

CANADA / JUDGMENT

R. v. Cardinal

2003 BCSC 158

COURT

Supreme Court of British Columbia

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Citation:

R. v. Cardinal

Date:

20030128

2003 BCSC 158

Docket:

233721-2

Registry: Dawson Creek

IN THE SUPREME COURT OF BRITISH COLUMBIA

REGINA

RESPONDENT/CROWN

v.

CHESTER BENJAMIN CARDINAL

APPLICANT/ACCUSED

VOIR DIRE RULING

OF THE

HONOURABLE MR. JUSTICE CHAMBERLIST

Re: Defence Application for Relief

pursuant to Sections 8 & 24(2) of the

Canadian Charter of Rights and Freedoms

Counsel for the Respondent/Crown:

R.N. Apps

Counsel for the Applicant/Accused:

P. Jensen

Date and Place of Hearing/Trial:

8 January 2003

Dawson Creek, BC

INTRODUCTION

[1] The accused, Chester Benjamin Cardinal, is charged with unlawfully possessing a controlled substance, cocaine, for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19.

[2] The evidence the Crown relies on in support of the charge arises from the execution of a telewarrant at the residence of Mr. Cardinal at 4704 Wabi Crescent, Chetwynd, B.C., on August 10, 2002. The information to obtain contains, within its body, this statement:

The informant has reasonable grounds to believe and does believe that there is a controlled substance or precursor, a thing in which such a controlled substance or precursor is contained or concealed offence-related property, or a thing that will afford evidence in respect of an offence under the Controlled Drugs and Substances Act namely

Implements related to trafficking of cocaine and methamphetamine including, but not limited to, cutting agents, score sheets, scales, paper used for packaging cocaine and other documentation to the selling of cocaine, including electronic records, and computers.

[3] At the commencement of this trial on January 8th, 2003, I declared a voir dire to determine the validity of the telewarrant and the admissibility of evidence seized pursuant to a search conducted of the accused's residence on August 10, 2002.

[4] Evidence was led from Cst. Bouey and Cst. Paquette relating to the contents of the information to obtain a search warrant by telecommunication pursuant to s. 11 of the Controlled Drugs and Substances Act and s. 487.1 of the Criminal Code of Canada.

[5] During the course of the voir dire the Court was asked to examine the information to obtain and Appendix "A" which set out the grounds in support. In addition, the Court reviewed the warrant which was issued by the Judicial Justice of the Peace on August 10th, 2002.

[6] Given the length of Appendix "A", I will set it out in detail:

APPENDIX "A"

I, Constable Shannon Kathleen Bouey, of the District of Chetwynd, Province of British Columbia, a regular member of the Royal Canadian Mounted Police, make an oath and say as follows:

1. THAT, I am a Peace Officer and have been a member of the Royal Canadian Mounted Police for 2 years. I am presently attached to the General Duty Section at the Chetwynd Detachment.
2. THAT, I have personal knowledge of the matters and facts to which I depose in this Information to Obtain a Search Warrant, save and except where stated to be on information and belief. As to such facts, I verily believe them to be true.
3. THAT, Chester Benjamin CARDINAL is known to reside at 4704 Wabi Crescent, Chetwynd, British Columbia.
4. THAT, on numerous occasions since 2001, members of the Chetwynd RCMP have received information that Chester Benjamin CARDINAL is trafficking cocaine from his residence.
5. THAT, on October 12, 2001 Constable MARSHALL and I observed several vehicles coming and going from Chester CARDINAL's residence. All the vehicles pulled up, an occupant got out and went to the door at the back of the residence. The cars were left idling and the occupants returned within minutes of going in to the house.

It is my experience as a police officer, and through learning from experienced drug enforcement officers, that drug transactions take place within a short duration of time, approximately 2-6 minutes.

