

Citation: ☀ R. v. MacDonald
2018 BCPC 135

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Registry: Abbotsford

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

BRIAN VINCENT MacDONALD

**RULING ON APPLICATION FOR JUDICIAL STAY
OF THE
HONOURABLE JUDGE E. M. RITCHIE**

Counsel for the Crown:	J. LeDressay
Counsel for the Accused:	K. Beatch
Place of Hearing:	Abbotsford, B.C.
Dates of Hearing:	April 23, 24, 25, 30, May 1, 2018
Date of Judgment:	June 8, 2018

[1] Mr. MacDonald faces eight serious charges alleging possession of illegal drugs for the purpose of trafficking. These proceedings to date consist of a *voir dire* in relation to allegations of various *Charter* violations. These are my reasons with respect to Mr. MacDonald's application for a judicial stay of proceedings for abuse of process arising from the actions of one of the police officers involved in the investigation leading to the laying of the Information before me.

[2] Specifically, Mr. MacDonald alleges that Cst. Sovio stole money during the search of Mr. MacDonald's residence. Mr. MacDonald submits that Cst. Sovio's actions were such an egregious breach of trust that a stay is warranted even though the alleged theft is not relevant to the proof of the charges.

[3] The Crown submits that regardless of my findings with respect to Cst. Sovio's actions, a stay of proceedings is not warranted in this case.

The Actions of Constable Sovio

[4] On November 23, 2017 Cst. Sovio was one of the officers involved in the search of Mr. MacDonald's home. Cst. Sovio was delegated to search the kitchen. He was also delegated, along with Cst. Young, to search Mr. MacDonald's bedroom.

[5] Cst. Sovio located some Canadian and some American cash in the bedroom. He recorded information in his notebook about the Canadian cash and the Exhibits Officer, Cst. Bell later seized the Canadian cash. There is no evidence before me indicating that Cst. Sovio failed to account for all of the Canadian cash he located.

[6] With respect to the American cash, it is clear on the evidence that some US currency located by Cst. Sovio was never accounted for in his police notes and was never seized by Cst. Bell.

[7] It turns out that there were hidden cameras in Mr. MacDonald's bedroom. He presented three video clips of footage taken during the search of the residence. The first clip shows Cst. Sovio picking up cash and sorting it. Some of the cash is placed to Cst. Sovio's right and some is placed to his left. In the video you can clearly see American one dollar bills and an American two dollar bill.

[8] The second video clip shows Cst. Sovio leaving the area of the bedroom where he located the cash and going to where he had placed his notebook. There is no reference to US \$1 and \$2 bills recorded in the notebook.

[9] The third video shows Cst. Sovio entering the bedroom and proceeding to the area where he had previously located the cash. A noise is heard as he appears to be reaching for something. Cst. Sovio is then seen holding some cash in his hand, folded in half. It is not clear exactly how much cash Cst. Sovio had. The third video goes on to show Cst. Sovio leaning over and moving in a manner consistent with lifting his pant leg and placing something in his sock. There is no cash in his hands when he straightens up. Unlike during the first two video clips, there is no background noise heard during the third clip, other than the noise heard as Cst. Sovio reached out. Specifically, no voices of other officers can be heard.

[10] Cst. Sovio testified after being advised that he could expect to be accused of serious criminality. During cross examination he spontaneously started telling the court

of putting some money in his sock as part of a practical joke he intended to play on the exhibits officer.

[11] Cst. Sovio testified that he intended to pull the money out of his sock and present it to Cst. Bell as “the real jackpot”. He described it as going to be an “aha” moment. During his initial testimony in this regard, which occurred before he saw the video clips, Cst. Sovio said that he recalled changing his mind about the joke and removing the money. He said:

I don't recall where I did this in -- in the residence. I remember having it in my hand and being near the living room. So I -- I don't recall if I put it back with these exhibits, if these numbers accurately reflect exactly the money that was there or if it --the money actually went back -- was left at the residence.

