

CANADA / JUDGMENT

R. v. Wallis

2024 BCCA 235

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 235 R. v. Wallis

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Wallis,

2024 BCCA 235

Date: 20240617

Docket: CA48957

Between:

Rex

Respondent

And

Devan Shane Wallis

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

September 2, 2022 (conviction) (R. v. Wallis, 2022 BCSC 2435,

Kamloops Docket 110953-2).

Oral Reasons for Judgment

Counsel for the Appellant:

C.E. Johnson

Counsel for the Respondent:

M. Shah

Place and Date of Hearing:

Vancouver, British Columbia

June 17, 2024

Place and Date of Judgment:

Vancouver, British Columbia

June 17, 2024

Summary:

This is an appeal from conviction for possessing child pornography. The police seized a mobile phone from the appellant while executing a search warrant at his residence. There were child exploitation materials on the phone. At his trial, the appellant challenged the admissibility of the evidence taken from the phone, arguing that the police did not have lawful authority to seize the phone from him. The trial judge disagreed and admitted the evidence. He then found that the appellant had knowledge of the materials on the phone and control over them. On appeal, the appellant says the judge erred in his admissibility ruling and, on the trial proper, impermissibly reversed the burden of proof. HELD: Appeal dismissed. The phone was lawfully seized under the search warrant. Furthermore, the judge did not reverse the burden of proof. Rather, he analyzed the appellant's evidence in the context of the other evidence and concluded that it did not raise a reasonable doubt. The appellant has not established reversible legal error.

- [1] DEWITT-VAN OOSTEN J.A.: In September 2023, the appellant, Devan Shane Wallis, was found guilty of possessing child pornography contrary to s. 163.1(4)(a) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The offence occurred in Kamloops in July 2020. While executing a search warrant at Mr. Wallis' residence, the police seized a mobile phone that he was holding in one of his hands. The phone was later searched and found to contain 746 images and 42 video files depicting child pornography.
- [3] Mr. Wallis was tried in the Supreme Court. He challenged the admissibility of the evidence found on the phone, but it was admitted. The judge then found as a fact that Mr. Wallis knew the phone contained child pornography and that he had control over the material. The judge was satisfied the Crown had proved possession beyond a reasonable doubt.

- [4] Mr. Wallis appeals from his conviction. He alleges two errors.
- [5] First, he says the judge erred in not finding that the seizure of the phone was unreasonable under s. 8 of the Canadian Charter of Rights and Freedoms. Second, Mr. Wallis submits that in finding he had possession of child pornography, the judge reversed the onus of proof.

Discussion

A. Seizure of the phone

- [6] The facts surrounding the seizure are set out in the judge's reasons on the admissibility voir dire, indexed as 2022 BCSC 2434.
- [7] On July 7, 2020, the police obtained a warrant authorizing them to search Mr. Wallis' residence. They had grounds to believe that images depicting child pornography had been uploaded to an image-sharing platform from an Internet Protocol ("IP") address associated with that residence. (Access to the IP address has not been raised as an issue on appeal.)
- [8] Among other things, the warrant allowed the police to seize any cellphones, tablets or mobile devices that were capable of connecting to the Internet. Once seized, those items would then be searched for digital images, videos, computerized graphic or data files depicting child pornography, presumably under the authority of another warrant.
- [9] Mr. Wallis was present when the police executed the warrant. He was falling asleep when first alerted to their presence and wearing only his underwear. He testified that he grabbed his pants from the foot of the bed and was in the process of putting them on when the police entered the residence and approached him.
- [10] Mr. Wallis' phone was sticking out of a pants pocket. He said he was asked if it was his phone. He did not answer, but removed the phone from his pocket and requested that he be allowed to call his employer. He sent a text message. According to Mr. Wallis, one of the police officers then took the phone from him and gave it to another officer.
- [11] At trial, Mr. Wallis did not challenge the validity of the warrant. Instead, he argued that seizing a phone held by him went beyond the scope of the warrant and the police did not have lawful authority to take it. The warrant authorized a search of the residence and the seizure of items discovered during that search, not a search of Mr. Wallis. He testified that he did not voluntarily provide the phone to the police. Rather, he felt that he had no choice but to turn it over to them and did so in response to their presence. From Mr. Wallis' perspective, the police effected a search of his person. His lawyer put it this way in submissions on the voir dire:

[The phone] was in his hand, yes, it was in his hand as a result of events precipitated by police asking questions coming into his apartment while he's in his underwear, asking him about a phone poking out of his pocket, and then seizing the phone. The entire -- the totality of the circumstances speak to a search of his person.

