

162095-1
Surrey Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

[REDACTED] and [REDACTED]

**ORAL RULING ON VOIR DIRE
OF
THE HONOURABLE JUDGE RAVEN**

COPY

Federal Crown Counsel:

C. Stanley

Counsel for the Accused:

J. Solomon

Place of Hearing:

Surrey, B.C.

Date of Judgment:

December 8, 2008

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[1] THE COURT: This matter is for a voir dire ruling this morning.

[2] [REDACTED] are charged with unlawful production of a controlled substance, unlawful possession of a controlled substance for the purpose of trafficking, and theft of electricity.

[3] I pause just to note that Mr. and Ms. [REDACTED] are present and we do have the assistance of a Vietnamese speaking interpreter.

[4] THE INTERPRETER: Yes, Your Honour.

[5] THE COURT: And your name, sir, is?

[6] THE INTERPRETER: Chan Bui, B-u-i, Your Honour.

[7] THE COURT: Thank you, Mr. Bui.

[8] All evidence presented by the Crown was heard on a voir dire. This ruling addresses the admissibility of evidence seized by the police when they entered the home occupied by Mr. and Ms. [REDACTED] located at [REDACTED] Avenue in Surrey, B.C. on June 13th, 2007. The Crown admits the search warrant relied on by the police was invalid, therefore the accused's s. 8 Charter rights were breached. The defence argues that, in addition, the accused's s. 10(b) Charter rights were breached and the cumulative effect of these breaches applying s. 24(2) of the Charter should result in the exclusion of the evidence seized.

[9] By way of background, on May 28th, 2007, Cst. James Hooker received a report alleging theft of electricity at [REDACTED] in Surrey, B.C. After

conducting surveillance of the property for a few days in June of 2007 and determining who the owner of the property was, he formed the opinion that hydro theft was occurring at that residence. He then prepared an Information to Obtain a Warrant. Because he could not fit a description of all of the items he intended to seize from the residence on the front page of the warrant to search, he listed them on Appendix B to the Information to Obtain as follows: "electrical bypass, hydro meter seals, equipment, electronics and wiring utilized in supporting and facilitating the theft of hydro electricity, which occurred on the 28th day of May, 2007 and is still believed to be occurring, as well as documentation to support residency at [REDACTED], Surrey, B.C."

[10] The Information to Obtain and Warrant to Search were faxed to a judicial justice of the peace at 9:00 a.m. on the morning of June 13th, 2007. The portion of the warrant cover page that left a space to itemize the items to be seized was left blank. The judicial justice of the peace wrote in "attached Appendix B" in that space and issued the Warrant to Search at 9:45 a.m. on June 13th, 2007. Cst. Hooker photocopied the cover page of the warrant, excluding Appendix B, and provided a copy of the cover page to other members of the RCMP at a briefing held at 10:49 a.m. on June the 13th. Several officers signed the warrant. No one asked about the missing Appendix B and no officers realized the warrant was not valid. Cst. Hooker testified that he has been involved in 25 prior search warrants and did not realize there was any problem with the validity of the warrant.

[11] Cst. Critchley, the exhibits officer, initialled the warrant as did six other members of the RCMP involved in the execution of the warrant. Cst. Critchley had performed the role of Exhibits Officer dozens of times and knew what items were supposed to be seized. At no time did this Cst. think there was any problem with the warrant. The witness knew there was a time limit for filing a report to a justice describing the items seized but did not know the exact time frame. The witness thought it might be around ten days. The report to a justice in this case was filed on June 22nd, 2007, two days after the seven-day limit to file such reports as set out in the Criminal Code. There was no reasonable explanation provided as to why the report was filed late. It is argued on behalf of the accused that this delay in filing a report constitutes a breach of the accused's s. 8 Charter rights.

