


Action No.: 181103938P1
E-File No.: CCP19-
Appeal No.: _____

IN THE PROVINCIAL COURT OF ALBERTA
JUDICIAL CENTRE OF CALGARY

HER MAJESTY THE QUEEN

v.



Accused

TRIAL
(Excerpt)

Calgary, Alberta
October 9, 2019

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1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

4 October 9, 2019

Afternoon Session

6 The Honourable Judge Brown

Provincial Court of Alberta

8 R.R. Constantinescu

For the Crown

9 P.C. Fagan, QC

For the Accused

10 T. Saban

Court Clerk

12

13 **Discussion**

15 THE COURT:

Mr. Constantinescu, Mr. Fagan, are you ready

16 for the matter to be called?

18 MR. FAGAN:

Yes, we are, Your Honour.

20 MR. CONSTANTINESCU:

We are, yes.

22 THE COURT:

All right.

24 THE COURT CLERK:

Calling [REDACTED]

26 MR. FAGAN:

For the record, [REDACTED] is present.

28 **Ruling (Voir Dire)**

30 THE COURT:

Thank you. [REDACTED], I have concluded that

31 you have established that your rights were breached in the following ways. Your right to
32 be free from arbitrary detention by a state agent was breached. Your arrest was unlawful,
33 and that is a factor in the arbitrary detention. Your right to be informed of the reason for
34 your detention was breached. And your right to be free from unreasonable search and
35 seizure was also breached.

37 Of course, as a result of, in particular, the breach of your right to be free from unreasonable
38 search, the unlawful firearm was discovered in the vehicle that you were driving. I have
39 concluded that the breach is so serious that that evidence must be excluded from the trial.
40 I have concluded that the breach was serious. It had a serious impact on you. And although
41 the public's right -- public's confidence in the justice system and the concern to have a trial

1 on the merits of a case favours the introduction of the evidence, that cannot be at the cost
2 of an unlawful and arbitrary arrest.
3

4 So that is the short version. And I will now explain why I reached that decision.
5

6 Essentially, this boils down to the difference between a police hunch or intuition or mere
7 suspicion and reasonable suspicion. If reasonable suspicion grounds the detention and the
8 search, it is a whole different case. But in this case, I have concluded that it did not reach
9 that threshold.
10

11 I will review the facts of the case first and then make further reference to the legal
12 principles. This investigation began as a spinoff investigation from Medicine Hat Police
13 Service. The Calgary Police Service were contacted in July of 2018 to assist the Medicine
14 Hat Police Service in a drug trafficking investigation. The target in Medicine Hat was a
15 man named Benjamin Douglas (phonetic). And the information received from Medicine
16 Hat Police Service was that he appeared to be regularly driving a red Toyota Echo to
17 Calgary and obtaining drugs from a supplier in -- a supplier or suppliers in Calgary, then
18 returning to Medicine Hat to conduct his trafficking operation. So, in short, the Medicine
19 Hat police believed that he was being supplied in Calgary, and asked for the Calgary Police
20 Service assistance in locating the supplier and assisting in the investigation.
21

22 So Calgary Police Service did that. They provided assistance with surveillance operations
23 in July, August and September of 2018. July 26th, their attention was drawn to a Calgary
24 target named Quait (phonetic), who typically drove a Chevrolet Silverado. A very common
25 type of meeting was observed in the Monterey Plaza strip mall between Quait in the
26 Silverado and Douglas in the red Toyota Echo. That was observed on July 26th. The
27 meeting consisted of one person leaving the Echo and getting into the passenger seat of the
28 Silverado for a brief period of time, then back into the Echo. And then the vehicles
29 separated.
30

31 Then on August 7th, there was a very similar meeting observed, but this time the vehicle
32 meeting up in the Monterey Plaza with the red Toyota Echo was a white Ford F150. Again,
33 Douglas was observed sitting for a short period of time in the passenger seat of the F150,
34 and then returning to the Toyota Echo and then departing.
35

36 After the Calgary Police Service observed that interaction, they contacted Medicine Hat
37 and explained what had just transpired. Medicine Hat on that occasion did not stop the
38 Echo on its return to their city. And the F150 was not maintained under surveillance.
39

40 However, the primary investigation took numerous steps after that meeting to follow up on
41 the ownership of the F150 and make other inquiries. So the ownership of the F150 was

1 Extreme Construction Services Inc. With that information, the primary investigator then
2 pursued it further to find out who was behind or who were the principals of Extreme
3 Construction Services Inc., and at that time learned that you and your brother [REDACTED]
4 [REDACTED] (phonetic) were directors of that company.
5

6 Constable Wishnowski went further and then put up -- put together profile information
7 about you and your brother, and that included locating pictures. And she described both
8 you and [REDACTED] as being in their -- your late 20s to early 30s, and having full black
9 beards and appearing to be of Middle Eastern heritage.
10

11 Further, your brother [REDACTED] has a criminal record. And later in the investigation, Constable
12 Wishnowski received confidential informant information to suggest that your brother was
13 involved in drug trafficking and had firearms. Your record came up clean, no criminal
14 record, married, four children, no police involvement. Similarly, the F150 had not
15 apparently ever been involved in any criminal activity.
16

