Court of Queen's Bench of Alberta

Citation: R v. [redacted], 2013 ABQB 476

Date: 20131216
Docket: 101382067Q1
Registry: Red Deer

Between:

Her Majesty the Queen

Crown

- and -

[redacted]

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4. By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any manner.
NOTE: This judgment is intended to comply with the restriction so that it may be published.

Corrected judgment: A corrigendum was issued on January 15, 2014; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee

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[1] This is a *voir dire* dealing with the admissibility of electronic evidence seized from the Accused's cameras found in the bedroom of his residence after police responded to a call of a sexual assault in progress. Found on the Accused's cameras was evidence of sexual activity.

Argument

[2] The Applicant submits that he had a high expectation of privacy in his home, his bedroom and the personal electronic devices contained therein. When the police conducted a lengthy and warrantless search of his bedroom and cameras, they committed serious and flagrant breaches of his Section 8 *Charter* rights. The police were not entitled to use any evidence obtained during these illegal searches in support of judicial authorization for further searches. As such, all of the searches in this case were warrantless and *prima facie* unreasonable violations of the Applicant's *Charter* rights. Given the highly invasive nature of the searches and the reckless conduct of the officers involved in this case, the Accused argues that the illegally obtained evidence must be excluded pursuant to section 24(2) of the *Charter*.

[3] The Crown responds that it is black letter law that police have the power to search a person and their surroundings after arrest for evidence of the crime. It is submitted that the search conducted here was clearly within the scope of that power, for the reasons I noted in ***R v Franko*** [2012] ABQB 282 at paragraph 132, as it was for evidence of the crime at the location where the Accused was arrested.

> "A seminal case in this regard is ***R v Caslake*** (1998), 121 C.C.C. (3d) 97. The Court in ***Caslake*** held that automobiles are legitimately the objects of search incidental to arrest as they attract no heightened expectation of privacy that would justify an exception from the usual common law principles. All of the limits on search incident to arrest are arrived from the justification for the common law power itself: searches which derive their legal authority from the fact that arrest must be truly incidental to the arrest in question. The search is only justifiable if the purpose of the search is related to the purpose of the arrest. The three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others and the discovery of evidence which can be used at the arrestee's trial. The restriction that the search must be truly incidental to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. There are both subjective and objective aspects to this issue. The police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one. This is not a standard of reasonable and probable grounds. The only requirement is that there be some reasonable basis of doing what the police officer did."

[4] While the search was not carried out by the officer who arrested the accused, this is permissible per ***R v Hall*** (2006) 206 CCC (3d) 416 paragraphs 12 and 13 which indicated the delegate can rely on the delegator to have requisite reasonable and probable grounds. It is submitted that viewing the evidence without prior court authorization was permissible is supported by paragraph 147 of ***Franko***, wherein the search of the contents of an electronic storage device was likened to looking within a log or a notebook. While the Crown

acknowledges that subsequent SCC case law appears to be retreating from this analogy, those cases deal with personal computers and other devices which contain far more than simple images held on the cameras in question, and do not deal with search incidental to arrest.

[5] Even if there was a breach of the Accused's privacy rights in a camera context, the Crown submits the evidence ought to still be admitted, consistent with the SCC's 24(2) analysis in ***R v Cole*** [2012] 3 S.C.R. 34 at paragraphs 81– 98. This was not a willful breach of the Accused's rights. Police attempted to comply by seeking a search warrant before the download of all the contents of the cameras, the evidence is probative in the case of the pictures, and dispositive in the case of the video, and therefore ought to be admitted notwithstanding any breach of the Accused's *Charter* rights in the case at bar.

Analysis

[6] In order to determine whether the initial searches and seizures in this case were authorized by law, the Court must consider the actions of the police in light of the scope of their lawful authority (or lack thereof) in the circumstances.

[7] The investigation into this matter began as a 911 call originating from the residence. According to the arresting officer, Cst. Erb, he received a complaint about a "sexual assault in progress" and attended at the residence. When he got there, a female told him "she could hear noises coming from her roommate's bedroom and she went down, opened the bedroom door, saw her roommate laying on the bed naked. There was another female and she asked this female if she needed help, and the victim said yes". This was the extent of the information Cst. Erb had when he entered the Applicant's bedroom.

[8] The scope of the police's common law authority to investigate a 911 call was articulated by the Supreme Court in *Godoy*, 1999 1 S.C.R. 311. Based on Cst. Erb's evidence, he was authorized to enter the residence and the Applicant's bedroom for the limited purpose of determining whether anyone inside required assistance and providing that assistance, and he was entitled to perform the actions required to preserve life and ensure safety. Cst. Erb and the officers who followed him into the residence were not entitled to conduct any searches or investigations ancillary to that purpose at the point of their entry.

