

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Doroslovac, 2012 ONCA 680

DATE: 20121010

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Winkler C.J.O., Laskin and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Milenko Doroslovac

Respondent

Kevin Wilson, for the appellant

James Marentette, for the respondent

Heard: April 4, 2012

On appeal from the verdicts of acquittal entered by Justice M. D. Parayeski of the Superior Court of Justice, sitting without a jury, on December 21, 2010.

Watt J.A.:

[1] In May, 2008 Slavko Ilic and Milenko Doroslovac (the respondent) had cell phones. They talked to one another on their cell phones. And they sent text messages to one another on their cell phones.

[2] In mid-May 2008, a judge of the Superior Court of Justice authorized police to intercept Slavko Ilic's telephone calls as well as his other telecommunications.

[3] From several text messages they intercepted later that same month, police concluded that Ilic and the respondent were about to meet in a commuter parking lot at Highways 6 and 401 to exchange drugs for money.

[4] Undercover police officers watched the exchange between Ilic and the respondent, then followed the respondent to Toronto where they saw him turn over a white plastic bag to another man at a coffee shop. Arrests followed. The white plastic bag contained 3 kilograms of cocaine.

[5] The judge who presided at the respondent's trial on charges of trafficking and possession of cocaine for the purpose of trafficking excluded the intercepted text messages as evidence and acquitted the respondent. The Crown appeals.

[6] These reasons explain why I think the trial judge was wrong to exclude the intercepted text messages as evidence and why I think the respondent should be tried again.

THE BACKGROUND FACTS

[7] The grounds of appeal advanced can be adequately serviced by brief references to the terms of the authorization, the evidence adduced on the *voir dire*, and the ruling of the trial judge.

The Authorization

[8] On May 13, 2008 a judge of the Superior Court of Justice granted an *Authorization to Intercept Communications, Make Visual Observations and*

Related Orders (the authorization) on the application of a specially designated agent of the Minister of Public Safety and Emergency Preparedness, pursuant to s. 186(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The authorization permitted the interception of private communications of named persons and the use of other investigative procedures including tracking devices, number recorders and video surveillance.

[9] The authorization permitted the interception of “all private oral and telecommunications” of Slavko Ilic¹ in paragraph 2, and delineated various specific places where the interceptions could occur including his residence, place of business and listed vehicles, in paragraph 4. In addition, interceptions could be made at “any other place, stationary or mobile that there are reasonable grounds to believe is being, or will be, resorted to or used by” Ilic.

[10] The order authorized the interception of Ilic’s² communications when made over listed mobile telephones and additional devices as described in paragraph 5 under the heading “Devices Used by Persons”. The “Other Terms and Conditions” of the authorization set out requirements for live monitoring under 6c, but excluded non-oral telecommunications from those requirements under 6e. The paragraphs 5c, 6c, and 6e, are of significance to the issues raised on appeal

¹ Ilic is described as the “Principal Known Person” in the authorization.

² As well as persons who fell within the “Unknown Persons” clause in paragraph 3c of the authorization.

and their precise terms are set out in “The Grounds of Appeal” section of this judgment.

The Voir Dire

[11] At trial, counsel for the respondent (who is also counsel on the appeal) challenged the admissibility of the intercepted text messages. To expedite matters, the trial judge and counsel agreed to combine the admissibility hearing and trial, and the respondent called the supervisor of the investigation, Corporal Rupert Wilson, to give evidence about the interceptions proposed for admission.

[12] Cpl. Wilson gave evidence that investigators received information on May 21, 2008, from a confidential source of another police force, that Slavko Ilic was using a mobile telephone with the number (226) 220-6845. Two days later, surveillance officers saw Ilic and his son in a car. Ilic drove onto a parking lot by a movie theatre in Kitchener and began to clean out his car. He threw a plastic bag into an open garbage container, then sat on the steps outside the theatre apparently awaiting the arrival of others. His son stayed in the car. A few minutes later, Ilic’s ex-wife and daughter arrived. All four entered the theatre.

[13] Cpl. Wilson kept constant watch on the garbage container and the bag Ilic had dropped there. No one added or took out anything out of the container before officers seized the bag. Inside the bag, police found a piece of paper torn into several smaller pieces. They re-assembled the pieces into a single page.

On the paper were the telephone number (226) 220-6845 and instructions about operating the telephone and purchasing additional air time. Police began interception of communications on this telephone.

