

CANADA / JUDGMENT

R. v. Zamora

2020 BCSC 1259

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1259 R. v. Zamora

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zamora,

2020 BCSC 1259

Date: 20200612

Docket: 28159

Registry: Vancouver

Regina

v.

Austin Isaias Zamora

Before: The Honourable Madam Justice Duncan

Oral Reasons on Application for evidence to be given by video pursuant to s. 714.1

Counsel for the Crown:

S.K. Steele

A. Novakovic

Counsel for the Defence:

C.B.S. Muldoon

W. Jessop

Place and Date of Hearing:

Vancouver, B.C.

June 12, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 12, 2020

- [1] THE COURT: The accused, Austin Isaias Zamora, is charged on indictment with 17 counts of possession of various firearms and oversized magazines. Mr. Zamora came to the attention of the police in June 2017 in the context of a larger investigation into fentanyl trafficking.
- [2] The Crown's theory is that Mr. Zamora was the unknown male who was surreptitiously recorded speaking to Andrew Leach, one of the principal targets of a Part VI authorization, and who accompanied Mr. Leach to a storage facility. The storage facility was later searched and a quantity of firearms was seized. Also seized was a piece of paper with a fingerprint alleged to be Mr. Zamora's. The paper was located in a Rubbermaid bin that was otherwise empty.
- [3] The Crown will call, as part of its case, Constable Dusan Postolovic. Constable Postolovic now lives in Halifax, Nova Scotia. The Crown applies, pursuant to s. 714.1 of the Criminal Code, R.S.C. 1985, c. C-46, for the constable to testify at trial by videoconference because he has an underlying condition, asthma, which he says puts him at greater risk if he were to contract COVID-19 by travelling to Vancouver to testify.
- [4] It goes without saying, but I will say it nevertheless, that, at the time this application is taking place, there is a COVID-19 pandemic. The defence opposes the application.
- [5] I refused the Crown's initial application for the order on the basis that there was not enough information before the court about the proposed technology to determine if such an order was appropriate, but I gave the Crown leave to reargue the application. I was guided in that respect by the judgment of Verhoeven J. in *R. v. Jeanes*, 2014 BCSC 995. Justice Verhoeven heard the same type of application, with a contemporaneous demonstration of how that technology worked. I ordered that the constable be produced by videoconference to test the technology and provide defence counsel with an opportunity to cross-examine the constable on the affidavit regarding his health concerns.
- [6] The section provides:
- 714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including
- (a) the location and personal circumstances of the witness;

- (b) the costs that would be incurred if the witness were to appear personally;
 - (c) the nature of the witness' anticipated evidence;
 - (d) the suitability of the location from where the witness will give evidence;
 - (e) the accused's right to a fair and public hearing;
 - (f) the nature and seriousness of the offence; and
 - (g) (not applicable to videoconference applications).
- [7] The constable deposes that he has asthma and is currently on medication for it. He is aware it is a risk factor for complications if he becomes infected with COVID-19. Since March 30, the Halifax Regional Police has accommodated his condition by taking him off patrol and placing him on administrative duties in an isolated office to reduce the need for him to interact with the public and other coworkers. This arrangement is of indefinite duration.
- [8] Constable Postolovic's family doctor wrote a letter of advice, which is appended to his affidavit, stating that he should avoid travelling outside of Nova Scotia and limit public interaction during the pandemic. He testified that he has been essentially following this advice by limiting his grocery shopping and other errands.
- [9] Constable Postolovic was cross-examined about his asthma condition. He uses an inhaler on a regular basis. Regular colds tend to exacerbate the asthma. He has a plan with his doctor to attend Emergency if the inhaler is not sufficient. He is otherwise a fit and healthy 33-year-old. He said that but for the COVID-19 pandemic he would have attended for trial in person, adding that he has many friends in the Vancouver area. The appeal of an all-expenses-paid work trip to Vancouver was obvious to him.
- [10] In order to fly from Halifax to Vancouver, the constable would have to take several flights through several airports, thereby increasing his risk of exposure to COVID-19 by the simple fact of being in an airport or an airplane. He would have to stay in a hotel and eat from or in restaurants in Vancouver, further increasing his risk of exposure. Constable Postolovic notes in his affidavit that the Government of Nova Scotia currently has discouraged all non-essential travel into and out of the province and if he travels he is obliged to self-quarantine for 14 days away from his spouse.
- [11] The defence characterizes Constable Postolovic as the linchpin of the Crown's case. The constable will testify about his observations of an individual he now believes was Mr. Zamora in June 2017. Those observations occurred during police surveillance of Mr. Leach, the principal target in the larger investigation. The constable also investigated a storage locker where firearms were ultimately located. He was the exhibits officer during the search of a storage locker and located the piece of paper which allegedly bears Mr. Zamora's fingerprint.

