
CANADA / JUDGMENT

R. v. Edwardsen

2016 BCSC 530

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 530 R. v. Edwardsen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Edwardsen,

2016 BCSC 530

Date: 20160324

Docket: 30870-2

Registry: Terrace

Regina

v.

David Harry Edwardsen

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Application to Cross-Examine Sub-Affiants

Counsel for the Crown:

J.N. Walker

A.M. Switzer

Counsel for the Applicant:

K.S. Westlake, Q.C.

D.J. Song

Place and Date of Hearing:

Vancouver, B.C.

February 4, 2016

Place and Date of Judgment:

Terrace, B.C.

March 24, 2016

- [1] As a result of an earlier application (R. v. Edwardsen, 2015 BCSC 1660) the defence was allowed to cross-examine Cst. Etele, the affiant of the information to obtain a tracking warrant. The defence now applies to cross-examine Cst. Coutre and Cst. Bergeron as sub-affiants and source handlers respecting Informant C.
- [2] On February 15, 2016 by way of a memorandum to counsel I dismissed the application with reasons to follow. These are those reasons.
- [3] The application is based on the assertion that Cst. Etele did not see any of the source debriefing notes or source handler notes for Informant C but instead relied on oral information from the sub-affiant handlers. The defence submits this application is substantively the same as the application to cross-examine Cst. Etele as it is based on the same information as that application. They note as well that it is a narrower application as it is only related to information provided by Informant C.
- [4] In allowing the cross-examination of Cst. Etele I said this:
- [32] In my view, the discrepancies noted by the accused above relate primarily to the correspondence, or lack thereof, between information in the ITO and the foundational rendering of that same information in the source materials. That being so, if Cst. Etele did not review the Source Materials, it likely follows that he neither knew nor ought to know of the discrepancies pointed out by defence counsel. As noted in Pires, cross-examination "directed at the credibility or reliability of an "informant" should only be permitted where it can support the inference that "the affiant knew or ought to have known" that the information was "false" (para. 41).
- [35] It appears that Informant "C" inaccurately described the River Drive residence to the police. Informant "C" also described Mr. Edwardsen selling drugs on at least two occasions, despite telling police that he hadn't seen Mr. Edwardsen selling. These matters are significant in evaluating the reasonableness of Cst. Etele's belief respecting the information provided by Informant "C." Moreover, the failure of Cst. Etele to expressly mention these inaccuracies in the ITO, the omission from the ITO of the further inaccuracy relating to the colour of the house as well as Informant "C"'s statement that he had not seen Mr. Edwardsen "selling" all bear on the credibility of the affiant and the question of full, fair, and frank disclosure.

- [36] While I acknowledge that these issues may well be the result of inadvertence or minor error, such can only be resolved through cross-examination. I am satisfied that cross-examination should be permitted in these limited areas, as there is a reasonable likelihood of eliciting evidence going to a material issue with respect to the ultimate validity of the warrant. I also find that, in this instance, there is a reasonable likelihood that cross-examination can support the inference that the affiant knew or ought to have known of the discrepancies between the source materials and the informant intelligence provided in the ITO.
- [5] As a result Cst. Etele's cross-examination was limited to the issue of the description of the River Drive residence, its ownership and the statement that Informant C had seen Mr. Edwardsen selling drugs when in fact the informant had not. During the cross-examination of Cst. Etele, evidence was also elicited respecting the colour of a van at the River Drive property. The cross-examination addressed whether those matters were deliberately or inadvertently reflected in the omnibus information to obtain (the "ITO").

