

CANADA / JUDGMENT

R. v. Wong

2021 BCSC 1778

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wong,

2021 BCSC 1778

Date: 20210616

Docket: X83311-1

Registry: New Westminster

Regina

v.

Khamla Wong also known as Khamla Siharaj

Ban on Publication - Inherent Jurisdiction

Before: The Honourable Mr. Justice Tammen

Oral Ruling on Voir Dire #1

Counsel for the Crown:

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Place and Date of Hearing:

New Westminster, B.C.

June 14-15, 2021

Place and Date of Judgment:

New Westminster, B.C.

June 16, 2021

- [1] THE COURT: At issue on this motion is the validity of a search warrant issued for the residence of the accused, Khamla Wong, located at 32699 Downes Road, Abbotsford, BC, (the "Downes Residence") on June 15, 2009. That warrant was one of six sought simultaneously by police on the strength of a single Information to Obtain sworn by RCMP Constable Willcott (the "ITO").
- [2] The challenge to the warrant is solely based on facial validity, the material disclosed within the four corners of the warrant and supporting affidavit. The offences under investigation were conspiracy to import cocaine into Canada and conspiracy to commit extortion.
- [3] It is not disputed that on December 24, 2008, members of the RCMP and Canada Border Services Agency effected a seizure of 97 kilograms of cocaine at the Pacific Highway Border Crossing. The drugs were secreted in a commercial truck trailer filled with bananas.
- [4] The seizure was made possible by email communications intercepted by the United States Drug Enforcement Agency (DEA), involving an individual named Jeremy Stark and his associates. The RCMP took possession of a BlackBerry network being operated by the DEA on February 22, 2009.
- [5] The RCMP also obtained an authorization pursuant to Part 6 of the Criminal Code, R.S.C., 1985, c. C-46 to intercept Mr. Stark's communications, including BlackBerry emails, on February 20, 2009. That authorization was valid to April 22, 2009.
- [6] On April 21, 2009, police obtained a second authorization with an expanded list of targets to be intercepted. One of the targets was an unknown person using BlackBerry email account "Riches@phantomsecure.tv." Based on intercepted communications, mostly emails, police believed Mr. Stark and his associates, who had an ownership stake in the 97 kilogram cocaine shipment, were conspiring to extort the person responsible for transport of the cocaine. Even a cursory review of the summaries of the emails among Mr. Stark and his associates discloses considerable evidence of some plot to extort the individual thought to be responsible for transporting the cocaine into Canada. By extension, those planning the extortion might reasonably be inferred to be implicated in the related cocaine importation scheme.

- [7] A slightly unique feature of this investigation is that an undercover DEA agent supplied Mr. Stark with multiple BlackBerry devices with email suffixes "@goosebomb.com." Thus, Mr. Stark is readily associated to emails sent or received from those devices. With other targets the linkage to specific BlackBerry devices is not as readily made.
- [8] The ITO sets out, in part, the reasons police believed certain targets were using specific BlackBerry devices attached to unique email addresses. The first of the named items sought to be recovered through execution of search warrants were those very devices.
- [9] Paragraph 28(d) of the ITO says this with respect to the accused Mr. Wong:

During the course of the investigation my section has confirmed through monitoring the intercepted communications in conjunction with physical surveillance, that . . .

- [10] Then after reference to Mr. Stark, Christopher Mehan, and Anthony Pomonis, other targets, Mr. Wong is addressed at subparagraph (d) as follows:

(d) WONG was or is the user of the following BlackBerry devices:

- (1) riches@phantomsecure.tv;
- (2) vanguard@cryptochannel.tv;
- (3) 811@cryptochannel.tv (currently using this device).

- [11] The "Vanguard BlackBerry" does not feature in the ITO and I will say nothing more about it.

- [12] Paragraph 29 of the ITO reads:

The purpose of this section is to explain how my section has confirmed through the intercepted communications and surveillance observations, which BlackBerry devices the above mentioned targets are currently using. This section is important to note as the current BlackBerry devices used by the above targets are listed items that I am obtaining these search warrants for.

- [13] It is noteworthy that in the paragraphs which follow 29 there is a discrete section purporting to link Mr. Wong to the "811 BlackBerry." There is nothing in relation to the "Riches BlackBerry."
- [14] The Riches BlackBerry features a great deal in the section titled "Detailed Narrative of Events," with the bare assertion that Mr. Wong is the user of the device. The essential theory posited in the affidavit is that targets switch devices on occasion and that as of June 2009, Mr. Wong was using the 811 BlackBerry device, having previously used the Riches BlackBerry.
- [15] It is common ground on this application that the focus of the inquiry is the evidentiary foundation for the affiant's belief that the accused was the user of the two BlackBerry devices (811 and Riches.) The legal framework at issue here is well settled. In order to secure a valid search warrant, the police must demonstrate on the reasonable and probable grounds standard the following:

- a) That an offence has been committed;
- b) That the specific items sought will afford evidence of the offence; and
- c) That evidence will be found at the specific place to be searched.