- [12] On October 4, police obtained a DNA warrant authorizing them to take a sample from Mr. Zamora. During the execution of the warrant, Constable Postolovic had the opportunity to observe Mr. Zamora, and then again on January 12, 2018. On that date, Constable Postolovic arrested Mr. Zamora and attempted to take a recorded statement from him.
- [13] The Crown will seek to tender a recording of the attempt as a known sample of Mr. Zamora's voice, to be compared against the recording of the voice of the unknown male speaking to Mr. Leach which police had intercepted the preceding June. It is anticipated that Constable Postolovic will say he believes it was Mr. Zamora on the wiretap intercept.
- [14] Constable Postolovic initially thought the unknown male was an individual named Dustin Viscount. His explanation for this changed opinion will no doubt be probed on cross-examination.
- [15] There was a preliminary hearing in this matter. Constable Postolovic testified at the preliminary hearing concerning the visual identification issue, but I understand he was not asked about the voice identification issue. Mr. Muldoon maintained the defence is at a disadvantage in this case, not having been counsel at the preliminary hearing, but it is not unusual for individuals to change counsel after a preliminary hearing or, indeed, for a preliminary hearing to be bypassed entirely through the direct indictment process.
- [16] Ms. Steele submits this is an identification case and there is other evidence in the form of surveillance and photos to substantiate Constable Postolovic's evidence and his presence is not as critical as it might otherwise be. Ms. Steele also notes that Constable Postolovic can have copies of the audio files that will be played in court, and, if there is any difficulty with him hearing them, either through a poor connection or feedback, he could listen to an identical copy from the location from which he will testify.
- [17] Mr. Muldoon does not agree this is simply an identification case. He points out that it is also a possession case, and that engages issues of knowledge and control of the firearms in question. There are no DNA results from the DNA warrant that tie Mr. Zamora to any of the firearms. There are no fingerprints on any of the firearms or on any of the Rubbermaid buckets found in the storage locker.
- [18] Mr. Muldoon maintains that earlier misidentification by the constable goes to his credibility and reliability, issues which may not be as easy to pursue over a video connection as with a witness who is present in court. He is also concerned about the ability to challenge the witness on excerpts from audio clips which are heard contemporaneously in court and by the witness over the videoconferencing system, whether the quality of the recording he might have to resort to is the same we hear and what he will use to hear it. The constable is the only Crown witness who purports to be able to identify Mr. Zamora's voice.
- [19] Mr. Muldoon also raises the issue of how Constable Postolovic will be confronted with documents or other things on cross-examination, which the defence are, of course, not obliged to disclose in advance.

- [20] Constable Postolovic testified by videoconference on the application. It took about an hour to make the connection from a boardroom at the Halifax Regional Police Office to the courtroom. The delay was occasioned, apparently, by firewalls in the police computer. The problem was solved by Constable Postolovic using his personal computer. Mr. Muldoon expressed some concerns about that, given that the personal computer might have applications on it or other information in the background. I will return to that in a moment.
- [21] The constable described a fairly clear view of the courtroom, apart from a few blind spots, which I am satisfied can be fixed by changing the camera angle. The worst that can be said about the constable's perception of the courtroom is that he mistook the unicorn on the coat of arms above the bench as a horse.
- [22] The Crown played a small part of a video-recorded interview of Mr. Zamora. It did not cause feedback or any technological problems and the constable said he could hear it clearly and would be able to see the computer screen displaying the video clearly if the computer was moved closer to the camera. He had at his disposal a USB stick of the Crown disclosure in this case for reference during his evidence if required.
- [23] Mr. Muldoon produced a large blue Rubbermaid bin and asked the constable to describe the contents. Constable Postolovic identified a piece of paper that was affixed to the inside of the bin without difficulty. He had a similar plastic bin at his disposal in the Halifax boardroom.
- [24] The transmission was lost for approximately two minutes, but was successfully restored for cross-examination purposes. The audio and video were clear. I noted one instance for approximately 10 seconds where there was a slight delay between the audio and video, but the audio remained clear.
- [25] Finally, the Crown filed the affidavit of Kimberly Wood, a paralegal with the Public Prosecution Service of Canada, to explain the arrangements with the videoconference service provider. The cost of the videoconference is probably at least as much as it would cost to fly the constable out, although this is not a case that hinges on the cost. It is more of a balancing the health concerns of the witness against the rights of Mr. Zamora in the trial process.
- [26] The starting point is that the attendance of a witness at trial is the norm and an order under s. 714.1 is the exception. The Nova Scotia Court of Appeal, in *R. v. S.D.L.*, 2017 NSCA 58, reviewed the jurisprudence concerning the section and proposed a set of guidelines for trial judges in that province:
- [32]
1. As long as it does not negatively impact trial fairness or the open courts principle, testimony by way of video link should be permitted. As the case law suggests, in appropriate circumstances, it can enhance access to justice.

