
CANADA / JUDGMENT

R. v. Eakin

2017 BCSC 1721

COURT

Supreme Court of British Columbia

DECIDED

11 July 2017

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2017 BCSC 1721 R. v. Eakin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Eakin,

2017 BCSC 1721

Date: 20170711

Docket: 165019-2-C

Registry: Victoria

Regina

v.

Matthew William Eakin

Ashley Paige Ludwig

Sarah Brittany Depape

Before: The Honourable Mr. Justice MacKenzie

Oral Ruling on Defence Application

Counsel for Crown:

S. Simpson

Counsel for Accused Ludwig:

M. Munro

Counsel for Accused Depape

B. Lynsky

Place and Date of Trial:

Victoria, B.C.

July 10-14 and 17, 2017

Place and Date of Judgment:

Victoria, B.C.

July 11, 2017

- [1] THE COURT: Ms. Depape is charged on this indictment with possession of heroin and possession of GHB for the purpose of trafficking, the two offence dates being May 28th, 2015. A co-accused is Ms. Ludwig. She is charged with trafficking in cocaine as a result of what the Crown says was her involvement in an undercover drug buy in the company of Mr. Eakin.
- [2] Mr. Eakin apparently has waived the matter to another jurisdiction and it would appear has, or intends to, plead guilty to one or more of these counts, thereby leaving only Ms. Depape and Ms. Ludwig before the court. At the commencement of the trial Ms. Depape made an application to have the court enter into a voir dire in order to permit her to challenge the validity of the search warrant that was obtained to search a residence, storage locker, and motor vehicle, which the police believed, as far as the residence was concerned, was a residence occupied by Ms. Ludwig and Mr. Eakin, this belief coming after the police received information from a known confidential source combined with a month long investigation, which included surveillance.
- [3] Ms. Depape further seeks an order excluding evidence obtained as a result of the search of the unit in question on the basis that there has been a breach of her s. 8 Charter rights. In this regard upon execution of the search warrant the police found documentation supporting the conclusion that Ms. Depape was the official tenant of the unit in question, even though prior to executing the search warrant the police had no information whatsoever about Ms. Depape or that she was a target or in any other way connected with the investigation.
- [4] As a result of that documentation both Crown and defence agree that there is no issue that Ms. Depape has standing to challenge the sufficiency of the information contained in the ITO that was before the judicial officer who issued the search warrant. Ms. Depape's argument, if a voir dire is declared permitting a challenge to the validity of the search warrant, is that on its face the information to obtain the warrant does not contain sufficient information that could support the issuance of the warrant. Ms. Depape does not seek to cross-examine the affiant. The argument rests solely on the facial validity of the ITO.

[5] The Crown opposes the application for the court to enter into a voir dire, relying on the well-known 1996 decision of Chief Justice McEachern in *Vukelich*. Based on this decision and subsequent authorities, the Crown submits the court has discretion not to embark upon a voir dire with a view to considering Charter challenges or the validity of a search warrant if, after hearing submissions from counsel, the court concludes there is no merit in the application. That particular statement of law is not in dispute.

[6] On this point, at paragraph 17 in *Vukelich*, Chief Justice McEachern states:

Generally speaking, I believe that both the reason for having, or not having, a voir dire, and the conduct of such proceedings, should, if possible, be based and determined upon the statements of counsel. This is the most expeditious way to resolve these problems.

At paragraph 26 the Chief Justice states the following:

Based on these authorities, it does not follow that an accused is always entitled as of right to a voir dire in the course of a criminal trial in order to challenge the constitutionality of a search. The trial judge must control the course of the proceedings, and he or she need not embark upon an enquiry that will not assist the proper trial of the real issues. I reach that conclusion because it is clear from cases such as *Grant* and *Garofoli* that a warrant remains valid if there is enough left in the supporting affidavit to support the issuance of the warrant after all the impugned portions are deleted. In other words the trial judge does not revisit the application for the warrant ab initio in the light of subsequent information, but rather considers whether, as stated in *Garofoli* at 1452, "... there continues to be any basis for the decision of the authorizing judge" to issue the warrant.

[7] Now, clearly in that particular statement there is reference to amplification on an application, but the general principles clearly still hold true with respect to a challenge as to the facial validity of the search warrant.

[8] This particular approach that has been followed since *Vukelich* was summarized by Justice Romilly in *R. v. Ellard* in 2004, where at paragraph 9 he states:

On an application to review a search warrant the proper procedure is for the trial judge to request counsel to summarize the evidence that they intend to lead on the voir dire. It is then up to the trial judge to decide what procedure should be followed. If the statement from counsel in the summary does not disclose a basis upon which the court should make an order excluding the evidence, the application may be dismissed without a hearing.

Judge Romilly also referred to *R. v. Hamill*, a decision of Mr. Justice Esson in the Court of Appeal. Once again, the same principle applies where, as in this particular case, quite properly in my view, learned defence counsel seeks to challenge only the warrant on its face.

[9] As I have mentioned, there have been several cases since *Vukelich* that have referred to the comments of Chief Justice McEachern. For example, in *R. v. Armstrong*, Madam Justice Bennett in the Court of Appeal points out that a trial judge has discretion to decline to embark upon a hearing relating to Charter issues on the sufficiency of an ITO and the

validity of a search warrant if the outcome would not assist the court in determining the real issues or bring an end to the prosecution; again, a clear reference to paragraph 26 in Vukelich.