- [12] The judge rejected the defence characterization of what happened in the residence and found the seizure was lawful. He found that the police did not discover the phone by searching Mr. Wallis. Instead, Mr. Wallis produced the phone of his own accord and for his own purposes. The phone was in the residence, it was a type of item named in the warrant, it was visible once produced, and the police were entitled to seize it: at paras. 16-17.
- [13] In its submissions on the voir dire, the Crown acknowledged that a warrant for searching a residence does not authorize the police to search people who may be present. Rather, the authority to conduct a search of the person must find its lawful grounding elsewhere, such as in the power to search incident to an investigative detention, the power to search incident to an arrest, or the power to conduct a stand-alone "safety search".
- [14] In deciding that the seizure was lawful, the judge also acknowledged a distinction between a warranted search of a residence and a search of the person (at paras. 18-19):

Different considerations may have applied if the cellphone was not plainly obvious to the police when they arrived. Had the cellphone remained in [Mr. Wallis'] pocket, the police would not have had the authority to search [Mr. Wallis'] person to locate it.

I accept that a search warrant that authorizes a search of a residence does not authorize the police to conduct a search of a suspect's person. However, in my view, there is a difference between search and seizure. The police may not have had authority to search [Mr. Wallis'] person under the warrant, but they certainly had the authority to seize any electronic devices at the residence that were plainly obvious.

- [15] The judge concluded that what happened here was not a search of a person. Mr. Wallis acknowledged in his testimony that he was not "patted down or frisked" by the police before they seized the phone: at para. 20. The judge found there was "no evidence that a search of the accused's person resulted in the discovery of the cellphone": at para. 20 (emphasis added).

Submissions on appeal

- [16] On appeal, Mr. Wallis makes essentially the same argument made at trial. He says the warrant did not authorize a search of his person or the seizure of anything directly from him. Instead, the police were limited to a search of the residence and the seizure of items discovered from that search. Mr. Wallis submits that in asking about the phone, watching him as he texted his employer, and then taking the phone directly from him, the police conducted a search of his person. They had no lawful basis for doing so and the ensuing seizure was presumptively unreasonable.

- [17] There was a factual dispute at trial over the precise location of the phone when it was seized. Mr. Wallis said he was holding it in one of his hands. A police officer testified that Mr. Wallis had placed the phone on a table. The judge did not resolve this dispute. However, for purposes of the appeal, the Crown accepts that the phone was taken directly from Mr. Wallis' hand. It says this fact does not render the seizure unlawful and the judge correctly determined the s. 8 analysis.
- [18] In support of its position, the Crown cites *R. v. Le*, 2013 BCCA 442. In that case, the police obtained a warrant to search a residence as part of a drug investigation. The warrant authorized the seizure of drugs, money, documents, drug packaging material, equipment and cell phones. The appellant was in the residence when the warrant was executed. She was allowed to leave. As she did so, she picked up her purse from the kitchen table. A police officer directed that the purse be taken from the appellant. It was searched and contained crack cocaine. Ms. Le was prosecuted for possessing illicit drugs.
- [19] The admissibility of those drugs was challenged at trial. The evidence was admitted. On appeal, this Court agreed with the trial judge that the warrant extended to the purse even though it was picked up by Ms. Le: at para. 21. The warrant authorized the police to search for "things" that would afford evidence of a drug offence and at the time the warrant was initially executed, the purse was "merely an object in the premises": at para. 26. The authority to seize that object under the warrant did not end merely because someone with a reasonable expectation of privacy picked it up from a table: at para. 28.
- [20] In *Le*, the Court drew a distinction between the facts of that case and a situation in which a purse may have been searched while it was "on the person": at para. 17. The Court acknowledged that in the latter circumstances, a judge may need to consider "whether the search warrant extended to the purse as a "thing" in the dwelling-house or whether it did not because searching such an object would be the search of a person": at para. 17.
- [21] The Crown says that on the facts of this case, the distinction drawn in *Le* does not arise. There was no search of the person. Instead, the phone was in the residence when the police arrived. It was produced by Mr. Wallis of his own accord and it was in plain view when seized. It was taken from Mr. Wallis' hand, not from his clothing, and the police did not search the contents of the phone while it was in Mr. Wallis' possession (or indeed, at the scene).