17 On August 31st last year, again the Calgary Police Service were contacted as Mr. Douglas
18 was headed towards Calgary in his Echo. And once more, the Calgary Police Service
19 observed a meeting between Quait in his Silverado and Douglas in the Echo. On this
20 occasion, when the Calgary Police Service contacted Medicine Hat with the information,
21 Medicine Hat decided to intercept the Echo, and Mr. Douglas was found to be in possession
22 of 3 ounces of cocaine.
23

24 The surveillance on Mr. Quait was quite intensive between July and September of last year.
25 He was noted many times conducting these short transactions which are always believed
26 to be consistent with drug trafficking. And of course, the police followed up on his
27 whereabouts and location, and found that he was tied to the Skyview Ranch condo
28 development.
29

30 Then on September 6th, the police service applied for a search warrant for both the
31 Silverado and the condo to which Mr. Quait had been tied. On September 12th, the police
32 were primed for execution of that search warrant, but before they entered the condo to
33 execute the search warrant, some surveillance took Mr. Quait off to another of these
34 meetings, this time with a man named Kwong (phonetic). Both Quait and Kwong were
35 arrested after an observed transaction, and a large quantity of drugs and cash were seized.
36

37 Meanwhile, back at the Skyview Ranch location, the police were maintaining continuity
38 on the condo, awaiting the arrival of the TAC team to execute the search warrant. At that
39 time then, while waiting to enter the condo to execute the search warrant, the surveillance
40 picked up on you in the F150. The F150 was described as moving around in a suspicious
41 way, doing at least three laps of this large condo development, and doing some entry into

1 parking stalls and backing out.
2

3 Also, Acting Sergeant Perkins testified that he recognized you as the person who had been
4 in the F150 back on August 7th. In any event, out of concern that perhaps the investigation
5 and execution of the search warrant had been compromised because he recognized
6 certainly the F150, he directed a traffic stop, directed Constable Swanson to do a traffic
7 stop and identify the driver of the F150.
8

9 That was the stated concern, that possibly the investigation in regard to the execution of
10 the search warrant had been compromised. However, there was no information passed on
11 to Constable Swanson to say, for example, Don't let the driver make any calls. So
12 Constable Swanson did the traffic stop, as directed, and obtained identifying information
13 from you. You were entirely cooperative. Constable Swanson didn't direct you to not
14 make any phone calls. You had a cell phone on you. Constable Swanson went back to his
15 vehicle. And there is no issue about the fact that you were under police detention from that
16 point on and, in fact, for 41 minutes before the next stage happened.
17

18 And that happened after the TAC team had entered the condo, located a large quantity of
19 drugs and cash, and then Acting Sergeant Perkins made two subsequent directions. The
20 first was that you were to be arrested for possession for the purpose of trafficking, and then,
21 a bit later, for possession of the proceeds of crime, which Constable Swanson did. And
22 Constable Swanson advised you at that time, when he arrested you, of your *Charter* rights.
23

24 The *Charter* -- Constable Swanson did an initial search when you were first arrested. And
25 then later, Constable Batchelor was directed to do a more thorough search of the vehicle.
26 And it was on that second search that the firearm was located behind a secret panel behind
27 the dash. And it is as a result of that seizure, of course, that you are on trial.
28

29 Now, dual purpose stops have been upheld, and it was unquestionably intelligent police
30 work to order the stop of the same vehicle that had been observed earlier in the three-month
31 investigation on August 7th. So the very first moments of that stop were not problematic.
32 But detaining without advising that you were under investigative detention, and leaving
33 you with a cell phone, puts the lie to the rationale that there was concern that the
34 investigation and the search warrant had been compromised.
35

36 While it was absolutely sound to act on a hunch that there may be a problem with the
37 execution of the search warrant, there was nothing close to grounds for arrest for possession
38 for the purpose of trafficking when the totality of the evidence against you amounted to,
39 first of all, the August 7th incident involving the vehicle belonging to a corporation of
40 which you were one of two directors. Now, Acting Sergeant Perkins claims to identify you
41 as the driver on August 7th, and of course you are the driver on September 12th. But

1 Acting Sergeant Perkins was not shown a photo lineup, and apparently there is some
2 considerable similarity between you and your brother.
3

4 Also, for this fairly intensive surveillance operation that observed many meets by Quait
5 with these short duration meetings in adjacent vehicles, never before or after August 7th
6 was the Ford F150 involved, you were never seen in the presence of Mr. Quait, the F150
7 was never under surveillance in the Skyview Ranch vicinity until September 12th.
8

9 So I have concluded that the detention was arbitrary, there were no grounds for the arrest
10 for possession for the purpose of trafficking and then possession of the proceeds of crime.
11 And really, the whole essence of this is nicely summarized in the *Mohamed* decision from
12 Saskatchewan Court of Queen's Bench, 2018 SJ No 215, when the law as set down by the
13 Supreme Court in *Mann* and *Chehil* is summarized. I am quoting from paragraph 58.
14