[12] Cst. Sovio later testified that he left the money from his sock in the residence but he could not recall where or exactly when. He denied stealing the money or ever having any intention of stealing the money.

[13] Cst. Sovio denied being alone in the MacDonald residence after the other officers left.

Other Evidence Relevant to this Application

[14] The Crown concedes that Cst. Sovio was alone in the MacDonald residence for eight minutes after all other police officers left that residence.

[15] The exhibits officer, Cst. Bell, confirmed that Cst. Sovio advised him that he had located some cash in Mr. MacDonald's bedroom. There was Canadian cash and American cash. Cst. Sovio advised Cst. Bell of the amount of the Canadian cash and American cash. Cst. Bell counted it before placing each type into bags. At the

detachment Cst. Bell counted the money again and Cst. Moore also counted it to verify the amounts before those exhibits were logged into the exhibits locker. The amount of American money seized was \$125, consisting of five 20s, two 10s, and one 5.

[16] I also heard evidence of the procedures used by APD officers to document and verify what evidence is located and seized during a search.

Submissions

[17] Mr. MacDonald submits that Cst. Sovio stole the money in question and that I should make that same conclusion. The Crown submits that I should be very careful about making any such finding as it could have grave consequences, especially for Cst. Sovio.

[18] Cst. Sovio was a witness on the *voir dire*. While he understandably consulted counsel after being advised that he would be accused of serious criminality, that counsel had no standing before me.

[19] On the evidence presented, Cst. Sovio at best disregarded proper police procedure by failing to document all of the cash he located and by failing to advise the exhibits officer of that cash. At worst, Cst. Sovio stole an unknown amount of cash during the search of the MacDonald residence.

[20] I am not making any finding that Cst. Sovio did or did not steal the money in question. I will rule on Mr. MacDonald's application for a judicial stay based on the assumption that Cst. Sovio did steal the money. Accordingly, when I refer to "Cst. Sovio's actions" in these reasons, I am assuming but not ruling that he stole cash from Mr. MacDonald's residence.

[21] The Crown is not relying on evidence from the MacDonald residence in the prosecution of the substantive charges against Mr. MacDonald.

[22] Mr. MacDonald submits that Cst. Sovio's actions were a betrayal of his office, his fellow Abbotsford Police Department members, the citizens of Abbotsford and the individuals he was investigating. The court is urged to distance itself from Cst. Sovio's actions in the strongest possible terms. That is, by staying the charges against Mr. MacDonald.

[23] The Crown does not try and justify Cst. Sovio's actions but rather says that I must conduct a controlled, tempered analysis of the factors set out in the case law and not revert to emotional retribution based on righteous indignation.

The Law

[24] I have reviewed the cases presented by Mr. MacDonald and the Crown. I do not intend to refer to them all. As set out by the Supreme Court of Canada in *R. v. Babos*,

[2014] 1 S.C.R. 309 at paragraph 32:

[32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in

having a final decision on the merits” (ibid., at para. 57).or not a judicial stay is necessary.

[25] With respect to the first requirement the most serious concern is about the integrity of the justice system. No evidence resulting from the search of the MacDonald residence is being relied on by the Crown in the trial proper. Cst. Sovio was not involved in the search of the storage locker or the search of Mr. MacDonald’s car. Evidence from those two searches will be relied on by the Crown in the trial, if this matter proceeds. I am satisfied that Mr. MacDonald’s right to a fair trial remains intact despite the actions of Cst. Sovio.

[26] Dealing with the test of whether or not there is prejudice to the integrity of the justice system that will be manifested, perpetuated, or aggravated through the conduct of the trial, or by its outcome, I share Mr. MacDonald’s concerns that the integrity of the justice system relies on the police to follow the law. No person, regardless of what criminal history he has or what charges he may face, should have a concern that a police officer is stealing anything belonging to that person.

