Court of Queen's Bench of Alberta

Citation: Alberta (Justice and Solicitor General) v Berezovich, 2021 ABQB 585

Date: 20210723
Docket: 2003 04028
Registry: Edmonton

Between:

Minister of Justice and Solicitor General for Alberta

Plaintiff

- and -

Shania Berezovich, Nathanial Jalal, and The Chief of Police of the Edmonton Police Service

Defendants

Reasons for Decision
of the
Honourable Mr. Justice Peter Michalyshyn

Introduction

[1] This is an application to forfeit the respondent Berezovich's interest in a 2009 Acura TL owing to its alleged use as an instrument of illegal activity. Related, the respondent Jalal seeks a finding that he is the owner of the Acura. For reasons which follow, the Acura was not Jalal's at any material time, and the forfeiture application succeeds.

Background

[2] On October 30, 2019 Jalal sold the Acura to Berezovich for $10,000. Both parties to the transaction say Berezovich paid $2,000 up front and promised to pay the $8,000 balance later. There is no reliable evidence as to how much later, or of terms.

[3] Jalal bought the Acura less than a year before he sold it to Berezovich. It cost him $11,200 cash. He bought it "off Kijiji off some random guy" (transcript of examination on affidavit, September 4, 2020, p 8). Jalal carried on a side business of buying selling cars – "I'll sell [a vehicle] to make 1,000 bucks, or $2,000". (p 10)

[4] Jalal knew Berezovich since high school, some seven years. They were just friends. Jalal offered no explanation why he sold the Acura to Berezovich at a $1,200 cash loss. Or why he was prepared to carry the $8,000 owing, without terms of repayment. Jalal testified there was a written side agreement regarding the $8,000 owing, but nothing was produced. Jalal suggested the side agreement had been registered, but registry searches belie that evidence. All of this aside, Jalal testified he was confident Berezovich would pay him the outstanding balance. He "honestly…didn't know" (p 14) why section 3 of the standard Bill of Sale was not completed (that part of the standard form available to detail "special conditions of sale" such as outstanding payment). He summed up that he was prepared to accept repayment on the basis of "whatever [Berezovich] could afford" within a year of the October 30, 2019 sale. (p 17)

[5] Jalal was unequivocal that from October 30, 2019 he had no intention to maintain ownership of the Acura. Berezovich was the registered owner from October 30, 2019.

[6] Jalal maintains he is now the owner of the Acura because he was never paid fully for it.

[7] Contrary to Jalal's evidence, Berezovich denied any side agreement regarding payment of the outstanding $8,000. (transcript, September 4, 2020, p 12)

[8] She testified she obtained the $2,000 cash paid to Jalal from a birthday gift cheque from her mother. No evidence is before the court from the mother. Banking records fail to disclose a relevant cheque deposit on or before October 30, 2019.

[9] Berezovich testified that from the time the Acura was "apprehended", she and Jalal agreed that ownership would revert to him owing to her inability to pay the $8,000 balance. She was "not entirely sure" (p 15) why she nevertheless indicated, in her Notice of Objection, that the Acura was hers. Nor was she able to explain why she said, on the Notice of Objection, that her mother lent her the $2,000 to buy the Acura, as distinct from that sum being a birthday present.

[10] Berezovich was arrested following surveillance on November 12, 2019, about which more in what follows. A search incidental to her arrest resulted in the seizure from the Acura of crack cocaine, cocaine hydrochloride, and $830 cash.

[11] Berezovich testified that after her arrest she filed two sworn Notices of Objection to the Crown's forfeiture application. One related to the Acura, the other to the $830.

[12] At the September 4, 2020 examination on affidavit Berezovich confirmed she was consenting to forfeiture of the cash seized of $830.15. This was confirmed in a court order of October 2, 2020.

[13] At the same examination Berezovich was questioned regarding the evidence of Cst Amyotte, whose evidence is relied on by the Crown in its application.

[14] Cst Amyotte swore an affidavit in support of the application on February 21, 2020. He was not examined on his affidavit, including as to his training and experience to have made certain observations, and to have reached certain conclusions based on those observations.

