

CANADA / JUDGMENT

R. v. Egan

2026 ONCA 48

COURT

Court of Appeal for Ontario

DECIDED

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COA-23-CR-0591

Judges

Simmons, Janet M.; Favreau, Lise G.; Rahman, Moiz

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Egan, 2026 ONCA 48

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Simmons, Favreau and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Jesse Egan

Appellant

Mark C. Halfyard, for the appellant

Bari Crackower, for the respondent

Heard: January 12, 2026

On appeal from the conviction entered by Justice Joseph Nadel of the Ontario Court of Justice, on March 8, 2023.

REASONS FOR DECISION

- [1] The appellant appeals from a conviction for possession of 110.64 grams of fentanyl for the purpose of trafficking.
- [2] The fentanyl was seized from the appellant's vehicle (the "Ford Escape") on June 18, 2020 following execution of search warrants granted that day to search the Ford Escape (the "vehicle warrant") and the appellant's father's Hamilton home (the "house warrant").
- [3] At trial, the appellant applied to quash both search warrants and requested leave to cross-examine the affiant of the Information to Obtain ("ITO") filed in support of the search warrant application.
- [4] The trial judge denied the appellant's request to cross-examine and quashed the house warrant but dismissed the appellant's request to quash the vehicle warrant.
- [5] Following the trial judge's ruling, the parties filed an agreed statement of fact that formed the basis of the appellant's conviction.
- [6] The appellant raises three issues on appeal:
 - (i) the trial judge erred in failing to grant leave to cross-examine the ITO affiant, Officer Kay;
 - (ii) the trial judge erred in failing to quash the vehicle warrant, and
 - (iii) the trial judge erred in failing to address, or gave insufficient reasons to properly address, the appellant's argument that the ITO was so negligently and misleadingly drafted that the search warrants should be quashed – regardless of whether, after excision, the ITO disclosed sufficient grounds to support the issuance of the search warrants.
- [7] For the reasons that follow, we dismiss the appeal.

Background

- [8] Justice of the Peace (“JP”) Visser authorized the house warrant and vehicle warrant issued on June 18, 2020. Prior to obtaining those warrants, the police applied for search warrants on June 16 and 17, 2020. Both applications were rejected, the first by JP Baker and the second by JP Visser.
- i. The June 16 search warrant application rejected by JP Baker
- [9] The initial ITO submitted to JP Baker on June 16, 2020 (the “June 16 ITO”) relied on police surveillance conducted on June 10 and 11, 2020 prompted by a tip from a confidential informant who had never previously provided information to the police (the “CI tip”). The CI tip consisted of a somewhat dated (within three months of the ITO being drafted), and an essentially bare, assertion that the appellant was trafficking fentanyl and heroin.
- [10] The police observations of the appellant on June 10, 2020 did no more than place him at his father’s home for a relatively brief period.
- [11] On June 11, 2020, the police observed what they believed were six suspected drugs deals, the first three of which occurred while the appellant rode as a passenger in a rented vehicle driven by another male (the “appellant’s associate”) and the last three of which occurred later in the day after the appellant had been dropped off at his father’s home and began driving around in the Ford Escape.
- [12] During the first suspected drug deal on June 11, 2020, the appellant got out of the rented vehicle, interacted with another party and got back in the rented vehicle. Following the appellant’s departure, the police saw the other party put a clear plastic baggie containing a white substance in his pocket.
- [13] The next suspected drug deal involved a previously unobserved male getting out of the back seat of the rented vehicle approximately five minutes after the police had lost sight of it. Before the trial judge, the Crown conceded, and the trial judge accepted, that the claim that this was a suspected drug deal was speculative.
- [14] The third suspected drug deal involved another party getting into the back seat of the rented vehicle, the rented vehicle going “mobile” and then dropping the other party off after one minute.
- [15] The next two suspected drug deals involved another party approaching the appellant while he was in the Ford Escape and either handing something to him and receiving something from him or simply receiving something from him through the passenger window. The final suspected drug deal on June 11, 2020 involved another party getting into the back seat of the Ford Escape, the Ford Escape going “mobile” and then dropping the other party off after six minutes.

