
CANADA / JUDGMENT

R. v. Zamora

2020 BCSC 1260

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zamora,

2020 BCSC 1260

Date: 20200617

Docket: 28159

Registry: Vancouver

Regina

v.

Austin Isaias Zamora

Before: The Honourable Madam Justice Duncan

Oral Reasons on Application #3

Counsel for the Crown:

S.K. Steele

A. Novakovic

Counsel for the Defence:

C.B.S. Muldoon

W. Jessop

Place and Dates of Hearing:

Vancouver, B.C.

June 9-11, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 17, 2020

- [1] THE COURT: The accused Austin Zamora is charged on an indictment with 17 offences relating to firearms and prohibited devices. This is a defence application, pursuant to s. 8 of the Canadian Charter of Rights and Freedoms [Charter], for a finding that Mr. Zamora's rights were breached by the police when they recorded a conversation pursuant to a wiretap authorization that the Crown alleges he was a participant in.
- [2] The intercept in question is referred to as Session 225 on the 2006 Mercedes SL55 line. There is no challenge to the authorization itself. Rather, the defence asserts that the police did not properly carry out the terms of a minimization clause designed to protect the rights of third parties.
- [3] The accused was not a target of the wiretap, nor did he identify himself on the recording, but the Crown's theory is that his voice was captured and took no issue with his standing to challenge the interception. This is consistent with the conclusion in *R. v. Jones*, 2017 SCC 60, where the court held that an individual attempting to establish a privacy interest in a communication for the purposes of a s. 8 challenge may rely on the Crown's theory of the case rather than having to choose between admitting involvement or foregoing the challenge.

Authorization

- [4] On May 1, 2017, Cullen A.C.J., as he then was, authorized the police to intercept the private communications and radio-based telephone communications of several individuals on their cellular phones as well as at various places, including a device in a Mercedes SL55 vehicle driven by Andrew Leach. I will refer to that as "the Mercedes".
- [5] Mr. Leach was identified in paragraph 3 of the authorization as a principle known person ("PKP"), and thus a target of the authorization. The authorization permitted the covert installation of devices in the residence and vehicles of the PKPs. The clause relating to vehicles is 6.3, and it provided:
6. The communications of all persons, including those referred to in paragraph 3, may be intercepted:

6.3 In or near any of the motor vehicles described in sub-paragraphs 4.3 to 4.4, when in Canada, where devices are installed, including covertly, pursuant to paragraph 9 or pursuant to any other lawful means of entry, save and except that such devices may only be activated at and during

such times as surveillance or other investigative means, including the interception of communications, has established that at least one of the persons named in sub-paragraph 3.1 is in or near the vehicles in question. Such devices may be activated intermittently for the express purpose of determining through selective monitoring and voice identification whether or not any of the persons referred to in sub-paragraph 3.1 is in or near the vehicles in question.

[6] I turn now to the evidence on the application.

Evidence on the Application

- [7] Lisa Stack is a civilian member of the RCMP who works in Special I, the section responsible for intercepting private communications. Ms. Stack has worked in Special I for about 15 years as a line monitor in a wiretap room. She was a line monitor for the authorization at issue in this case and had reviewed it and signed a copy. Ms. Stack has no independent recollection of June 7, 2017, the day of the interception at issue in this case.
- [8] Ms. Stack said that line monitors receive continuing education on authorizations about every two years. She has not received any formal training on the interpretation of authorizations or minimization clauses, nor has she consulted with lawyers or others about the interpretation of such clauses.
- [9] Ms. Stack said that selective monitoring means she can do a periodic check by activating access to the covert device to see if a target is in the vehicle or not. The system automatically begins recording at the start of selective monitoring. If the line monitors are listening, they are recording. If she determines the PKP is present in the vehicle, she will continue recording. If after about two minutes she cannot detect whether the PKP is present, she will cease monitoring and check again later. Line monitors will also activate the device upon receiving information that police officers conducting surveillance have observed that the PKP is approaching or in the vehicle.
- [10] Sometimes a line monitor is monitoring and determines the PKP is present, but then the PKP makes a phone call. At that point the line monitor usually disconnects, because the phone intercept is generally much clearer than the recording from the probe in the vehicle. Phone calls on phones identified in the authorization are automatically intercepted and always recorded.
- [11] Ms. Stack understands that the purpose of minimization terms in an authorization is to prohibit the recording of a conversation with the lawyer and also prohibit recording if a PKP is not in the vehicle or the residence.
- [12] Corporal Dykeman was working in the wireroom on June 7, 2017. He knew one of the PKPs was Andrew Leach. He said the wireroom had a large screen, visible to investigators and line monitors, which showed vehicle tracking information. If a tracking device was installed on a vehicle, its movements were shown on the screen.

