IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Gerling*,
2013 BCSC 1659

Date: 20130422
Docket: 60138
Registry: Chilliwack

Regina

v.

Melvin Leonard Gerling

Before: The Honourable Mr. Justice Truscott

Oral Reasons for Judgment on *Voir Dire*

Counsel for the Crown:	S. Di Curzio
Counsel for the Defence:	D. Petri
Place and Date of Hearing:	Chilliwack, B.C. April 22, 2013
Place and Date of Judgment:	Chilliwack, B.C. April 22, 2013

[1] **THE COURT:** These are my reasons for my ruling on the *voir dire* dealing with the application of the accused, Mr. Gerling, for standing to challenge the warrant to search the premises at 406 Sumas Way, Abbotsford, BC, on September 24, 2010. My ruling was that Mr. Gerling has no standing to challenge the warrant.

[2] On September 24, 2010, a judicial justice of the peace issued a warrant to an authorized agent of the British Columbia Society for the Prevention of Cruelty to Animals or, if applicable, to a peace officer in the Province of British Columbia exercising the powers of an authorized agent under s. 22 of the *Prevention of Cruelty to Animals Act* , R.S.B.C. 1996, c. 372 ("the *Act*"), authorizing that person to enter the premises between the hours of 9:00 in the morning on September 24 to 9:00 p.m. of that date to determine whether any actions authorized by the *Act* should be taken to relieve the animals' distress and to take such action and search for and seize the things described in the warrant, being deceased animals and veterinary records.

[3] The judicial justice of the peace found reasonable grounds to believe that an animal was in distress in the premises, dwelling house and outbuildings at 406 Sumas Way and that an offence under s. 24 of the *Act* had been committed, namely causing or permitting an animal to be in distress.

[4] Mr. Gerling claims a reasonable expectation of privacy with respect to the area on the property, 406 Sumas Way, where the dogs were being kept in a pen. Mr. Gerling was the only one to give evidence on this *voir dire*. His evidence is that the property at 406 Sumas Way is and was not owned by him but was owned by a friend or acquaintance of his by the name of Mr. McPhate.

[5] It is his evidence that on September 1, 2010 he placed 14 of his dogs with Mr. McPhate at the premises for safekeeping and care of them for one month for the remuneration of $750. He says the agreement was for Mr. McPhate to maintain the dogs for one month and during that month deliver the dogs one at a time or in small numbers to a veterinarian by the name of Dr. Bath for attention to their teeth and for

any other necessary medical attention. Mr. Gerling says his intention at the end of the month was to give the dogs away for nothing.

[6] He says he rented the pen area from Mr. McPhate as part of this oral agreement, although he allows that Mr. McPhate could take the dogs out of the pen into his residence if he wished and he recognizes that Mr. McPhate probably did so. Mr. Gerling never lived on the property himself and never attended the dogs in that month and he says he only visited once or twice that month to see how things were going.

[7] He says he supplied a large dog house to go in the pen for the dogs, but had no further use of the dog house and says he basically gave it over to Mr. McPhate. The pen had a gate on it that on the evidence remained unlocked and was accessible to Mr. McPhate or to any of the other persons living in the residence where Mr. McPhate was offering rooms for rent.

[8] Mr. Gerling's counsel relies heavily on the facts of the case of *R. v. Veranski and Bellotti*, a decision on February 14, 2012 of Madam Justice Ker. In my opinion, the facts of that case are completely distinguishable from the facts provided by Mr. Gerling on this *voir dire*. In *Veranski and Bellotti* there was an agreed set of facts filed on the *voir dire* in addition to the evidence given on the *voir dire* by Veranski.

[9] Some of the agreed facts were as follows: Mr. Bellotti was the one who had the lease on a storage locker in a storage facility which itself was fenced and secured. Each storage locker was alarmed and locked and under the lease agreement each customer had a unique four-digit pass code to key into a pad at the facility. The evidence in that case established that Veranski had been given the entry code by Bellotti and had been seen on video surveillance entering the code on three different occasions. It was also the evidence on that *voir dire* that Veranski paid Bellotti $200 per month for the use of the storage locker. In the end result, Madam Justice Ker found that he had a reasonable expectation of privacy in that storage locker.

[10] In summary then, Bellotti gave Veranski the code to the locked facility and locker and Veranski paid for its use and actually used it on three different occasions for his own purposes. In the case of Mr. Gerling, he did not control the pen and the dogs in it. That was within the responsibility of Mr. McPhate and within his control. The pen was not locked and Mr. Gerling had no exclusive right to enter it and, in fact, may never have entered it.

[11] On applying the seven factors on standing set out in *R. v. Edwards*, [1996] 1 S.C.R. 128, I find as follows: on the first factor of whether Mr. Gerling was present when the search warrant was executed on the property on September 24, 2010, there is some question on his evidence as to whether he was present when it was executed, but I will consider this to be a neutral factor in any event.

[12] The second factor is whether he was in possession or control of the property or place searched. While Mr. Veranski had the access code to enter the storage premises and a key to access the storage locker and had personally used the locker, the pen where Mr. Gerling's dogs were kept behind the McPhate residence was not locked and any occupant of the house could gain access. It was Mr. McPhate who had the control over the pen area and the dogs and not Mr. Gerling, who had no personal measure of control at all. Mr. McPhate had the control of the dogs because he had the ability to take them in the house and he had the responsibility to take them out of the pen to the veterinarian, Dr. Bath.

[13] On the third factor of whether Mr. Gerling had ownership of the place or property, he certainly had no ownership of the place or property. It was all owned by Mr. McPhate. Mr. Gerling had no ownership of the pen area either, although he says he paid Mr. McPhate money to keep the dogs there. Nevertheless, it was still Mr. McPhate's pen and his pen to control and the dogs to control.

[14] On the fourth factor, did Mr. Gerling have any use of the property, Mr. Gerling says he was only there in the month of September 2010 once or twice to check things over, but otherwise did not visit the property. He does not even say he went into the pen.

[15] On factor five, whether he had the ability to regulate access, including the right to admit or exclude others, I find that he did not have any ability to personally regulate access and he never sought to do so. Only Mr. McPhate could. Even then, access was not restricted by lock and key, so any resident of the house had access.

[16] The sixth factor is whether Mr. Gerling had any subjective expectation of privacy? Mr. Gerling says he did, but I find that he did not when he was effectively never there and never sought to control the pen area or even his dogs.

[17] The seventh and last factor is whether any subjective expectation he might have had for privacy was an objectively reasonable expectation, and I say, considering all the circumstances, the answer is no.

"The Honourable Mr. Justice Truscott"