
CANADA / JUDGMENT

R. v. Brereton

2014 BCSC 2568

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2568 R. v. Brereton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Brereton,

2014 BCSC 2568

Date: 20141203

Docket: 157734-2

Registry: Victoria

Regina

v.

Katherine Ann Brereton

Mark William Guy

Colin Arthur Traquair

Before: The Honourable Mr. Justice MacKenzie

Oral Ruling on Voir Dire

Counsel for the Crown:

J.A.R. Vivian

Counsel for the Accused Brereton:

R.O. Alberto

Counsel for the Accused Guy:

M.F. Allen

Counsel for the Accused Traquair:

R.R. Drury

Place and Date of Trial:

Victoria, B.C.

December 1-3, 2014

Place and Date of Judgment:

Victoria, B.C.

December 3, 2014

- [1] THE COURT: This is an application by the defence to exclude evidence obtained when the police executed a search warrant at the residence the Crown says was occupied by the three defendants.
- [2] The offences that were outlined in the application to obtain a search warrant were possession of a restricted firearm, two firearms, and possession of narcotics for the purpose of trafficking. On this application, the defence submits that the authorizing judicial officer did not have sufficient credible information in the information to obtain the warrant to justify authorizing the warrant. As a result, the defence submits the search was unlawful and unreasonable, contrary to s. 8 of the Charter and the evidence should be excluded under s. 24(2), pursuant to the principles and analysis outlined in Grant.
- [3] The argument was advanced after I ruled the defence had established that it would be appropriate to conduct a voir dire. I also concluded the defence had established it was appropriate to allow cross-examination of the affiant on specific portions of the ITO.
- [4] At the conclusion of the cross-examination, the defence has submitted that the information contained in the ITO, as amplified by the relatively brief cross-examination of the affiant, is incapable of providing a sufficient basis upon which the issuing justice could have issued the warrant. In this regard, it is well settled that a search warrant can only be lawfully issued where the authorizing judicial officer is satisfied there are reasonable grounds to believe that an offence is being or has been committed, and that evidence with respect to that offence will be found in the location to be searched.
- [5] On this point, as has been stated many times, the reasonable grounds standard is not only less than that required for conviction, but is also less than the civil standard of proof. Madam Justice Wilson put it this way in *R. v. Debot* -- I want to pause there to simply state I do not plan to include citations in this oral decision, they are readily available. In *Debot*, Justice Wilson stated:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.

[6] More recently, in *Mugesera v. Canada*, the Supreme Court of Canada stated at paragraph 114:

... the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities.

[7] Further, as Mr. Justice Hill noted in *R. v. Sanchez* in Ontario:

The appropriate standard of reasonable or credibly-based probability envisions a practical, non-technical and common-sense probability as to the existence of the facts and inferences asserted.

[8] In addition, it is well established that a reasonable grounds determination involves a consideration of the totality of the circumstances. When the police act on the basis of an anonymous tip or even a known informant's tip, consideration must be given to a variety of factors, including the degree of detail provided, information as to the source's source of knowledge, and indicia of reliability, including the presence or absence of confirmation of some of the information provided.

[9] The test to be applied in determining whether a search warrant was properly issued by the authorizing judicial officer was summarized by Justice Frankel in *R. v. Wilson*. At paragraph 37, after noting that the test is often referred to as the Garofoli test, Frankel J.A. cited the comments of Mr. Justice Donald in *R. v. Bacon*, at paragraph 25:

The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant.

[10] Moreover, as Justice Sopinka noted in *Garofoli*, where the application for the warrant is based largely on information coming from a confidential informant, the court should make three inquiries:

1. was the information predicting the crime compelling;
2. was the source of the information credible; and
3. was the information corroborated by the police before conducting the search.

[11] So the question on review is whether, given the totality of the information, does that information demonstrate reasonable grounds such that the search warrant could have issued.

[12] In this case, the defence emphasizes the fact that the material in the application for the warrant is based primarily on the information provided by a single confidential informant, who had been providing source material to the police for what the defence submits is

approximately a two-week period prior to the warrant being authorized. In addition, the defendants say there is only minor generalized observations of information that can, at best, be described as matters of common knowledge which fall short of providing confirming evidence of the source information, as opposed to significant confirmation by way of further police investigation or surveillance, especially when the source provided information that he or she had observed drugs at the residence, but with no reference or information about drug trafficking.