- [16] The June 16 ITO also included information obtained from police database searches which the trial judge ultimately decided should be excised or ignored on the application to quash the search warrants.[1] This included information about the appellant's criminal record that lacked dates and other particulars, information about the appellant being shot on a prior occasion (which the CI tip had referred to), and information about criminal charges the appellant's associate was facing and the appellant attending a home related to the charges. The trial judge concluded that the information about the appellant's criminal record was improperly presented, and that the other database search information was either irrelevant or an attempt to "besmirch" the appellant "by way of association".
- [17] In his note declining to issue the requested search warrants JP Baker stated "insufficient grounds at this time" and "further investigation is required".
- ii. The June 17 search warrant application rejected by JP Visser
- [18] The ITO submitted on June 17, 2020 added information to the June 16 ITO about police surveillance observations of the appellant on June 16, 2020 in relation to four suspected drug deals. The ITO was reviewed by JP Visser. Two of the suspected drug deals involved the appellant entering and then quickly exiting the passenger seat of vehicles being driven by other parties (in one case, he exited after two minutes; in the other case, he exited after thirty seconds). In one case the appellant put something into his pocket after exiting the vehicle. A third suspected drug deal involved another party getting into the Ford Escape with the appellant, the Ford Escape driving off and then dropping the passenger off after one minute. The final suspected drug deal involved a hand-to-hand transaction between the appellant and another party at the driver's door of the Ford Escape.
- [19] The June 17, 2020 search warrant application to JP Visser requested a third search warrant, in addition to the vehicle warrant and the house warrant, namely, a warrant to search a hotel room. The police had observed the appellant park the Ford Escape at the hotel shortly after 10 p.m. on June 16, 2020.
- [20] In her decision refusing to grant the June 17, 2020 search warrant application JP Visser stated that "[w]hile there may be reasonable grounds with respect to the Ford Escape, the ITO is lacking in reasonable grounds with respect to the two addresses – both of which are registered to other people." Further, she said it was "unclear if in fact [the appellant] is staying at either location or just visiting". She also noted an error in the affiant's references to the appendices.
- iii. The June 18 search warrant application granted by JP Visser
- [21] The June 18, 2020 application to JP Visser requested only the vehicle warrant and the house warrant. The ITO filed in support of the June 18, 2020 (the "June 18 ITO") application added police surveillance information about one additional suspected drug deal on June 17, 2020 to the information included in the previous ITOs and also added notes from the affiant setting out various conclusions she opined could be drawn from the surveillance information.

- [22] The additional suspected drug deal involved another party getting into the Ford Escape with the appellant, the Ford Escape going “mobile” and the other party getting out of the Ford Escape after one minute with something in his hand which he then put in his pocket.

Discussion

1. Denial of leave to cross-examine

- [23] It was undisputed at trial that the first two Debot[2] criteria were not met[3] and that the validity of the search warrants turned on the third Debot criterion, i.e., whether the police surveillance evidence sufficiently corroborated the CI tip to support the issuance of the warrant.
- [24] During oral argument of the request for leave to cross-examine, the appellant narrowed his request for cross-examination to two issues: i) conclusions asserted throughout the ITO; and ii) additional investigative steps undertaken between the declined search warrant applications and the subsequent authorization.
- [25] The appellant asserted that the conclusions inserted by the affiant – in the form of “affiant notes” – into the June 18 ITO were not rooted in the evidence and that the ITO was so carelessly and incompetently drafted as to be misleading. He submitted that there was a reasonable possibility that cross-examination could yield evidence that the affiant acted intentionally in drafting the June 18 ITO in the manner in which she did to bolster her request for the warrants. There was no allegation that any of the information in the ITO was false.
- [26] The trial judge declined the request to cross-examine, holding that cross-examination was not necessary to allow the appellant to make full answer and defence because there was no reasonable likelihood that cross-examination would assist the court in determining a material issue. Whether the conclusions the affiant had expressed were justified could be assessed on the face of the June 18 ITO. The appellant had called no evidence in support of his request. Similarly, whatever additional investigative steps had been taken had been disclosed. The differences between the ITOs could be discerned from the record and whether the only real difference was the insertion of conclusory statements was a matter for argument.
- [27] On appeal, the appellant acknowledges that the decision whether to permit cross-examination of the affiant of an ITO is a discretionary decision entitled to deference on appeal. However, he submits that the trial judge failed to exercise his discretion judicially by inserting two extraneous factors into the test of whether there is a reasonable likelihood that cross-examination would assist in determining a material issue. In this case, the material issue was whether the deficiencies in the surveillance evidence, the failure to take further investigative steps and the conclusory opinions inserted into the June 18 ITO by the affiant were indicators of bad faith. The extraneous factors were the trial judge’s determinations that the appellant could make his argument in any event without the benefit of cross-

examination and that he was somehow at fault for failing to call evidence.

