
CANADA / JUDGMENT

R. v. Young

2008 BCCA 513

COURT

British Columbia Court of Appeal

DECIDED

10 October 2008

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2008 BCCA 513 R. v. Young

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Young,

2008 BCCA 513

Date: 20081010

Docket: CA034187

Between:

Regina

Respondent

And

James William Young

Appellant

Before:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Bauman

Oral Reasons for Judgment

N.L. Cobb

Counsel for the Appellant

P.R. La Prairie

Counsel for the (Crown) Respondent

Place and Date of Hearing:

Vancouver, British Columbia

6 October 2008

Place and Date of Judgment

Vancouver, British Columbia

10 October 2008

- [1] BAUMAN J.A.: At the conclusion of a voir dire into the validity of the search warrant obtained by telecommunication in this grow-op prosecution, the Honourable Judge Cowling admitted the fruits of the search into evidence and the appellant, through counsel, then invited the judge to enter a conviction on Counts 1 and 2 on the Indictment. The incidents giving rise to the Indictment occurred in August 2004 at Port Alberni.
- [2] The appellant appeals to this Court and impugns the ruling on the voir dire. Mr. Young argues that the evidence gathered in the search should not have been admitted at trial. The appellant seeks an acquittal or, in the alternative, a new trial.
- [3] I turn to outline the trial judge's ruling on the voir dire to give context to the issues before us.
- [4] The trial judge first concluded that the Information to Obtain was "overall an honest and viable compilation of information that is sufficient upon which the [judicial justice of the peace] could have issued the warrant".
- [5] The trial judge then proceeded to consider whether this was a proper case for a telewarrant to be issued under s. 487.1 of the Criminal Code, R.S. 1985, c. C-46, s. 487.1(1) provides:

Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

- [6] Constable Allen testified on the voir dire that in August 2004 it was the practice in Port Alberni to apply for search warrants under s. 487.1. The learned judge concluded in his ruling:
- [34] Counsel for the Federal Crown has offered very little evidence to justify or explain why the Port Alberni RCMP proceeded by telewarrant as opposed to a face-to-face application to a JJP or to a PCJ.

- [35] Constable Bouchard, Constable Allen's supervisor for his unit at the relevant time, testified that he was on holidays in August but that his understanding was that the practice was in effect because he had been told in 2004 when he inquired at the Port Alberni registry that there was no JJP available in Port Alberni, and it appears that the reason that the practice continued was that the police did not go through the exercise of calling and getting told that answer on each occasion thereafter when they applied for a warrant.
- [36] There has not been put before me a comprehensive discussion as to why the Port Alberni RCMP were using the telewarrant procedure when there was the directive of June 26th, 2003, which is Exhibit N. That is part of the equation. The other issue is that there has been no attempt to lead evidence of the issue of impracticality or urgency, as set forth under s. 487.
- [37] It would seem preferable that when such issues arise that there be a proper evidentiary framework, much as in the situation when there is an Askov application, as to the history of the matter rather than a bare recitation of the facts. But that onus falls upon the Crown and there has been put before me insufficient evidence within the reasoning set forth in the Koprowski case, included in Mr. Cobb's book of authorities at 2005 BCPC 657, to find that it was open to the Port Alberni RCMP in this situation to proceed by telewarrant and being bound by the Koprowski decision in that respect, I find that the warrant must be quashed.
- [7] Judge Cowling then proceeded to consider whether the evidence should be excluded on the s. 24(2) Charter analysis.
- [8] He dealt with this issue at paras. 38 and 39 of his reasons:
- [38] On the issue as to exclusion of the evidence with the warrant being quashed, counsel have not referred the court to any other decision but Koprowski. There are numerous other decisions that have been referred to with respect to the issue of s. 24(2) issues, but I do note that Koprowski was recently followed in the decision of R. v. Tran and Vo at 2006 BCPC 31, a decision of The Honourable Judge Ball, and at paragraphs 44 and 45 of that decision, Koprowski is followed. In paragraphs 46 to 53 the learned judge then considers the issue of exclusion and does not exclude the evidence of the grow operation in that case.
- [39] I substantially concur with the reasons in R. v. Tran and Vo and decline to exclude the evidence obtained from the search of Mr. Young's residence on the basis of the fact that this matter proceeded by telewarrant as opposed to a possible application to a JJP or a Provincial Court judge.
- [9] Judge Cowling finally dealt with two other alleged Charter violations arising out of the summary arrest of Mr. Young when he answered the police knock at his door and identified himself, and the fact that Mr. Young was not afforded his s. 10(b) rights immediately at his residence but only when he arrived at the R.C.M.P. detachment.