6. THAT, on June 7, 2002 I observed a female arrive at Chester CARDINAL's residence. She approached a window at the rear of the residence located to the right of the back door. Bobbi CARDINAL (Chester's daughter) partially opened the window. The female handed Bobbi something, Bobbi then handed the female something in return. The female returned to her vehicle and left the residence. Approximately one minute later a second female approached and a similar transaction took place.
7. THAT, on June 7, 2002 I observed a vehicle arrive at Chester CARDINAL's residence. The [blank] exited a vehicle and approached the rear of the residence. [blank] entered the residence and met with Bobbi CARDINAL. Approximately two minutes later the [blank] exited the residence and returned to [blank] vehicle. The [blank] was [blank] and was wearing a light coloured hat. I advised Corporal HOGG of what had taken place and he relayed that information to the patrol cars in the area. Shortly thereafter, the [blank] vehicle was stopped by Constable KENNEDY. The driver was identified as [blank]. After a short discussion the [blank] gave Constable KENNEDY permission to search [blank] vehicle. A search was conducted and revealed a small paper pouch containing a controlled substance, in the glove box. A second small paper pouch containing a controlled substance was found in [blank] lower left side jacket pocket.

8. THAT, the Marquis Test is a glass vial containing acid. The acid changes color when mixed with a controlled [sic] substance. The acid becomes orange in color when mixed with methamphetamine [sic].

THAT, on June 8, 2002 Corporal GUIBAULT performed a Marquis Test on the controlled substance, found in paragraph 7. The acid turned orange in color, which is positive for methamphetamine.

9. THAT, on August 10, 2002 Constable PAQUETTE observed a vehicle parked in the driveway of Chester CARDINAL's residence, situated at 4704 Wabi Crescent, Chetwynd, BC. The vehicle departed within 30 seconds.

Constable PAQUETTE, acting upon his experience as a police officer, previous information received, and personal knowledge of Chester CARDINAL trafficking cocaine, he stopped the vehicle. At this point Constable PAQUETTE began a drug investigation with the occupants of the vehicle.

An occupant of the vehicle, hereinafter known as Contact A, supplied Constable PAQUETTE with information.

Contact A is a confidential contact whom, Constable PAQUETTE believes to be reliable.

Contact A informed that the reason for [blank] visit to Chester CARDINAL's residence was to purchase cocaine.

Contact A indicated that [blank] cocaine was purchased [blank] from Chester CARDINAL.

Contact A explained that the deal took place at the kitchen window to the right of the rear door. Contact A presented the [blank] to Chester CARDINAL, CARDINAL counted the money, walked through the kitchen and turned right down the hallway. Chester returned within 30 seconds and handed [blank] decks of cocaine to Contact A.

Contact A stated that this was [blank] time purchasing cocaine from Chester CARDINAL. The first transaction occurred approximately 2 weeks ago, where Contact A purchased [blank] cocaine [blank] from Chester CARDINAL. The next transaction occurred in the last days, where Contact A purchased [blank].

Contact A informed Constable PAQUETTE that Chester CARDINAL never runs out of cocaine. That he trafficks cocaine 24 hours a day, 7 days a week. Contact A informed Constable Paquette that there is more controlled substances in the residence.

10. THAT from information received and my own observations, I believe that there is controlled substances in Chester CARDINAL's residence at this time.

The blanked out portions of Appendix "A" were explained by Constable Bouey. They had been blanked out to protect the identity of the informant.

- [7] The search warrant was issued at 5:15 p.m. on August 10, 2002. It provided, inter alia, as follows:

THIS IS THEREFORE, to authorize and require you to enter the said place or premises between the hours of 5:15 p.m. on Aug. 10, 2002 to 8:00 p.m. on Aug. 10, 2002 and upon entering to search for and seize the things, and to report thereon as soon as practicable but within a period not exceeding seven days after the execution of the warrant to the Clerk of the Court for . . .

