
CANADA / JUDGMENT

R. v. Wilkinson

2020 BCSC 2231

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wilkinson,

2020 BCSC 2231

Date: 20201106

Docket: 42009-2

Registry: Duncan

Regina

v.

James Christopher Wilkinson

Before: The Honourable Mr. Justice Steeves

Oral Ruling on Voir Dire re s. 24(2) Application

Counsel for the Federal Crown

appearing via teleconference:

J. Rutherford

(agent for B. Lansdowne)

Counsel for the Accused

appearing via teleconference:

C. L. Hodson

Place and Date of Trial/Hearing:

Duncan, B.C.

October 30, 2020

Place and Date of Judgment:

Duncan, B.C.

November 6, 2020

- [1] THE COURT: On September 25, 2020, I allowed an application by the defendant, James Wilkinson, for the exclusion of evidence under s. 9 of the Charter. I denied applications under s. 10(a), 10(b), and s. 8. This is my decision about whether to admit the evidence that was subject to the s. 9 ruling under s. 24(2) of the Charter.
- [2] The background is that two peace officers were driving in a high crime neighbourhood in Duncan, B.C. at 11:30 p.m. on July 13, 2019. They were in an unmarked police vehicle, wearing civilian clothes. They passed two males, one who was carrying a backpack, on the right on the sidewalk. After passing by, the police car slowed down at a corner stop sign. One of the peace officers noticed the two males turn and run away. The police immediately reversed and turned their vehicle to put the car's lights on the bush and abandoned lot where the two males ran. One of the males then ran out and down the street towards the stop sign. The police pursued in their vehicle.
- [3] The male turned at the corner and ran back into the abandoned lot and the police stopped their vehicle and got out. They yelled, "Stop. Police." The male gave a positive reply, but he continued running. He tripped over a low fence in the underbrush, but stood up and continued running. One of the peace officers pursued him through the underbrush, while the other circled around from the street. The male tripped again at another low fence and the peace officers caught up to him and detained him. He was without a backpack and not wearing shoes.
- [4] One peace officer went back and retrieved the backpack and two shoes. The other peace officer asked the male for his name, and he identified himself as Mr. Wilkinson. The police officer also asked Mr. Wilkinson why he ran. To this he said he was afraid of being shot because it had happened before. Charter warnings were given. The other police officer returned with the backpack and shoes.
- [5] The following were found in the backpack: there was cash of \$1,035 in one envelope; there was a cellphone, which was described as somewhat unique, inasmuch as it was capable of high security communications; in a zipped bag, there was \$1,330, 97.3 grams of heroin/fentanyl, 4.9 grams of crack cocaine, 7.7 grams of powder cocaine, and 0.5 grams of methamphetamine; there was also a tag associated with a Mercedes-Benz. On his person were found a charging cord compatible with the cellphone in the backpack and a key for a

Mercedes-Benz.

- [6] In my decision of September 25, 2020, I found that the defendant had been arbitrarily detained under s. 9 of the Charter. I accepted that the police believed there was a subjective belief in grounds for an investigative detention. However, there was insufficient objective grounds. Specifically, two males walking on a dark street in a high crime area did not establish objective grounds. The fact that the two males ran away when the unmarked police car passed them gave rise to a hunch, but that was not sufficient, and investigative detention requires a reasonable suspicion, a higher standard.
- [7] With respect to Mr. Wilkinson's application under s. 8 of the Charter, I concluded that he had abandoned the backpack when he ran away from it and he gave up his ability to control it. I denied the s. 8 application. I also denied the application under s. 10(a) and 10(b) of the Charter. I concluded that Mr. Wilkinson had been cautioned within one to two minutes of his detention. This was done "promptly" and "without delay".
- [8] As above, Mr. Wilkinson now seeks to exclude the evidence seized from his person and the contents of the backpack. The applicable provision of the Charter is s. 24(2):

