

Citation:

Date:

File No: 12544

Registry: Powell River

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

DAVID WAYNE SUDERMAN

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE LAZAR**

Counsel for the Crown:

Counsel for the Defendant:

Place of Hearing:

Date of Hearing:

Date of Judgment:

A.R.M. Johnston

J.W. Conroy, Q.C.

Powell River, B.C.

February 5th and 25th, 2004

March 26, 2004

RULING ON A VOIR DIRE

David Suderman has been charged with unlawfully producing a controlled substance, to wit: Cannabis (Marijuana) and with having that substance in his possession for the purposes of trafficking. Growing marijuana plants and dried product were discovered when Suderman's property was searched on the 17th of April 2003. The defence says that this search was illegal and that the evidence obtained as a result of it should be excluded under section 24(2) of the Charter.

The circumstances of the case are rather complicated. On March 28th, 2003, police responded to a complaint and discovered a stolen vehicle that had just been abandoned. In it, they found a number of items which looked like they might have been stolen. At about the same time as the officers were examining this vehicle and its contents, other officers were responding to a reported break and enter at 8061 Gunther Road. Police were quickly able to identify many of the items that had been found in the stolen vehicle as property which had been removed from this residence. In addition to, and on top of these items, there was in the vehicle, a quantity of electrical equipment of the sort generally used in the indoor cultivation of marijuana. Police thought that it was likely that the people who had fled the stolen vehicle had done the break in at 8061 Gunther and then a broken into a second house immediately thereafter. Corporal Blanch set out to check houses that were near the 8061 Gunther address.

Crp. Blanch attended at 8080 Gunther, which was the neighbour nearest to the house that had been broken into. He found the door to that residence open and he went in. The only furnishings were a table, a lawn chair, a television set, a wood stove, and a refrigerator. There was some food in the refrigerator. Having satisfied himself that no one was in the house, Blanch left the residence and went to check a cottage situated on the same property. He says that building showed signs of forced entry. In it, he found evidence to suggest that someone had been in the process of setting up a marijuana grow operation. At this point, Blanch re-entered the main house and did a more thorough search. He found a jacket and some shoes in a closet. He searched the pocket of the jacket and found an unopened cable bill in the name of David Suderman. The bill was addressed to 6783 Cranberry Street in Powell River.

Blanch then returned to the detachment. There, he says:

"I did a query of our CPIC and PIRS and was, on the 29th of March, 2003 able to determine that David Suderman had a vehicle registered to him

which was a 1997 grey Jeep Cherokee bearing British Columbia license EHT 581".

(This would suggest that Suderman had a criminal record or at least had been the subject of police investigation. Under cross examination, Blanch conceded that he had found nothing relevant on the CPIC or PIRS system and had in fact obtained this information from the motor vehicle branch.) Since he was convinced that Suderman had been interrupted while in the process of setting up a facility for the cultivation of marijuana, Blanch established surveillance of the Cranberry Street address. He thought that Suderman might have growing sites at other locations and hoped that he might lead them to these sites. This surveillance continued for almost three weeks.

On the morning of April 17, 2003 Blanch drove by the residence and noticed the 1997 Jeep Cherokee in the driveway. He went up to the residence and knocked at the door. Suderman answered and it was obvious that he had just been awakened. The officer says he told Suderman he wanted to talk to him. Suderman said he needed to get some clothes on and he left the officer standing at the open door while he went to do that. Blanch says he detected a strong odour of marijuana in the dried, or growing stage coming from the house. When Suderman came out of the house, Blanch says he told him that he was investigating a break in at 8080 Gunther. He says Suderman volunteered the information that he had been renting that house for about a month. Based on that acknowledgement and the smell that he had detected while standing at the doorway, Blanch arrested Suderman. He says he told him he was under arrest for possession of marijuana.

Blanch says that he told Suderman of his rights under the Charter and gave him the police warning. The following morning when Suderman was interviewed, he adamantly denied even being told why he had been arrested. On the videotape, Blanch can be seen repeatedly trying to establish that he advised the accused of his rights and Suderman keeps accusing him of making all of this up. If Blanch did give the accused the appropriate warnings, he has not told us what the responses were. We do not know if Suderman expressed the desire to speak to a lawyer or not. Blanch says that after he had cuffed Suderman and placed him in the back of his vehicle, Suderman acknowledged that he had been in the process of establishing a marijuana growing operation at the 8080 Gunther Street address and that it had been the subject of a break in. In his video taped statement, Suderman denies having made any such admission.

If in fact Suderman made this admission, I find that it was voluntary. There may have been a charter violation but that point was not argued.