[12] Cst. Robert Dickson was responsible for arresting the accused and transporting them to the police detachment. He too testified about reviewing the warrant and signing it with no concerns about its validity. At 4:45 p.m. on June 13th, 2007 he entered the residence at [REDACTED] with Cst. Hooker, Cst. Critchley, and approximately five other RCMP officers to execute the warrant obtained by Cst. Hooker. Mr. [REDACTED] appeared at the door of the residence when Cst. Hooker announced the police's arrival. According to Cst. Dickson, Cst. Hooker showed Mr. [REDACTED] the warrant as they entered. Ms. [REDACTED] appeared behind Mr. [REDACTED]. Cst. Dickson told both Mr. and Ms. [REDACTED] they were detained and gestured for them to sit on the front steps of the house as it was obvious to him they did not understand the English language. He told them they were being detained for the purpose of executing the search warrant. Shortly afterwards, Cst. Dickson was informed by

other RCMP members inside the home that a marihuana grow operation had been located inside the house. Cst. Dickson took Mr. and Ms. ██████ into the residence and sat with them at the dining room table. He told them why they were arrested and he gave them Charter warnings from memory. The evidence is that Mr. and Ms. ██████ were cooperative throughout their dealings with the police.

[13] As it was apparent to Cst. Dickson that the ██████'s did not understand English, Cst. Dickson called Mosaic, an organization that provides interpreters, and by 5:00 p.m. he received a call back and was provided assistance from a Vietnamese speaking interpreter who provided translation services via speaker phone. Cst. Dickson informed the accused again they were under arrest for production of a controlled substance, possession of a controlled substance for the purpose of trafficking, and theft of electricity. He read the accused their rights from a card. They indicated they understood their rights and they wanted to call a lawyer.

[14] This conversation that was conducted with the assistance of the Vietnamese interpreter present via speaker phone lasted approximately 24 minutes ending at 5:24 p.m. Cst. Dickson testified that he considered allowing the accused the opportunity to call counsel from the residence but decided to take them to the police detachment instead. On examination in chief he said he made this decision to provide the accused with privacy, interpretation services and a land-line at the police detachment. On cross-examination he acknowledged none of the officers at the scene understood Vietnamese and the privacy concern was not as significant as it might be in other cases. Several of the police officers had cell phones with them

at the residence. It was not clear from the evidence why a land-line was considered to be more practicable. It was also noted from the evidence of Cst. Hooker that he, as a matter of practice, generally allowed accused an opportunity to waive their right to privacy if they wished to contact a counsel from their residence following their arrest, Charter, and warning.

[15] Cst. Dickson transported the accused to the police station at 5:48 p.m. He testified he used the 24 minutes from the time the conversation with the interpreter ended and the time they left the residence to make notes and to determine which vehicle to use to transport the accused. The drive to the police station took about 12 minutes. Upon their arrival at 6:00 p.m. the accused were booked in, a quantity of money was seized from Ms. ██████'s purse, a call was placed to the Legal Aid Services Society at 6:18 p.m. At 6:25 p.m. Ms. ██████ spoke to a lawyer with the assistance of an interpreter. When she finished speaking to a lawyer Mr. ██████ spoke to a lawyer at 6:30 p.m. The delay to exercising their s. 10(b) rights to speak with counsel was approximately 1.5 hours, a delay which is argued constitutes a Charter breach for each of the accused.

[16] During all of the time that Cst. Dickson was dealing with the accused at the residence other officers were continuing to conduct a search of that same residence. According to the evidence of Sgt. John Furac, who testified as an expert in the production, distribution and packaging of marihuana, 426 marihuana plants were located in the residence. Sgt. Furac described a three-stage marihuana grow operation with equipment set up for clones, active vegetative stages of growth, and

flowering stage plants. The marihuana was located primarily in the basement of the premises and the main washroom, however, the second level of the home was also used as a hothouse. It was a rudimentary manual-feed operation administered through pumps and hoses. This type of operation, according to Sgt. Furac, required daily care. In all 53 pounds of marihuana were seized by the police with a value of \$99,000 to \$149,000. Also an electrical bypass was located.

[17] As indicated earlier, the Crown conceded there was a warrantless search in this case, therefore the accused's s. 8 Charter rights were breached. The Crown argues there was no s. 10 breach and, with respect to the late filing of the report to the justice, argues that was a technicality rather than a breach of the accused's s. 8 Charter rights.

[18] With respect to the existence of a s. 10(b) breach, the onus is on the accused to show on a balance of probabilities that their s. 10(b) Charter rights were breached in this case. Section 10 of the Charter states, "Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right."