- [10] This latter issue was further complicated by the fact that police contacted the cruiser transporting Mr. Young to the detachment and obtained information from Mr. Young as to the location of the key to a locked freezer on the premises, which contained some marihuana product.
- [11] The learned judge dealt with these issues at paras. 40 to 43 of his reasons:
- [40] There is an additional issue as to the arrest of Mr. Young at the time of the attendance of the police at one o'clock in the afternoon. I agree that it would have been more correct to detain Mr. Young as opposed to arrest him. He had identified himself at the door. He was the only occupant of the house at the time. There were not perhaps reasonable and probable grounds to actually arrest him until the contents of the grow room and/or the freezer had actually been observed. His connection to the property had previously been established. It would also have been preferable to allow Mr. Young earlier access to counsel, although there would have been practical problems in maintaining the integrity of the scene and the investigation and also providing him with privacy with a house telephone.
- [41] However, I find that nothing turns with respect to the non-conscriptive evidence which was recovered pursuant to the search warrant. His arrest and/or detention was ultimately irrelevant to the recovery of the items in the freezer and the grow room.
- [42] There is an issue about his disclosure about the key to the freezer as opposed to having the freezer forced open, and I would exclude this evidence if requested by the defence to do so. I would also exclude the evidence of the conversation that took place between Constable Allen and Mr. Young back at the police station with respect to the firearms, if there was a request that I do so.
- [43] But I do not consider that the fact that he was arrested as opposed to detained and the delay in providing him counsel under the particular circumstances of this case justify exclusion of the evidence as to the contents of the house.
- [12] Before us, Mr. Cobb, counsel for Mr. Young, submits that the trial judge erred in holding that the warrant could have been issued by the judicial justice of the peace in the circumstances; that the trial judge correctly quashed the warrant on a consideration of the requirements of s. 487.1; and that the trial judge erred in the s. 24(2) analysis, given the pattern of Charter breaches in this case. Counsel relied, in this regard, on this Court's decision in *R. v. Bohn*, 2000 BCCA 239, 145 C.C.C. (3d) 320.
- [13] Counsel for the Crown, Mr. La Prairie, in turn argues that the warrant was properly issued; that s. 487.1 had been complied with and, that in any event, the trial judge correctly admitted the evidence on the s. 24(2) analysis.
- [14] I turn to deal with these three general issues.

- [15] As discussed by Sopinka J. in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161, when an accused challenges the warrant, the issue for the trial judge is not whether he or she could have granted the order, but whether there is a basis upon which the authorizing judicial officer could have done so. In confirming the standard of review in *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, LeBel J. stated (at para. 51):

As I noted as a judge at the Quebec Court of Appeal in *R. v. Hiscock*, [[1992] R.J.Q. 895, 72 C.C.C. (3d) 303] at p. 326 C.C.C., even a basis that is schematic in nature may suffice. However, as our Court has recognized, it must be a basis founded on reliable information. In *R. v. Bisson*, [1994] 3 S.C.R. 1097, at p. 1098, the requirement was described as "sufficient reliable information to support an authorization". The Court concluded that this requirement had still been met despite the excision of retracted testimony. In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.

[underlining by LeBel J.]

- [16] The learned trial judge reviewed the history of the investigation and the actions taken by the police to further the investigation. He referred to a Crimestoppers tip that commenced the investigation, the surveillance of the residence conducted by the police and their observations of the smell of marihuana. The learned trial judge referenced the hydro-electric consumption records for the property associated to Mr. J. Young, as well as the surveillance of the vehicles in front of the property. In addition, he noted discrepancies in the evidence as compared to material in the Information to Obtain. On amplification, the learned trial judge found the police witnesses, including the affiant, to be credible witnesses.
- [17] The learned trial judge found that the search warrant "should have been granted" as there was sufficient reliable evidence such that the justice could have issued the warrant.
- [18] I have concluded that there was no error on the part of the learned trial judge in his review of the sufficiency of the evidence in support of the issuance of the search warrant. The learned trial judge properly applied the tests in *Garofoli* and *Araujo*: that is, whether upon a consideration of the totality of the circumstances there continues to be any basis for the decision of the justice, as amplified on review, that the authorizing judicial officer could have issued the search warrant. The appellant has identified no error in fact or law by the learned trial judge in arriving at this conclusion.
- [19] I advance to the s. 487.1 issue. It arises in the context of a Practice Note dated 6 June 2003 from the Chief Judge of the Provincial Court. This Practice Note was exhibited on the voir dire before Judge Cowling. The directive says in part:

This Practice Note updates the procedure for in-person search warrants outlined in my Memorandum of November 18, 2002, entitled "Assignment of Daytime Applications for Search Warrants, Effective Today." Daytime in-person Search Warrant applications will now be assigned only to available Judicial Justices of the Peace (not Judges) in their assigned court location. Judges are no longer assigned to "in person" Search Warrants, except when approved by the Administrative Judge for reasons of expediency or sensitivity.

Instructions have been given to the police agencies advising them that when they contemplate applying for a daytime search warrant, before they prepare the paperwork, they are required to telephone the local Judicial Administrative Assistant to inquire whether a Judicial Justice of the Peace is available to hear the application in person.

[20] In the Information to Obtain, Cst. Allen deposed that: "there are no justices of the peace available in this jurisdiction to approve the warrant". On the voir dire Cst. Bouchard testified that in 2004 he contacted the Port Alberni registry to enquire about the existence of local judicial justices of the peace and he was advised that there were none in that location.

