

CANADA / JUDGMENT

R. v. Alkhalil

2019 BCSC 1959

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2019 BCSC 1959

Date: 20191113

Docket: 27393-37

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and

Larry Ronald Amero

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Before: The Honourable Madam Justice Maisonville

Ruling Re 37 Application for Leave to Cross-Examine Det. Lisa Wu on Affidavit Sworn March 28, 2012 (BMO Production Order)

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Place and Dates of Trial/Hearing:

Vancouver, B.C.

September 23 and 24, 2019

Place and Date of Ruling:

Vancouver, B.C.

November 13, 2019

Introduction

- [1] The Applicant, Dean Wiwchar, is charged with first degree murder and conspiracy to commit murder. He has applied to exclude evidence acquired by the police during a search of a safety deposit box at the Bank of Montreal located at 100-401 West Georgia Street, Vancouver, BC ("BMO Branch").
- [2] The application is based upon the Applicant's contention that the police used unlawfully obtained evidence, contrary to s. 8 of the Charter, in an information to obtain ("ITO") that formed the basis of two separate judicial authorizations. The first was a production order for records, accounts and information in the possession of the BMO Branch ("BMO Production Order"). The second was a general warrant to search the safety deposit box that was issued on the basis of evidence gathered from the BMO Production Order.

- [3] In support of the application to exclude the safety deposit box evidence, the Applicant seeks leave to cross-examine Det. Lisa Wu of the Vancouver Police Department ("VPD") who affirmed the affidavit in support of the ITO for the BMO Production Order, pursuant to s. 487.012 of the Criminal Code, R.S.C. 1985, c. C-46. The date of the ITO was March 28, 2012.
- [4] This decision deals only with the Applicant's request for leave to cross-examine the affiant, Det. Wu.

Facts

- [5] On January 17, 2012, Sandip Duhre ("Duhre") was shot and killed at the Sheraton Wall Centre in Vancouver. Following an investigation into the death, the VPD identified the Applicant as a person of interest on March 2, 2012.
- [6] In the March 28, 2012, ITO filed in support of the BMO Production Order, Det. Wu referenced certain documents and information provided to her. She affirmed the following:
 - a) The first VPD Surveillance Report on the Applicant referenced in the ITO is dated 24 March 2012. On 2 March 2012, the Applicant was determined to be a "Person of Interest" in the investigation into Duhre's shooting death (INV.Document.001.0001010, paras. 113, 116).
 - b) On 25 March 2012, the VPD observed the Applicant at the Edgewater Casino. VPD officers used the casino's video surveillance systems to monitor the Applicant while he was inside the casino, and observed him with a large amount of cash, estimated to be approximately \$30,000 (INV.Document.001.0001010, para. 119(t)).
 - c) On 26 March 2012, the VPD surveillance team reported observing the Applicant enter the BMO Branch at approximately 2:00 pm carrying a "black laptop size briefcase". After losing sight of him, officers conducted a "check of the automated teller area, all the teller wickets and offices off the main lobby area". The Applicant left the BMO still carrying the briefcase at 2:10 pm (INV.Document.001.0001010, paras. 120-121).
 - d) On 27 March 2012, the Applicant was considered a suspect in the murder of Duhre (INV.Document.001.0001010, para. 124).
 - e) On that date, Det. St. Amant contacted Bank of Montreal investigator, Steve Goss, who confirmed that the Applicant had "documentation, accounts and information" at the BMO Branch. Mr. Goss stated that a production order would be required for any further details. Mr. Goss also stated that police would want to get a production order and a search warrant to obtain the "personal information (application, accounts, phone numbers, credit cards, automated teller machine (debit) cards) and safety deposit box information" (INV.Document.001.0001010, paras. 125(c)).
 - f) Mr. Goss "implied", but did not "confirm", there was a safety deposit box (INV.Document.001.0001010, para. 125(v)).

- 9) Det. St. Amant spoke to the BMO branch manager, Steve Lee, who "advised there was not a lot of activity on the Applicant's accounts and that he also had an older account that is no longer active" (INV.Document.001.0001010, para. 125(d)).
- [7] Det. Wu expressed her personal belief that the Applicant had money in the black briefcase (INV.Document.001.0001010, para. 120(e)), and that he was in the safety deposit box area when he was not visible to the surveillance team at the BMO Branch between 2:00 and 2:10 pm on 26 March 2012 (INV.Document.001.0001010, para. 121(b)).
- [8] Additionally, in the context of Mr. Lee's statement that there was not a lot of activity on the Applicant's accounts, Det. Wu stated her belief that he had a safety deposit box because he was observed with a substantial amount of cash at the Edgewater Casino (INV.Document.001.0001010, para 125(d)(iii)).

