

CANADA / JUDGMENT

R. v. Van Winkle

2022 BCSC 1043

COURT

Supreme Court of British Columbia

DECIDED

14 April 2022

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2022 BCSC 1043 R. v. Van Winkle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Van Winkle,

2022 BCSC 1043

Date: 20220414

Docket: 175880-2

Registry: Victoria

Regina

v.

Samantha Ellen Fink

Jason Robert Van Winkle

Before: The Honourable Mr. Justice A. Saunders

Oral Reasons for Judgment

re Jason Robert Van Winkle

(Conviction and Entrapment Application)

Counsel for the Crown:

A.M. Van Tine

Counsel for the Accused Jason Van Winkle:

T.W. Morino

Place and Date of Trial/Hearing:

Victoria, B.C.

April 11, 13-14, 2022

Place and Date of Judgment:

Victoria, B.C.

April 14 and 27, 2022

Judgment

- [1] THE COURT: Jason Robert Van Winkle was charged with four counts of offences under the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]: possession for the purpose of trafficking of, respectively, cocaine, heroin and fentanyl, methamphetamine, and fentanyl. I found him guilty of those offences in oral reasons for judgement pronounced April 14, 2022. Mr. Van Winkle then applied to have the proceedings stayed on the grounds of entrapment. I dismissed that application in oral reasons pronounced on April 27, 2022.
- [2] The following reflects the transcription of those two oral decisions, edited and presented together for the sake of completeness and clarity.
- [3] Mr. Van Winkle was arrested just before 1:00 a.m. the morning of February 24, 2019, by Sergeant Robert Brown of the Victoria Police Department. The arrest occurred in the underground parking garage of a residential building on Johnson Street. Sergeant Brown was there to meet with a person with whom he had arranged a drug transaction through exchanging text messages.
- [4] Mr. Van Winkle was located in the driver seat of his motor vehicle parked in a visitor's stall. His passenger, a Ms. Fink, was in the front passenger seat. Mr. Van Winkle was holding a cellphone in his hand. Sergeant Brown opened the vehicle door and arrested Mr. Van Winkle. He emerged from the vehicle still holding a cellphone in his hand. It was the phone that Sergeant Brown had sent the text messages to.
- [5] Mr. Van Winkle and Ms. Fink were both arrested. Ms. Fink has since deceased.
- [6] Mr. Van Winkle's vehicle had come to the attention of Sergeant Brown earlier that evening at about 11:40 p.m., when he had observed it parked in front of a 7-Eleven store at the intersection of Quadra and Yates. He observed a group of four or five people, whom he described as appearing "street entrenched" or homeless, loitering in the vicinity of the vehicle driver's window. These persons had their backs turned to Sergeant Brown and this obscured his view of the driver. He was not positioned to observe whether there were any hand-to-hand transactions being carried out and did not observe anyone placing anything in their pockets.

- [7] Sergeant Brown drove further down Quadra St. and turned his vehicle around, parking it so that he could observe the passenger side of the vehicle. Again, he saw one or two people appear to engage in short, that is approximately 30-second, interactions at the passenger door and then walk away from the passenger side, but again he could not identify the vehicle occupants.
- [8] Sergeant Brown queried the vehicle plate number and learned it was registered to Mr. Van Winkle, who was known to Sergeant Brown as a drug trafficker. Given the vicinity that they were located in, which is close to a known busy drug area, given the activities he was observing, and given Mr. Van Winkle's history, Sergeant Brown suspected drug trafficking activity, and after watching the vehicle for about 12 minutes in total, he initiated an investigation by sending a text message to a phone number that he believed, from information obtained through an informant, to be used by Mr. Van Winkle. The message, sent at 11:55 p.m., read, "Yo J, it's Wes. Got shirts", "shirts" being a street term for cocaine.
- [9] Just after Sergeant Brown sent that message, the vehicle reversed out of the parking lot, headed north on Quadra, and then turned east on Johnson. It was very briefly out of Sergeant Brown's view. However, he followed and, within approximately 30 seconds, he saw that the vehicle had come to a stop at a red bus zone. Sergeant Brown then initiated a traffic stop in order to check the identity of the occupants. He recognized Mr. Van Winkle as the driver. Mr. Van Winkle gave Sergeant Brown his name and his identification. The front seat passenger was known to Sergeant Brown as Ms. Fink.
- [10] There was also a passenger in the rear. The passenger initially gave Sergeant Brown a false name, that coincidentally corresponded with the name of someone who was wanted on an unendorsed warrant. That passenger exited the vehicle and was placed under arrest. As there was nothing indicative of illegal activity, Mr. Van Winkle and Ms. Fink were told they were free to leave. The backseat passenger, who had been arrested, then confirmed his real identity and he, too, was let go. All told, this truck stop took about three to five minutes.
- [11] Sergeant Brown was then dispatched to another call. He next checked his phone for a reply to his text message at about 12:17 a.m. and saw that a reply had come in, timestamped 12:06, "Yes I do." Sergeant Brown then messaged at 12:17, "Meet for \$100". He sent follow-up queries at 12:25 and 12:32. At 12:35, he received a message that the sender had, "Just got jacked up downtown" and was parked on Johnson, two blocks past Cook, waiting for someone.
- [12] At 12:41, Sergeant Brown texted that he would head that way, and also said that he needed "down", i.e., heroin, "if you have \$50". The reply a minute later was, "Yep."
- [13] Over the next 13 minutes, there were nine separate text messages sent or received, including directions to the specific address on Johnson, "underground", "first car in visitor parking", which was where Mr. Van Winkle and Ms. Fink were ultimately arrested.