Blanch then says that he asked Suderman if there was anyone else in the Cranberry Street residence. Suderman told him that a friend named Kelly had been sleeping in the first bedroom on the night. Upon learning this, Blanch radioed to Cst. Parmar. When he attended, both officers set about searching the residence, trying to locate Kelly. The back door to the residence had been left open and it looked as if Kelly had left the premises. A dog handler was called to assist. Incidental to the search for Kelly, the officers found a baggie and a Tupperware container containing marijuana, on the dining room table and a garbage bag 2/3 full of marijuana bud in the loft area of the house. Blanch took Suderman's keys which he found on the dining room table and secured the house.

When the dog and his handler arrived, Blanch left for the detachment to lodge Suderman in cells and to make application for a search warrant. Lacerte, the dog handler, and Cst. Parmar searched the property and did not find Kelly. They then used the keys that Blanch had seized to re-enter the house and search it again. Kelly was finally located near the house and arrested.

At about 4:30 that day, Blanch obtained a search warrant. He had requested a warrant that would authorize him to search the house, the detached garage and Suderman's vehicle. There was nothing in the information that he had sworn to establish any grounds for a search of the garage or the car. The warrant that was granted authorized only the search of the house. Blanch characterizes this as "an error on the face of the warrant." It clearly was not an error. If there was an error it was Blanch's error in not bothering to read the warrant once it was in his hands. He had also requested authorization to search for and seize certain items. Those included keys. The judicial justice deleted that from the face of the warrant using what looks like a black felt pen. The amendment is striking. Blanch already had the keys, a fact that he had not disclosed to the Judicial Justice. He proceeded to use them to gain access to the garage that he had no authority to search. It was in the garage that the grow operation was located. It was not until he was under cross-examination that he mentioned that he had also searched the motor vehicle.

The following morning, Blanch interviewed Suderman at the police detachment. That interview was videotaped and that tape was marked as an exhibit on this voir dire. Suderman made no admissions and repeatedly objected to the history that Blanch tried to establish as it related to the information he had provided to the accused and the statements that he said the accused had made to him. Suderman

did not give evidence on this voir dire and so it is not open to me to use his protestations to find that he was not given his rights under the charter. What is clear, however, is that during the course of that interview, he repeatedly said he needed to speak to a lawyer and that he did not wish to discuss the case until he had done so. Despite this, Blanch continued to question him. This was a clear violation of Suderman's 10(b) rights. No evidence relevant to the charge was obtained from this interrogation.

It is the defence position that Suderman's rights under section 8 of the Charter have been breached and that the evidence obtained as a result of these searches should be excluded under section 24(2) of the Charter. The crown acknowledges that there were several warrantless searches but says that they were authorized by law or occurred because of honest error.

I will then look at the various searches that were conducted as part of this investigation in the order in which they took place:

1. The first search involved the entry onto the property and then into the premises at 8080 Gunther Road. Given the information that the police had at the time, they had grounds to believe that the occupants of the stolen Jeep Cherokee had broken into a second house after leaving the one at 8061 Gunther Road. In canvassing the neighbourhood they were acting within the scope of their duty. When they found the door of the residence open, it was reasonable for them to enter to assure that no one was still there and then to secure the residence as well as they could. It was not a case where they knew the identity and the location of the owner and could have remained on site until that person attended, checked the house, and locked it up. To this point I agree then with the position put forth by the crown. Where the police overstep the bounds, however, is when they return to the house the second time and do a more thorough search. What possible justification could they provide for going through the pockets of a jacket they found hanging in the closet? I find that this second search of the residence at 8080 Gunther violated Suderman's rights under section 8 of the Charter.
2. The second time that the police enter onto Suderman's property is on April 17th, 2003 when Blanch attends at the door of 6783 Cranberry Street. Blanch says that he was investigating the break in at 8080 Gunther Rd and that he wanted to speak to Suderman about it. I do not believe him. From the moment that Blanch found the accused's name on that cable bill in the pocket of a jacket hung in a closet at the scene of the break in, he

concluded that Suderman was involved in the drug trade. His only interest in him was as a suspect. He had specifically rejected the idea of contacting the accused by phone or leaving a note to ask him to attend at the detachment. He had determined who owned the property at 8080 Gunther but said the owner had a history of drug related offences. This led him to suspect that the owner might also be involved in this project. (With further questioning Blanch conceded that the owner had no criminal record and that her husband had been investigated for drug related offences but that no charges had ever been laid.) If he was investigating the break in, it would be the usual practise to contact the owner to determine if the property was rented and then to contact the renter to determine what-if anything had been removed and whether anyone had had permission to enter those premises. Blanch was not interested in that kind of information. The young men had responsible for the break ins had already been arrested and charged by the time Blanch approached Suderman's door. Blanch's interest, and I find it was his only interest was in trying to substantiate his suspicion that the accused was involved in the production of marijuana. He had spent almost three weeks doing drive by surveillance of the Cranberry Street residence. He had checked the motor vehicle branch to get a description of Suderman's vehicle hoping that he and his fellow officers would be able to follow that vehicle to another location where he felt the accused might be growing marijuana. When he approached Suderman, he did not ask any questions relevant to the break in. He was totally focused on the interrupted grow operation. His actions over the previous 2-½ weeks persuaded me that he did not expect that additional evidence to come from an interview with Suderman. I must conclude then that he went onto the property and knocked on the door hoping to see or smell something that would raise his suspicions to reasonable and probable ground so that he could arrest the accused and/or get search warrant.