[15] Cst Amyotte's evidence includes the following:

- That on November 12, 2019 he observed the Acura operated by Berezovich stop at a curb at an Edmonton location; a male entered the Acura; the vehicle then drove to a nearby alley, at which point the male exited the vehicle; the entire interaction took some 15 seconds;
- On the same date, at an entirely different location in Edmonton, he observed Berezovich in the Acura park in a residential driveway; a male exited the residence, entered the car, then exited some ten seconds later;
- On the same date, and again at an entirely location in Edmonton, he observed Berezovich park in front of a residence, exit the Acura and walk to the rear of the residence; less than a minute later Berezovich returned to the Acura;
- But for a brief loss of continuity, Cst Amyotte confirmed there were no other stops or other activity between the first and third alleged transactions in question.

[16] A vehicle stop of the Acura followed. In the result, police located:

- A black Alcatel flip phone;
- Two individually wrapped "spitballs" one suspected – and later verified – to be cocaine;
- These two items were in plain view on the driver's seat of the Acura;
- Eight further "spitballs" (cocaine) were found in gum containers near the centre console;
- $830.15 cash was found in a black purse in the front passenger seat of the Acura.

[17] From Berezovich's person a white iPhone was seized that had on it numerous "notes" that Cst Amyotte deposed were consistent with scoresheets of names and monies owed, presumably to Berezovich.

[18] It was Cst Amyotte's opinion that based on these observations and his training and experience that he had witnessed probable drug transactions owing to the short duration of the encounters or stops, the location (including an alley and a driveway), and based on the outcome of the subsequent search of the vehicle and outcome of substance analyses. Based on his observations, Cst Amyotte formed the opinion that Berezovich was probably in possession of a controlled substance for the purposes of trafficking.

[19] There is no evidence that Cst Amyotte, or anyone, observed anything else consistent with actual drug trafficking, e.g., hand-to-hand transactions, cell phone use, the presence of other paraphernalia.

[20] Berezovich had all of this evidence before her when she testified under oath on September 4, 2020.

[21] She was asked to explain each of the three stops, only some ten months earlier, on November 12, 2009.

[22] She was unable to remember any details of any of the three interactions.

[23] She testified the ten spitballs in the Acura were for her personal use.

[24] She was unable to recall anything about the black flip phone recovered from the Acura.

[25] She testified she owned the white iPhone. As to the numerous screen shots in evidence alleged to be score sheets, her testimony included that these were "just for games… board games I play", yet there were certain notations she was unable to remember or recall. (pp 22-23)

Analysis

[26] This application is made pursuant to the *Civil Forfeiture Act*, SA 2001, c C-15.2 (the "*Act*"), formerly the *Victims Restitution and Compensation Payment Act*, SA 2001 c V-3.5.

[27] As set out in the excellent brief filed on behalf of the Minister, the issues are:

1. Was the Acura an instrument of illegal activity;
2. What was the interest in the Acura of Berezovich and Jalal; and
3. Should the Acura be ordered forfeited, then ordered sold for the purposes of the *Act*.

[28] The purpose of the *Act* is set out at s 19.2(1):

> 19.2(1) Subject to subsection (2), the Minister may, with respect to property that is alleged to be an instrument of illegal activity, commence an action under this Part by an application for any one or more of the following purposes:
>
> (a) to obtain restitution or compensation for victims and other persons, including the Crown and prescribed public bodies;
>
> (b) to remove financial incentives to commit illegal acts, including disgorging financial gains from illegal acts;
>
> (c) to prevent property that has been used or is likely to be used in carrying out an illegal act from being used to carry out future illegal acts;
>
> (d) other purposes provided for in the regulations.