[27] However, I agree with the Crown that there is no evidence that carrying forward with this case will manifest, perpetuate or aggravate any abuse. The evidence satisfies me that Cst. Sovio’s actions were his alone and prior to this hearing, no other officers of the Abbotsford Police Department were aware of Cst. Sovio’s actions. The facts of this case are different from the facts of *R. v. Somerville*, 2017 ONSC 3311 (CanLII) where the court found that all four officers involved in the search “committed what they knew was a theft of property” and “each of those officers decided that he was not going to be truthful in court”.

[28] Mr. MacDonald also referred to the case of *R. v. Nicholson*, 2018 BCSC 515, involving another APD officer who pled guilty to one count involving three incidents of breach of trust. There is no evidence before me that the actions of *Nicholson* in 2013 and Cst. Sovio's actions were in any way related or that there is a systematic or institutional abuse of constitutional rights by the Abbotsford Police Department.

[29] Accordingly, I do not find that continuing with this case will perpetuate an ongoing systematic or institutional wrong or lend judicial condonation to Cst. Sovio's actions.

[30] Turning to the second part of the test, the issue is whether or not there is no other remedy available that is reasonably capable of redressing the prejudice to the integrity of the justice system.

[31] As stated, the Crown is not relying on any evidence arising from the search of the MacDonald residence. Therefore, the issue of excluding any evidence to redress the harm to the justice system does not arise.

[32] Cst. Sovio acknowledged that his conduct during the search of the MacDonald residence could be career ending and result in disciplinary measures. He was also advised that he would be accused of serious criminality. There is legislation in BC dealing with how complaints against police officers are dealt with, independent of the police department involved. If Cst. Sovio is charged with and convicted of any offences under the *Criminal Code*, the court could consider his misconduct as a police officer at the time of sentencing.

[33] Any police misconduct is harmful to the integrity of the justice system. However, police misconduct does not, and should not automatically result in a judicial stay of

proceedings. Unlike the facts in the *Somerville* case, and in *R. v. Haevischer*, [2014] B.C.J. 2821, this is not a situation where several police officers were involved in the misconduct.

[34] I am satisfied that there are alternative remedies to a stay of proceedings that are available to redress the prejudice to the integrity of the justice system.

[35] In case I am mistaken about the availability of alternative remedies, I will deal with the third part of the test on the assumption that no alternative remedy is available. This stage involves a balancing and requires a determination of whether the seriousness of the state misconduct (i.e. Cst. Sovio's actions) is disproportionate to the interest of society to have the charges against Mr. Macdonald proceed.

[36] Applying *Babos*, at this stage I must consider the seriousness of the state misconduct; whether the misconduct is isolated or reflects a systematic or ongoing problem; Mr. MacDonald's circumstances; the seriousness of the charges against Mr. MacDonald; and the societal interest in having this matter proceed.

[37] I find that Cst. Sovio's actions constitute serious misconduct but I am satisfied that the misconduct was isolated and there is no evidence that it is ongoing.

[38] I have not heard any evidence that establishes that Mr. MacDonald's circumstances were adversely affected by Cst. Sovio's actions.

[39] The charges against Mr. MacDonald are serious. He faces eight counts of possession of controlled substances for the purpose of trafficking. Those substances include fentanyl, carfentanil, heroin, cocaine and methamphetamine. The state misconduct is also serious.

[40] However, it is clearly in the interest of society to have the charges against Mr. MacDonald dealt with. This is not a case where that warrants the exceptional remedy of a stay of proceedings.

Conclusion

[41] The issue to be determined is whether Mr. MacDonald has established an evidentiary basis to justify a stay of proceedings.

[42] I have assumed, for the purpose of this hearing, that Cst. Sovio stole money during the search of Mr. MacDonald's residence. However, even with that assumption, I am not satisfied that a stay of proceedings is warranted as a stay would be a disproportionate response given the seriousness of the charges against Mr. MacDonald and the societal interest in having the charges dealt with.

[43] Accordingly, Mr. MacDonald's application for a stay of proceedings is dismissed.

The Honourable Judge E. M. Ritchie
Provincial Court of British Columbia