Analysis

- [22] To comply with s. 8 of the Charter, a search or seizure must be authorized by law, the law itself must be reasonable, and the search or seizure must be carried out in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278, 1987 CanLII 84; *R. v. Caslake*, [1998] 1 S.C.R. 51, 1998 CanLII 838 at para. 10.

- [23] Mr. Wallis has not persuaded me that the seizure of his phone contravened s. 8. This first ground of appeal is assessed applying a correctness standard: *R. v. Clarke*, 2017 BCCA 453 at para. 24, leave to appeal to SCC ref'd, 37977 (31 January 2019).
- [24] Mr. Wallis acknowledged on the voir dire that the police did not frisk him or pat him down before discovering the phone. They did not go through his clothing or reach into his pants pocket and remove the phone. Mr. Wallis did not say that he produced the phone from his pocket in response to police questioning. Rather, the police took possession of the phone after Mr. Wallis produced it of his own accord, after he used it in the presence of the police, and after his choice to do so rendered the phone plainly visible: at paras. 17-20.
- [25] In these circumstances, and consistent with the reasoning in *Le*, I agree with the Crown that the phone could be seized under the warrant.
- [26] The warrant authorized the police to search for cellphones or mobile devices that would afford evidence of a child pornography offence. When the police arrived and entered the residence to execute the warrant, the phone was not in Mr. Wallis' physical possession. Rather, it was in the pocket of a pair of pants that he put on after becoming aware of the police presence. On appeal, Mr. Wallis concedes that if the pants had remained at the foot of the bed, the warrant allowed the police to search the pockets and pull out the phone.
- [27] In my view, the fact that Mr. Wallis put on the pants, removed the phone from a pocket, and then held it in one of his hands, did not change the scope of the authority to seize. Mr. Wallis explained the circumstances this way in his testimony:

[my partner] got up to go to the bathroom, and I started drifting off back to sleep, and then during that point there was a loud knock on the door, and I heard [my partner] answer it, and I heard conversation, but wasn't sure what, and then [my partner] entered into the apartment and told me it was the police. So I started to -- that they had a search warrant. I was in nothing but my underwear, so I jumped up, and I grabbed my pair of pants that were at the foot of the bed, and I walked towards the -- the police that were standing at the end of the hallway, and as I was going to put my leg in, I asked what it was about, they said it was distribution of child pornography, and so I was stunned by that, and I continued to try and put on my pants, at which point my phone was poking out of the pocket, and [one of the police officers] asked if that was my phone.

I didn't respond yes or no, I just said -- asked if I could text my employer, and let them know I wasn't sure if I was going to be in or if I was going to be late, that I was speaking to police. She said that that was fine. So I started doing that. I only had my pants on, and as I was doing that, [another police officer] entered the room, and reaffirmed that they were going to need that phone, and I restated, "I'm just texting my employer", and she put her hand on the end of the phone, and as I -- as I hit send, she pulled it out of my hand. I continued getting dressed.

[Emphasis added.]