- [8] At 7:14 p.m., Cst. Bouey and Cst. Paquette, along with other members of the RCMP, entered the residence at 4704 Wabi Crescent, arrested the accused and residents of the house. Cst. Bouey, in amplification of the circumstances relating to the obtaining of the telewarrant and her actions that evening, said that they entered the residence at 7:14 p.m. and had a copy of the warrant with them, which she gave to Mr. Cardinal. She, and other police officers, remained in the residence until 11:00 p.m. when all police officers left the residence.
- [9] Cst. Bouey testified that she knew the accused before that date, and in fact had known of him (for some 2½ years) in the course of her duties at Chetwynd, B.C. She testified that on at least 50 separate occasions she received complaints of the accused trafficking in cocaine. She also testified that she had seen the accused at the Wabi Crescent residence before August 10, 2002.
- [10] Cst. Paquette also gave evidence on the voir dire. He testified that the information contained in para. 9 of Appendix "A" was the information that he had passed on to Cst. Bouey.
- [11] Against this background, Mr. Cardinal challenges the validity of the search warrant on two distinct grounds.
- [12] Firstly, that there was a failure to comply with the terms of the warrant in that, notwithstanding that the search warrant on its face authorized entry into the dwelling house until 8:00 p.m. on the 10th of August, members of the RCMP remained in the dwelling home until 11:00 p.m.
- [13] This submits, Mr. Cardinal, is a serious violation that amounts to negligence and relies on the decision of R. v. L.S.U., January 28, 1999 (unreported) B.C.S.C. No. X051691, New Westminster Registry, for the proposition that the search warrant should be found to be invalid under s. 8 of the Charter. The accused submits that this failure to comply with the specific terms of the telewarrant, being a serious breach of the accused's Charter rights, ought to result in the evidence obtained by virtue of the warrantless search being excluded from this trial on the basis that the admission of the evidence in these proceedings would bring the administration of justice into disrepute pursuant to s. 24(2) of the Charter.

- [14] The second ground advanced by Mr. Cardinal relates to the evidence provided to the Judicial Justice of the Peace on August 10, 2002. The accused submits that there were insufficient grounds contained within the information to obtain. The defence submission is that there was insufficient reliable information before the Justice of the Peace to allow the issuance of the search warrant.
- [15] Mr. Cardinal argues that before the warrant was issued, it had to be established that there was a "credibly-based" probability that an offence had been committed and that there was evidence of it to be found in the place to be searched. Mr. Cardinal submits that the essence of the issue in this case is the lack of a substantial basis for the existence of Cst. Bouey's belief. With respect to the Appendix, in particular, the accused makes these submissions --
- 1) Para. 3 of the information to obtain states that "Cardinal is known to reside at the residence". Mr. Cardinal submits that there is no evidence as to the basis for such knowledge and that the statement even fails to establish who knows it;
 - 2) Mr. Cardinal submits that para. 4 which states that "members of the Chetwynd RCMP have received information" is completely lacking in evidence. The accused submits that there simply is no evidence as to the basis of this knowledge - that is to say, unless Cst. Bouey received information herself (of which there is no evidence), it is impossible to determine how Cst. Bouey came to know this information;
 - 3) With respect to para. 7, Mr. Cardinal submits that it can not be determined that the person who had the methamphetamine was the same person who went into the residence. Moreover, these events were between Cst. Kennedy and an unknown person, not Cst. Bouey. Mr. Cardinal submits that there is no statement as to how this information came to Cst. Bouey;
 - 4) With respect to para. 9, Mr. Cardinal submits that Cst. Paquette gave no evidence for the belief that the unknown person was reliable. Moreover, these events were between Cst. Paquette and an unknown person, not the affiant, Cst. Bouey. Again Mr. Cardinal submits that there is no statement as to how this information came to Cst. Bouey;
 - 5) Mr. Cardinal submits that para. 2 states that the matters were based on personal knowledge (except where stated otherwise). With respect to this assertion, the Mr. Cardinal submits that there is simply no statement as to "otherwise", yet the information was quite clearly not based on personal knowledge of Cst. Bouey.

Generally, Mr. Cardinal submits that much of the information provided by Cst. Bouey is second hand and by its very nature unreliable. In addition, the information of the alleged tips from the unknown and unreliable tipster comes third hand to Cst. Bouey and, as such, ought not to be considered trustworthy without evidence of reliability.

