

CANADA / JUDGMENT

R. v. Wong

2021 BCSC 2393

COURT

Supreme Court of British Columbia

DECIDED

30 July 2021

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2021 BCSC 2393 R. v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wong,

2021 BCSC 2393

Date: 20210730

Docket: X083311-1

Registry: New Westminster

Regina

v.

Khamla Wong also known as Khamla Siharaj

Restriction on Publication: Inherent Jurisdiction

Before: The Honourable Mr. Justice Tammen

Oral Ruling on Voir Dire #1

(re s. 24(2) Application)

Counsel for the Crown:

E. Laurie

C. Fast

Counsel for the Accused:

M.A. Nathanson

Place and Date of Hearing:

New Westminster, B.C.

June 17, 21 and 28-29, 2021

Place and Date of Judgment:

New Westminster, B.C.

July 30, 2021

- [1] THE COURT: On June 18, 2009, members of the Combined Forces Special Enforcement Unit executed a search warrant on the home of the accused which was then occupied by him, his spouse, and their two young children.
- [2] The accused was detained for over eight hours while the search occurred and arrested for firearms offences during the search process. The leader of the search team was Detective Spearn, who was also the primary investigator for the project, an investigation into a large conspiracy to import and traffic in cocaine.
- [3] During his interactions with the accused, Detective Spearn impermissibly questioned the accused prior to permitting access to counsel and, in so doing, breached the accused's s. 10 Charter rights. Following a challenge to the facial validity of the warrant, I set it aside and found a breach of the accused's s. 8 right to be free from unreasonable search or seizure. I must now determine the admissibility of items seized by police during the search pursuant to s. 24(2) of the Charter.
- [4] The fruits of the search which Crown wishes to adduce at trial are three BlackBerry devices found at the home. Those devices are each linked to communications which show complicity in the conspiracy. Also found during the search was a loaded handgun which Crown does not seek to have admitted at trial.
- [5] The framework within which I must assess the admissibility of the BlackBerries is well known and thoroughly canvassed in the Supreme Court of Canada decision of *R. v. Grant*, 2009 SCC 32. In determining the overarching question of impact of exclusion of the evidence on the repute of the administration of justice, I must consider and balance the following:
- a) the seriousness of the Charter-infringing state conduct;
 - b) the impact of the breach on the Charter-protected interests of the accused; and
 - c) society's interests in an adjudication on the merits.
- [6] I will address each of the Charter breaches individually before considering the cumulative effect on the long-term repute of the administration of justice.

- [7] The s. 8 breach involves a search of a dwelling house and is thus a serious incursion on the privacy interests of the accused. The adage that a person's home is their castle has always held sway in Charter jurisprudence. Warrantless searches of dwelling houses are among the most egregious breaches of privacy interests. In this case, the police conduct is tempered by the fact that they sought a warrant and thus exhibited regard for the rights of the accused.
- [8] The individual s. 10 breaches are not among the most serious police conduct. However, there were three discrete breaches of the s. 10 rights of the accused within a short period of time and all were committed by a senior officer who acknowledged that he knew better at the time. Superintendent Spearn frankly conceded that he could offer no explanation for his Charter-infringing conduct.
- [9] The facts surrounding the s. 10 breaches are as follows:
- a) Superintendent Spearn detained the accused outside the residence and permitted him to read the search warrant. The accused, after being told of his right to counsel, said he wished to contact a lawyer. Superintendent Spearn did not immediately permit the accused to do so, but rather suspended his right to counsel. The accused finally spoke with a lawyer approximately three hours after the initial detention;
 - b) After emergency response team members cleared the premises, both Superintendent Spearn and the accused moved into the home of the accused. Approximately two hours after the initial detention, Superintendent Spearn showed the accused the warrant again and asked if he wished to call a lawyer. The accused said no. At the time, they were in the kitchen and the accused was in handcuffs. Superintendent Spearn did not advise the accused of the police obligation to hold off questioning until the accused had been given a reasonable opportunity to contact counsel. This is the second s. 10 breach, the failure to provide a Prosper warning, named for the Supreme Court of Canada case. Superintendent Spearn could not say why he showed the accused the warrant a second time, nor why he asked a second time if the accused wished to contact counsel, when the accused had previously asserted that right; and
 - c) The final breach of s. 10 occurred when Superintendent Spearn inexplicably did exactly what the Supreme Court of Canada jurisprudence says police cannot and should not do, namely questioned the detainee with a view to gaining incriminatory admissions prior to giving the accused an opportunity to consult counsel. Superintendent Spearn asked the accused if there were any drugs or firearms in the house. The accused replied that he kept a gun in the house for protection. Superintendent Spearn then immediately arrested the accused for firearms offences.
- [10] A loaded firearm was subsequently discovered by police, but no substantive charges were laid and Crown does not seek to have the gun admitted into evidence at trial.
- [11] I will next examine the Grant factors in order.