- [28] We do not accept these submissions. The appellant does not dispute that the trial judge articulated the test for granting leave to cross-examine correctly. In our view, the trial judge made no error in holding that the appellant could, and should, advance his arguments on the basis of the record that existed. The trial judge found that there was no basis in the record for asserting that the affiant had intentionally falsified any information in the June 18 ITO. Further, he said, “[n]othing has been hidden and nothing has been shown to be misrepresented.” Having made those findings, the trial judge properly relied on this court’s decision in *R. v. Victoria*, 2018 ONCA 69, at para. 85, to hold that cross-examination was not warranted because “[c]omplaints about an affiant’s inferences, like claims of omissions, inconsistencies or conclusory or inaccurate statements afford no basis for cross-examination.”
2. Issuance of the vehicle warrant [29] The appellant submits that, even in the absence of cross-examination, the June 18 ITO did not disclose reasonable and probable grounds that an offence had been committed or that evidence of that offence would be found in the Ford Escape. Relying on *Debot*, at p. 1172, and *R. v. Herta*, 2018 ONCA 927, 143 O.R. (3d) 721, at paras. 39-41, he submits that where the first two *Debot* criteria are not met such that the CI tip is neither credible nor compelling, there is a heightened need for corroborative efforts on the part of the police. Here, he says such efforts were insufficient because the police took no additional steps beyond their surveillance to corroborate the nature of the meetings the police observed. Such steps could have included licence plates searches and criminal record searches of the plate holders. Further, the trial judge found that the affiant engaged on occasion in speculation. Finally, the appellant says that the police surveillance was inadequate to connect any possible drug trafficking activity on the appellant’s part to the Ford Escape – he was not even in the Escape on many of the occasions the police asserted were suspected drug transactions.
- [30] We do not accept these submissions. The question for the trial judge was whether the issuing justice could have issued the warrant based on the June 18 ITO as drafted. That did not require the trial judge to consider whether additional steps could have been taken. Relying on the ten remaining surveillance observations of suspected drug transactions after the second speculative surveillance observation on June 11, 2020 was eliminated and the totality of the circumstances, the trial judge found the strength of the inference that the appellant was selling drugs in the brief encounters the police had observed “irresistible”. We see no error in that conclusion. Six of the suspected drug transactions took place in, or at the window, of the Ford Escape. We are satisfied that it was open to the trial judge to conclude, as he did, that the “evidence supports the finding that there were reasonable grounds to believe that [the appellant] was a peripatetic drug trafficker, using his vehicle to go hither and yon plying his trade.”

3. Sufficiency of reasons to properly address the appellant's argument that the June 18 ITO was so carelessly drafted that it should be quashed [31] The appellant submits that the trial judge erred by failing to address his argument made at trial that the June 18 ITO was an exercise in police advocacy and so carelessly drafted that it misled the issuing justice, JP Visser. He says the trial judge properly excised prejudicial information obtained from the database searches, but failed to address his associated submission that an affiant's failure to meet the full and frank disclosure threshold through bad faith can engage a court's residual discretion to quash the warrant even if the ITO contains sufficient evidence to support it. He submits that this is so even where an affiant did not engage in deliberate bad faith but was grossly negligent.

[32] According to the appellant, the residual discretion was engaged in this case because the police obtained a search warrant based on an ITO that contained prejudicial information and, in addition, opinions that amounted to police advocacy premised on nothing more than speculative surveillance evidence which had been prompted by a bare tip that was neither compelling nor credible.

[33] We do not accept this submission. Although the trial judge's reasons do not include a separate section specifically addressing the argument the appellant made at trial, we are satisfied that he rejected it and that his reasons for doing so are apparent.

[34] The appellant does not contest that the trial judge acknowledged the argument in his reasons.

[35] On page 74 of his reasons, the trial judge said:

While [the Crown] agreed that there were stylistic concerns in Kay's ITO that could be improved upon, in his submission those defects were not matters of substance. As the cases he adverted to provide, there needs to be more than inconsistencies or errors to amount to bad faith or before an ITO becomes misleading. [Emphasis added.]

[36] Although this statement was made in the context of reviewing the Crown's position, we are satisfied that it demonstrates at least implicitly, if not explicitly, that the trial judge rejected the appellant's argument.

[37] Whatever deficiencies and shortcomings the trial judge found did not amount to bad faith, let alone the kind of conduct that would lead to quashing an otherwise sufficient warrant. The standard for invoking the residual discretion is high. It requires police conduct that has "subverted the pre-authorization process through deliberate non-disclosure, bad faith, deliberate deception, fraudulent misrepresentation or the like": *R. v. Paryniuk*, 2017 ONCA 87, 134 O.R. (3d) 321, leave to appeal dismissed [2017] S.C.C.A. No. 81, at para. 69. Even on the trial judge's findings,[4] the appellant cannot meet this high standard.

Disposition

[38] Based on the foregoing reasons, the appeal is dismissed.

“Janet Simmons J.A.”

“L. Favreau J.A.”

“M. Rahman J.A.”

[1] Nothing in these reasons should be taken as endorsing this aspect of the trial judge’s decision.

[2] R. v. Debot, [1989] 2 S.C.R. 1140.

[3] The CI information was not credible or compelling.

[4] Again, we should not be taken as endorsing those findings.

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