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

- [9] The onus is on Mr. Wilkinson to show both that the evidence was obtained in a manner that infringed his rights and the admission of the evidence would bring the administrative justice into disrepute (*R. v. Robertson*, 2017 BCSC 965, at para. 15). I will consider these two issues.
- [10] With respect to the first requirement under s. 24(2), Mr. Wilkinson must meet the threshold requirement that the backpack and items on his person were obtained in a manner that infringed his rights and freedoms. I will deal with the backpack here and the items found on his person at the end.
- [11] The Crown submits, and I agree, that my previous finding that Mr. Wilkinson had abandoned the backpack is significant. I concluded, under the s. 8 analysis, that Mr. Wilkinson had abandoned any control he could exercise over the backpack; he did not hide it for a later retrieval; and it was left on the property of a third party over which Mr. Wilkinson had no control.
- [12] There is a useful analogy in the so-called garbage cases. An example is *R. v. Patrick*, 2009 SCC 17, where the police attempted to introduce evidence taken from garbage bags left by the accused in that case, in an alleyway adjacent to his property. The accused sought, unsuccessfully, to exclude the evidence. The Supreme Court of Canada concluded that the accused had abandoned any reasonable expectation of privacy because he had done everything required to commit the bags to the municipal collection system. The bags were unprotected and within easy reach of anyone walking by, including street people, children,

nosy neighbours, etc. That is para. 55.

- [13] It is true that the backpack in this case was not abandoned in a public place. However, the place where it was left by the defendant appeared to be abandoned itself, as evidenced by the undergrowth and unused fences. In addition, unlike some of the garbage cases, there could be no extension of Mr. Wilkinson's private property dwelling rights to the backpack, because he did not live there.
- [14] In another similar case, the Supreme Court of Canada found that the accused did not have an expectation of privacy in his girlfriend's residence. That is *R. v. Edwards*, [1996] 1 S.C.R. 128. Since no personal right of the accused was affected by the police conduct, he could not contest the admissibility of evidence obtained from the residence under s. 24(2) of the Charter.
- [15] Here, I conclude that the defendant abandoned any privacy interest in the backpack when he ran away from it. Therefore, he does not have any standing to claim his property in the bag. I conclude that its contents were not obtained in a manner that infringed or denied Mr. Wilkinson's rights or freedoms. This conclusion is sufficient to dispose of the s. 24(2) issue. I will, however, briefly review the issues that arise under the administrative justice part of that provision.
- [16] The Supreme Court of Canada has identified considerations underlying the application of s. 24(2). The focus is not on the immediate reaction to an individual case, but, instead, it looks objectively at whether the overall repute of the system will be adversely affected over the long term by the admission of the evidence at issue. The focus of s. 24(2) is also prospective, in the sense of preventing further damage to the repute of the justice system; and the focus is on societal interests; and it is not aimed at the police, but at systemic concerns (*R. v. Grant*, 2009 SCC 32, at paras. 67 to 70).
- [17] *Grant* also set out three lines of inquiry when considering s. 24(2): (1) the seriousness of the Charter infringing state conduct; (2) the impact of the accused's Charter protected interests; and (3) society's interest in adjudication of the case on its merits (*Grant* at para. 71; *Robertson* at para. 22). I will review these and the evidence in this case.
- [18] Looking at the seriousness of the Charter-infringing conduct, a spectrum is set out in *Grant*. At one end is an inadvertent or minor violation and at the other end there is a wilful or reckless regard for Charter interests (para. 74). The two ends of this spectrum obviously have different effects on the public's confidence in the justice system.
- [19] In this case, I cannot agree with the defendant that the police acted recklessly or wilfully to violate his Charter interests. I found previously that the police had a valid subjective belief in the grounds for detention. They were acting quickly, and the entire episode on the night of July 13, 2019 took minutes. There is no pattern of abuse or extreme measures. In fact, the actions of the police were no more than what was required to detain Mr. Wilkinson, albeit without a reasonable suspicion. This seems, to me, close to the minor end of the spectrum

set out in Grant and it favours the admission of the backpack and its contents.