Seriousness of the Charter-infringing state conduct

- [12] As noted, the s. 8 breach involves a search of a dwelling house and thus falls at the most serious end of the spectrum of intrusiveness. There was certainly not overt bad faith on the part of police, inasmuch as they sought a warrant. However, the level of care exhibited by Constable Wilcott, the affiant, in securing that warrant fell well below the expected standard. His failure to demonstrate objective grounds for the search was negligence of a high degree.
- [13] The negligence of Cst. Wilcott is exponentially compounded by the almost complete disregard for the accused's s. 10 rights exhibited by Superintendent Spearn. In that regard, I adopt what was said by Doherty J.A. of the Ontario Court of Appeal in *R. v. Rover*, 2018 ONCA 745:
- [45] The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.
- [14] Here the police were coordinating multiple searches simultaneously. There had been a briefing the previous day to assist with that coordination. The site commander for this search was the lead investigator, Superintendent Spearn. Superintendent Spearn should have set the standard for the team. Instead, he engaged in conduct which deprived the accused of his important lifeline: access to counsel, at a time when he was under the complete control of police. All of this occurred while police were conducting an extremely intrusive search of the entire home of the accused, a search performed pursuant to a warrant believed by police to be valid, but which I subsequently set aside.
- [15] Viewed cumulatively, the Charter-infringing police conduct falls at the most serious end of the spectrum and tilts in favour of exclusion of the evidence.

Impact of the breaches on the Charter-protected interests of the accused

- [16] In respect of the s. 10 breaches, as noted, the accused incriminated himself as a direct result of the breaching behaviour of the police. In addition, the incriminatory answers led directly to his arrest, a significant change in his legal jeopardy.
- [17] The s. 8 breach directly impacted the privacy rights of the accused, intruding on an area in which he enjoyed a high expectation of privacy.
- [18] Crown submits that the impact of this breach on the interests of the accused is tempered by the principle of discoverability. Citing cases such as *R. v. Cole*, 2012 SCC 53, and *R. v. Côté*, 2011 SCC 46, Crown counsel says that Cst. Wilcott in fact possessed the requisite reasonable and probable grounds for the issuance of the warrant and, had he properly outlined them in the Information to Obtain (ITO), the warrant would have properly issued. Thus, the evidence

was discoverable, a fact which substantially diminishes the impact on the Charter-protected interests of the accused.