Positions of the Parties

The Applicant

Edgewater Casino Surveillance

- [9] First, the Applicant seeks leave to cross-examine Det. Wu on the basis that the video surveillance at the Edgewater Casino intruded on his privacy when his behaviour and money use were recorded. The Applicant contends that the surveillance was unlawful as the VPD directed staff to assist them in their murder investigation. Then, on a second occasion, police used the surveillance cameras inside the casino to zoom in on the Applicant's private text messages, and they spoke to casino staff about his gambling.
- [10] The Applicant submits that cross-examination will provide an evidentiary context to the search issue and provide evidence of the affiant's knowledge of police conduct. Further, it will assist the Court in assessing the nature of what the Applicant characterizes as unlawful evidence collection methods and Det. Wu's knowledge of her reliance on that evidence.

BMO Branch Surveillance

- [11] Second, the Applicant submits that Det. Wu's belief that the Applicant was in the safety deposit box area of the BMO Branch is not supported by the source materials. The Applicant states that cross-examination will assist in determining the extent of these "deficiencies".

Breach of Privacy - BMO Branch Bank Interviews

- [12] Third, the Applicant argues that cross-examination will elicit evidence to assist in determining whether Det. Wu knew she was relying on information that the Applicant submits was obtained in breach of privacy laws when she relied upon Det. St. Amant's exchanges with the BMO branch manager and investigator regarding the Applicant's bank accounts and information.

Applicant's Status as Suspect

- [13] Fourth, the Applicant wishes to cross-examine on the extent to which the surveillance factored into Det. Wu's grounds to support the ITO, and whether she had sufficient grounds prior to the surveillance.

The Crown

Edgewater Casino Surveillance

- [14] The Crown opposes the application to cross-examine Det. Wu on the Edgewater Casino surveillance, arguing that it has already agreed to the excision of the footage that captured the Applicant's text messages. This concession is made in light of Mr. Justice Bowden's ruling in *R. v. Wiwchar and Ley*, 2014 BCSC 2108 that this same footage constituted an unreasonable search (para. 51). Therefore, the Crown submits that cross-examination on excised aspects of the ITO would not be necessary for the purposes of the review hearing.
- [15] The Crown also contends that the Applicant has failed to demonstrate that cross-examination on the Edgewater Casino footage would elicit evidence tending to discredit the reasonable and probable grounds for the authorization.

BMO Branch Surveillance

- [16] With respect to the surveillance at the BMO Branch, the Crown submits that the Applicant has failed to establish a proper foundation for cross-examination, as the affiant was explicit that the propositions that the Applicant had money in his briefcase and that he was in the safety deposit box area were based on her own personal opinions and beliefs. Accordingly, the Crown suggests any concerns regarding this can be dealt with on a facial validity assessment of the affidavit.

Applicant's Status

- [17] The Crown submits that the affiant's personal opinions and beliefs regarding the sufficiency of the grounds in the ITO, either before or after information is excised, is not relevant to a Garofoli hearing, as there is no statutory requirement that an affiant of an ITO must have a subjective belief in the information laid in support of the reasonable grounds in s. 487.012 of the Criminal Code.

Legal principles - Garofoli hearing

Standard of Review

- [18] The test on a review of an ITO in support of a judicial authorization is articulated in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at paras. 53-56. The reviewing judge must determine whether there was any basis upon which the authorizing judge could have issued the authorization, taking any information that was excised or amplified into consideration on the review. The accused has the onus of demonstrating that the authorization was not valid: *R. v. Baires*, 2014 BCSC 2549 at para. 11, as cited in *R. v. Wong*, 2017 BCSC 306 at para. 49.
- [19] That a reviewing judge can draw more than one inference from the facts contained in an ITO will not necessarily lead to a finding that it was invalid. The judge reviewing it can make any reasonable inferences as the facts permit. The question is whether the ITO contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued: *R. v. Nero*, 2016 ONCA 160 at para. 71.

Leave to Cross Examine an Affiant

- [20] In a *Garofoli* hearing, an applicant does not have the right to cross-examine the affiant of an ITO; however, they may seek leave to do so. In order to meet the threshold for leave to cross-examine, the applicant must demonstrate a reasonable likelihood that cross-examination will elicit testimony that will assist in the determination of whether the statutory preconditions for the authorization were met. Leave should be granted when it is deemed necessary to permit the accused to make full answer and defence: *Garofoli* at para. 88.
- [21] In *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, the Supreme Court of Canada affirmed *Garofoli*, emphasizing the narrow basis upon which leave may be granted (at para. 40):

the reviewing judge must remain strictly focussed on the question to be determined on a *Garofoli* review - whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted. However, if the proposed cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization.