- [14] Inside the vehicle at the time of the arrest there was a significant amount of drug paraphernalia and Mr. Van Winkle had a large amount of cash on his person, \$335 loose in his pocket in \$20 bills, and single \$10 and \$5 bills; and, \$180 in bills in his wallet with some loose change.
- [15] The drugs in question were found in a backpack located in the front passenger footwell, i.e., they would have been at Ms. Fink's feet. The backpack had a lock mechanism but it was unlocked. The drugs in question were contained within a hard-shell naloxone kit case inside the backpack. All told, there were 35.2 grams of cocaine, 27.3 grams of fentanyl and fentanyl mixed with heroin, and 6.3 grams of methamphetamine. Some of the heroin was individually wrapped in small amounts such as is typically used for street sale.
- [16] Mr. Van Winkle has formally admitted the issues of identification, date and location, jurisdiction, and the nature of the substances seized.
- [17] The Crown submits that there is circumstantial evidence that leads to only two reasonable conclusions: that Mr. Van Winkle was a knowing participant as a principal in the planned drug trafficking and was either personally or constructively in possession of the drugs for that purpose, or that Ms. Fink was principal and Mr. Van Winkle aided and abetted by driving her.
- [18] The defence concedes three aspects of the evidence that are fundamental circumstances in respect of the Crown's theory of the case. First, the defence concedes that the circumstance of the amount of drugs found in Mr. Van Winkle's vehicle is sufficient to prove that the drugs were for the purpose of trafficking. Second, it is conceded that the text messages are evidence of a drug trafficking transaction being planned. Third, it is conceded that Mr. Van Winkle, as the owner and operator of the motor vehicle, would have had knowledge of and control over the backpack sufficient for him to be found to have been in possession of the backpack, either personally or jointly with Ms. Fink; as to the distinction, see *R. v. Howell*, 2014 BCSC 2290 at paras. 7-10
- [19] All of these inferences and conclusions are amply supported by the evidence, and these are all findings that I would have made in any event, independent of any concessions made by the defence in argument.
- [20] However, where the defence says that the Crown fails to prove all the essential elements of the offence is in respect of Mr. Van Winkle knowing that the backpack contained drugs. The defence submits that there is nothing to tie Mr. Van Winkle personally to a planned drug transaction, other than the fact that he was found holding the phone on which the transaction was arranged in his hand at the time of his arrest. While it is conceded that the drugs were for the purpose of trafficking, it is submitted that there is no evidence that Mr. Van Winkle was personally aware of a drug transaction being planned. The defence points to the neat manner in which the contents of the backpack were arranged which, it is suggested, supports at least a reasonable inference that the drugs were not being kept readily at hand for immediate, quick, street-level sale, but were perhaps intended to be used for trafficking

at a later time, possibly by Ms. Fink, but regardless without Mr. Van Winkle's knowledge.