ANALYSIS

Entry into 4704 Wabi Crescent

- [16] Mr. Cardinal relies on the decision of this Court in *R. v. L.S.U.* for the proposition that entry must be made and the search completed by the time specified in the warrant. In *L.S.U.* the entry was made at 14:18 hours when the time specified for entry in the search warrant was "between 14:30 and 20:30 hours". In *L.S.U.*, Stromberg-Stein J. found that the fact that the police entered the residence before the effective time specified in the search warrant rendered the search a "warrantless search".
- [17] In my view, the situation here is not the same as in *L.S.U.* Initial entry was made within the time specified. The question therefore is, does the time specified in the warrant make it a requirement of the timing of the warrant that entry be made and the search completed within the parameters set forth in the warrant. I think not.
- [18] In *R. v. Jeffery Arthur Bohn*, unreported, October 9, 1997, Docket X042896, New Westminster Registry, (reversed on other grounds by *R. v. Bohn*, 2000 BCCA 239), MacKenzie J. had this to say with respect to a similar argument:

16 The authorization in the NCA warrant is "to authorize and require you to enter the said dwelling house at any time between the hours of 9:50 p.m. on March 30th 1994 and 12:00 a.m. on March 30th 1994 to search for the said narcotic and seize same, if found." The authorization in the CC warrant is in substantially the same terms. The dismantling and removal of the cultivation equipment was not completed until after 12:00 a.m. and it is contended that search and seizure activities after that time was unauthorized. Counsel relied on a decision in this court in *Pars Oriental Rug et al v. A.G. Can.* (1988), 18 C.E.R. 6. Wood J. concluded that the wording of the Customs Act warrant at issue there was ambiguous. The wording here, by referring to the time of search immediately after the reference to the place of search, removes that ambiguity in the manner suggested by Wood J. In my view the authorization here is not ambiguous. It sets the limits of the time of entry and commencement of the search and does not require the completion of the search and seizure within those limits. Officers obtaining search warrants for marijuana cultivation operations cannot reasonably be expected to estimate in advance the length of time that may be required to dismantle and remove the fixtures and equipment they may find on the premises.

(Emphasis added)

- [19] A similar conclusion was reached by Higgins J. in *R. v. Woodall*, [1991] O.J. No. 3563, where a like argument was made. In that case, the warrant stipulated that the hours in effect were 6:00 p.m. to 9:00 p.m. on the 7th of August 1990. Upon entering the residence, the officers found stolen goods, described by Higgins J. as:

. . . an astonishing array of articles that defy anyone's imagination as indicating other than a stockpile of stolen goods.

[20] It actually took the two following days to remove all of the household items from the premises. At para. 59, His Lordship said this with respect to a similar argument made by Mr. Cardinal:

59 To hold that no search or seizure was lawfully possible after 9:00 p.m. on August 7th, after these viewings, would make a mockery of the administration of justice. . . .

[21] Further in his reasons, at para. 61, Higgins J. said this:

. . . In the peculiar circumstances of this case and without ruling that in all situations only entry is required by a specified hour to prevent a search warrant from lapsing, I find that the search warrant first obtained on August 7th, Exhibit One, did not lapse at 9:00 p.m. that night, and that it remained operative and cloaking all activity conducted until the police finally left the premises with the thus lawfully seized articles on August the 9th. . . .

[22] As a result, I find that there was no failure to comply with the terms of the telewarrant in question, and that the officers remaining in the dwelling home until 11:00 p.m. was indeed consistent with the terms of the telewarrant.

The Sufficiency of the Grounds Contained Within the Information to Obtain

[23] The information to obtain a search warrant was made pursuant to s. 11 of the Controlled Drugs and Substances Act and s. 487.1 of the Criminal Code of Canada. S. 11(1) of the Controlled Drugs and Substances Act, 1996, c. 19, provides:

11.(1) A justice who, on ex-parte application, is satisfied by information on oath that there are reasonable grounds to believe that

- (a) a controlled substance or precursor in respect of which this Act has been contravened,
- (b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,
- (c) offence-related property, or
- (d) any thing that will afford evidence in respect of an offence under this Act

is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

[24] There is no disagreement between Counsel as to the test I am to apply to determine whether this search warrant was issued in breach of s. 8 of the Charter. The test is whether the Justice of the Peace, acting judicially on the information before her, could have had reasonable and probable grounds to believe that an offence was being committed at 4704 Wabi Crescent in Chetwynd, B.C.