- [13] On this latter point, the defence submits the information from the source supports only the belief expressed by the affiant that Mr. Guy was in possession of cocaine, ketamine, and methamphetamine, not in possession for the purpose of trafficking. As the affiant acknowledged in his cross-examination that it was the lead investigator who suggested the ITO should stipulate the offence alleged to be being committed is possession for the purpose of trafficking, the defence says this would be misleading to the authorizing JP and should undermine the validity of the warrant, even though the affidavit states at paragraph 7 that he has reasonable grounds to believe the offence of PPT had been committed.
- [14] I am unable to agree with the defence on this particular point. In my view, the affiant fairly expressed his belief that Mr. Guy was in possession of Schedule I and Schedule II substances, contrary to the Controlled Drugs and Substances Act. Even though the affiant did not, in the body of the ITO, express that possession of the substances was for the purpose of trafficking, and nor did the confidential source provide information of drug trafficking, in my view it was open to the police to stipulate the offence being committed was PPT, in addition to possession of firearms, and allow the authorizing officer to determine whether the totality of the information was sufficient to establish a reasonable probability that the offence of possession for the purpose of trafficking was being committed. In my view, the justice of the peace was entitled to make that determination on the information contained in the ITO, nor do I find anything misleading in these circumstances in the request for a warrant pertaining to that particular offence.
- [15] Turning to the credibility or reliability of the informant, the defence says that given the fact that the confidential informant had only a brief period of interaction with the police prior to the ITO being prepared, this particular informant cannot be considered reliable. In addition, the defence submits that it is uncertain as to when the source information was received by the police. Complicating this factor somewhat is the fact that the affiant was relying on information the lead investigator, Constable Bland, had received from a Victoria City Police officer, Constable Hourston, on or about July 18th, as the affiant confirmed in his cross-examination. In addition, the affiant confirmed that additional information from the source was forwarded by Constable Hourston and was information about the "pedigree" of the source.

- [16] The defence submits that as the affiant acknowledged in cross-examination that he did not know anything about the informant who was providing information to Constable Hourston, there was insufficient information before the JP to indicate the informant was a reliable source: see Garofoli, paragraphs 79 and 81.
- [17] As a result, the defence submits the police were obliged to conduct further investigation or surveillance in order to provide an indicia of reliability, and this the police did not do in the present case. Even though the defence acknowledges there is a degree of detail in the source information that goes beyond mere conclusory statements, the defence submits they are simply general observations and often somewhat vague: for example, as to how many bedrooms were in the residence.
- [18] The defence further submits that because the affiant had no personal interactions with the confidential informant, and therefore was unable to amplify as to what was specifically meant by Constable Hourston when he provided information that the source has provided "valuable information on numerous occasions relating to criminal activities," that this information is not helpful when determining the reliability of the informant. In addition, the defence says the fact that the informant is described as a person with a criminal record, albeit none for perjury, who has received money for information on a past occasion, "has been known to traffic in illegal drugs," and "currently struggles with addiction," further undermines the reliability of this particular informant.
- [19] The Crown, of course, takes a different view when it comes to the pedigree or reliability of the informant and says the source information, when viewed in its entirety, is compelling and detailed and is based on first-hand knowledge of the defendant Mr. Guy.
- [20] The Crown says the totality of the circumstances contain various indicia of reliability which suggest clearly that the source is reliable. Those indicia in paragraph 26 include that the source was known to the police handler for about two weeks, that the source had provided information, as I have already said, on "numerous occasions" about drug trafficking, and that the source has provided information that was used to locate and seize drugs and stolen property. Crown submits that these factors indicate the informant is a reliable source. Moreover, the Crown submits the involvement of the source in the drug culture enhances the reliability of the information he provided or she provided about drugs and weapons. In addition, there is information that the source provided information on a prior occasion which was "used" in a previous warrant application.
- [21] As such, this is not a situation where the information has been provided by an anonymous source, those situations calling for a greater degree of confirmation than would otherwise be the case: see *R. v. MacDonald*, the Ontario Court of Appeal.

- [22] The Crown also says that the information provided by the source was corroborated by the police. Crown notes that the ITO states the police corroborated the location of Mr. Guy's alleged residence through surveillance observation of vehicles registered to Mr. Guy that were located at the residence, that there was observations of Mr. Guy at that location, and that he granted access to another person at that residence.
- [23] Moreover, as was noted in Garofoli, the informant's source of knowledge is a factor when assessing the reliability of the source information, as is the degree of detail contained in the tip. In this regard, the Crown points out that there are details that support the conclusion that the information given by the source was indeed obtained on a first-hand basis, based on the amount of detail, including the fact that Mr. Guy keeps drugs in his bedroom and the fact that the source was inside the residence making detailed observations therein, including that Mr. Guy "usually" keeps drugs on the top of his dresser. In addition, paragraph 32 of the ITO stipulates that the source has seen firearms on several occasions.
- [24] As a result, the Crown submits all of this information supports a conclusion that the source is reporting first-hand information and that that information was current, and therefore establishes the reliability of the informant.
- [25] Given all of the circumstances, I agree with the Crown on this particular point.
- [26] In addition, the Crown notes that the informant in this particular case participated in what might be called a drive-by with Constable Hourston, past the target residence, to confirm it was where Mr. Guy resided. There were observations of a vehicle parked in the driveway that was consistent with the information provided by the source to the police.
- [27] In my view, these efforts by the officer who had direct contact with the confidential informant are similar and indeed stronger than the investigation undertaken by the police in *R. v. Plant*, who were acting on an anonymous Crime Stoppers tip. In *Plant*, after referring to *R. v. Debot* and the three areas of concern I have already referred to when considering the reliability of the tip of an informant, Justice Sopinka had this to say:

While that case related to the decision of the police to conduct a warrantless search pursuant to the tip of a known informant, the factors enunciated demonstrate principled concerns with the use of informants in general and are equally applicable to the anonymous tip in the case at bar. The information given by the anonymous informant was compelling in that it identified the location of the cultivation operation and located the appellant's house in a fairly specific geographic region, albeit without specifying an exact street address. It is impossible to determine whether the source was credible except by reference to the fact that the information was subsequently corroborated by a police reconnaissance which resulted in identification of the exact address of the residence described by the informant. The tip itself, therefore, was compelling enough in its specification of the place in which the offence was occurring for the police to readily locate the exact address of the appellant's residence and corroborate the report of the informant. I conclude that the anonymous tip, although made by an unknown informant, was sufficiently reliable to have formed part of the reasonable grounds asserted in the

information to obtain the warrant.

- [28] In my view, those observations are apropos to the circumstances here. As far as the degree of detail in the present case, the information provided by the source refers again to substantial detail. In paragraph 14, the information from the source is that Mr. Guy has a .357 Magnum, it is not loaded, and the informant had not seen any ammunition. Mr. Guy also has a shotgun. There was reference to past and present residences of Mr. Guy, and the presence of narcotics, including cocaine, MDA, and ketamine.
- [29] There was also information that Mr. Guy is intent on selling the Magnum and wants \$2,000 for it. In addition, there was also detail about the motor vehicles used by Mr. Guy, these being a '96 or '97 dark blue Mazda Protégé, and a white two-door full-sized van.
- [30] A couple of weeks later, on July 30th, the update from Constable Hourston included information that confirmed the residence on Tattersall Drive, that shotgun ammunition was observed inside the residence, and that drugs were kept by Mr. Guy on the top of the bedroom dresser.
- [31] In addition, having regard to all of the information, it does appear that the information is current and quite recent, and as such, as the Crown says, makes the information more compelling than otherwise might be the case.
- [32] On this last point, I agree wholeheartedly with the defence submission that the currency of any information relied on in support of an authorization is a most relevant factor, stale-dated information having, of course, less weight than current information.
- [33] In this regard, I agree that the ITO is not clear as to when Constable Hourston first received the information from the confidential informant, but I am satisfied that, whether it is two weeks or a month prior to the ITO being prepared, the information should clearly be considered current.
- [34] Finally, the ITO stated that Mr. Guy has a prior conviction for PPT in April 2008, and 16 "drug-related" police files where Mr. Guy was "either charged or a subject of complaint." While it is clear this information by itself would never make out reasonable probability, it is somewhat relevant with respect to confirmation of the source information, given the similarity of the conviction to the information provided by the source that Mr. Guy possesses narcotics, and the fact that the conviction is not that dated vis-à-vis the authorization. On this point, see again *R. v. MacDonald* in the Ontario Court of Appeal at paragraph 22.
- [35] As far as the criminality of the informant is concerned and his apparent addiction to drugs, or hers, in my view this information does not undermine the reliability of the informant and, in fact, as the Crown submits, the involvement of the source in the drug culture might very well be considered circumstances which enhances the reliability of the information provided by the source.

[36] While all the authorities counsel have provided are instructive and helpful, as the defence has submitted, each case dealing with the validity of a search warrant turns on its own set of facts and circumstances. When dealing with an application of this nature, the appropriate standard of review was articulated by Justice Laskin in the Ontario Court of Appeal in MacDonald as follows:

A judge reviewing the authorization of the issuance of a warrant has a limited mandate. That mandate was set out by Sopinka J. in R. v. Garofoli

The reviewing judge does not substitute his or her view for that of the authorizing judge. If based on the record which was before the authorizing judge as amplified on review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere.

[37] Applying this standard of review and in considering the totality of the information contained in the ITO, I am satisfied that the information provided by this known, albeit relatively recent, confidential informant was highly specific and compelling and was confirmed by the reconnaissance, if you will, undertaken by the police in observations of the residence, the location of the motor vehicles, and the presence of Mr. Guy, thereby establishing, in my view, the reliability of the informant.

[38] In addition, it is helpful to recall the guidance provided by our Court of Appeal in R. v. Law at paragraph 11, where the court acknowledged that there is no doubt that often in search warrant cases the investigating officers could always do more to obtain further evidence in support of an application for a warrant, but that:

[39] The question for this court is not what additional evidence might have put the issue beyond debate, it is whether the entirety of the evidence before the justice of the peace was sufficient to give her reason to conclude "probability" had replaced "suspicion".

[40] I am therefore satisfied that, notwithstanding the very able submissions of Mr. Allen on behalf of Mr. Guy, that based on the record which was before the authorizing judicial officer, amplified slightly on review, the authorizing officer could have granted the authorization to search the residence in question and, as such, the defence application for a finding that there was an unlawful search is dismissed.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie

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