[9] When Cst. Erb entered the Applicant's bedroom, he found the Applicant and female sitting on the bed. He arrested the Applicant and removed him from the bedroom. Other officers attended to the female sitting on the bed who was having a "difficult time talking, let alone answering any direct questions."

[10] The Accused argues that once the police had located and offered assistance to the female in the Applicant's bedroom, their authority to remain in the home and the bedroom ended; and that all further warrantless activities and searches conducted within the bedroom were unauthorized, unreasonable and cannot be justified because they were responding to a 911 call.

[11] The Applicant submits that a reasonable person standing in the shoes of Cst. Erb would not have believed that reasonable and probably grounds existed to make an arrest. The information known to Cst. Erb when he arrested the Applicant simply did not constitute reasonable grounds.

[12] The Court is not entitled to consider information learned post-arrest in assessing the reasonableness of Cst. Erb's beliefs. Cst. Erb's evidence was that when he arrested the Applicant. he knew the following:

- There was a complaint of a "sexual assault" in progress;
- The complaint was based on Ms. Lund hearing "noises" coming from her roommate's bedroom and entering the bedroom;
- Upon entering the bedroom, Ms. Lund saw the Applicant naked with a female;
- Ms. Lund asked the female if she required assistance and she said yes;
- When he entered the bedroom, he saw the Applicant and a female sitting on the bed.

[13] While these circumstances certainly warranted inquiry, the Accused argues they did not give rise to an objectively reasonable belief that an offence had been committed. Cst. Erb did not indicate he had any information about the nature of the noises or the type of assistance the woman in the bedroom requested. When he entered the bedroom, the parties were simply sitting on the bed. The Accused argues that these circumstances gave Cst. Erb the grounds to place the Applicant under investigative detention, but such a detention would have carried with it a limited power to conduct a pat-down search for officer safety, and it is submitted that there would have been no power to search the individual's surroundings.

[14] Additionally the Crown has not established that a warrantless arrest was justified under section 495 of the Criminal Code. Cst. Erb's limited information gave no reason to believe that an arrest would be necessary to establish identity, preserve evidence, prevent the continuation of an offence or ensure attendance at court. It is submitted that the arrest of the Applicant and the search of his bedroom and electronics grossly exceeded the scope of what the police were authorized to do in the circumstances.

Conclusion

A. Reasonable Grounds for Arrest Existed

[15] I conclude that Cst. Erb had reasonable and probable grounds to arrest the Accused, both subjectively and objectively, when one considers the evidence of the nature of the call, the evidence of the roommate, and the scene in the bedroom. The officer knew the complaint was of

a sexual assault in progress. He was told by the caller what she had seen including the naked roommate and the female indicating she needed assistance. Nothing in the scene which presented itself to Cst. Erb when he opened the door to the bedroom contradicted what he had been told. We know from the evidence that the Complainant was grossly intoxicated to the point she could not dress herself or carry on a normal conversation. So there was likely no consent at law at some point for any sexual activity, if consent was ever given.

B. No Power of Search Incident to Arrest

[16] The Accused argues that police had no authority to search his house, his bedroom or his electronics without a warrant. As per ***Golub***, the search of a dwelling house as an incident of an arrest is generally prohibited subject to exceptional circumstances. In this case I conclude that there were no exceptional circumstances, as the complainant had been located and given assistance and the Applicant had been taken into police custody. There were no safety concerns that necessitated a search and indeed officer safety was not mentioned in any of the evidence. There was no risk of the loss, destruction or disappearance of evidence - the police could have easily secured the bedroom and sought judicial authorization to search. Applying for a warrant does not appear to have crossed the mind of anyone involved in the investigation. Instead they simply intruded upon the privacy of the Applicant's home for at least 2 hours and conducted a carte blanche search of the Applicant's most private/bedroom domain and personal devices.

C. No Grounds to Search the Camera

[17] In addition to having no lawful authority to search the bedroom, the police had no grounds to search the Applicant's cameras. Initially Cst. Roung claimed she ordered the search of the camera because she had noticed it sitting at a suspicious angle. However when she was further examined and shown the contradictory photos she took at the scene, she changed her testimony and acknowledged she may have been "mistaken" about her recollection on that point. The Information to Obtain ("ITO's") in this case state that both cameras were found on the bedroom floor. In any event Cst. Roung acknowledged she had no reasonable grounds when in her evidence she admitted that when she saw the first camera, she did not know what she would find on it, and had no information to suggest that anyone had filmed any sexual activity. The second camera was searched because of the contents of the first camera.

[18] In order to have obtained judicial authorization to search these cameras, the police would have had to have demonstrated reasonable grounds to believe evidence of the offence would be found on them, and this analysis cannot be done *post facto*. As per ***Rafferty*** 2012 ONSC 703 and ***Caron*** 2011 BCCA 56, the Applicant had a high expectation of privacy in the cameras, judicial authorization was required for the police to search them, and this is particularly true given their location in the bedroom of a private dwelling house.