- [21] However, I find that viewed as a whole, the circumstances of this case - the activities centred around the car when the car was in the parking lot of the 7-Eleven occupied by a person or persons with a known history of drug-related activity and actually, in fact, containing drugs; the content of the text messages; Mr. Van Winkle being the driver, and him being found parked in an underground garage with a phone in his hand where the transaction had been arranged to take place - lead to only one reasonable inference: that Mr. Van Winkle had knowledge that a drug transaction was underway and that the drugs were available to allow that transaction to take place.
- [22] The neatness of the backpack's organization is a red herring. The text messages are incontrovertible evidence that a drug transaction was being planned. The only evidence of any drugs being available to effect that transaction is those drugs that were in the backpack. The only reasonable inference on the evidence is that whoever was texting about selling drugs intended to use that very same supply of drugs in the sale.
- [23] The only possible alternatives to Mr. Van Winkle having knowledge of the drugs, would be a scenario in which the activity at the 7-Eleven did not involve drugs - or, possibly, that it was Ms. Fink or the other passenger in the rear of the vehicle being engaged in drug transactions, with Mr. Van Winkle being blissfully unaware of what was going on - in which the text messages were being sent and received by Ms. Fink without Mr. Van Winkle's knowledge, and in which Ms. Fink would have directed Mr. Van Winkle to park his car in an underground garage, out of plain view, where it could not be seen from the street, for some innocent purpose.
- [24] There is no explanation offered and certainly no evidence as to why Ms. Fink might have behaved in such a manner. Perhaps, the defence submits, Mr. Van Winkle may have understood only that they were going, at one o'clock in the morning, to park in the garage to visit residents of the building. Or, as noted by Sergeant Brown, there was a cat in the car with them at the time of the arrest; perhaps Mr. Van Winkle only understood that they were going there to drop off the cat. Those possible scenarios are all conjecture and seem fanciful or farfetched. The Supreme Court of Canada reminds us in *R. v. Villaroman*, 2016 SCC 33, that inferences that are not supported by the evidence may be used to raise a reasonable doubt. But absent positive evidential underpinnings, such inferences must at least be plausible in order to give rise to reasonable doubt.
- [25] There is no reasonable doubt in this case that the drugs were in Mr. Van Winkle's possession, either jointly or constructively, for the purpose of trafficking, and the Crown has proven the essential elements to establish Mr. Van Winkle's guilt in respect of all counts.
- [26] Mr. Van Winkle then applied for these proceedings to be stayed, on the basis of entrapment. I heard further evidence from the arresting officer, Sergeant Brown.

- [27] In the context of dial-a-dope trafficking investigations, police are not permitted to offer a person who answers a cellphone or responds to a text message the opportunity to commit an offence, unless the police have first formed a reasonable suspicion of criminal activity.
- [28] The reasonable suspicion requirement was formulated in the Supreme Court of Canada's decision in *R. v. Mack*, [1988] 2 S.C.R. 903 [Mack] at 959. Its particular application to dial-a-dope investigations is set out in the decisions of the Supreme Court of Canada in *R. v. Ahmad*, 2020 SCC 11 [Ahmad], in particular in the majority decision at paras. 33 to 57.
- [29] For the reasons I will now set out, I find that Sergeant Brown did form a reasonable suspicion before offering Mr. Van Winkle the opportunity to commit a crime. I have come to this conclusion for two reasons.
- [30] First, I find that Sergeant Brown's state of knowledge was sufficient to lead to a reasonable suspicion, even before he placed the first "Got shirts" text message to the number he had been told was being used by Mr. Van Winkle to sell drugs.
- [31] Second, and even if I am wrong on that first point, I find that this first text message was merely investigatory, and that an actual opportunity to commit an offence was not presented until Sergeant Brown had even stronger grounds for a reasonable suspicion tying drug-related activity to Mr. Van Winkle in particular.
- [32] Sergeant Brown testified that approximately one to three weeks prior to the events in question, he had obtained second-hand information, from a police handler of a confidential informant, that Jason Van Winkle was selling drugs using the telephone number in question. Sergeant Brown knew, in general terms, that Mr. Van Winkle was involved or was believed to have been involved in drug trafficking. Other than the fact that this tip came through an experienced handler, Sergeant Brown could say nothing of the tip's pedigree: see the discussion in *Ahmad* at para. 51.
- [33] It is common ground that this was the sort of bald tip that would not, on its own, ground a reasonable suspicion: *Ahmad* at para. 53.
- [34] Sergeant Brown, however, did not act on that tip until the night of February 23, 2019, when he made the observations I have described: individual "street people" carrying out seemingly random brief interactions with the occupants of a vehicle registered to Mr. Van Winkle, late at night, close to an area known for a high frequency of street level drug crime. Of course, as the defence contends, perhaps there was an innocent explanation for what Sergeant Brown observed. Maybe all of these people were just asking for cigarettes, for example, or begging for change; or maybe the vehicle occupants were handing out harm reduction kits. But as the majority in *Ahmad* stated at para. 47:
- [47] Although innocent explanations and exculpatory information remain relevant to an assessment of reasonable suspicion, the police are not required to undertake further investigation to rule out those explanations (*Chehil*, at paras. 33-34). Nevertheless, the facts must indicate the possibility of criminal behaviour: characteristics that apply broadly to

innocent people are not markers of criminal activity (Chehil, at para. 35). Mere hunches and intuition will not suffice (Barnes, at p. 460). However, an officer's training or experience can make otherwise equivocal information probative of the presence of criminal activity (Chehil, at para. 47).