[16] Here, no issue was taken with the first two enumerated criteria. The issue is whether there were grounds to believe that offence-related items would be found at the Downes Residence, which residence was clearly associated to Mr. Wong.

[17] The missing link in the chain, says the accused, was any evidence implicating him in the offences under investigation. Such linkage could only be made by connecting him with one or both of the BlackBerry devices (811 and Riches.)

[18] There was a large body of evidence implicating the user of the Riches BlackBerry to, at a minimum, the extortion plot. There was some evidence, likely sufficient to clear the evidentiary bar, implicating the user of the 811 BlackBerry in the extortion plot. Mr. Wong submits there was no evidence connecting him to the Riches BlackBerry and little to no reliable evidence connecting him with the 811 BlackBerry.

[19] On a review such as this, the court must not substitute its view of the adequacy of the grounds for that of the issuing justice. As was noted by the Supreme Court of Canada in *R. v. Morelli*, 2010 SCC 8 at para. 40:

... The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.

[20] Put another way, I should only set aside the warrant if I am satisfied on the whole of the material presented that there was no basis on which it could be sustained, and that is paraphrasing the well-known case of *R. v. Garofoli*, [1990] S.C.J. No. 115.

[21] In this case, I am so satisfied. I agree with the defence submission that the ITO falls woefully short of the required reasonable grounds standard. Reasonable grounds requires that the affiant subjectively believed such grounds exist and importantly that the basis for that belief be objectively verifiable and supportable.

[22] As noted in *R. v. Vu*, 2011 BCCA 536, at para. 39:

... reasonable grounds "is the point at which credibly-based probability replaces suspicion". Determining whether that standard has been met involves "a practical, non-technical, and common-sense assessment of the totality of the circumstances" ...

[23] Here, what is required is an assessment of the totality of the evidence linking Mr. Wong to the Riches and 811 BlackBerry devices. I will start with the Riches BlackBerry. However, before I do so I note that there is no evidence to support the theory that one individual used first the Riches BlackBerry and later switched to the 811 BlackBerry. That theory is based on pure speculation. Such an inference cannot be drawn from the evidence disclosed in the ITO.

[24] As for the identity of the user of the Riches BlackBerry, the affiant deposed as follows. At paragraph 13:

On April 21st, 2009, I was granted Authorization P.33/2009, to intercept the private communications of Jeremy Albert Rowland STARK, Christopher Lloyd MEHAN, Anthony POMONIS, Sukhvir DEO, and the person known only as "RICHES" (who was later identified as Khamla WONG).

[25] At paragraph 14, under the heading "The Offences and the Offenders Being Investigated," in respect of Mr. Wong, it was stated:

Wong has been identified as the person known only as "RICHES", a named target in Authorization P.33/2009.

[26] There is then paragraph 28, which I have already quoted but will repeat here:

During the course of the investigation my section has confirmed through monitoring the intercepted communications in conjunction with physical surveillance, that . . .

(d) WONG was or is the user of the following BlackBerry devices:

[27] The first of those named is "riches@phantomsecure.tv."

[28] The reader is thus left with the clear impression that later in the ITO it will be set out what investigative confirmation led to the firm assertion that Mr. Wong was the user of the Riches BlackBerry. There is no such confirmation disclosed in the ITO. It is not a question of weighing evidence or drawing inferences from proved facts. There is no evidence disclosed linking Mr. Wong to the Riches BlackBerry.

[29] The theory advanced here by Crown is a valiant effort to make a silk purse out of a sow's ear, that is really nothing more than an invitation to connect dots using impermissible speculation. That theory is, in a nutshell, as follows:

- a) On March 1, 2009, the user of the Riches BlackBerry expresses a desire to grab the extortion victim in Mexico.
- b) On March 2, 2009, Mr. Stark emails another target, saying "My guy wants to go to Mex to grab this guy." Therefore "my guy" is Riches.