- [13] The command triangle briefs the team at the outset on the authorization. Corporal Dykeman, as an investigator, would read it and sign the back of the original. It was his job to make sure new members coming in as investigators had read and signed off on it as well. He has not been trained in the interpretation of an authorization, nor has he consulted with the Crown about interpretation issues. His understanding of a minimization clause was that if you cannot determine the PKP is on the call or in the place the interception should be minimized or ended to protect third-party or privileged communications.
- [14] Corporal Dykeman agreed the authorization to intercept private communications permitted selective monitoring of the Mercedes. He believes that he told the monitors to check the Mercedes periodically on June 7. Either as a result of a phone call to Mr. Leach from his mother or because the vehicle was mobile, he thought Mr. Leach was going to take his mother to a medical appointment that day, although this was not reflected in the line sheets tendered as part of this voir dire. Corporal Dykeman did not agree that the line monitor could only start recording once satisfied the PKP was in the vehicle.

The Defence Position

- [15] Mr. Jessop, counsel for the accused, notes that the authorization before the court mentions both interception and monitoring and maintained that those two activities should be given different meanings, although he acknowledged he could not locate a case precisely on point.
- [16] Mr. Jessop says that the first part of Clause 6.3 permits police to commence interception from the device in the vehicle only if they have determined, through surveillance or other investigative means including the interception of communications, that at least one of the primary targets is in or near the vehicle. This is to prevent interception of the words of third parties who may be in or near the vehicle but not in the company of a primary target.
- [17] Mr. Jessop says the second part of Clause 6.3, which is at issue, permits police to turn on the device subject to two restrictions: (1) it must be for the express purpose of determining if one of the primary targets is in the vehicle; and (2) that determination must be accomplished through selective monitoring and voice identification. His position is that police cannot commence recording until it is established that one of the primary targets is in the vehicle.
- [18] The defence relies on a combination of the definition of terms and some inferences from authorities to make the point. First, counsel notes that while intercept is a defined term in s. 183 of the Criminal Code, R.S.C. 1985, c. C-46, and "includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof", monitor is not a defined term. Its meaning must be derived from the jurisdiction.

- [19] In *R. v. Ansari*, 2010 ONSC 1316, the trial judge applied the dictionary definition of monitor. When used as a verb, it meant "observe and check over a period of time", with an alternative meaning of "maintain regular surveillance over", or "listen to and report on", at para. 30. The phrase in issue was "live monitoring", and the trial judge followed an earlier decision where the phrase was taken to mean "listening to and monitoring all intercepted communications as and when they are being made", at para. 32.
- [20] In *R. v. Peluso*, 2010 ONSC 1952, the issue was the meaning of "monitor on an ongoing basis". The trial judge found this required continuous uninterrupted monitoring by a monitor as and when the communication was being intercepted.
- [21] The clause of the authorization at issue in this case involves selective monitoring, not live monitoring or monitor on an ongoing basis. So those authorities are not of particular assistance and, in any event, do not draw a bright line between the act of intercepting, which by definition includes recording, and monitoring.
- [22] Mr. Jessop referred to *R. v. Sipes*, 2011 BCSC 1730, where a selective monitoring clause was considered. The clause in question permitted the interception of private communication, and the clause in question is 7.9 as it was reproduced in Smart J.'s judgment:
- [1]
- 7.9 ... where there exists reasonable grounds to believe that [the cell phone line] is being used by the [target associated to the particular cell phone] save and except that the interception of a communication shall cease forthwith once it has been determined, by way of selective monitoring and voice identification, that the [target] is not a party to the communication.
- [23] Smart, J. said:
- [56] Although the two calls were being listened to by Ms. Sugimoto [the monitor] as they were being intercepted, this occurred by chance and the calls were being automatically recorded regardless if Mr. Brownell was a party or if a monitor was listening to them at the time of interception. Ms. Sugimoto was monitoring the calls solely to obtain information to assist the investigation, not to ensure compliance with the Authorization. While the two intercepted calls were authorized, their interceptions arguably occurred in the course of a process that was not.
- [57] For the purpose of this application, I will assume, without deciding, that, the calls were unlawfully intercepted.
- [24] Justice Smart's analysis then shifted to a consideration of s. 24(2) of the Charter.
- [25] Given that the issue was not actually decided, I find the case of no practical assistance.

