

CANADA / JUDGMENT

R. v. Elliott

2015 BCSC 1664

COURT

Supreme Court of British Columbia

DECIDED

4 March 2015

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2015 BCSC 1664 R. v. Elliott IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Elliott, 2015 BCSC 1664 Date: 20150304 Docket: 78741 Registry: Kelowna Regina v. Keith Steven Elliott Before: The Honourable Madam Justice Fenlon Oral Ruling on Voir Dire Counsel for the Crown: C. Burnett Counsel for the Accused: M. Kennedy Place and Date of Hearing: Kelowna, B.C. March 4, 2015 Place and Date of Judgment: Kelowna, B.C. March 4, 2015

- [1] THE COURT: Keith Steven Elliott is charged with two offences in relation to an alleged marihuana grow operation at a residence at 1237 Pettman Road in West Kelowna, British Columbia, on June 6, 2013. Count 1 is a charge of producing a controlled substance, cannabis marihuana, contrary to s. 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. Count 2 is a charge of possessing a controlled substance for the purpose of trafficking contrary to s. 5(2).
- [2] On this voir dire, the defence challenges the admissibility of the evidence gathered by the police inside the residence. Defence counsel submits that the evidence was obtained in circumstances that infringed Mr. Elliott's rights under s. 8 of the Canadian Charter of Rights and Freedoms, the right to be secure against unreasonable search and seizure. He seeks to have the evidence excluded under s. 24(2) of the Charter.
- [3] Crown counsel does not take issue with Mr. Elliott's standing to raise the s. 8 issue. It is common ground that Mr. Elliott resided at 1237 Pettman Road and, therefore, had a reasonable expectation of privacy in that property.
- [4] The defence does not challenge the accuracy of the statements contained in the Information to Obtain. There is no allegation here of bad faith or misstatements. Defence did not seek to cross-examine the affiant. Indeed, no witnesses were called by either Crown or defence on the voir dire.
- [5] The issue raised by the defence is whether the grounds for issuing the search warrant, taken as a whole, were sufficient to justify the issuance of a search warrant for a private residence. In general terms, defence submits that the Information to Obtain relies primarily on an unreliable anonymous tip; and that police failed to adequately investigate the statements made in the tip and therefore failed to corroborate them. Defence points to weaknesses in

the anonymous tip. The tip consisted of the following information, as set out in paragraph 14 of the Information to Obtain:

- (a) Anthony Rico is growing marihuana at his residence in West Kelowna (no address was provided);
- (b) He is growing it for the purpose of trafficking;
- (c) He drives a lifted pick up truck.
- (d) He works for a landscaping company.

- [6] The Crown acknowledges that the tip is not a strong one. As stated in *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1168, the tip must be assessed taking into account, first, how compelling it is; second, how credible its source is; and third, whether it has been corroborated. The tip clearly lacks detail and is relatively generic so it cannot be described as compelling. In the words of Mr. Kennedy, "it is not irresistible". It comes close to a bare statement that Mr. Rico, who was a co-accused of Mr. Elliott, is committing an offence at his house. The tipster is anonymous so there is no way to assess the reliability of the tip or the motive of the person making it. It is not even clear from the tip whether the tipster is acting on first-hand information or second-hand knowledge.
- [7] The third factor in assessing the strength of the tip is corroboration which brings us back to the weakness alleged by the defence generally that the police did not adequately investigate or corroborate the allegations that were made in the tip. The defence argues that, if the tip is essentially nothing, it cannot be corroborated. In other words, you cannot breathe life into a "nothing". While I agree that the tip itself was weak and could not support the issuance of a search warrant on its own, it was not, in my view, nothing at all. It provided a specific name, a general location, the nature of the offence, the type of vehicle driven by the alleged perpetrator, and his occupation. It also included a photograph.
- [8] From investigations using CPIC and PRIME, the police were able to confirm that there was an Anthony Edward Rico living in West Kelowna at 1237 Pettman Road and they eventually determined he drove a pickup truck, although it was not described as a lifted pickup truck in the Information to Obtain. In addition, the police determined from hydro records that hydro use at 1237 Pettman Road was more than two times the average for electrical use by a house heated by electricity. A FLIR, conducted the same day the Information to Obtain was sworn, showed significant heat in the rear basement area of the residence consistent with a grow-op and far different from heat patterns in comparable neighbouring houses.
- [9] In other cases such as *R. v. Plant*, [1993] 3 S.C.R. 281, a relatively vague tip, although more detailed than the one here, and the hydro use pattern alone were held to be sufficient to support issuance of a search warrant. But what of this case? Much of the defence submissions focused on the gaps in the facts commonly found in an Information to Obtain. First, there is virtually no surveillance evidence, nothing describing the type of activity to be expected around a residence in which a grow operation is located. Second, there was no

evidence of covered windows. Third, there is no evidence of any smell of fresh marihuana around the residence.

- [10] Ultimately, however, my task is not to review what is missing, but rather to review what is in the Information to Obtain the search warrant; in particular, whether there was reliable evidence before the justice of the peace that might reasonably be believed and, on that basis, a search warrant issued. Here, as I have noted, we have a tipster who has identified a specific named person, the type of vehicle he drives, his occupation, and who has identified that there is a grow operation in the residence. Further investigation confirmed that the named person lived at 1237 Pettman Road. Investigation revealed hydro records showing a significantly higher use than would be expected from an average single family home and, in particular, use consistent with a grow operation. Finally, a FLIR report consistent with a grow operation was also conducted and obtained in relation to that residence.
- [11] I do not view the one- to two-month delay between the tip and the warrant issuing as undermining the reliability of the evidence comprising the Information to Obtain since the key objective of corroboration of the tip was determined on the day of or shortly before the authorization was granted. Nor do I find the failure of the police to do surveillance to determine who else was living in the house to be a reason to set aside the warrant. The information supporting the place at which the warrant was to be executed is directed to that place, it focussed on that place, and the conduct that is said to be occurring there. That is what is in issue. The warrant is not directed to particular people, necessarily, but rather to the place.
- [12] Having considered all of the evidence in the Information to Obtain as a whole, as I must, I conclude that there is evidence that could reasonably be believed to support the existence of a grow operation at the residence. I find the search warrant was validly obtained and the search pursuant to that warrant was therefore authorized by law. It did not infringe s. 8 of the Charter. It follows that the evidence obtained through the search is admissible. The Honourable Madam Justice L.A. Fenlon

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