COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Vi,***
2008 BCCA 481

Date: 20081120
Docket: CA035725

Between:

Regina

Respondent

And

Gia Hung Vi

Appellant

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall
The Honourable Madam Justice Saunders

Oral Reasons for Judgment

J.I. Solomon
A.L. Smith — Counsel for the Appellant

W.P. Riley — Counsel for the Respondent

Place and Date: Vancouver, British Columbia
20 November 2008

[1] **FINCH, C.J.B.C.**: Mr. Vi, the appellant, appeals his conviction in Provincial Court on 8 January 2008 on one count of unlawfully producing a controlled substance, marihuana, and one count of possessing marihuana for the purpose of trafficking. He raises two grounds of appeal. First, he says the learned trial judge erred in dismissing his application to cross-examine the affiant on the Information to Obtain a search warrant, on the basis that the appellant had no standing to bring such an application. Second, he says the trial judge erred in holding that his ***Charter*** rights were not breached when he was arrested in his home, without the police first having obtained a "Feeney warrant".

[2] In the view I take of the matter, it is necessary to address only the first ground of appeal.

[3] On 26 April 2006 the RCMP executed a search warrant at 4642 McLauchlin Drive in Courtney, and discovered a marihuana grow operation.

[4] At the commencement of the trial, counsel for the accused sought leave to cross-examine the Informant on the Information to Obtain the search warrant, Corporal Irvine. Crown counsel opposed the application, arguing that the onus was on the accused to establish a reasonable expectation of privacy, and that the accused could not meet the test for cross-examination as articulated in ***R. v. Garofoli***, [1990] 2 S.C.R. 1421, 60 ***C.C.C.*** (3d) 161.

[5] Through the submissions of counsel, and by reference to the Information to Obtain, the following facts were before the judge as to the accused's expectation of privacy in the house at 4642 McLauchlin Drive:

(a) Mr. Vi was the owner of the property and the land title documents listed his address as 4642 McLauchlin Drive.

(b) Several neighbors told the police that an "Asian" male and female lived at the property but never seemed to be home. On one occasion, a neighbor saw the Asian female cooking something late at night. There was some evidence to suggest that the Asian male was Mr. Vi, in that one neighbor said the male worked at Best Wok restaurant in Campbell River, where the police had seen Mr. Vi's pickup truck parked on one occasion.

(c) The police had observed Mr. Vi's pick-up truck parked at the McLauchlin Drive property on three separate occasions in the two weeks preceding the search. Mr. Vi's truck was not present on at least five other occasions when the police made observations of the property over the same span of time.

(d) On the date of the offence, although Mr. Vi was not at the property and was arrested at another premise, he was found in possession of keys to the McLauchlin Drive property.

(e) Mr. Vi's fingerprints were found on some of the equipment in the grow operation in the basement of the McLauchlin Drive property.

(f) The house itself was sparsely furnished and did not have the appearance of being lived in or occupied as a residence. On one occasion the police noted that the grass appeared to have been mowed.

(g) There was evidence that Mr. Vi in fact resided elsewhere, in a townhouse in Ascot Court, a townhouse complex on Back Road in Courtenay. More specifically:

> (i) both the motor vehicle registration for Mr. Vi's pickup truck, and Mr. Vi's driver's license specified his address as unit 6, 240 Back Road, Courtenay;
>
> (ii) the police saw Mr. Vi's pickup truck parked in the Ascot Court parking lot at 240 Back Road on one occasion;
>
> (iii) when the police went to arrest Mr. Vi they learned that he had "moved" from unit 6 to unit 31, which is where the police ultimately arrested him.

[6] In refusing defence counsel the right to cross-examine, the judge concluded:

> [19] As to the subjective expectation of privacy, objectively that is hard to equate with the fact that the accused lived elsewhere.
>
> [20] I cannot see how, in the circumstances, the accused has established, on a balance of probabilities, that he could have any reasonable expectation of privacy in the subject home, and thereby standing for the application sought.