The references are to R. v. Chehil, 2013 SCC 49, and R. v. Barnes, [1991] 1 S.C.R. 449.

- [35] At that point, Sergeant Brown had not seen more substantial evidence of drug transactions, such as individuals placing items in their pockets as they walked away from the vehicle or hand-to-hand exchanges between those persons and the vehicle occupants, and he had not positively identified Mr. Van Winkle as an occupant of the vehicle at that point. Nevertheless, the totality of the circumstances was such that the officer suspected he was observing drug activity. Given his training and experience, that was an inference he was well-positioned to make. After keeping Mr. Van Winkle's car under observation for about 12 minutes, he then initiated the text communications to the number he believed, on the basis of the tip, to be associated with Mr. Van Winkle.
- [36] Nothing in what Sergeant Brown had observed to that point specifically tied Mr. Van Winkle to the phone number. However, I find that the bare tip that Mr. Van Winkle was conducting drug transactions with that number, combined with Sergeant Brown's observations of the activity around the vehicle owned by Mr. Van Winkle, sufficiently individualized Mr. Van Winkle as the target. The officer had reasonable cause to suspect that an individual was involved in the type of criminal activity under investigation - see Chehil, para. 29 - and that that individual was Mr. Van Winkle. This suspicion justified the use of the cellphone, that the officer believed Mr. Van Winkle might be using, to attempt to initiate a drug transaction. It was not a random call and, in totality, was not based merely on speculation. It was part of a focused investigation.
- [37] There is also a second rationale for finding that no entrapment took place, which is that in any event Sergeant Brown did not extend or create an actual opportunity for the person he was texting with to commit an offence, until that individual had responded positively to the inquiry "Got shirts", indicating, in street language, that he had cocaine available for sale.
- [38] The defence says that those opening words, "Got shirts", themselves presented an opportunity constituting entrapment. But under the current analytical framework in the law of entrapment, the words used in a telephone or text communication must be scrutinized to determine if and when an offer to commit an offence was made. A distinction is drawn between communications that offer such opportunity and those that are merely investigatory. In this case, the opening words - again, "Yo J, it's Wes. Got shirts" - fell into the latter category. I accept that "shirts" would have been understood by a dealer or someone involved in drug culture to refer to cocaine. Further, I accept that the inquiry would have been understood by a person familiar with the terminology as indicating at least that the person sending the message was looking for a supply of drugs. However, those words fell short of a specific offer or inducement to participate in criminal conduct.

- [39] In Ahmad, the police officer's opening query in a phone conversation was as to whether the unidentified male who answered the phone could help him out. The male replied, "What do you need?" And the officer then said, "Two soft", meaning two grams of cocaine. The majority held that the "help me out" query itself was not an opportunity to traffic because a positive response would not have been trafficking as defined in the CDSA, since no particular scheduled substance had been mentioned: see Ahmad, para. 73. What the positive response, "What do you need?" did show was a willingness to traffic that elevated the officer's state of knowledge to a reasonable suspicion.
- [40] In the present case, a scheduled drug, "shirts" or cocaine, had been mentioned; but the words "got shirts" were not an unequivocal offer to purchase, and a positive response, "yes", could not constitute trafficking. That query did present an opportunity to traffic, in the sense that "J", when asked, "got shirts", could have responded, "Sure, I'll sell you a gram for a hundred dollars." But that was no more of an opportunity than in Ahmad, where the request, "Can you help me out?", could have been met with, "Yes, I'll sell you hard or soft, what do you need?"
- [41] In both Ahmad and the present case, the initial query itself, regardless of the range of possible responses, fell on the investigative side of the line. In this case, no actual offer to purchase - "meet for \$100" - was made by the officer until after the traffic stop, by which time he had positively identified Mr. Van Winkle as being an occupant of the vehicle.
- [42] In the totality of the circumstances, the defence of entrapment is not made out.
- [43] Mr. Van Winkle, if you would stand, please.
- [44] Jason Robert Van Winkle, I find you guilty of the four counts of the indictment, and convictions will be entered on each of those four counts.

"A. Saunders J."

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