[14] Cpl. Wilson explained that no one was assigned the responsibility of determining who had the telephone when text messages were sent to or from it. He was unaware of how such monitoring could be accomplished. He did point out, however, that physical surveillance on many occasions confirmed meetings involving Ilic in accordance with the messages sent on the telephone.

[15] Telephone calls involving the number (226) 220-6845 were live monitored to ensure that Ilic was a party to the call.

The Ruling of the Trial Judge

[16] At the conclusion of argument on the *voir dire*, the trial judge ruled that the text messages had not been intercepted in accordance with the terms of the authorization. The judge was satisfied that investigators had reasonable grounds to believe that Ilic used telephone number (226) 220-6845. For text messages, the judge concluded, the order required certainty about Ilic's actual use at the time of the interceptions. In the absence of any attempt to ensure Ilic was the author of the intercepted messages, the search was unreasonable and the messages inadmissible under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

THE GROUNDS OF APPEAL

[17] The Crown advances two grounds of appeal. The first is that the trial judge erred in law in his interpretation of the relevant terms of the authorization. As a consequence, the judge wrongly concluded that the interceptions of the text messages had not been made in accordance with the authorization and that the search was unreasonable under s. 8 of the *Charter*. The second is that the trial judge erred in excluding the intercepted text messages as evidence under s. 24(2) of the *Charter*, even if the interceptions offended s. 8.

Ground #1: The Interpretation of the Authorization

[18] Earlier paragraphs have set out the background essential for a consideration and determination of this ground of appeal. For ease of reference I will set out the precise terms of the authorization and conclusion of the trial judge before turning to the arguments raised, the principles that govern, and the application of those principles to the circumstances of this case.

The Authorization

[19] The authorization permits interceptions in accordance with its several terms and conditions. Paragraph 3 describes the persons whose private communications may be intercepted. These persons include Slavko Ilic as the “Principal Known Person”, seven others as “Other Known Persons”, and a third category, “Unknown Persons” described as the following:

Any other person intercepted or observed at any of the places listed in paragraph 4 or intercepted over any device listed in paragraph 5.

[20] In paragraph 5, the authorization lists and describes various devices and permits the interception of communications of anyone listed or described in paragraph 3, thus both knowns and unknowns, when the communications are made over those devices. The devices included are defined as follows:

5. The communications of the persons in paragraph 3 may also be intercepted when made over:

...

c. any other device used to make a telecommunication, including mobile telephones, pages, or devices, believed on reasonable grounds to be used by the person in paragraph 3a *and while being used by one of the persons named in 3a or 3b.* [Added in handwriting by authorizing judge.]

[21] Paragraph 6 of the authorization, headed "Other Terms and Conditions", contains terms that relate to interceptions at the "Business Places" listed and "Other Places" described in paragraph 4 of the order and to interception of non-oral telecommunications. Paragraphs 6c and 6e are in these terms:

c. Interception at the Business Places and Other Places in paragraph 4 shall be live monitored and, where practicable, be accompanied by live visual surveillance and be discontinued once it has been determined that the person in paragraph 3a (Slavko Ilic)

is not a party to it. However, interception may be resumed at reasonable intervals to determine whether Slavko Ilic has become a party to the communication. If so, then the interception may continue.

...

e. The interception of non-oral telecommunications, including pagers, faxes, electronic mail, modem, and internet communications, is not subject to the live visual surveillance, or live monitoring.

The Ruling of the Trial Judge

[22] The trial judge concluded his ruling on the interception of the text messages in these terms:

I have taken into careful consideration the arguments of the Crown that the ease with which cell phones can be purchased and their telephone numbers switched makes living up to the term imposed by Her Honour potentially impractical. Nonetheless that is what she wrote. She no doubt had in mind the advances of technology when she did so as well as the case law as it has developed. I disagree with the Crown's assertion that this interpretation flies in the face of the balance of the authorization.

I find that the interceptions in question were not done in compliance with the authorization. As such there was a violation of the *Charter of Rights* and we shall now proceed to determine whether the evidence that flows from that breach ought to be excluded. Counsel?

The Arguments on Appeal

[23] For the appellant Crown, Mr. Wilson says that the ruling of the trial judge amounts to a determination that, although the police had a general authority to intercept communications from Ilic's phone, they could only intercept text communications from that phone if they were *certain* that Ilic was the person sending the message they were intercepting. This standard of certainty has the effect of eliminating the interception of text messages, despite other authorization terms that expressly permit it.