[29] At s 19.93 the *Act* sets out what the applicant Minister and respondents Berezovich and Jalal must show:

> 19.93(1) At a property disposal hearing
>
> (a) the onus is on the Minister to establish that the restrained property is an instrument of illegal activity;
>
> (b) the onus is on a respondent, other than a respondent referred to in clause (b.1), to establish, with respect to the restrained property,
>
> (i) the origin and the nature and extent of that respondent's interest in the property,
>
> (ii) that the respondent

> (A) has not been or would not have been involved in or associated with carrying out an illegal act using, or associated with, the restrained property, and
>
> (B) did not know and would not reasonably be expected to know that the restrained property was or was likely to be used in carrying out an illegal act,
>
> (iii) if the respondent is a victim of an illegal act that the restrained property was used in carrying out, that the respondent's safety or health or property has been, in some manner, adversely affected or compromised as a result of the illegal act, and
>
> (iv) where the property was used in carrying out an illegal act and subsequent to the illegal act the property was acquired by the respondent, that the respondent did not know and would not reasonably be expected to know that the property had been used in carrying out an illegal act;
>
> …
>
> (4) For the purposes of a property disposal hearing, it is not necessary for the Minister to establish that any person has been charged with, found guilty of or convicted of or otherwise held responsible for any illegal act in relation to any matter related to the property in respect of which the property disposal hearing is being conducted.

[30] The standard of proof throughout is a balance of probabilities. As noted by the Minister at para 14 of counsel's brief, the question is whether, on a common-sense view of the situation, it is more likely than not that the Acura was an instrument of unlawful activity.

[31] It matters not that following her arrest, no criminal prosecution proceeded against Berezovich.

[32] No viva voce evidence was heard by the court on this application. Again, as noted by the Minister at para 32, the evidence from sworn affidavits and examinations on affidavit is viewed through the lens of what is sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

[33] Much of the evidence of the respondents Berezovich and Jalal is after-the-fact and self-serving, and accordingly must be viewed with caution: ***Alberta (Minister of Justice and Solicitor General) v Amer***, 2017 ABQB 558 at para 44.

[34] This court's task is to review all of the evidence in determining if the parties have met their respective onuses.

Was the Acura an instrument of illegal activity?

[35] Relying on cases such as ***R v Quilop***, 2017 ABCA 70 and ***R v Gore***, 2017 ABQB 167, the respondent Berezovich argues the evidence falls short of showing, even on a balance of probabilities, that the Acura was an instrument of illegal activity.

[36] ***Quilop*** is a criminal case dealing with ss 8 and 9 of the *Charter* and the power of a peace officer to make an arrest without a warrant, and whether or not the various investigating peace officers who observed the accused prior to his arrest had reason to believe he was committing or had committed an indictable offence. While not irrelevant, ***Quilop*** does not drive me to the conclusion sought by the respondent on this application. It is a case dealing with the *Charter* and with criminal law consequences coming after an impugned search and seizure. It does not deal with civil forfeiture or the onuses on the parties set out in the *Act*, or the purposes of the *Act* and the questions the *Act* requires the court to determine (as more fully set out in the discussion of ***Alberta (Minister of Justice and Attorney General) v Sykes***, 2011 ABCA 191, below).

[37] Likewise, ***Gore*** is a criminal case in which the court found only "ambiguous observations" that gave rise only to mere suspicion that police were observing drug transactions.

[38] However, Gore was the subject of comment in ***R v Knapp***, 2020 ABCA 406, at para 16, that the court in Gore:

> …incorrectly assume[d] "that reasonable grounds to believe evidence will be found cannot exist if there is any possible innocent explanation for the observed transactions… Those possible innocent inferences, however, do not preclude the formation of reasonable and probable grounds: ***R. v Lao***, 2013 ONCA 285, 277 CRR (2d) 362; ***R. v Savage***, 2011 SKCA 65, 239 CRR (2d) 102, at paras. 20-21; ***R. v Warsame***, 2018 ABCA 329 at para. 10.

[39] The decision in ***Gore*** is also given as an example, in ***R v Ha***, 2018 ABCA 233 at para 90, of a court possibly "over-read[ing]" the earlier decision in ***Quilop***.

[40] The Minister makes a further interesting point – but one upon which I do not find it necessary to rely – that because decisions such as ***Quilop*** and ***Gore*** emerge from challenges under the *Charter of Rights and Freedoms*, they are of questionable relevance in the absence of a restraint order review earlier in the process of the *Act*: ***Alberta (Justice and Attorney General) v Petros***, 2011 ABQB 541, at paras 64-66).