2. That said, when credibility is an issue, the court should authorize testimony via 714.1 only in the face of exceptional circumstances that personally impact the proposed witness. Mere inconvenience should not suffice.
 3. When the credibility of the complainant is at stake, the requisite exceptional circumstances described in #2 must be even more compelling.
 4. The more significant or complex the proposed video link evidence, the more guarded the court should be.
 5. When credibility will not be an issue, the test should be on a balance of convenience.
 6. Barring unusual circumstances, there should be an evidentiary foundation supporting the request. This would typically be provided by affidavit. Should cross examination be required, that could be done by video link.
 7. When authorized, the court should insist on advance testing and stringent quality control measures that should be monitored throughout the entire process. If unsatisfactory, the decision authorizing the video testimony should be revisited.
 8. Finally, it is noteworthy that in the present matter, the judge authorized the witnesses to testify "in a courtroom or at the offices of Victims' Services ". To preserve judicial independence and the appearance of impartiality, the video evidence, where feasible, should be taken from a local courtroom.
- [27] In S.D.L., the Court of Appeal found that the videoconferencing technology was poor, with many interruptions, which completely broke the flow of any meaningful examination or cross-examination of witnesses whose evidence was the foundation of most of the Crown's case and whose credibility was in issue. The Court of Appeal determined that an objective reading of the transcript led to the inescapable conclusion that the appellant's right to make full answer and defence was jeopardized, and a new trial was ordered.
- [28] In Jeanes, the decision of Verhoeven J., which I referenced earlier in these reasons, the complainant was permitted to testify by videoconference. She was 93 years of age and lived close to the courthouse but was housebound. There were significant concerns about her health. Justice Verhoeven heard from the complainant via video linked to her home during the application. He also heard evidence from her gerontologist and from an assistance analyst who testified about the technology to be employed.
- [29] Justice Verhoeven concluded that the use of the video and voice technology would not impede or jeopardize the accused's right to make full answer and defence and that the application was founded on bona fide medical concerns. Justice Verhoeven acknowledged that it was not utterly impossible that the complainant could attend court, but that was not the test. The test is whether it was appropriate that he make the order, in all the circumstances of the case, and the order was made.