[24] Mr. Wilson contends that the authorization must be read as a whole and in a way that gives a common sense meaning to all its terms. Paragraph 6e of the authorization refers to non-oral telecommunications and excludes from their interception any requirement of live monitoring or live visual surveillance that would generally apply under paragraph 6c. Removal of this less onerous requirement is inconsistent with the imposition of a standard that far exceeds the constitutional norm settled by *R. v. Thompson*, [1990] 2 S.C.R. 1111.

[25] In Mr. Wilson's submission the reading of paragraph 5c that is most consistent with the authorization as a whole is that the interceptions may be made if the investigators reasonably believe that the cell phone is being used by Ilic in some general sense, and that at the time of the interception either Ilic or another person in paragraph 3b of the authorization is using the device.

[26] For the respondent, Mr. Marentette says that the trial judge properly interpreted the requirements of paragraph 5c. The judge's reading of the clause was grammatically correct, compatible with the balance of the authorization, and the only sensible interpretation that the restrictions imposed could reasonably support. The conditions were imposed under s. 186(4)(d) of the *Criminal Code* to prevent unjustified intrusions into the privacy interests of innocent persons. Paragraph 5c makes no reference to "reasonable belief", rather it imposes a more stringent standard as the authorizing judge was entitled to find.

[27] Mr. Marentette contends that the trial record is barren of any evidence to support the claim that the trial judge's interpretation of paragraph 5c rendered interceptions of text messages impossible despite their authorization under the order. And even if the trial judge's interpretation had such an effect, the restriction was one that the authorizing judge was entitled to impose under s. 186(4)(d). Investigators could have sought specific authorization to permit these interceptions but chose not to do so.

The Governing Principles

[28] In the end, this ground of appeal reduces to the interpretation of the terms of the enabling authorization. To be more specific, the issue is whether this authorization permitted interception of the text messages sent from or received by telephone number (226) 220-6845 absent evidence that their author or

recipient was llic. To determine that issue, it is helpful to return to some basic principles.

[29] To take first the obvious. The interception of private communications constitutes a search or seizure, thus is subject to the requirement of reasonableness imposed by s. 8 of the *Charter*. *R. v. Duarte*, [1990] 1 S.C.R. 30. A search or seizure is reasonable if it is authorized by a law that is itself reasonable and is carried out in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278.

[30] Second, to be carried out in a reasonable manner pursuant to a conventional authorization issued under s. 186(1) of the *Criminal Code*, the interception of private communications must be carried out *in accordance with* the terms of a valid authorization, as required by s. 184(2)(b).³

[31] Third, s. 186(4) of the *Criminal Code* prescribes the content and limitations of a conventional authorization. Among other things, the authorization must generally describe the place of interception, if a general description of that place can be given, and generally describe the manner of interception: *Criminal Code*, s. 186(4)(c).

[32] Fourth, the authorizing judge has a discretion, but not an obligation, to include terms and conditions in the authorization. This discretion, for which

³ This exempts the interceptions from criminal liability under that section.

s. 186(4)(d) provides, becomes engaged if and to the extent that the authorizing judge considers that terms and conditions are advisable in the public interest.

[33] Fifth, among the terms and conditions a judge may include in an authorization as advisable in the public interest are terms and conditions the purpose of which is to curtail the interception of the private communications in which designated targets do not participate, but rather are made by innocent third parties. These terms and conditions are often described as minimization clauses. Unlike §2518(5) of its American equivalent, Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*, 18 U.S.C.A. §§2510-2520, Part VI of the *Criminal Code* and, in particular, s. 186(4), does not make minimization a mandatory term of every authorization:⁴ *R. v. Finlay* (1985), 52 O.R. (2d) 632 (C.A.), at pp. 658-660; *Thompson*, at pp. 1130-1132, and 1137-1138.

[34] Minimization clauses may take different forms. Some are linked to the places at which the communications to be intercepted take place. Interception of communications originating from or received at pay telephones, for example, may require live visual surveillance and live monitoring to confine interceptions to specified individuals. Other minimization clauses have to do with the nature of the device used in the communications or the manner in which interceptions are to be carried out.

⁴ Sections 186(2) and (3) require minimization clauses to protect solicitor-client communications against interception.

[35] The power to impose minimization clauses is discretionary: however the failure to include such a term may result in an authorization that is unreasonable: *Thompson*, at pp. 1145-1146.