- [10] In addition, as the Crown has pointed out in resisting Ms. Depape's application, in the recent decisions of Cody and Jordan the Supreme Court of Canada has reinforced the general observations noted by Chief Justice McEachern in Vukelich, when it clearly says that trial judges must make reasonable efforts to control the conduct of trials and as such before an application such as the present one is allowed to proceed, the court should consider whether it has a reasonable prospect of success. See paragraphs 37 and 38 in Cody.
- [11] At the same time I readily appreciate defence counsel's point in this case that as it made sense, as Chief Justice McEachern pointed out, for the defence to make a full argument on the sufficiency of the ITO, no further court time would be required at least from the defence if a voir dire was indeed ordered. It is this practicality which might very well be at the heart of some of the concerns that have been expressed from time to time about the utility or practicality of considering the Vukelich threshold question especially, as I say, when Chief Justice McEachern stated at paragraph 21:

there would be nothing to prevent the defence from advancing its full position in the first instance.

- [12] That is indeed what has occurred here, as I have mentioned. In this case I have heard full and able submissions by defence counsel as to the sufficiency of the information contained within the ITO and have considered those submissions vis-à-vis the totality of the evidence contained in the ITO. Given the totality of the circumstances, I am satisfied that in these circumstances the information to obtain the warrant contains more than enough information to support a finding that there was a credibly based probability an offence had been committed and evidence would be found in the unit police had observed Mr. Eakin and Ms. Ludwig attend over the course of approximately four weeks, evidence that in my view did tend to corroborate the confidential information from source A.
- [13] I am satisfied that there is sufficient information filed in support of the warrant that could support the issuance of that warrant. That is, the facts set out in the ITO are sufficient to establish a link between Mr. Eakin and Ms. Ludwig's trafficking activities and the residence which the police in my view had reasonable grounds to believe was indeed a stash house or a safe house.
- [14] In addition, in reaching this conclusion it is appropriate to acknowledge the test with respect to the sufficiency of information contained in an information to obtain a search warrant. In that regard, in R. v. Bacon, Mr. Justice Donald adopted the following as a statement of the Garofoli test:

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. While evidence of fraud, material non-disclosure, or misleading information are all relevant to this enquiry, their sole impact is to determine whether there is a continuing basis to support the warrant.

[15] Similarly, in *Morelli*, Justice Fish in the Supreme Court of Canada put it this way, at paragraph 40:

In reviewing the sufficiency of a warrant application, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.

[16] Finally, Justice Frankel in *Wilson*, a 2011 decision, confirms what perhaps is obvious, but it is worth restating, when he says at paragraph 39:

On a facial-validity review, there is no "amplified" (i.e., enlarged) record. Rather, a trial judge determines the matter solely on the basis of the information contained in the ITO. Based on that information, the judge's task is to determine whether a justice of the peace could (not would) have issued the warrant.

[17] In other words, a facial challenge looks only at whether the ITO on its face was sufficient to support the warrant with the statements in the ITO accepted as reliable and accurate. As a result, as the Crown has submitted, there is a presumption the search warrant is facially valid. The onus is on an accused to establish that the ITO on its face does not provide sufficient grounds for believing evidence of an offence would be found at a particular address. (See the Ontario Court of Appeal decision in *Crevier*.) On this point I am satisfied that the onus on the defence on this type of threshold question is relatively low, but there must be an articulable basis to embark upon an inquiry.

[18] In addition, on this particular application I have considered two cases counsel has referred to, *R. v. Lee* and *R. v. Cheng*. Without going into detail I am satisfied the circumstances in those cases and their respective ITOs are significantly different than in the present case and do not persuade me the ITO here was deficient or merely a "fishing expedition."

[19] I will also state that even if I allowed the application to proceed and in fact agreed with learned defence counsel that I should excise paragraphs 19 and that portion of paragraph 54 where the affiant was of the view that surveillance of Eakin and Ms. Ludwig on May 20th corroborated the source information that the unit on Yates Street was a "safe house", what would remain would still in my view be a sufficient basis for the issuance of the warrant. In this regard I am satisfied the facts outlined in the ITO are sufficient with respect to Mr. Eakin and Ms. Ludwig leaving the unit on Yates Street, embarking upon activities that are

consistent with drug trafficking, confirmed by at least one undercover buy and then eventually returning to the residence, circumstances that in my view are significantly different from the circumstances in Lee and Cheng. I again readily appreciate learned defence counsel's able submission with respect to the lack of specific times and whether or not there is evidence of a direct leaving from the residence to a drug trafficking scenario, but in my view that does not undermine the sufficiency of the information.

[20] Having regard to the Garofoli test and the principles that I have referred to and applying the totality of the information contained in this ITO, I am not satisfied that Ms. Depape has established that it would be appropriate for me to exercise my discretion in favour of the application on the basis that the application in my view does not have a reasonable prospect of success. So for those reasons Ms. Depape's application to embark upon a voir dire to challenge the sufficiency of the ITO is dismissed.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie

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