Position of the Defence

- [6] The defence relies on *R. v. N.M.* (2007), 223 C.C.C. (3d) 417 at paras. 175, 186-187 (Ont. S.C.J.), for the proposition that both affiants and sub-affiants respecting an ITO must be full, fair and frank. They submit that since Cst. Etele did not review the source handler notes and the source debriefing reports but instead relied on what the sub-affiants told him he was not privy, at the time the ITO was sworn, to the fact that he had been given inaccurate information.
- [7] They note that the granting of the right to cross-examine Cst. Etele was based on inaccurate information disclosed in the source handler notes and source debriefing reports. The defendant submits that since it became apparent on his cross-examination that Cst. Etele had not reviewed the inaccurate source documents the defence has not had the opportunity to examine on the issues that formed the basis for the granting of the right to cross-examine the affiant. While in their written submission they had alleged that Cst. Etele was a "straw man" affiant they did not pursue that during submissions.
- [8] They submit however that the sub-affiants cannot be permitted to frustrate the affiant's duty to disclose. The defence submits that given Cst. Etele was not aware of the inconsistencies the issue is why he was not so aware and that we do not know why the information was not given to him or perhaps it was and he did not disclose it thereby undermining his credibility.
- [9] They also assert that the inconsistencies raise questions about the reliability of the informant.
- [10] They note as well that there is no risk of informant privilege being breached as the cross-examination can be narrowly limited and that prolixity of proceedings is not an issue given the cross-examinations will be short (noting that Cst. Etele's cross-examination was less than 1.5 hours).

Position of the Crown

- [11] The Crown submits that the defence application is founded on the premise that the inaccuracies in the ITO can be resolved through cross-examination of the sub-affiants. In the Crown's submission the cross-examination of Cst. Etele resolved the issue and the Court is now in the position to rule on the application respecting the tracking warrant. They submit the cross-examination of the sub-affiants will not produce any probative evidence.
- [12] In addition they state Cst. Etele was not a straw man as he was personally involved in the investigation, was doing surveillance contemporaneous with the ITO and in identifying source information, and had access to all file materials except for S.H.N.'s and the source informant. They also note that he received information directly from the source handler, a better source of information than the source handler notes given the depth, detail and explanation a source handler can give that would not appear in handler notes. Indeed they note that for an affiant to review actual unredacted source handler notes increases the risk of informant privilege being breached. They submit there is no legal requirement that an affidavit speak directly to an informant and that it is appropriate for the affiant to rely on fellow officers and the presumption that they will make full, frank and complete disclosure. In addition Cst. Etele confirmed that his written affidavit was reviewed and confirmed by the source handler who had provided the information.

Law and Discussion

- [13] I previously reviewed the law in the application to cross-examine the affiant hence will not repeat it in detail here.
- [14] Leave to cross-examine an affiant ought to be granted:
- a) Where cross-examination is reasonably likely to impugn the credibility of the affiant and therefore the reliability of the ITO (*R. v. Pires*; *R. v. Lising*, 2005 SCC 66 at para. 43).
 - b) Where cross-examination is reasonably likely to demonstrate that the affiant knew or ought to have known about undisclosed concerns regarding the credibility or reliability of the information in the ITO (*Pires* at paras. 41-42).
 - c) Where there is a facially obvious deficiency in the ITO. (*Pires*, at para. 44).
- [15] In addition, whereas here cross-examination of the affiant has occurred and the application is now to cross-examine a sub-affiant an accused seeks "to go behind the affiant's knowledge". To succeed the accused must show there is good reason to doubt the accuracy of the affiant: see *R. v. Durette* (1992), 72 C.C.C. (3d) 421 at para. 101 (Ont C.A.) (overturned on other grounds, *R. v. Durette*, [1994] 1 S.C.R. 469).
- [16] In *R. v. Sanghera*, 2012 BCSC 992, the defence applied to cross-examine two sub-affiants. One officer was the lead investigator and the other was source coordinator and a source handler for a particular informant. Madam Justice Holmes addressed the test as follows:

