

“Client acquitted of possessing MJ for purpose of trafficking after court agreed police used excessive force in executing search warrant.” [COMMENTS BY RICHARD NEARY]

R. v. C___

Between

Regina

v.

E S C___

[2006] B.C.J. No. 3516

2006 BCPC 626

Victoria Registry No. 130303-1

British Columbia Provincial Court

Victoria, British Columbia

Chaperon Prov. Ct. J.

Heard: February 2, 2006.

Oral judgment: February 2, 2006.

(15 paras.)

Counsel:

Counsel for the Crown: R. Fowler.

Counsel for the Defendant: R. Neary.

1 CHAPERON PROV. CT. J. (orally):— The accused is charged with trafficking in marihuana.

2 In January of last year, based on information from a confidential source, Police Officer Austin applied for and obtained a search warrant which allowed them to enter into the accused's residence between the hours of eight o'clock and eleven-thirty.

3 Police Officer Austin did what is called a risk assessment, and that was done with a view to requesting assistance from what is known as the Emergency Response Team. The risk assessment indicated that there was no history of violence, no indication of weapons in the residence or associated to the targets. It indicated the target is dealing in marihuana, selling from his apartment, and it indicated that the ERT would likely be utilized to execute the warrant to preserve evidence from being destroyed. That risk assessment resulted in the involvement of the Emergency Response Team.

4 The head of that team, Thomas Sawyer, testified and indicated that it was his decision, after reviewing the entirety of the circumstances, to conduct a breached entry. He considered the information provided by Police Officer Austin and the information in the Information to Obtain the search warrant that there was four and a half pounds of marihuana believed to be in the premises and he was concerned about preservation of evidence.

5 He also reviewed the accused's criminal record and certain aspects of what are called "prime reports," which are items that are investigated by police but do not necessarily result in charges. Amongst the entries, there was a domestic assault from three years prior, another assault investigation, a loud voices causing a disturbance type of allegation. The only mention of weapons in those reports was the presence of a sword, and I think that was attached to the domestic dispute.

6 In any event, having considered all that, and I am satisfied that he did consider each item and that this was not a result of a blanket policy -- a question that had been in my mind because the evidence of Police Officer Austin made it seem as though, because of the presence of drugs, preservation of evidence was an issue, and weapons were likely because it was a drug offence, and a forced entry in that case would be something that would be looked at automatically -- that is not what Sawyer did. He did conduct a proper review and came to the determination that he wanted to do a forced entry.

7 The officers were on a very tight time line because they had another call prior to the attendance at the accused's residence. There is an issue with the time. I am satisfied that the ERT team and Constables Austin and Walt entered prior to the warrant termination time, but that Police Officer McLeod and his dog did not; they entered after that time.

8 The accused was found in a darkened apartment in bed. I accept his evidence that he had taken a very heavy dose of a pain medication because he was suffering from a severe headache. That is certainly corroborated by the evidence of the officers that entered the apartment.

9 Seven officers entered the apartment. Two other officers were stationed outside to secure the perimeter, I believe is the phrase they usually use to describe that. The seven officers who entered the premises were armed with variously their police issue handguns, but also an assault rifle, a submachine gun, a shotgun. I believe it was the officer with the shotgun who entered the accused's bedroom and secured his person by handcuffing him.

10 The accused was taken down to the police station and at some point a vehicle was located in the apartment complex in the parking lot that was associated to the accused, and Police Officer Austin called someone at the police station and asked him to secure the accused's permission to search the vehicle. We do not know what the officer said from his perspective. We

only have the accused's evidence in that regard, and it was, you know, "Where is the key to the car? We need it. Otherwise we are going to break in." That is the only evidence I have of what was said.

11 Now, when the ERT team had left, they left Constables Austin and Walt of Saanich Police in charge of the premises to conduct their search. When they left, in complete contradiction to their own police policy, they left that property unsecured. The accused's pets, the accused's computer, the accused's television, electronics, prescription medication were in an unsecured apartment in an area that can only be called dangerous. By the grace of God nothing was taken and the pets were okay, but that was in no way attributable to any care that Constables Austin or Walt took. I am very, very disturbed by their cavalier treatment of a person's residence.

12 This is a case where the entry was intrusive. It is a home, whatever neighbourhood it is in. The expectation of privacy is high. In my view, in this case, the circumstances did not justify the force used to enter these premises. I have great difficulty contemplating four and a half pounds of marihuana being destroyed within the very brief period of time it would have taken the police to announce their presence and demand entry. If that entry was not forthcoming within a minute, they would have broken in. There was nothing to indicate that the accused in this case had taken any efforts or made any efforts to bar the door to the police. They must have known the apartment was darkened. It was eleven-thirty at night or close to it. In my view, this is not a case that justified the method of entry and the use of force that was employed in this case.

13 I think, and again this is something that does not relate directly to the search itself, but the leaving the property unsecured, the way entry to the vehicle was made, indicate to me a cavalier disregard for a person's home, and I am going to exclude the evidence in this case even though I am well aware that it means that the charges will have to be dismissed.

14 MR. FOWLER: Thank you, Your Honour. Obviously the Crown is calling no further evidence.

15 MR. NEARY: Thank you very much, Your Honour.

(REASONS FOR JUDGMENT CONCLUDED)