- [20] The second factor in Grant is the impact on the Charter interests of Mr. Wilkinson. In Grant, another spectrum is posed; this one from fleeting and technical to profoundly intrusive (para. 76).
- [21] I accept that detention of Mr. Wilkinson negatively affected his liberty. However, again, the entire incident, from the first observation of the two males to the detention of Mr. Wilkinson, took only a few minutes. This could be considered more than fleeting, but not much more. It cannot be considered as profoundly intrusive. I add that any privacy interest the defendant had in the backpack was, again, foregone when he abandoned it. I do not accept that interest was violated. This also favours the admission of the evidence.
- [22] Turning to the third factor in Grant, it relates to society's interest in having the case adjudicated on its merits. The question here is whether the truth-seeking function is better served by admission or exclusion of the evidence. Factors to be considered include the reliability of the evidence and its importance to the Crown's case, and physical evidence is generally reliable and will not be related to a Charter breach (Grant at paras. 79, 81 to 83, and 115).
- [23] As well, the exclusion of highly reliable evidence may impact more negatively on the reputation of the administration of justice when the remedy "guts" the prosecution. This third factor in Grant should not be neutered so that the safety of the public is compromised (Grant at paras. 81 to 83 and para. 115; and R. v. Omar, 2019 SCC 32, citing R. v. Omar, 2018 ONCA 975, at paras. 137 to 138).
- [24] Here, the Crown says that excluding the evidence in the backpack would gut its case. That is not determinative, but it is worthy of some significant weight. I also note that it is physical evidence that is at issue here and it is considered inherently reliable. Finally, there is no suggestion at all that the backpack did not belong to Mr. Wilkinson (before he abandoned it) or that it had been tampered with in some way. In my view, the truth-seeking function of the justice system would be better served by the admission of the backpack and its contents. This favours the admission of the backpack and its contents.
- [25] There remains the items found on the person of Mr. Wilkinson. This was the unique cellphone which matched the charging cord in the backpack, and the Mercedes-Benz item which matched another Mercedes-Benz item in the backpack.
- [26] The conduct of the police in searching the defendant cannot be described as reckless in any sense. Indeed, it was a routine search incidental to his arrest. He certainly had a privacy interest in his person, but it cannot be said that the search was intrusive. As for the third factor in Grant, the Crown accepts that its case would not be gutted by the exclusion of the items found on Mr. Wilkinson's person. On the other hand, the items are physical evidence and there is no dispute about their ownership. In my view, they are admissible.

- [27] By way of a summary: (1) the items in the backpack were not obtained in a manner that violated the Charter rights of Mr. Wilkinson; (2) the three factors in Grant favour the admission of the backpack and its contents; (3) the three factors in Grant also favour the admission of the two items found on the person of Mr. Wilkinson.
- [28] Mr. Wilkinson's application to exclude the evidence at issue under s. 24(2) of the Charter is dismissed.
- [29] THE ACCUSED (via video): So you're basically saying I can't walk down the street without being harassed by two police officers? Now, if I was a black African-American, this would be a totally different story. That backpack was on -- apparently on my back when I walked down the street, which was totally legal, and you're saying that I can't walk down the street without being harassed by two police officers? I want to remove counsel. I motion to -- how is that even like legitimate? These cops can just -- I walk down the -- I walk down the street, they can just come up and harass me? Like how is that even justifiable?
- [30] THE COURT: So, counsel, we have a hearing on November 12th to start this -- for the stage one of the jury selection.
- [31] THE ACCUSED: I want to -- no, I would like to -- so, another thing is, you question --
- [32] THE COURT: I will see you at that hearing.
- [33] THE ACCUSED: -- the cop's record and integrity.
- [34] THE COURT: Thank you. We are adjourned.
- [35] THE ACCUSED: My counsel's fired. My counsel is fired.
- [36] THE CLERK: Order in court.
- [37] THE ACCUSED: I am the counsel. Now you question the cops. I want to subpoena their records, Your Honour. Their records. I want to subpoena how their track records are.

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

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