[25] In *R. v. Law*, 2002 BCCA 594, the Court, at para. 3 of that decision, said that this expression of the test is a convenient summary of the test for warrantless searches and arrests developed by the Supreme Court. In that case, the Court also stated that it is well settled that the test for a search warrant under s. 11 of the Controlled Drugs and Substances Act is the same as the test for a search warrant under s. 487(1) of the Criminal Code despite their different wordings. At paras. 4, 5 and 7 of *Law*, supra, the Court of Appeal said this:

4 In *R. v. Debot*, [1989] 2 S.C.R. 1140 the Supreme Court was considering a warrantless search under s. 37 of the predecessor Food and Drugs Act, R.S.C. 1985, c. F-27. That section authorized a peace officer to search a place other than a dwelling house and any person found there if "he reasonably believes there is a controlled drug by means of which or in respect of which an offence" has been committed. At 1166 Wilson J. wrote:

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.

5 In *R. v. Storrey*, [1990] 1 S.C.R. 241 the Supreme Court considered whether a warrantless arrest was lawful under s. 450(1) [now s. 495(1)] of the Criminal Code. That section permits a peace officer to arrest a person "who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence." Mr. Justice Cory explained at 250-1 that this means not only that the peace officer must subjectively reach that conclusion, but also that a reasonable person standing in the peace officer's shoes would have believed that reasonable and probable grounds existed for the arrest.

...

7 So, whether expressed as "reasonable grounds to believe," "reasonable belief," "reasonable probability," or "probable cause," the question is whether the evidence is sufficient to found what the Supreme Court called a "credibly-based probability" in this oft-cited passage from *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 167:

The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion.

(Emphasis added)

[26] As in *Law*, supra, the question in this case is whether or not the evidence in the information to obtain, consisting of the printed form and Appendix A, was sufficient to "induce" in the Justice of the Peace an objectively reasonable belief that "implements related to trafficking of cocaine and methamphetamine including, but not limited to, cutting agents, score sheets, scales, paper used for packaging cocaine and other documentation to the selling of cocaine, including electronic records, and computers", would be found at the accused's house.

- [27] Mr. Cardinal's point is that no reasonable person could conclude from the third hand evidence that there was a probability that a criminal offence was taking place in Mr. Cardinal's home and that, at best, the evidence only supports "a suspicious probability" of an offence.
- [28] Mr. Cardinal asserts that there is nothing in the material to indicate that the deponent, Cst. Bouey, believed the contact referred to in Appendix A to be reliable. Rather, Mr. Cardinal submits, the wording indicates that only Cst. Paquette thought the contact was reliable and that this is not sufficient because Cst. Bouey does not state that she believes, as a result of her discussions with Cst. Paquette, the contact is indeed reliable.
- [29] In support of this position, Mr. Cardinal relies on this extract from *R. v. Greffe* (1990), 55 C.C.C. (3rd) 161 (S.C.C.), where Lamer J. (as he then was) discussed the duty of the police officer to ensure that the information received from their informant was reliable. At pp. 176-7, his Lordship said this:

... With respect, a conclusion that the police had reliable information about the appellant's attempt to import heroin must be based on more than the fact of a subsequent recovery of the drugs. There must be an independent inquiry into the source and reliability of the confidential information in order to determine whether, in the totality of the circumstances, there existed reasonable and probable grounds to believe the appellant was carrying the heroin or whether there was mere suspicion. Relevant to this inquiry is whether the information received contains sufficient detail to ensure that it is based on more than mere rumour or gossip, whether the source or means of knowledge is revealed and whether there is any indicia of the reliability of the source of the information, such as the supplying of reliable information in the past: see *R. v. DeBot* (1986), 30 C.C.C. (3d) 207 at p. 219, ... (Ont. C.A.). ...