- [30] I observe the same in these circumstances: it is not utterly impossible for the constable to travel from Halifax. The question is, balancing travel against his health concerns and the other aspects of s. 714.1 of the Criminal Code, whether the order should be made.
- [31] The Crown maintains that (a) the location and personal circumstances of a witness, militates in favour of the order being made. As I said, the constable has to travel across the country, potentially putting his health at risk by requiring him to take four flights and transit through several airports. Mr. Muldoon maintains the constable is young and otherwise healthy and should make the trip.
- [32] The backdrop of this application, as I said earlier, is the COVID-19 pandemic. I am prepared to take judicial notice of the fact that while province-to-province travel is not impossible, it is discouraged in order to prevent people from contracting or spreading a highly contagious virus for which there is, as yet, no vaccine and no reliably predictable course of treatment. I am satisfied the constable has obtained medical advice about his particular situation, and that advice is not to travel outside Nova Scotia.
- [33] Factor (b) relates to the costs to be incurred for personal appearance. While I earlier remarked upon what appears to be a high cost, of about \$400 an hour, for the videoconferencing, I do not think the cost is really the issue in this case. It is balancing the health concerns against Mr. Zamora's trial rights.
- [34] Factor (c) relates to the witness's anticipated evidence. The Crown maintains he is an important witness but his evidence is corroborated on virtually every point by other evidence. His surveillance observations are backed up by what he filmed and the evidence he seized is documented with photographs. The statements from Mr. Zamora were audio and video-recorded and the dispute is the constable's misidentification.
- [35] Mr. Muldoon characterizes the constable's evidence in a different manner. He refers to the need for the officer to deal with exhibits or to observe and perhaps demonstrate, by reference to an exhibit such as a Rubbermaid tub, where certain things were found. There is also an issue of how the defence can cross-examine the constable on documents that have not been made exhibits.
- [36] Mr. Muldoon also suggested that if the defence applied for an in-person lineup, by which I understand him to mean an application to have Mr. Zamora sit in the body of the court with others and ask the witness to pick him out, that process would not be amenable to video.
- [37] I was satisfied, after a demonstration of the technology, that handling exhibits, at least on direct examination, will not be a problem. If the defence wants to cross-examine the officer on something new that is not part of the disclosure package that he has on hand, we will deal with it if and when the issue arises.
- [38] I am also satisfied that any issues with physical exhibits, like the Rubbermaid tub, can be satisfactorily dealt with because of the quality of the video transmission.

- [39] If the defence applies to have Mr. Zamora sit in a group in the body of the court to challenge the witness's identification of him, we will make accommodation for that process.
- [40] Factor (d) relates to the suitability of the location from where the witness will give evidence. The constable testified from a secure boardroom at the Halifax Regional Police Office. I am satisfied this is an appropriate location, with the proviso that the officer put a sign on the door prohibiting entry and that he use a computer that is not his personal computer and that is not loaded with other programs or applications that might interfere with the court process.
- [41] Factor (e) relates to the accused's right to a fair and public hearing. I am satisfied, based on the demonstration of the technology, that Mr. Zamora's counsel can effectively challenge the constable's evidence in a meaningful way. To the extent that demeanour factors into things, the constable appears much larger on screen than he would in real life. His facial expressions, any obvious reddening, or discomfort, or any of the common indicia someone might demonstrate whilst having difficulty explaining themselves would all be highlighted, with the exception, as Mr. Muldoon pointed out, of perhaps the wringing of the hands or fidgeting.
- [42] I am satisfied the constable's credibility and reliability can be probed just as effectively by video as it could in person. Again, if there is a difficulty in that regard, I will certainly hear defence counsel on that issue.
- [43] Factor (f) is the nature and seriousness of the offence. Mr. Zamora faces very serious charges. Ms. Steele says it is not the type of offence where the court has to sort out competing versions of events, nor does it turn directly on credibility. It turns on whether the Crown has established the identity of Mr. Zamora on the totality of the evidence.
- [44] Mr. Muldoon, as I noted earlier, takes the position, and I think correctly, that this case is not just about identification but also about possession, with its constituent elements of knowledge and control. The defence expects to challenge the constable's evidence about where and how certain things were found in the storage locker, something that may be difficult to do by video, but I am satisfied, on a demonstration of this morning, that it is possible.
- [45] I observe that, also, parliament has not excluded any particular category of offence from s. 714.1's scope and the seriousness of the charges alone would not persuade me to refuse the order.
- [46] In conclusion, I am satisfied the constable has a bona fide reason not to travel, and, after a demonstration of the technology, I am satisfied I should exercise my discretion and grant the Crown's application to have Constable Postolovic testify by videoconference from the Halifax Regional Police Office, with the additional caveats that it cannot be his personal computer; that he not have any disclosure on hand, apart from his own notes, which I will direct him to put facedown on a table behind him or beside him.

[47] I think it would also be appropriate if the Crown were able to arrange for someone from the Halifax office of the Public Prosecution Service of Canada to be available with the USB containing disclosure and potentially with other items that may be put to the witness on cross-examination. But, as I say, some of those things will depend upon what the defence cross-examines on. I am certainly not expecting defence counsel to give a disclosure package to be sent to Halifax in advance. That is something that can likely be scanned into a PDF and sent and then produced to him by someone, probably from the PPSC office, at an appropriate time.

[48] In all the circumstances, I am satisfied that the balance is in favour of exercising my discretion to proceed in this manner.

"Duncan J."

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