was the address the accused provided to CSC as his residence while on parole.
- [32] I am not persuaded that the information in question can reasonably be construed as information going to the accused's biographical core: that is, information that he would wish to prevent disseminating to the State and that would tend to reveal intimate details of his lifestyle and personal choices. In fact virtually all of the information was provided by the accused to CSC in order to be released on parole. The fact that he had to provide it does not in my view change the nature of it.
- (2) Direct interest
- [33] I accept that the accused had an interest in his information.
- (3) Subjective Expectation of Privacy
- [34] As Mr. Van Buskirk did not testify there is no direct evidence that he had a subjective expectation of privacy in any of the information. As stated above, such an expectation may be inferred, but there must be evidence upon which to do so: *R. v. Ali, Boparai & Malonga-Massamba*, 2020 BCSC 1309 at para. 100.
- [35] In order to infer a subjective expectation of privacy, the accused points to legislation which governs information sharing between CSC and police, and CSC information sharing policies. He argues that as the legislative scheme contemplates a privacy interest in his personal information, a privacy interest exists.
- [36] However, that argument cuts both ways. If the accused understands that legislation protects the sharing of information, he would also know that there are exceptions in which CSC is mandated to share an offender's personal information with police. One of those exceptions is set out in s. 25(1) of the Corrections and Conditional Release Act, SC 1992, c 20 (CCRA) which provides that CSC shall give police all information under its control that is relevant to release decision-making or to the supervision or surveillance of offenders.

- [37] I am not persuaded that there is evidence from which the inference can be drawn that the accused had a subjective expectation of privacy in the information in issue. He gave it to CSC in order to be released on parole. He knew that he was being supervised in the community. He knew or ought to have known that police would be aiding in the supervision. He knew or ought to have known that the CSC information would be shared with police to aid in that supervision. I pause to note that I view investigating a parolee for criminal activity as an aspect of supervising him.
- [38] Nevertheless, a subjective expectation of privacy is not a prerequisite to a finding of a reasonable expectation of privacy on a consideration of the totality of the circumstances: Tessling at para. 42.
- (4) Objectively Reasonable Expectation of Privacy
- [39] In my view, this is the pivotal inquiry. The analysis "can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion": Patrick, para. 38.
- [40] I find the following factors to be significant:
- a) Mr. Van Buskirk was on parole and therefore had a significantly reduced expectation of privacy: R. v. Stillman, (1997) 113 CCC (3d) 321 (SCC) at para. 61;
 - b) He was subject to stringent release conditions in the community, the primary purpose of which was to ensure the safety of the community;
 - c) He provided the information in issue to CSC in order to be released on parole. He knew or ought to have known that the information would be used to monitor/ supervise him;
 - d) He knew or ought to have known that police would be assisting CSC in supervising him in the community and that the CSC information would be shared with them if required;
 - e) The information was shared for a purpose consistent with the purpose for which it was gathered. As stated above, CSC is legislated to give police all information under its control that is relevant to the supervision and surveillance of offenders (s. 25(1) of the CCRA).
- [41] The purpose of CSC is to carry out sentences and assist with the rehabilitation of offenders: CCRA s. 3. Protection of the public is the paramount consideration in the corrections process: CCRA s. 3.1. CSC collects information for the purpose of supervising parolees in the community.
- [42] I find that all of the cases relied on by the accused are distinguishable. They involve information given by accused persons to agencies/ businesses outside law enforcement. The information involved in this case is collected by CSC with one purpose: to supervise the offender. While an offender is on parole CSC has an overriding duty to protect society. All of the conditions of an offender's release are directed toward that duty. It is significant that the information was shared with police, not to the public at large. It is also significant that one

of the conditions of the accused's release was that he "obey the law and keep the peace". An important aspect of parole is to ensure that offenders are not involved in further criminal activity while under their supervision. Correctional officers are restricted in what they can do in the community, therefore CSC relies on police to assist. For example, if an accused is suspected of committing criminal activity, it is police that would investigate. It would be absurd if CSC did not or could not share the information they gathered to aid in supervision with the agency that is actually carrying out the supervision.

- [43] I accept that the accused has a direct interest in his phone number, phone bills, associations and employment. I further accept there are circumstances in which there can be a reasonable expectation of privacy in even a person's name when it is "connected to an otherwise anonymous activity" like renting a car: Alkalil at para. 107. The information in issue in this application was not associated with an anonymous activity or a private business. Quite the opposite. The accused was aware that it was information collected and gathered by CSC in order to supervise him and to ensure that he was complying with his conditions including not putting society at risk by committing further criminal acts. Implicit in that is that he ought to have been aware that it would be shared with anyone supervising him, including police. I reject the accused's submission that he was entitled to anonymity. On parole, he was not entitled to anonymity from police. Applying a normative approach, I find that a reasonable person would expect that CSC would share the information gathered with police for the purpose of investigating a parolee for a criminal offence and thus, a breach of his parole conditions.
- [44] Given that, it is my view that there can be no reasonable expectation of privacy in information provided to CSC for the purposes of supervising an offender on parole being shared with police.
- [45] Considering the law and all of the circumstances I am not persuaded that the accused has established that he had a reasonable expectation of privacy in the information obtained by police from CSC.

CONCLUSION

- [46] I find that Mr. Van Buskirk has failed to establish that he had a reasonable expectation of privacy in any of the information obtained by police from CSC. As such he does not have standing to assert a s.8 Charter claim in relation to that information.
- [47] Mr. Van Buskirk's application for standing is dismissed.

"The Honourable Madam Justice Murray"

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