[19] Several cases were presented that addresses this Charter issue. In *R. v. Strachan* [1988] S.C.J. 94, the accused asked to speak to counsel following his arrest at his home. He was told he could not speak to counsel until the police had matters under control. In that case the police had to question two other men in the apartment and locate two registered revolvers for safety reasons. The court determined the accused's right to speak to counsel was violated from the time the

potentially volatile situation was under control, the weapons were located, and the two other men left the apartment.

[20] In *R. v. Nguyen* [2006] B.C.J. 3577, the accused was not allowed to use the phone at his residence in circumstances where the police responded to a 9-1-1 call of a break-in in progress. The court found the premises were insecure and unsafe. It determined it was unreasonable to permit the accused in these circumstances to use his own cell phone at home and found it reasonable and practical to delay his contact with counsel until he was taken to the station. No Charter breach was found, at least not on the basis of a phone call not being allowed from the accused's home. This case did distinguish the circumstances from others where police have their own cell phones and I note in the case before me there were several cell phones in the possession of the police. As well, it was noted in the *Nguyen* case that it was reasonable for the police to leave the scene to avoid jeopardizing the security of the investigation as two individuals had already attended the scene at the accused's request.

[21] In *R. v. Liu* a 2006 decision of the British Columbia Court of Appeal found at [2006] B.C.C.A. 73, the court found a breach of the accused's s. 10(b) Charter rights in circumstances where he was not allowed to phone counsel from his residence following his arrest. This case follows the *Strachan* decision and supports the proposition that an accused should be asked if he waives his right to privacy in order to exercise his right to counsel.

[22] From a review of other cases provided, including *R. v. Bone* [2000] B.C.C.A. 239, *R. v. Petit* [2003] B.C.C.A. 522, *R. v. Wong* [2004] B.C.J. 1862 and *R. v. Fan* [2003] B.C.J. 1782, I find the legal principle to be applied is that absent exigent circumstances that affect the safety of the police and/or the accused and whenever it is practicable and reasonable to do so the accused should be afforded an opportunity to speak with counsel at their residence if they make that request prior to being transported to the station. In this case, Cst. Dickson, was able to arrange a Vietnamese speaking interpreter at the scene of the investigation within 15 minutes. The accused were cooperative throughout. There were eight officers at the scene, several of whom had cell phones. There was no urgency in leaving the premises. In fact, Cst. Dickson spent 24 minutes following the Charter and warning of the accused making notes and deciding what vehicle to use to transport the accused to the police station. In these circumstances I find the accused's s. 10(b) Charter rights were breached because they were not afforded an opportunity to speak with counsel at their residence and they were not asked if they waived their privacy rights in order to do so.

[23] I have considered the accused's argument that their s. 8 Charter rights were also breached because the report to a justice was filed two days after the required time limit. Having reviewed the cases of *R. v. Steeves* [2002] B.C.S.C. 551 and *R. v. Martins* [2004] B.C.J. No. 2300 B.C.S.C., I conclude that filing the report two days late constituted a technical error following the seizure of the evidence and was not a breach of the accused's s. 8 Charter rights. My decision would have been different if there was a failure to file the report at all or a continuing breach of the

telewarrant process continued for an extended period of time as was the case in the Martins decision.

[24] Having determined that the accused's s. 8 and s. 10(b) Charter rights were breached in this case, I must conduct an analysis pursuant to s. 24(2) of the Charter to determine if the evidence seized should be admitted. Section 23(2) of the Charter states, "Where evidence is obtained in a manner that infringes an accused's Charter rights, the evidence shall be excluded if it is established that having regard to all of the circumstances the admission of it in the proceedings would bring the administration of justice into disrepute". The applicant must prove on a balance of probabilities that admission of the evidence would bring the administration of justice into disrepute. As stated in the leading case of *R. v. Collins* [1987] 1 S.C.R. 265 at paragraph 31:

The purpose of 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing or from judicial condemnation of unacceptable conduct by the investigatory and prosecutorial agencies. It will also be necessary to consider any disrepute that may result from the exclusion of the evidence. It would be inconsistent with the purpose of s. 24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission. Finally it must be emphasized that, even though the inquiry under s. 24(2) will necessarily focus on the specific prosecution, it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered.