[36] Sixth, some authorizations permit interception of private communications that emanate from or are directed to places to which targets “resort”, at which they “attend”, or that they “use” for communication purposes. The contents of the intercepted private communications tendered for admission cannot themselves establish that the target “resorted to”, “attended at”, or “used” the place or device for communication purposes. Extrinsic evidence is required and must be adequate to establish an investigative belief, based on reasonable and probable grounds, that the person will “resort to”, “attend at”, or “use” the location or device depending on the language of the authorization: *Thompson*, at pp. 1140-1141.

[37] The nature of the communications to be intercepted may also be important in the inclusion and construction of minimization terms. Some minimization terms, such as those that require visual surveillance or live monitoring may be invoked prior to or contemporaneous with the interception process. Others may permit after-the-fact minimization, or require it for efficacy.

[38] Section 2518(5) of Title III, for example, allows minimization to be “accomplished as soon as practicable after such interception” where the intercepted communications are in a code or foreign language and an expert in

that code or foreign language is not readily available during the interception period.

[39] Under Title III, text messages fall within the definition of “electronic communication” in §2510(12). They are subject to the minimization requirement of §2518(5), but Title III does not prescribe how minimization is to be accomplished. United States courts and law enforcement agencies recognize that traditional minimization techniques, like live monitoring or contemporaneous live visual surveillance, will not work with many forms of electronic communications. Section 29 of the *United States Attorneys’ Criminal Resource Manual*, which guides US Attorneys on the requirements of a Title III affidavit, advises attorneys that the affidavit must contain a statement that monitoring agents will minimize all non-pertinent interceptions and address any specific minimization problems: U.S. Dep’t of Justice, *United States Attorneys’ Criminal Resource Manual* § 29 (1998). For electronic communications, the communications are recorded, subjected to after-the-fact minimization, and their disclosure limited to communications by the subject or their confederates that are criminal in nature: see, for example, *United States v. Tutino*, 883 F. 2d 1125 (2d Cir. 1989) *cert denied* 493 U.S. 1081 (1990).

[40] Authorizations granted under s. 186 of the *Criminal Code* permit investigators to do things, to intercept private communications, that would be a crime in the absence of the order. Among other things, an authorization defines

the extent to which the privacy of various persons may be invaded, where the invasions may occur, and how the invasions may be carried out. An authorization is, in effect, an interception licence.

[41] To determine whether an authorization permits certain interceptions to be made, or to determine after the fact whether the interceptions have been made in accordance with an authorization, requires an examination not only of the specific words, phrases and clauses in the order, but also the order as a whole. Interpretations that yield absurd results, impose requirements that effectively neuter permissible interceptional activity, or ignore related terms in the order should be avoided.

The Principles Applied

[42] For reasons that follow, I would give effect to this ground of appeal and order a new trial.

[43] Paragraph 2 of the authorization, entitled “Types of Communications and Observations”, permitted the interception of “telecommunications”. The term “telecommunication” appears in the exhaustive definition of “private communication” in s. 183 of the *Criminal Code*, but “telecommunication” is not

itself defined in, or for the purposes of, Part VI.⁵ The parties agree that the term “telecommunications” as used in the authorization includes text messages.

[44] The interceptional authority paragraph 2 provides in connection with telecommunications is unrestricted. It makes no reference to the persons whose telecommunications may be intercepted or where or how the interceptions are to be carried out. Thus, it becomes necessary to review the balance of the authorization to determine under what circumstances telecommunications may be intercepted.

[45] Two paragraphs of the authorization deal specifically with the interception of telecommunications: paragraph 5c and paragraph 6e.

[46] Paragraph 5c appears under the heading “Devices Used By Persons”:

5. The communications of the persons in paragraph 3 may also be intercepted when made over:

...

c. any other device used to make a telecommunication, including mobile telephones, pages, or devices, believed on reasonable grounds to be used by the person in paragraph 3a *and while being used by one of the persons named in 3a or 3b*. [Emphasis added.]

⁵ Section 326(2) of the *Criminal Code* defines “telecommunication” for the purposes of the offences created by ss. 326(1) and 327(1). This statutory definition approximates the ordinary meaning and provides a serviceable benchmark for Part VI.

[47] The introductory words in paragraph 5 refer to “communications”, a term that would include both oral and telecommunications. Paragraph 5c is more specific. It applies only to “any other device used to make a telecommunication”, including but not only several kinds of devices described in the rest of the paragraph. The reference to “a telecommunication” does not distinguish between oral communications, such as telephone calls, and non-oral telecommunications, such as text messages.