The Crown's Position

- [26] Ms. Steele maintains that selective monitoring, in Clause 6.3 as written, does not require the police to listen and ascertain whether the PKP is present in or near the vehicle before recording. The opening words of Clause 6 "The communication of all persons, including those referred to in paragraph 3, may be intercepted" granted permission to police to use a device to ascertain if Mr. Leach was in the car.
- [27] The definition of intercept in the Criminal Code includes "listen to, record or acquire a communication or acquire the substance, meaning or purport thereof". The police had to listen to the device in order to determine if Mr. Leach was present. The Criminal Code makes no distinction between listening and recording. Justice Cullen could have made the distinction in the authorization but did not.
- [28] Ms. Steele also notes that the defence has been unable to locate any decisions considering the clause at issue in this case, which would overtake the plain and obvious meaning of interception or the words of Clause 6.3 itself. She notes there is no evidence to support the contention. The evidence was that it is the practice in the wireroom to record when monitoring. In the alternative, the Crown notes that police had established the presence of Mr. Leach in the vehicle before recording his conversation with the unknown male believed to be Mr. Zamora. The minimization clause, therefore, protected the rights of third parties as intended.

The Law

- [29] Police require prior authorization under Part VI of the Criminal Code to carry out the interception of private communications. Failure to do so will result in a finding that the interception, which constitutes a search and seizure, violates s. 8 of the Charter. Even where an authorization has been obtained, the manner in which the search is carried out, pursuant to the authorization, may result in a Charter violation. That is the allegation on this application. The search was carried out in an unreasonable manner because the minimization clause in 6.3 was not respected.
- [30] In *R. v. Doroslovac*, 2012 ONCA 680, Watt J. observed that minimization clauses are not mandatory but the failure to include them may result in an authorization that is unreasonable. Some minimization clauses, such as those requiring visual surveillance or live monitoring, "may be invoked prior to or contemporaneous with the interception process", at para. 37, and I emphasize "prior to or contemporaneous with". Mr. Jessop emphasizes this passage as well to support his contention that the minimization clause in this case did not permit interception contemporaneously with live monitoring.

- [31] The opening clauses of the authorization itself provide authority to peace officers in the province of British Columbia and elsewhere in Canada and to any other person acting under the direction of a peace officer for the purpose of investigating the delineated offences to intercept private communications. The governing purpose of the authorization is, therefore, to intercept, which, by definition, includes recording.
- [32] Clause 6.3, read in the context of the opening words of Clause 6, as well as overall within the authorization, authorizes the interception of private communications obtained through a particular device covertly installed in a motor vehicle. Police were authorized to intercept if they knew one of the PKPs was in the car and they were authorized to selectively monitor to determine if one of the PKPs was in the car. To monitor, someone had to activate the device in the vehicle to listen and identify the presence of the target. The device was not continuously recording. It recorded only when activated.
- [33] Clause 6.3 did not permit continuous recording, but listening is one of the interchangeable terms included in the definition of intercept, along with record. There is no prohibition in either the Code definition or in Clause 6.3 itself against listening and recording.
- [34] One obvious difficulty with finding that Clause 6.3 permits police to selectively monitor but not record until they confirm the presence of a PKP arises from the following example: A monitor who has been listening to a target's voice for months hears the target utter a phrase in a foreign language and then starts recording. A third party is then heard, and that person's utterances are responsive to the unrecorded phrase and lose their meaning without reference to it. The monitor does not note the code word or phrase on the line sheet because it is in a foreign language and is later challenged at trial on his or her recollection of it months or years later. The evidence, both the proof that the PKP was speaking and the words uttered, is lost. The exercise of obtaining an authorization to intercept communications would have been pointless.
- [35] The defence bears the burden, on a balance of probabilities, of establishing a breach of s. 8 of the Charter. On a plain reading of the words of the authorization, in combination with the definition of intercept in the governing statute, I find that the minimization clause was properly applied by the police. The monitor was not required to establish the presence of the target before recording sound from the vehicle while selectively monitoring. The authorization permitted interception, meaning recording of private communications, with the concomitant requirement to minimize if a target was not present.
- [36] An authorization could be written in a different manner, but that is not what is before me, and notwithstanding Mr. Jessop's able submissions, the application is dismissed.

"Duncan J."

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