[41] Berezovich relies on ***Alberta (Minister of Justice and Attorney General) v Sykes***, 2011 ABCA 191 for the proposition the use of the Acura was no more than merely incidental to the alleged drug trafficking activity.

[42] In my view ***Sykes*** does not assist Berezovich's cause.

[43] The facts in ***Sykes*** were of three drug sales, the first two "on foot", the third through the window of a vehicle the respondent had driven to a pre-arranged location to effect the transaction. The court found this use of the vehicle was more than merely incidental:

> The use of vehicles in the trafficking of drugs is well known and, even though the evidence revealed this use to be isolated in this case, it nevertheless facilitated the sale. If isolated uses are to be exempted from the reach of the legislation, then the use of a firearm during a robbery would not subject it to forfeiture if the robber had always used a knife in his other robberies or if this was the robber's first

> attempt at that form of crime. In my view, if the object subject to seizure was more than incidentally involved in the commission of the crime, it was used for criminal activity under this legislation. Therefore, the Respondent's vehicle was an instrument of illegal activity, which made it subject to the possible granting of a disposal order pursuant to s. 19.94(b) of the VCRPA. (at para 22)

[44] Notwithstanding this conclusion, the court confirmed it was still within the application judge's discretion to decide whether or not to order forfeiture. At paras 34-47 the court in ***Sykes*** discusses several factors of relevance:

- Whether property should be forfeited when it had only a cursory relationship to a crime, as distinct from being used directly to commit a crime;
- In the context of a drug transaction, the quantity involved and whether the method of delivery was a central feature of the underlying crime;
- The value of the thing sought to be forfeited in proportion to the amount of money involved in the underlying criminal act;
- Whether the thing sought to be forfeited was acquired with drug profits;
- The likelihood the respondent would have continued to use the thing sought to be forfeited in committing crimes.

[45] The court in ***Sykes*** relied on ***Ontario (Attorney General) v. 8477 Darlington Crescent***, 2011 ONCA 363 and its commentary around relief from forfeiture generally. Citing ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.***, [1994] 2 SCR 490, the court noted:

> Factors to be considered when determining whether to grant relief from forfeiture include the conduct of the party seeking relief, the gravity of the breach(es), and the damage caused by the breach(es): ***Saskatchewan River Bungalows*** at 504. Relief from forfeiture is very much the exception and will not be routinely exercised. It is only to be granted where the party seeking relief clearly makes a case that forfeiture would be inequitable and unjust. (at para 41)

[46] Finally, the court in ***Sykes*** commented that "…relief orders should rarely be granted."

> Given the broad purposes of the *VCRPA,* few applications for relief should succeed. Those who live a life of criminal activity should expect to forfeit all property used in furthering that activity. Drug couriers and dial-a-dopers should always expect to have the discretion exercised against them. The use of the word "discretion" does not mean that judges should routinely refuse to grant forfeiture orders respecting seized property that was used to commit illegal acts; the discretion permitted is not unfettered but, in fact, is narrow. It does not permit untrammeled personal choice. The narrow parameters within which the discretion may be exercised are established by the legislation's purposes. If the refusal to grant a forfeiture order defeats or subverts those purposes, the refusal will be unreasonable. (at para 44)

[47] Having set out the respondent's position, I turn now to the Minister's position – that for the purposes of the *Act* in question there is ample compelling and uncontradicted evidence that

the Acura was an instrument of unlawful activity. As argued persuasively on behalf of the Minister, the record discloses:

- Three probable drug trafficking interactions on the same day Berezovich was arrested – based on the observations of Cst Amyotte whose evidence, including his qualifications and training to make the observations and draw conclusions, was unchallenged;
- In each case Berezovich was unable 'to recall', under oath and not long after the events, anything about the transactions;
- ten individually-wrapped cocaine spitballs were located in the Acura;
- Two cell phones were located in the Acura, one of which Berezovich was unable, under oath, to account for;
- As to the iPhone found on her person, Berezovich's evidence under oath as to the alleged score sheets was incapable of belief – as argued by counsel for the Minister, her evidence was "nonsensical and not credible";
- After initially objecting to the seizure of some $830 in cash seized on her arrest, without explanation Berezovich abandoned any opposition to the Minister's forfeiture application to that alleged proceeds of unlawful activity.