- [28] Mr. Wallis' partner also testified on the voir dire. They confirmed that when Mr. Wallis woke up, got out of bed and reached for his pants, the police were already in the residence.
- [29] Based on this evidence, it was open to the judge to find that the phone was "merely an object in the premises" at the time of the initial execution of the warrant: Le at para. 26. Mr. Wallis subsequently put on the pants that housed the phone. However, as acknowledged by him, the phone was sticking out of one of the pockets when the police approached him. The phone was visible. Importantly, Mr. Wallis then proceeded to pull it out from his pocket and openly use it in the presence of the police. The judge found as a fact that the act of doing so was not done in response to direction provided by the police.
- [30] When it was seized, the phone was in the residence, out in the open, clearly visible to the police, and it was a type of item that was explicitly named in the warrant. The police did not conduct a search of Mr. Wallis before seizing the phone. They did not frisk him or pat him down. They did not touch his body or his clothing. They did not remove any of his clothing or direct him to do so. They did not reach into his pants pocket or direct him to empty it. There was no physical inspection of his body, or any other form of interference with Mr. Wallis' bodily integrity or personal dignity.
- [31] The factors that led to a finding of a search of the person in R. v. Ricciardi, 2017 ONSC 2105 (a case cited by the Crown), were not present here. There was no "non-consensual removal" of clothing that interfered with Mr. Wallis' "personal dignity, autonomy and privacy of the person" and resulted in evidence: at para. 32.
- [32] I agree with the judge that in the particular circumstances of this case, there was no search of the person. Furthermore, applying Le, I am satisfied that the warranted authority to seize the phone from the residence did not end merely because Mr. Wallis, who had a reasonable expectation of privacy in the phone, "picked up" the pants that held the phone, pulled the phone out of the pocket, and used it to send a text message: Le at paras. 26-28. In the scenario presented by this case, state interference with Mr. Wallis' reasonable expectation of privacy in the phone was adequately addressed through the fact of prior judicial authorization.
- [33] Given this conclusion, I do not consider it necessary to address the Crown's alternative argument that if the judge erred in finding no breach of s. 8, the phone was nonetheless admissible under s. 24(2) of the Charter.
- [34] I also do not consider it necessary to address an additional issue raised by Mr. Wallis on appeal, namely, that the police potentially violated his s. 8 right by viewing the text that he sent to his employer. This was not an argument advanced on the voir dire as a separate basis for a Charter violation. The judge did not consider it, the argument was not explored in evidence at trial, and it would not be appropriate for us to revisit admissibility on this basis: R. v. Tomlinson, 2009 BCCA 196 at paras. 33, 37; R. v. Gill, 2018 BCCA 144 at paras. 9-11.

B. Burden of proof

- [35] Once the content of the phone was admitted into evidence, the issue for the judge to decide was whether the Crown proved that Mr. Wallis had possession of the child pornography. To prove possession, the Crown had to establish beyond a reasonable doubt that Mr. Wallis had knowledge of the child exploitation material on the phone and some measure of control over it: *R. v. Ahmadzai*, 2012 BCCA 215 at para. 27; *R. v. Choudhury*, 2021 ONCA 560 at para. 19; *R. v. Morelli*, 2010 SCC 8 at para. 17.
- [36] At trial, Mr. Wallis admitted that the phone belonged to him. He also admitted that he had exclusive possession of the phone when it was seized. He admitted that the images and the video files found on the phone's memory card constituted child pornography. However, he denied any knowledge of that material or control over it. He said that it "never showed up in [his] gallery".
- [37] Mr. Wallis testified that he purchased the phone from a repair shop in 2015 or 2016. He subsequently allowed a former girlfriend to use the phone for several months between December 2018 and April 2019. He testified that when the phone was returned to him, he noticed that it was not operating correctly. He also noticed that the memory card had greater memory capacity than the one he installed before he lent the phone to his former girlfriend. He said there "was a large chunk of storage on the [memory] card, but it [did not] seem to matter how much [he] wiped it, it would never go away". He did not access that part of the card. All he could see on the card were "three folders, and they were all empty". The implication of this testimony, of course, was that it must have been the former girlfriend who downloaded and stored child pornography on the phone, rather than Mr. Wallis, and it had somehow been rendered inaccessible to him. He testified that this individual was manipulative, vindictive and, importantly, a pedophile.
- [38] In reasons for conviction indexed at 2022 BCSC 2435, the judge rejected Mr. Wallis' testimony. He had a number of reasons for doing so. For one, he found it not credible that in light of his purported belief about his former girlfriend's paedophiliac tendencies, Mr. Wallis would have taken no steps to replace the memory card or the phone once he discovered problems with it, including a large chunk of data that he could not wipe away, or to determine what was stored on the memory card. The judge found that Mr. Wallis' claim that his former girlfriend was a pedophile was not supported by any evidence, and that Mr. Wallis provided "no basis" for that opinion: at para. 14.
- [39] The judge also disbelieved Mr. Wallis when he said he could not access a large portion of the phone's memory card to see what was there. This evidence contrasted with the police testimony about accessing the card. The police were not able to recover data from the phone itself because it was password-protected: at para. 10. The judge was alive to this fact. However, the police were able to remove the memory card and insert it into a machine that allowed them to examine information on the card, extract it, and save it to another computer: at para. 8. This included the child exploitation material. There was no indication