[7] Whether Mr. Vi had an expectation of privacy in his house on McLauchlin Drive is a function of the totality of the circumstances. ***R. v. Edwards***, [1996] 1 S.C.R. 128, sets out some of the relevant factors:

> (i) presence at the time of the search;
> (ii) possession or control of the property or place searched;
> (iii) ownership of the property or place;
> (iv) historical use of the property or item;
> (v) the ability to regulate access;
> (vi) the existence of a subjective expectation of privacy; and
> (vii) the objective reasonableness of the expectation.

[8] Although the accused was not present at the time of the search, he did have possession or control of the property, he owned the property, and he had the ability to regulate access to the property. The evidence did not disclose any historical use of the property. Whether there was a subjective expectation of privacy, in the absence of any testimony from the accused, was a matter open to inference from the other facts, as was the objective reasonableness of such expectation.

[9] The trial judge appears to have found the determining factor on whether there was a subjective expectation of privacy to be the fact that the accused lived elsewhere.

[10] The cases relied on by the Crown are those where the accused persons similarly were not resident in the premises searched, see: ***R. v. Vu***, 1999 BCCA 182, 133 C.C.C. (3d) 481; ***R. v. Novak***, 2000 BCCA 257, 76 C.R.R. (2d) 104; ***R. v. Khuc***, 2000 BCCA 20; and ***R. v. Pugliese*** (1992), 71 C.C.C. (3d) 295 (ON.C.A.).

[11] However, of those cases only in ***Pugliese*** was the person asserting an expectation of privacy the owner of the property in question. Moreover, in those cases the premises searched were occupied by someone other than the accused, e.g. ***Vu***, ***Khuc*** and ***Pugliese***; or the premises were not residential accommodation, e.g. ***Novak***.

[12] This case is perhaps most similar to ***R. v. Wu***, 2008 BCCA 7, 165 C.R.R. 369, where the accused was the owner of the house, had keys to the property, was present at the time of the search, but lived elsewhere. On the question of standing, this Court held that the case was "near the line" because the accused was not ordinarily resident in the premises, but nevertheless considered the case on the basis that ***Wu*** had standing to challenge the validity of the search warrant.

[13] In recording the conviction in this case, the learned trial judge said:

> [2] I made three separate rulings during the course of this trial and therefore do not intend to review the evidence, save and except to remark that the accused owned the property in question although, apparently, he resided elsewhere. He had keys to the subject residence on McLauchlin Drive, in which the marihuana grow operation was found. His vehicle was seen at the residence, and his fingerprint was found on one of the grow bulbs.
>
> [3] I can only conclude, and in fact it is an irresistible inference to be drawn, that the accused had both knowledge and control and was

> involved in the growing of marihuana and the possession of marihuana for the purposes of trafficking.

[14] In my respectful view, it is inconsistent to hold that the same evidence is sufficient to support an "irresistible inference" that the accused had knowledge and control of the premises, yet on the same facts to hold as he did on the *voir dire*:

> [18] …
>
> 2. It is not exactly clear that he had possession or control of the property, although I am told that he had keys to the subject property on his person on his arrest.

[15] It would appear to me that the judge misapprehended these facts in his ruling as to standing. While possession and control of premises may not be conclusive on the question of a "reasonable expectation of privacy", there was no evidence here that the appellant had given up possession or control to any other occupant. Similarly, the fact that the accused did not reside in the property, was only one of the several factors to be considered in deciding the question of standing.

[16] In my view, a non-resident may not have the same expectation of privacy in property owned by him as would a resident. However, when considered together with all the other factors set out in ***Edwards***, the evidence in this case supported a reduced but nonetheless reasonable expectation of privacy.

[17] It was therefore in my view an error to hold that the appellant had no standing to cross-examine on the Information to Obtain. I would allow the appeal and order a new trial.

[18] **HALL J.A.**: I agree.

[19] **SAUNDERS J.A.**: I agree.

[20] **FINCH C.J.B.C.**: So ordered.

"The Honourable Chief Justice Finch"