[21] This evidence was not challenged in evidence on the voir dire.

[22] On this issue, the trial judge felt himself bound by the decision in *R. v. Koprowski*, 2005 BCPC 657. I need not decide if that case was properly decided; it was, I conclude, a different case than that at bar. In *Koprowski* the learned Provincial Court judge said at para. 13:

As to the lack of Provincial Court judges being available, the affiant made no inquiry to determine whether that was factually correct. Subjectively, his belief was based on his experience in telephoning in the past, and observing others being refused because of a lack of judges. He said now, he telephones every time. Therefore at the time of this case, he was aware of the requirement to determine if a justice was available before proceeding with a telewarrant. As to whether a justice was available, the affiant appeared to rely on what transpired on previous occasions. Objectively, there was no reliable evidence that a justice was or was not available, yet the officer made a categorical statement that no Surrey Provincial Court judge was available. He made no effort to find out.

[23] That is not the case here. Here the evidence was that no judicial justice of the peace sat in Port Alberni in 2004. I think the officer was entitled to rely on the information which had recently been obtained to that effect without checking each time with the registry to confirm that that was so. I say that in the circumstances of this particular case. And the police were also entitled to rely on the Chief Judge's Practice Note to the effect that in-person search warrant applications would only be assigned to available judicial justices of the peace not to judges of the Provincial Court.

[24] I have concluded that the learned trial judge erred in holding that the warrant should be quashed on this basis.

- [25] Nevertheless, I will consider the issue under s. 24(2) of the Charter on the assumption that the judge was correct in quashing the warrant on the s. 487.1 point.
- [26] Mr. Young's counsel's central submission on the s. 24(2) analysis is that Judge Cowling failed to come to grips with what counsel says is a pattern of Charter breaches in this case.
- [27] Counsel argues that the accused was improperly arrested when he answered the door. I agree with Crown counsel's submission at para. 53 of the Crown's factum:

It is unclear whether the learned trial judge made a positive finding that there were not sufficient grounds to arrest the Appellant, when the Appellant answered the door as the police attended to execute the search warrant. To the extent that the judge did make such a finding, he was in error as there was clearly an objectively reasonable basis for the arrest. The trial judge found that (a) there were grounds to believe that a marihuana grow operation was in the house, and (b) the Appellant's connection to the house was known to the police when they attended to execute the warrant. On these findings, there was an objectively reasonable basis to support the arrest.

[internal citations omitted]

- [28] This case bears some similarities to the facts in *R. v. Le*, 2006 BCCA 463, 231 B.C.A.C. 219, where the Court concluded that, in that case, there were subjective and objective grounds for the arrest of anyone leaving a suspected marihuana grow operation.
- [29] Counsel then argues that Mr. Young's Charter s. 10(b) rights were breached because he was not advised of his right to counsel at the home and that he was improperly questioned by police concerning the key to the locked freezer while en route to the R.C.M.P. detachment. For the purposes of argument I accept that this is so.
- [30] I do not accept, however, that the statement later given by Mr. Young to police at the detachment after he spoke with a legal aid lawyer was inadmissible. Counsel for Mr. Young added this to the pattern of breaches which he argued the trial judge failed to analyze on the s. 24(2) analysis.
- [31] Mr. Young's counsel admitted on the voir dire that this statement was made voluntarily and I can discern no grounds upon which it could be considered inadmissible.
- [32] That leaves then only the "key" statement taken in circumstances where Mr. Young had not been accorded his s. 10(b) rights.
- [33] I agree with the trial judge's conclusion that there was no causal connection between any Charter breaches and the discovery of this non-conscriptive evidence.
- [34] In my view, this is not a case like *R. v. Bohn* and here I respectfully adopt Mr. Justice Donald's reasons for distinguishing *Bohn* which he gave in *R. v. Pettit and Pranic*, 2003 BCCA 522, 179 C.C.C. (3d) 295, at paras. 16-23.

- [35] Even if, in addition to the s. 10(b) breach, the warrant was properly quashed on the s. 487.1 issue, I conclude that the trial judge properly declined to exclude the evidence. That was the result in this Court's decision in *R. v. Pech*, 2008 BCCA 61, 251 B.C.A.C. 244, which involved a more serious failure to meet the "impracticable to appear" requirement in s. 487.1, than arguably arises on the facts at bar.
- [36] I can find no error in the trial judge's analysis under s. 24(2) of the Charter.
- [37] Finally, counsel for Mr. Young, complains that the trial judge relied on a case which counsel did not cite and upon which they had no opportunity to make submissions. This was the decision in *R. v. Tran and Vo*, 2006 BCPC 31.
- [38] *Tran and Vo* simply applied well established principles on the s. 24(2) analysis to the facts there before the court. Its consideration by the trial judge here worked no substantive unfairness to Mr. Young.
- [39] I would, in the result, dismiss the appeal.
- [40] KIRKPATRICK J.A.: I agree.
- [41] CHIASSON J.A.: I agree.
- [42] KIRKPATRICK J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Bauman"

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