- c) On May 13, 2009, thus two-and-a-half months later, there is a meeting among several targets, including Mr. Stark, but not Mr. Wong. At the meeting Mr. Stark says, "The Asian guy," wanted to grab "Steve", the extortion victim.
- [30] Crown says Mr. Stark must be referring to the March 1, 2009, email from Riches. The Asian guy is thus Riches. Because Mr. Wong is the only target who is described as being Asian, and because Mr. Wong was not present at the May 13, 2009 meeting, an inference can be drawn that Mr. Wong is Riches.
- [31] Clearly, such is not a permissible inference. The only inference to be safely drawn from the known facts is that Mr. Wong is not excluded from all possible people who might be Riches. There is no safe foundation from which to construct an evidentiary framework sufficient to draw any inference concerning likelihood that Mr. Wong is the user of the Riches BlackBerry. There is thus no evidence disclosed in the ITO to support the firmly stated assertion that Mr. Wong was the user of the Riches BlackBerry.
- [32] Despite the complete absence of such evidence, the affiant repeatedly, in quoting emails sent by the Riches BlackBerry, attributed them to Mr. Wong, thus confirming for the reader by repetition a fact for which there was no evidentiary foundation.
- [33] That leaves for consideration the identity of the user of the 811 BlackBerry. Some brief background is required. As of April 21, 2009, when authorization P33 was granted, Wong was not a named target. It appears he had not yet been identified by investigators.
- [34] On April 22, 2009, Mr. Wong was identified by a member of the surveillance team who had dealt with him approximately two years prior. That member, Detective Batista, viewed a video taken by the surveillance team of an unknown Asian male and an unknown female waiting for luggage at Vancouver International Airport. Detective Batista recognized the Asian male as being the accused, Khamla Wong. There is no evidence of any steps taken post-April 22, 2009 to update, for example, any target sheets or otherwise memorialize for the benefit of other members of the surveillance team, Det. Batista's identification of the accused.
- [35] The linchpin to any connection between the accused and the 811 BlackBerry is a meeting arranged via BlackBerry communication, between Mr. Stark and someone said to be Mr. Wong at the Food Court of the Aberdeen Mall on April 24, 2009. That meeting is addressed at paragraphs 69-74 of the ITO.
- [36] Paragraph 69 reads, under the heading "Wong Uses 811 at cryptochannel.tv":

Based on the intercepted communications and surveillance observations set out below in paragraphs 70 to 75, I believe WONG is the user of the BlackBerry device with the email address 811@cryptochannel.tv.

[37] Paragraphs 70-73 set out four emails between Mr. Stark and the 811 BlackBerry related to a meeting. An inference can be drawn that Mr. Stark was sitting at a table awaiting the imminent arrival of the user of the 811 BlackBerry.

[38] Paragraph 74 reads:

I have viewed the surveillance report prepared by members of my section for April 24th, 2009. Based on this surveillance report, I believe that at 1524 hours WONG joined STARK at a table inside the food court on the 3rd floor of the Aberdeen Centre.

[39] Thus, the affiant expresses a subjective belief in the requisite facts, namely the identity of a person who met with Mr. Stark. However, there is nothing from which that subjective belief can be verified or objectively assessed. There is not even a rudimentary summary of the contents of the surveillance report. Not a single fact or hearsay observation is reported.

[40] Clearly the affiant's belief must be based on an opinion or opinions of a member or members of the surveillance team concerning the identity of the person, or perhaps one of several people, who met with Mr. Stark.

[41] In this regard, I echo what was said by Justice DeWitt-Van Oosten (as she then was) in *R. v. Ferguson*, 2018 BCSC 378 at para. 68:

Statements within an ITO that merely state a conclusion drawn from the information gathered by investigators, whether based on inferential reasoning or otherwise, are not likely to withstand scrutiny if the ITO offers no real sense of the underlying facts that led to the conclusions.

[42] Crown submits that paragraphs 5-6 of the ITO are a complete answer to these concerns, and in effect give the reference to surveillance reports a gloss of inherent reliability. I disagree. Paragraph 5-6 do nothing more than set out the basic means by which surveillance reports are generally prepared and the affiant's belief, which belief is also without evidentiary foundation, that the recorded observations are accurate. However, where, as here, the affiant fails to summarize those observations it matters not if they are accurate. For purposes of review, the observations are simply unknown.

[43] The only possibly helpful fact in paragraph 5 is the assertion that the officer in charge would generally ensure that the team had in hand suspect descriptions. However, in this case there is no evidence that the surveillance team at Aberdeen Mall on April 24, 2009, had a description of the accused or a photograph of him.

[44] It is not even apparent that the accused was an investigative target on April 24, 2009. He was not a named target in authorization P33, granted three days earlier.

[45] I agree with the defence submission that the ITO fails to disclose:

- a) What observations were made by the surveillance team;
- b) Who made those observations;

- c) The familiarity of the person making the observations, if any, with the accused;
- d) What physical descriptors, if any, supported the purported identification of the accused; and
- e) The specific contents of the surveillance report that bottomed the affiant's subjective belief.

[46] I also agree with defence counsel that the absence of such factual matters from the ITO precludes any independent assessment of the reliability of the affiant's opinion. In short, the affiant's subjective belief is incapable of being objectively assessed and is therefore worthless from an evidentiary perspective.

[47] That being so, the ITO fails to disclose reasonable grounds for the belief that the accused was the user of the 811 BlackBerry. I have already addressed the absence of grounds related to the Riches BlackBerry. Without evidence linking the accused to usage of those BlackBerry devices there was no evidence implicating him in the offences under investigation. Thus, there could not be any basis to believe that evidence related to those offences would be found at the home of the accused.

[48] That being so, the warrant to search 32699 Downes Road, Abbotsford, British Columbia, is set aside. The search of the accused's home was thus warrantless and presumptively unreasonable. I therefore find a breach of the right to be free from unreasonable search and seizure as guaranteed by s. 8 of the Canadian Charter of Rights and Freedoms.

[49] That concludes my ruling on the first part of this voir dire.

"Tammen J."

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