[48] Taking into account all of the evidence and applicable legal principles I am persuaded that the Minister has met his s 19.93(1)(a) onus of showing the Acura was an instrument of illegal activity, and that Berezovich has failed to meet the s 19.93(1)(b)(ii)(A) onus on her that she "has not been or would not have been involved in or associated with carrying out an illegal act using, or associated with, the restrained property".

[49] I reach this conclusion based on the uncontested evidence of Cst Amyotte alongside the evidence of Berezovich which as argued by the Minister and I find, is nonsensical and not credible.

[50] To take but one striking example: it is not credible that without explanation, Berezovich has utterly no memory of the events of November 12, 2019 as outlined in Cst Amyotte's detailed evidence.

[51] I note the Minister's argument – made only at the hearing before me – that an adverse inference arises from the inexplicable failure on Berezovich's part to contest seizure of the $830. I agree that the unexplained presence of the $830 is relevant to the question of illegal activity. It stands alongside evidence that Berezovich had no employment in November 2019 or for some time beforehand, and alongside evidence of unexplained regular bank deposits during her period of unemployment. Nevertheless I find it unnecessary to decide that a formal adverse inference should be drawn in the circumstances.

[52] I acknowledge there could be a stronger case that the Acura was an instrument of illegal activity – by means of evidence for example of one or more actual transaction, or of a larger amount of contraband found in the vehicle – but I find that for the purposes of the *Act* as set out and as interpreted by the cases noted, the Minister's evidence in this case is more than sufficient.

What was the interest in the Acura of Berezovich and Jalal?

[53] There is no merit to Jalal's cause that he retained any valid legal or beneficial ownership in the Acura after October 30, 2019. Or to the joint cause advanced by both Jalal and Berezovich that ownership reverted to Jalal at the time the Acura was seized pursuant to the *Act.* I agree with and adopt in their entirety the excellent submissions of counsel on behalf of the Minister in her brief, at paragraphs 40-68, including:

- The onus on Jalal under the *Act* to show the origin, nature and extent of his interest in the Acura;
- The importance of the presumption, here not rebutted, of ownership created by vehicle registration;
- The relevance of evidence of dominion and control of the Acura on Jalal's part, evidence of which in this case is entirely absent;
- Berezovich's evidence that she and Jalal agreed, upon the Acura's seizure, that Jalal would take ownership of the vehicle – a contradiction, the Minister says and I agree – that before its seizure Jalal had any valid ownership interest;
- The absence of any evidence that Jalal registered a beneficial (ie, security) interest in the Acura, or ever intended to do so.

Should the Acura be ordered forfeited, then ordered sold for the purposes of the *Act*?

[54] As discussed in the authorities canvassed earlier, this question engages the court's discretion, even after a threshold conclusion that the Acura was an instrument of illegal activity.

[55] I find that forfeiture should be ordered. Forfeiture is consistent and further the purposes of the *Act*, s 19.2(1). It arises from the facts of the case, and is consistent with the law, as discussed earlier in the case of ***Sykes*** and within it, ***Darlington Crescent***, and the comments finally in ***Sykes*** that of course subject to the facts of the case, "…relief orders should rarely be granted." Having considered the facts of this case and the authorities, there is nothing here that engages relief from forfeiture.

Conclusion

[56] The respondent Berezovich was the owner of the Acura at all times material to this application. The vehicle was used in carrying out an illegal act and is forfeited to the Crown to be dealt with in accordance with the *Act.*

[57] The Minister is entitled to costs.

Heard on the 3rd day of March, 2021.
Dated at the City of Edmonton, Alberta this 23rd day of July, 2021.

Peter Michalyshyn
J.C.Q.B.A.

Appearances:

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