15 A reasonable suspicion must be informed by all of the
16 circumstances available to the officer, which necessitates a
17 consideration of the entire constellation of factors available to the
18 officer. An officer's hunch or intuition cannot form the basis of a
19 reasonable suspicion ... The Supreme Court in *Chehil* offered
20 guidance:
21

22 T]he reasonable suspicion standard...is a robust standard
23 determined on the totality of the circumstances, based on
24 objectively discernible facts, and is subject to independent
25 and rigorous judicial scrutiny...
26

27 The reasonable suspicion standard requires that the entirety
28 of the circumstances, inculpatory and exculpatory, be
29 assessed to determine whether there are objective
30 ascertainable grounds to suspect that an individual is
31 involved in criminal behaviour...
32

33 Reasonable suspicion must be assessed against the totality
34 of the circumstances. The inquiry must consider the
35 constellation of objectively discernible facts that are said to
36 give the investigating officer reasonable cause to suspect
37 that an individual is involved in the type of criminal activity
38 under investigation...
39

40 Now, it was also raised as an argument that your *Charter* right to be provided access to
41 counsel promptly was breached. Now, I have concluded on that issue that the delay would

1 have been acceptable if the police were truly concerned about the compromised
 2 investigation. So if that were truly the case, then there's not a problem with the delay with
 3 which you were subjected before you could contact counsel, but in any event, I also
 4 concluded that the discovery of the firearm had nothing to do with any delay in receiving
 5 your right to counsel. So on that issue, I would not have excluded the evidence.
 6

7 However, the unlawful arrest and the arbitrary detention, according to my analysis of the
 8 *Grant* factors, and that comes from a Supreme Court of Canada decision, I have concluded
 9 that the evidence must be excluded as, first of all, it is frankly a shocking breach that,
 10 having detained you, purportedly out of concern that the execution of the search warrant
 11 had been compromised, but taking no steps such as to take away a cell phone that you
 12 might use to alert people, it was clearly an arbitrary detention. And you were given no
 13 reason for it. You were not advised of your -- of the reason for your detention, the true
 14 reason. Had there been an investigative detention embarked on then, you ought to have
 15 been informed.
 16

17 So that is a very serious breach. And of course, your rights are greatly harmed by the
 18 unlawful search that flowed from the unlawful arrest. As I say, the third branch of the test
 19 always -- almost always favours admission of the evidence, but it cannot be at the price of
 20 ignoring important rights such as the right to be free from arbitrary detention and free from
 21 unlawful arrest.
 22

23 So those are the reasons for which I have concluded that the evidence must be excluded.
 24

25 MR. CONSTANTINESCU:

26 did enter into a blended voir dire, --
 27

Thank you, Your Honour. As you'll recall, we

28 THE COURT:

Yes.

29
 30 MR. CONSTANTINESCU:

31 no further evidence at this point.
 32

-- so we're still in the case. The Crown will call

33 THE COURT:

Right. Thank you.

34
 35 MR. FAGAN:

And the defence calls no evidence on the ...
 36

37 **Reasons for Judgment**
 38

39 THE COURT:

40 [REDACTED] I now dismiss all three charges against you. You are now found not guilty, and
 41 you are free to go.

Right. Thank you. And that being the case, [REDACTED]

1
2 THE ACCUSED: Thank you, Your Honour.
3
4 THE COURT: Thank you.
5
6 MR. CONSTANTINESCU: And I might just add, I'll speak to my friend after.
7 I don't have a forfeiture order, but we'll talk about the firearm.
8
9 THE COURT: Oh, yes.
10
11 MR. CONSTANTINESCU: The firearm and what was purported to be
12 marihuana --
13
14 THE COURT: Right.
15
16 MR. CONSTANTINESCU: -- and the grinder, so I think that we can probably
17 come to an agreement on that and have a forfeiture order signed and --
18
19 MR. FAGAN: Forfeiture by consent, if my friend would like to
20 paper it.
21
22 MR. CONSTANTINESCU: I'll prepare the order.
23
24 THE COURT: Right.
25
26 MR. CONSTANTINESCU: And we'll just have it in 505, or should we send
27 it to your attention?
28
29 THE COURT: Oh, just send it to Chambers. Thank you, Mr.
30 Constantinescu.
31
32 MR. CONSTANTINESCU: We will do that then. Thank you very much.
33
34 THE COURT: Thank you.
35
36 MR. FAGAN: Thank you, Your Honour.
37
38 THE COURT: And I will return the binder to you, Mr. Fagan.
39
40 MR. FAGAN: Thank you, Your Honour.
41

1 THE COURT:

You are welcome. A nice little bit of recycling.

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5 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

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I, Taylore Saban, certify that this recording is the record made of the evidence in the proceedings in Provincial Criminal Court, held in courtroom 1106 at Calgary, Alberta on the 9th day of October, 2019, and that I was the court official in charge of the sound-recording machine during the proceedings.

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I, Laurie Plomp, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

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Order Number: AL-JO-1004-2680
Dated: October 29, 2019