3. The crown has suggested that the search of the residence at 6783 was a search incidental to arrest. The defence submits firstly that there were not reasonable and probable grounds for the arrest of Suderman and secondly that the search of the home that followed immediately Suderman's detention exceeded that which is permissible when there has been an investigative detention. This matter is complicated by the fact that the officers say they were also seeking out a second suspect. They ultimately found and arrested Kelly Krzysztofik. The search might then be described more accurately as being incidental to Krzysztofik's arrest. Given the other breaches I have found, I see no need to enter into an analysis of this rather convoluted situation and I make to finding on this issue.

4. Blanch ultimately obtained a search warrant for Suderman's residence. He said in his evidence that he had asked for authorization to search the detached garage and Suderman's motor vehicle as well and that he thought or assumed that that authorization had been granted. Crown concedes that this search is illegal but says that it was an error and that since the evidence obtained from the search is real evidence and the officers were acting in good faith, it should not be excluded.

In summary then I find that Suderman's rights under section 8 of the Charter were breached when the Blanch searched the pockets of his jacket, when Blanch came to his door hoping to uncover evidence and finally when Blanch and Parmar searched the detached garage without the authority of a search warrant. I also find that Suderman's 10(b) rights were violated when Blanch persisted in interrogating him despite his repeated request to speak to a lawyer before responding.

The evidence that the defence seeks to exclude is real evidence and its admission would not affect the fairness of the trial. The offence is a serious one and society has an interest in assuring that offenders are brought to trial. That leaves then the question of whether the officers acted in good faith. I have found four separate breaches of Suderman's charter rights. Not all of them resulted in the discovery of incriminating evidence but I have addressed each of them because it seems to me that they disclose a pattern of conduct. The most scrupulous police officer can at times make an error in judgement and breach the rights of an accused subject. It is hard for me to conclude though, when there have been four distinct breaches that the officer was acting in good faith.

Another factor that weighs in my decision is that I did not find Blanch to be a credible witness. I have already referred to 2 portions of his evidence where he presented "facts" from which a court might make inferences adverse to the interests of the accused, which facts proved to be inaccurate. He claims to have detected a strong odour of growing or dried marijuana while he was standing outside the partially opened door of Suderman's residence. This is highly subjective evidence. The only marijuana in the residence was a baggie and Tupperware container on a table one floor up from the door where Blanch was waiting and a bag of bud which in a third floor loft. I found it hard to believe that the smell would carry so far. Most cases where smell is a major factor in detection involve confined spaces like automobiles or fumes from areas where many plants are growing. In cross examination it was suggested that the containers on the kitchen table had not even been open when he first found them. Blanch's answers

on this issue can be found on page 75 of the transcript of day one of these proceedings. It was suggested that when he first saw the Tupperware container the top was on. He said he wasn't sure. It was suggested that it had been opened so they could photograph the contents. Again he said he wasn't sure. It was put to him that he wasn't sure if the container had been open or closed. He replied that he "wanted to say he remembered it being open." When he was confronted about that answer he then said he did remember it being open and went on to say that he had never said he did not remember. This interchange did little to calm my initial doubts.

I have already mentioned the fact that Suderman did not give evidence on this voir dire and so I am not put in the position of weighing his evidence against that of Blanch but I do note that just hours after his arrest and detention, Suderman, in a face to face confrontation with the Blanch, repeatedly accused him of distorting the facts.

Did Blanch really think he had been granted authorization to search the garage? I do not know whether I can believe him or not. I find that the whole pattern of behaviour Blanch exhibited in this investigation suggests that he did what he wanted to do and thought about the legality of his actions only later. If he did not intentionally breach the rights of the accused he did so recklessly. I find that he was not acting in good faith.

Would admitting the evidence bring the administration of justice into disrepute? Suderman is clearly guilty of the offences for which he has been charged and if this evidence is excluded there will be no case against him. That, I think, offends the public sense of justice. If, however, police can run roughshod over the rights of a suspect and obtain a conviction with evidence they could not have obtained had they obeyed the laws themselves, then the rights of all citizens are at risk. For these reasons, I find that the admitting the evidence obtained as a result of these searches would bring the administration of justice into disrepute and I am excluding the evidence pursuant to section 24(2) of the Charter.

This judgement dated the _____ day of _____ 2004

Judge C. Lazar