[48] Paragraph 6e appears under the heading “Other Terms and Conditions”:

6. It is further ordered that:

...

e. The interception of *non-oral telecommunications*, including pagers, faxes, electronic mail, modem, and internet communications, is not subject to the live visual surveillance, or live monitoring. [Emphasis added.]

[49] Unlike paragraph 5c, which refers to “a telecommunication”, thus to both oral and non-oral telecommunications, paragraph 6e is more specific: it deals only with “non-oral telecommunications”. Paragraph 6e makes it clear that neither of the usual minimization techniques, live visual surveillance and live monitoring, are required for the interception of non-oral telecommunications.

[50] The effect of the trial judge’s interpretation of paragraph 5c of the authorization is to require that monitors be *certain* that Slavko Ilic was using

telephone (226) 220-6845 to send a text message before that message could be intercepted. Several reasons persuade me that this interpretation is wrong.

[51] First, the construction adopted by the trial judge achieves an unworkable result. The authorization permits interception of telecommunications, both oral and non-oral telecommunications. For oral telecommunications, like telephone calls, minimization can be achieved by live monitoring, live visual surveillance, or both. Text messages, however, do not contain a human voice. There is no “live” to monitor. Neither is live visual surveillance a viable means of ensuring authorship of a particular text message. Practically speaking, the surveiller would need to be standing immediately next to the target, then somehow relay the target’s activity to monitors.

[52] Second, the interpretation of the trial judge is inconsistent with the terms of the authorization as a whole and the purpose underlying this investigative technique.

[53] The authorizing judge, satisfied that the conditions precedent of s. 186(1) had been met, granted the authorization to intercept the private communications of Slavko Ilic. She authorized investigators in paragraph 2 of the order to intercept not only Ilic’s oral communications, but also his telecommunications. In other words, what he said and what he wrote could be captured for its potential evidentiary value in connection with the investigation of various listed offences.

The judge set out the terms in accordance with which the interceptions could be made.

[54] The authorizing judge was satisfied that Ilic might use mobile telephones, other than those specifically listed, “to make a telecommunication”. It is a reasonable inference that the authorizing judge knew that mobile telephones could be used not only to make telephone calls, but also to send text messages. To ensure that these mobile telephones were used by Ilic, the judge imposed some conditions in paragraph 5c, but did not distinguish between oral and non-oral telecommunications in the applicability of these conditions.

[55] In another part of the authorization, however, the authorizing judge made specific reference to non-oral telecommunications. She made it clear that they could be intercepted without either live monitoring or live visual surveillance. As a consequence, any interpretation of paragraph 5c had to accord with the specific language of paragraph 6e in connection with the interception of non-oral telecommunications such as text messages. The trial judge’s interpretation denies paragraph 6e any influence.

[56] Third, the standard of evidence required by the trial judge as a precondition to interception of text messages at once exceeds the constitutional norm set by *Thompson* and imposes different standards for interceptions

involving the same device depending on the medium chosen for conveyance of the message. Such a distinction is unwarranted and unsupportable in principle.

[57] In my respectful view, the trial judge erred in his construction of the enabling authorization in relation to the text messages tendered for admission. The correct interpretation of paragraph 5c, consistent with the terms of the authorization as a whole, is that the interception of text messages was authorized if investigators reasonably believed that Ilic was using the cell phone as a means of communication and that, at the time of the interception, either Ilic or another person described in paragraph 3b of the authorization, was using the cell phone.

[58] The error in construction of the authorization led the trial judge to conclude that the interceptions were not made in accordance with the authorization, thus offended s. 8 of the *Charter* and should be excluded under s. 24(2).

[59] For the reasons I have given, I am satisfied that the interceptions of the text messages did not offend s. 8 of the *Charter*. In the circumstances, it is unnecessary for me to consider the correctness of the trial judge's decision to exclude the intercepted text messages as evidence under s. 24(2) of the *Charter*. In the absence of a constitutional infringement, s. 24(2) is not engaged.

CONCLUSION

[60] In the result, I would allow the appeal, set aside the acquittals and order a new trial on the indictment.

Released: October 10, 2012 “JL”

“David Watt J.A.”
“I agree Winkler C.J.O.”
“I agree John Laskin J.A.”