that the police had any difficulty in accessing the data: at para. 21. The officer who searched the memory card was not asked in cross-examination whether he experienced any difficulties in doing so, whether the use of police equipment made accessing data on the memory card easier than through the phone itself, or whether there were any strange or unusual files on the memory card (something testified to by a defence witness): at paras. 21-22.

- [40] Having disbelieved Mr. Wallis, the judge found "nothing else" in the evidence that raised a reasonable doubt about knowledge or control: at para. 27. Mr. Wallis' current partner testified about difficulties with the phone, but the judge found that their evidence was not "sufficiently reliable to provide dependable corroboration" for his assertion that he did not know of the child pornography: at para. 29. They reviewed the Crown's disclosure package before testifying (at para. 28), and the judge was concerned that their evidence may have been "tailored to answer the Crown's case": at para. 28.

Submissions on appeal

- [41] Mr. Wallis says the judge impermissibly reversed the onus of proof by concluding that he could not accept his testimony or find that it raised a reasonable doubt unless it was independently confirmed. In particular, he points to para. 20b of the reasons for conviction, in which the judge stated that he did not find Mr. Wallis credible because:

[He] testified that he could access some files on the memory card and not others, but there is no explanation for how that could be. In particular, there is no evidence that the cellphone had a program installed on it that would have this effect.

- [42] Mr. Wallis submits that this paragraph reflects the type of error made by the trial judge in *R. v. Veeken*, 2020 BCCA 54, and in the latter case, it necessitated a new trial.
- [43] In *Veeken*, the appellant was prosecuted for the offence of sexual interference. He denied that he ever touched the complainant for a sexual purpose. In assessing the appellant's evidence, the trial judge in *Veeken* noted there was "no reliable evidence" supporting the denial: at para. 72. He then went on to say that "[i]n these circumstances", a finding that the appellant's denial was truthful could not "reasonably be made": at para. 73 (emphasis added). The trial judge took the same approach to the question of whether the appellant's testimony raised a reasonable doubt. He said answering that question was "similarly problematic" in the absence of reliable evidence that supported the denial: at para. 74.
- [44] This Court held that the trial judge committed reversible error in the way he approached Mr. Veeken's evidence. As per Justice Fitch, writing for the Court:

[17] The judge was certainly entitled to reject the appellant's evidence and find that it did not raise a reasonable doubt about his guilt. The difficulty in this case arises because of the judge's conclusion that he could neither accept the appellant's evidence nor find that it raised a reasonable doubt in the absence of independent and reliable evidence supporting his account. To approach the issue this way was to erroneously shift the burden to the accused to adduce evidence that confirmed his denial of wrongdoing.

[Emphasis added.]

[45] In responding to Mr. Wallis' second ground of appeal, the Crown says his argument fails to consider the reasons for conviction as a whole and in the context of the record. This is what an appellate court must do before interfering: *R. v. G.F.*, 2021 SCC 20 at para. 69.