D. The Plain View Doctrine Does Not Apply

[19] In her evidence, Cst. Roung testified that she was not in possession of a search warrant when she seized the cameras and did not consider getting one because the cameras and did not consider getting one because the cameras were "in plain view". I conclude that the plain view doctrine has no applicability in these circumstances, and cannot be used to justify the search and seizure of the cameras.

[20] In order for the plain view doctrine to apply, an officer must come across a piece of evidence "in circumstances where it is at once obvious and visible without positive action on the officer's part to make it observable, he has the right to seize it." Cst. Roung had no idea what, if any, data might be stored on the camera when she ordered it searched. She instructed Cst. Gibeault to pick the camera up and turn it on for the specific purpose of determining its contents. The images or data contained on the camera were not in plain view; and the police purposefully searched the devices in order to view the impugned data. Recourse to the plain view doctrine in the particular facts of this case is without lawful justification.

E. Illegally Obtained Evidence Must be Excised

[21] I conclude that the Crown has failed to establish that the warrantless searches of the Applicant's bedroom and cameras were lawful. As such, the illegally-obtained information collected during the course of these searches must be excised from the ITOs. Such excision is not dependant on a 24(2) balancing exercise. Once the impugned evidence is discounted/excised, there remains no evidence upon which the search warrants could have issued. The Court must then consider whether the fruits of the numerous warrantless searches should be excluded pursuant to section 24(2).

Section 24(2) Analysis

[22] In R v Grant, 2009 S.C.J 32 at paragraph 71, the Supreme Court of Canada discussed the required analysis as follows:

> **71** A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a

> s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in ***Collins*** and subsequent jurisprudence.

[23] Although the police in this case entered the residence lawfully, and lawfully arrested the Accused, instead of leaving to obtain proper judicial authorization, they searched the Applicant's bedroom and his personal electronics at will for a number of hours. Back at the detachment, the officers continued to breach the Applicant's privacy rights by showing the contents of the camera to at least three other officers.

[24] In her evidence Cst. Nelson appeared to believe that the purpose of a search warrant was to "get data from cameras" so that the police would have a "copy for court purposes as evidence". This explanation suggests Cst. Nelson did not even realize that turning the camera on and going through its contents constituted a search.

[25] There are numerous cases where Courts have emphasized and reiterated the sanctity of the home being free from unauthorized state intrusion. Further there are an increasing number of cases emphasizing the privacy interests in personal electronics. The *Charter* infringing state conduct, the first factor from ***Grant***, was serious in this case.

[26] The Applicant had a high expectation of privacy in his residence - he had an even higher expectation of privacy in his bedroom and the devices contained therein. The searches were extensive and the police were on the scene for several hours. But for the illegal searches, the pictures and video stored on the camera would not have been found, and there would have been no grounds for an authorized search of these devices. Therefore the impact of the Charter protected interests of the Accused, the second factor from ***Grant***, was serious in this case.

[27] Excluding the contents of the cameras will not end the Crown's case as the prosecution can continue on the strength of the complainant's testimony, so the merits of the case can still be adjudicated upon. For this reason, the third factor from ***Grant*** weighs in favour of the exclusion of the evidence.

[28] In balancing the factors of the Grant analysis it is appropriate for the Court to take into account the cumulative effect of the Charter violations in this case and the extent to which they will bring the administration of justice into disrepute. I conclude that in the final balancing exercise, the extended and serious nature of the Charter violations favor the exclusion of the evidence in this case.

[29] The Supreme Court has recognized that the values underlying the privacy interest are "dignity, integrity and autonomy". Within the common law, there are limited exceptions to an

individual's expectations of privacy in their home to balance the needs of others and the larger community. The scope of these exceptions must be respected, and they were not in this case:

- The police entry into the Applicant's residence was authorized by the common law for the limited purpose of preserving life and safety;
- The police were not authorized to perform any searches ancillary to this purpose;
- The police searches of the Applicant's bedroom and digital cameras were warrantless and unreasonable within the meaning of section 8 of the *Charter*;
- The evidence gathered during these searches was unlawfully obtained and cannot be considered when conducting a judicial review of the Informations to obtain the warrants that eventually issued in this case;
- Once the impugned information is excised from the Informations to obtain, what remains is insufficient to justify the issuance of the search warrants;
- As a result all of the searches in this case were warrantless and prima facie unreasonable.

Disposition

[30] The video evidence in this case must be excluded under section 24(2) of the *Charter*.

Heard on the 24th day of June, 2013
Dated at the City of Red Deer, Alberta this 16th day of December, 2013

Donald Lee
J.C.Q.B.A.

Appearances:

A.G. Bell
Alberta Justice
Crown Prosecutor's Office
for the Crown

Patrick Fagan, Q.C.
Fagan & McKay
for the Accused

Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice Donald Lee

Please note the publication ban has been added to the first page.