- [2] In short, the test is whether there is a reasonable likelihood that the proposed cross-examination will assist the determination of an issue or issues relevant to the review of the authorization.
- [17] In Sanghara the cross-examination sought related to whether the source handler passed on three pieces of information relevant to the credibility and reliability of the informant and if she did not then what was her reason for not doing so.
- [18] Holmes J. said this:
- [6] Cross-examination of Sgt. Weidman and Det. Cst. Richards about these pieces of information will not assist the determination of an issue relevant to the review of the authorization, because it is already clear from the cross-examination of Cst. St. Amant that they existed and that he did not receive or include them in the affidavit. The effect of the omissions from the affidavit on the validity of the authorization is a matter for submissions at the end of the voir dire. Further cross-examination about the omissions themselves will add nothing to assist the determination of that matter.
- [7] Ms. Elden and Mr. Fai submit that cross-examination of Sgt. Weidman and Det. Cst. Richards will help the Court determine whether the affidavit amounted to an abuse or a subversion of the process for prior judicial authorization of intrusive investigative measures. They submit that senior investigators, including Sgt. Weidman, may have deliberately insulated the affiant from information he should have had about the investigation. However, some eight days of voir dire thus far have disclosed no basis for this position, despite the three and a half days of submissions concerning leave to cross-examine with detailed reference to the affidavit, and four and a half days of cross-examination of Cst. St. Amant. I conclude that the proposed cross-examination on this topic, which may in any event be outside the narrow scope of a Garofoli review, would amount to no more than fishing. I find no basis in the evidence or submissions to think it reasonably likely that cross-examination concerning a potential abuse or subversion of the process would assist determination of a material issue in the review.
- [8] The Garofoli review will allow for the consideration of omissions from the affidavit. However, it does so in relation to the content of the affidavit itself, after excisions, and does not seek to answer every question about the investigative project as a whole or how information travelled within it.
- [19] In the Crown's submission Sanghara is directly on point. The defence states it is distinguishable as the defence in that case wished to cross-examine on secondary material relating to an informant's credibility while in this case the assertions in the ITO when compared to the documents produced show inconsistencies in the assertions made. That submission however ignores the basis upon which Cst. Etele was permitted to be cross-examined and his resulting evidence.

- [20] I am of the view that Sanghara does assist. In Sanghara the proposed cross-examination sought to explore whether an informant handler passed on specific information to the affiant. As was clear from the cross-examination of the affiant he did not receive or include such information in the ITO hence the requested cross-examination would not be of assistance to the reviewing judge in determining whether the authorization could have issued.
- [21] While the defence application to cross-examine the sub-affiants is described by the defence as "not a new application" it is in fact new given my ruling and the cross-examination of Cst. Etele. In that ruling I determined what was subject to cross-examination. The purpose was to address concerns respecting whether the affiant knew of the discrepancies in the application and whether or not he intentionally omitted information that potentially should have been before the issuing justice. That is, the cross-examination of Cst. Etele was permitted in order to assess his credibility and the reasonableness of his beliefs about the information from Informant C given apparent discrepancies. He has now testified that he relied on what the sub-affiants told him and had no knowledge of the discrepancies. In addition, he provided the draft ITO to the sub-affiants for their review to insure he had accurately set out in the ITO the information they had provided to him.
- [22] Since he did not rely on the handler notes he neither knew nor ought to have known of the discrepancies relied on by the defence.
- [23] I fail to see how a basis to cross-examine the informant handlers has been established. There is no reasonable likelihood that the proposed cross-examinations will impugn Cst. Etele's credibility, undermine the basis for the warrant, or demonstrate that the police conduct subverted the judicial authorization process. (I note the Crown does not concede that the Court has a residual discretion to quash a warrant but responds on this point in order to reply to the application).
- [24] In my view, if after cross-examination of the affiant the defence cannot make out a case that the affiant was not telling the truth, cross-examination of a sub-affiant should not be permitted. Speculation as to what the sub-affiants might say is not sufficient to permit cross-examination of a sub-affiant in such circumstances. It amounts to a fishing expedition.
- [25] As noted by the Crown the credibility of Cst. Etele can now be assessed and the impact of the discrepancies can be assessed in conducting the review of the ITO. I am not satisfied given the cross-examination of Cst. Etele that the proposed cross-examination of the sub-affiants will elicit any testimony of probative value to the determination of a material issue.
- [26] In addition, if I am incorrect in denying the defence request for the above reasons, in this instance the proposed cross-examination of informer handlers would on balance create an unacceptable risk that informant privilege will be violated. This in my view would be the case even if cross-examination was confined to the issue of why information was not re-laid to the Cst. Etele. The earlier review of the source handler notes and related materials has shown the difficulty involved in protecting informant privilege and the high risk of

identifying the informant in the context of this case. The offences alleged arise in a small community in which those involved in the drug trade are an even smaller group. The process of avoiding the eliciting of evidence that could tend to identify an informer can be difficult and inadvertently identifying information can be released. In my opinion the risk in this instance should sub-affiant handlers be cross-examined would be unacceptable. For this reason alone cross-examination of the sub-affiants should not occur.

[27] The application is dismissed.

"Punnett J."

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