[46] The Crown submits that with the benefit of a functional and contextual review, it is readily apparent the judge did not reject Mr. Wallis' testimony because he thought he could only accept that testimony if it was independently confirmed. He did not commit a Veeken error. Rather, he found Mr. Wallis' testimony inherently implausible in light of the other evidence, including police testimony that they were able to access the material on the phone's memory card without difficulty.

Analysis

[47] I do not find Mr. Wallis' second ground of appeal persuasive.

[48] The judge correctly instructed himself on the Crown's burden of proof. He also correctly instructed himself on the principles established in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93. He understood that if he believed Mr. Wallis' denial that he knew of the child pornography, he must acquit. He also understood that if "the evidence" raised a reasonable doubt on the essential elements of the offence, he must acquit: at para. 19. It is clear from his reasons that the judge appreciated his obligation to consider "all of the evidence" in deciding whether the Crown proved the offence beyond a reasonable doubt: at para. 31.

[49] In my view, when the reasons are considered as a whole and in the context of the record, the judge's rejection of Mr. Wallis' testimony and his conclusion that the defence evidence did not raise a reasonable doubt were not grounded in a perception or belief that independent confirmation was required before Mr. Wallis could be found a credible or reliable witness. Instead, the judge found Mr. Wallis' explanation for why he did not know there was child pornography on his phone implausible in light of the other evidence in the case.

[50] In assessing Mr. Wallis' credibility and reliability, the judge was entitled to consider whether his narrative was plausible or inherently improbable: *R. v. Kruk*, 2024 SCC 7 at para. 73. That assessment is properly done in the context of the other evidence, whether adduced by the Crown or the defence. As explained in *R. v. Sheepway*, 2022 YKCA 3:

[101] Evidence provided by an accused is not assessed in isolation, even where the accused is the only witness to the events in question. A denial or defence that relies heavily on the testimony of the accused may be rejected "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence"

[Internal references omitted.]

[51] Here, the judge found it difficult to believe Mr. Wallis' testimony in light of the police testimony about their experience in dealing with the same memory card from which Mr. Wallis said he could only access three empty folders. However, this was not the only basis for rejecting his testimony. The judge also had other reasons for not believing Mr. Wallis and for finding that the defence evidence did not raise a reasonable doubt.

[52] Those reasons included: Mr. Wallis having asserted that his former girlfriend was a pedophile with no apparent basis in fact (at para. 14); unconvincing explanations for why he took no steps to address frustrating problems with the operability of his phone, even though he had serious misgivings about his former girlfriend, including pedophilic tendencies (at para. 20a); a failed testimonial attempt by Mr. Wallis to distance himself from the uploading incident that led the police to his residence in the first place, which "significantly" impacted his credibility (at para. 20c); and a possible tailoring of evidence by Mr. Wallis' current partner (at para. 28).

[53] Mr. Wallis says there were other inferences the judge could have drawn from the evidence and it was unreasonable for him to conclude that Mr. Wallis' assertion about lack of knowledge was implausible. However, it was fundamentally the role of the judge to decide if alternative ways of looking at the evidence were reasonable enough to raise a doubt (*R. v. Dipnarine*, 2014 ABCA 328 at para. 22), and I see no principled basis on which to interfere with his determination.

[54] At its heart, Mr. Wallis' second ground of appeal challenges the judge's credibility and reliability findings. These findings attract a highly deferential standard of review. It is "rarely" the case that deficiencies in a credibility and reliability analysis, as laid out in reasons for judgment, will merit appellate intervention: *R. v. Dinardo*, 2008 SCC 24 at para. 26. Mr. Wallis says the deferential standard has been displaced by legal error on the burden of proof. However, in my view that error has not been made out.

Disposition

[55] For all of these reasons, I would dismiss the appeal.

[56] SAUNDERS J.A.: I agree.

[57] FENLON J.A.: I agree.

[58] SAUNDERS J.A.: With thanks to counsel for your submissions, the appeal is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"

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