- [22] The Court further elaborated upon the threshold (at para. 41):

cross-examination that can do no more than show that some of the information relied upon by the affiant is false is not likely to be useful unless it can also support the inference that the affiant knew or ought to have known that it was false. a reasonable belief in the existence of the requisite statutory grounds will suffice for the granting of an authorization. Upon further investigation, the grounds relied upon in support of the authorization may prove to be false. That fact does not retroactively invalidate what was an otherwise valid authorization.

- [23] The Applicant ought to be able to demonstrate a basis for questioning the validity of the authorization on the strength of the information received in disclosure. If they cannot, the Court in *Pires; Lising* suggests it would be unlikely that cross-examining the affiant would provide any further relevant information: at para. 27.

Misleading Statements and Omissions in the ITO

- [24] If the judge in a *Garofoli* hearing finds that the ITO in support of an authorization contained misleading or erroneous information, or was obtained in breach of the Charter, that information may be excised: *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 53; and *R. v. Plant*, [1993] 3 S.C.R. 281 at paras. 33-34.
- [25] Omissions of relevant facts are also taken into consideration in a *Garofoli* hearing: *R. v. Morelli*, [2010] 1 S.C.R. 253 at para. 60. Where such omissions or erroneous information are the result of minor error or good faith, they may be amplified upon review, but amplification should not be used to circumvent the authorization process: *Araujo* at paras. 55-59.
- [26] If a reviewing judge finds that the affiant knew, or ought to have known, of additional information that should have been provided in the ITO in the interests of full, fair and frank disclosure, this information may be included for consideration on the review of the authorization: *World Bank Group v. Wallace*, 2016 SCC 15 at para. 121.

Sufficiency of Evidence in the ITO and Affiant's Subjective Belief

- [27] An affiant must provide a factual basis for conclusions articulated in an ITO that are sufficient for the reviewing judge to rule upon the reasonableness of those conclusions: *R. v. Sunner*, 2017 BCSC 2445 at para. 31; and *R. v. Ferguson*, 2018 BCSC 378 at para 65. The affiant must outline the facts that they relied upon and explain how those facts supported the inferences drawn from them in support of the ITO; *Ferguson* at paras. 66-69. A failure to establish the facts underpinning an inference or conclusion may affect the weight that the reviewing judge will place on those statements in the ITO with respect to the conclusions drawn: *Sunner* at para. 31).
- [28] There is no requirement that the affiant of an ITO have a subjective belief in the information put forward to support the application for a judicial authorization. Therefore, their personal opinions or beliefs on these matters, or the strength of the information in the ITO, are irrelevant to a *Garofoli* review: *Pires; Lising* at para. 66; and *R. v. MacNeil*, 2013 BCCA 162 at para. 27.

Analysis

- [29] With respect to the Applicant's assertion that the Edgewater Casino surveillance constituted an unlawful intrusion into his privacy, I find that the Applicant did not have a reasonable expectation of privacy in his behaviour and actions at the casino. A casino is a public place, and one at which a high level of surveillance is expected given the need to deter and address

cheating by patrons. In the case of the Edgewater, signs further alerted patrons to the fact of video surveillance. In the absence of any reasonable expectation of privacy, there would have been no requirement to obtain prior judicial authorization. Excised from the ITO will be all evidence respecting text messages on the Applicant's PGP Blackberry obtained by the casino surveillance system zooming in and taking images. Nothing will be gained from cross-examination of the affiant in such circumstances. There simply is no realistic expectation that cross-examination could elicit relevant evidence given the absence of a reasonable expectation of privacy.

- [30] As for the BMO branch surveillance, Det. Wu's personal belief that the Applicant was in the safety deposit box area is an inference that could be drawn by anyone acquainted with the physical layout of the branch. However, that is not apparent from the ITO. Accordingly, I do find that cross-examination on this point will assist the Court with respect to the issues that I will be called upon to determine in this application.
- [31] Respecting an alleged breach of privacy stemming from the police questioning of the BMO branch staff, there has not yet been a determination as to whether this violated the Applicant's reasonable expectation of privacy contrary to s. 8. Accordingly, the Applicant has failed to demonstrate that this area of cross-examination will even be relevant or material to the hearing and to issues the Court must determine.
- [32] Finally, with respect to the Applicant's status as a suspect, the affiant's personal opinions and beliefs regarding the sufficiency of the grounds in the ITO are not relevant on a Garofoli hearing and, accordingly, leave to cross-examination on that issue would be of no assistance to the Court. Cross-examination on that issue will not elicit evidence relevant to whether reasonable and probable grounds existed to issue the BMO Production Order.

Conclusion

- [33] I allow this application to cross-examine Det. Wu on her affidavit sworn in support of the ITO for the BMO Production Order dated March 28, 2012 only with respect to para. 121(b). Otherwise, the application is dismissed.

"Maisonville J."

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