- [19] In aid of this submission, Crown called Corporal Wilcott on the s. 24(2) portion of the voir dire and also tendered a book of materials containing some of the documents available to him at the time he swore the ITO.
- [20] Crown counsel submits that the combined effect of the viva voce and documentary evidence should persuade me that there were objectively-verifiable grounds to obtain the search warrant. Corporal Wilcott testified that he read the ITO approximately one month prior to his testimony and realized that the links among the three BlackBerry devices were not completely contained in the affidavit. He said that he failed to put the majority of that information in the affidavit, and was embarrassed by that fact.
- [21] Tab 7 of the book of documents is the surveillance report of a meeting between the main target and the suspected user of the 811 BlackBerry device. Tab 8 contains various still photographs of that individual extracted from surveillance video footage, as well as still photos culled from earlier video footage showing the accused at the Vancouver International Airport customs area. Corporal Wilcott testified that he reviewed all that material prior to swearing his affidavit.
- [22] At the end of the day, I am not persuaded by the Crown argument on discoverability. I simply cannot say if Corporal Wilcott could have made an objective case for his subjective grounds to the issuing justice. This is not a case such as *Cole* where police were in doubt about the need to obtain a warrant and thus did not do so, but clearly had sufficient grounds for one. Nor is it a case of a sub-facial challenge where the excised parts can be folded back into the mix and an assessment made of the adequacy of the grounds.
- [23] That is what occurred in *R. v. Mahmood*, 2011 ONCA 693, where, through technical oversight, police proceeded under the wrong Criminal Code, R.S.C., 1985, c. C-46 provision in obtaining some telephone records, which led to a later warrant being set aside. Had the police proceeded under the correct section, they would have been lawfully able to obtain the subsequent warrant.
- [24] In the case at bar, it is impossible to say if Corporal Wilcott had sufficient reliable information to make his case for objective grounds. It is not an obvious conclusion, nor indeed one which can be confidently made on the totality of the evidence tendered by the Crown on the Charter motion.
- [25] I cannot make a finding of fact that police possessed the required grounds for the warrant and thus the evidence was legally discoverable.
- [26] That is the end of the matter as regards the legal concept of discoverability. However, I wish as well to express my reservations about proceeding in the fashion proposed by Crown.

- [27] Crown counsel conceded that at the stage of determining whether or not there was a s. 8 breach, the additional evidence in support of reasonable grounds could not be received; such would defeat the fundamental requirement for prior judicial authorization. In my view, to receive this type of evidence at the s. 24(2) stage is fraught with danger. This was not a case such as *R. v. Bains*, 2014 BCCA 43, where the additional evidence was an explanation for a discrete error made by the affiant at the time the ITO was sworn. Here the additional evidence amounted to an attempt to completely reconstruct the grounds on which the affiant said he believed the important facts set out in the ITO.
- [28] Corporal Wilcott chose which email messages to either summarize or include in the body of his affidavit. Likewise, he chose not to summarize the content of the critical surveillance report, but instead to put into his affidavit only a bald conclusory statement. The police and Crown must now live with those decisions and the consequences that flow from them.
- [29] Permitting the police to substantially supplement the grounds at the s. 24(2) stage of a Charter motion in essence gives them a second chance to make their case for a warrant. The danger in that approach is self-evident, particularly in a case such as this when the challenge occurs many years after the issuance of the warrant. I accept the sincerity of Corporal Wilcott's belief that he had all the additional information at the time, but he obviously and understandably cannot recall what was in his mind over a decade ago.
- [30] If the approach proposed here were to become commonplace, it could lead to police ex post facto reviewing the investigative file to fill in gaps and unearth new evidentiary threads to bolster their grounds. That practice would do significant damage to the legally-required regime of prior judicial authorization for warrants.
- [31] Having said the foregoing, I wish to repeat that my ultimate conclusion on discoverability is premised on my inability on the evidence to find the necessary facts. The totality of the evidence does not permit me to find the facts required to support the conclusion that the BlackBerry evidence was legally discoverable.
- [32] That being so, the concept of discoverability is not engaged and there is no consequent diminishment of the impact on the accused's Charter-protected interests occasioned by the breaches.
- [33] When I consider the cumulative effect of the multiple breaches on those interests, this factor, too, pulls toward exclusion of the evidence.

Society's interest in adjudication on the merits

- [34] This factor tilts in favour of inclusion of the evidence. The BlackBerry devices discovered in the home are real, non-conscriptive evidence and are important to the Crown case. Society has an interest in serious drug charges being determined on the merits.

- [35] Nonetheless, I have determined that the long-term reputations of the administration of justice is better served by exclusion of the evidence. That is so when one considers the cumulative effect and number of breaches. The police conduct related to the search warrant was highly negligent. The conduct related to the right to counsel was disrespectful of one of the most basic rights afforded all detainees, in circumstances where a senior officer knew he was breaking the rules.
- [36] The court must disassociate itself from the police conduct here. To do otherwise would send a message that Charter rights count for little when breaches lead to incriminating physical evidence.
- [37] I have determined that the admission of the BlackBerry evidence would bring the administration of justice into disrepute and that evidence is hereby excluded.

"Tammen J."

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