(Emphasis added)

- [30] In addition, the applicant relies on the more recent decision of the Supreme Court of Canada in *R. v. Araujo* (2000), 149 C.C.C. (3d) 449 (S.C.C.), where LeBel J., for the court, dealt with the kind of affidavit that the police should submit in order to seek permission to use wire tapping. The Court stated that the obligation of anyone seeking an ex parte order was to make full and frank disclosure of material facts, should avoid boiler-plate language and should where ever possible contain an affidavit directly from those with first hand knowledge. At para. 48 of *Araujo*, the Court said:

... those gathering affidavit material should give consideration to obtaining affidavits directly from those with the best first hand knowledge of the facts set out therein, like the police officers carrying on the criminal investigation or handling the informers. This would strengthen the material by making it more reliable. ...

- [31] Thus, Mr. Cardinal submits that Cst. Bouey's reasonable belief, although not having been based on personal knowledge, nevertheless must disclose a substantial basis for the existence of her belief. (See *R. v. York* (1992), 115 N.S.R. (2d) 426 (C.A.), affirmed [1993] 3 S.C.R. 647.)
- [32] I agree with counsel's submission that the information relating to the contact and the contact's reliability is lacking in that there is no direct evidence given by the deponent for her belief that the contact is reliable and credible. It would have been much better for Cst. Bouey to have stated that she believed the contact to be reliable and credible based on previous information which Cst. Paquette had indicated to her had been ultimately established to be credible and reliable.
- [33] However, it must be remembered that in *R. v. Greffe* the only information came from a contact or tipster. In such a case, of course, there can be no direct knowledge demonstrated by the deponent seeking the search warrant and, as a result, the reliability and credibility of the informant is key to whether or not the information contained is still merely a suspicion or is capable of moving the issuing Justice of the Peace to the level of "reasonable probability".
- [34] On amplification, Cst. Bouey indicated that she personally, relative to para. 4 of Appendix A, had received over 50 complaints of Mr. Cardinal trafficking in cocaine over the time she has been in Chetwynd. At para. 5 she described viewing vehicles coming and going from Mr. Cardinal's residence and also described, in paras. 6 and 7, what she had personally observed on June 7th, 2002.
- [35] In para. 9, she describes Cst. Paquette's involvement. It is regrettable that para. 9 was not better worded. Taken alone, without her personal knowledge of the information received as to Mr. Cardinal's trafficking, and her own observations in the previous year and June of 2002, the lack of particularity and the failure to set out the indicia of reliability that she attributed to the informant, described in para. 9, may have had a different result.
- [36] However, it is necessary to look at the totality of the evidence that was before the Justice of the Peace on August 10th, 2002. That evidence included the direct knowledge held by Cst. Bouey and the indirect knowledge she had from Cst. Paquette. This is not a case where there was only the evidence of an informant. Rather it is the evidence of a deponent with first hand knowledge and information received from Cst. Paquette. As was stated in *R. v. Law*, *supra*, at para. 11:

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".

- [37] I think in the circumstances of this case where there is both first hand knowledge and second hand knowledge the totality of that information must be emphasized as compared to the sole question of credibility and reliability which arises in circumstances where the only information before the issuing Justice of the Peace is similar to that found in *R. v. Greffe*, *supra*.
- [38] Even if I am wrong in finding that the third hand information coming from Cst. Paquette should be expunged I would nevertheless be of the opinion that leaving in the direct knowledge of Cst. Bouey and the direct knowledge of Cst. Paquette would still have left sufficient evidence before the issuing Justice of the Peace for her to issue the search warrant in question (*R. v. Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161 and *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173). I therefore find that there was no breach of Mr. Cardinal's s. 8 Charter rights and that the telewarrant was validly issued and the evidence obtained pursuant thereto is admissible in the trial proper.

"E.G. Chamberlist, J."

The Honourable Mr. Justice E.G. Chamberlist

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