[25] In determining whether the admission of evidence would bring the administration of justice into disrepute the test to be applied is that of the reasonable person who is dispassionate and aware of all of the circumstances of the case. The three-step inquiry that is often adopted from the *Collins* case is the

determination of, firstly, the effect of admitting the evidence on the fairness of the trial; secondly, the seriousness of the breach; and, thirdly, the effect of excluding the evidence on the administration of justice. With respect to the fairness of a trial, because the evidence seized in this case is non-conscriptive evidence, its admission would not render the trial unfair.

[26] With respect to the seriousness of the breach, I was referred to the case of *R. v. Buhay* [2003] 1 S.C.R. 631 which discusses various factors considered by the Court in determining that a s. 8 breach was serious. Factors to consider include: whether the breach was committed in good faith, or was inadvertent, or of merely a technical nature; whether the breach was deliberate, wilful or flagrant; whether the breach was motivated by urgency or necessity; the obtrusiveness of the search; and the individual's expectation of privacy in the area searched the existence of reasonable and probable grounds. In the *Buhay* case the police searched a locker in a bus station without obtaining a warrant. The police officer stated they did not believe it was necessary to obtain a warrant. The court considered the police's casual attitude towards the Charter rights of the accused and expressed the concern that if the evidence obtained was admitted in the trial it may encourage similar conduct by the police in the future.

[27] In the case before me the accused had a high expectation of privacy because they were in a residence. I cannot find that the s. 8 breach was inadvertent or merely technical in nature. Several police officers signed the warrant, yet none questioned the fact that Appendix B was not attached to the document

they received and none expressed any concern about the validity of the warrant. While this may not amount to deliberate, wilful, or flagrant conduct on the part of the police, I find it is an unreasonable error on their part. The evidence of the exhibit officer to the effect that the officer had been involved in many similar operations and knew what items to seize, in my view showed a casual disregard for the rights of the accused in circumstances that constituted a warrantless search. It was the general consensus of the police officers who testified that they acted in good faith and had no idea the warrant was not valid. This caused me great concern about the s. 8 breach. I find that a reasonable, dispassionate person aware of all the circumstances would expect police officers to realize there was an error on the warrant and seek to rectify it in the circumstances of this case. For these reasons I find the nature of the s. 8 breach was serious.

[28] The s. 10 breach I find was also significant in this case. There was no urgency or necessity that militated against allowing the accused their right to call counsel at the residence. In addition, the breach occurred at the time the evidence was being collected pursuant to an invalid warrant, therefore there was a strong causal connection between this breach and the impugned evidence. This distinguishes it from cases cited where the s. 10(b) breach occurred after the evidence had been collected.

[29] Finally, the s. 10 (b) breach occurred in conjunction with the s. 8 breach and therefore constituted a part of a larger pattern of disregard for the accused's Charter

rights. For these reasons I find the s. 10 (b) breach also serious in the circumstances of this case.

[30] The third part of the *Collins* test requires me to consider the effect of excluding the evidence on the administration of justice. The Crown requires the admission of the evidence seized in order to prove its case which is a significant factor militating in favour of admission of the evidence as the offence committed is serious in nature. The dilemma posed by this part of the test is articulated at page 73 of the *Buhay* decision as follows: "The decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial system on the other." This was well put by Doherty J.A. in a recent decision in the Court of Appeal for Ontario, *R. v. Kitaitchik* [2002] 161 O.A.C. 169 at paragraph 47 as follows: "The last stage of the *R. v. Collins*, supra, inquiry asks whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth seeking goal of the criminal trial."

[31] I have considered this carefully and placed significant weight on the fact that two serious Charter breaches occurred in this case. While the offence allegedly committed is serious in nature, I find the seriousness of the offences outweighed by the disrepute to the administration of justice that would occur from the judicial condemnation of unreasonable conduct by the police in this case.

[32] Therefore, I find the evidence of the marihuana and other items seized as a result of the search of the residence located at [REDACTED] Avenue in Surrey, B.C. on June 13th, 2007, to be inadmissible in the trial proper.

(RULING ON VOIRÉ DIRE CONCLUDED)