
CANADA / JUDGMENT

R. v. Kurtakis

2016 BCSC 1378

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kurtakis,

2016 BCSC 1378

Date: 20160706

Docket: 36263-2

Registry: Campbell River

Regina

v.

Ioannis Emmannil Kurtakis (also known as John Kurtakis)

and Mario Drew Kurtakis

Corrected Judgment: The text of the Judgment was corrected

at paragraphs 21 and 22 on August 4, 2016

Before: The Honourable Mr. Justice Thompson

Oral Ruling on Voir Dire

Counsel for the Crown:

T.I. McFadgen

Counsel for the Accused, Ioannis Kurtakis:

A.E. King, Q.C.

Counsel for the Accused, Mario Kurtakis:

J.W. Green

Place and Dates of Trial:

Campbell River, B.C.

July 5-6, 2016

Place and Date of Judgment:

Campbell River, B.C.

July 6, 2016

[1] THE COURT: The accused are charged with production of marihuana and possession of marihuana for the purpose of trafficking. They submit that their s. 8 Charter right to be secure against unreasonable search has been infringed or denied, and apply pursuant to s. 24(2) for an order excluding from evidence the items seized during the police search of Mario Kurtakis' residence. A voir dire was declared to address the question of whether the accused have established, on a balance of probabilities, that the search of the residence was not lawful. If it was not lawful, it would follow that an infringement or denial of s. 8 would be established.

I

[2] In the early morning hours of 3 July 2013, the police executed a tele-warrant authorized search of the residence of Mario Kurtakis in Tahsis. The warrant was issued to search for and seize marihuana plants, marihuana grow documentation, and documentation to confirm residency, relevant to the investigation of the offence on 2 July 2013 in Tahsis of "Production of a Substance" contrary to s. 7(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The warrant was issued on the basis of an Information to Obtain ("ITO") affirmed by the investigating officer, a member of the Nootka Sound detachment of the RCMP.

[3] The appendix to the ITO sets out the grounds in support of the application for the tele-warrant. The document begins with the assertion that the affiant is a 12-year member of the RCMP, stationed for the past year at the Tahsis satellite detachment, and he deposed that:

2. I have been involved in marihuana grow investigations in the course of my duties as a member of the RCMP. I have written informations to obtain, assisted in the investigation, as well as assisted in the dismantling of indoor marihuana grows.

- [4] Certain of the averments in the ITO were excised by agreement of counsel because they were based on facts that arose in connection with Charter infringements. The ITO carries on as follows, absent the parts excised by agreement:
7. I know that Mario KURTAKIS resides at [redacted] in Tahsis, B.C. I have been to his residence at least two times while performing my duties as a police officer. I have not been inside his residence, only outside at the front door. Both times Mario KURTAKIS came to the balcony on the second floor overlooking the front yard to speak with me, refusing to come down to the front door to speak.
 8. That approximately 2 weeks ago I was off duty and not in uniform when I was approached by [Source A, a neighbour of Mario Kurtakis]. [Source A] advised that there was a strong odor of marihuana coming from KURTAKIS' property. [Source A] also indicated that there has been an odor of marihuana coming from KURTAKIS' property for some time.
 9. That on June 18, 2013, I was on duty, in full uniform while operating a marked police vehicle in Tahsis. At approximately 4:30 pm I drove by Mario KURTAKIS' residence located at [redacted] and saw that there appeared to be a large brick of peat moss, still in the packaging, in the back of his black Dodge pickup truck. (From my experience being involved in the investigation of indoor marihuana grows, peat moss is a very popular medium to grow marihuana in.)
 10. That on July 2, 2013, I was on duty, in full uniform while operating a marked police vehicle in Tahsis. At approximately 10:30 am I drove by the residence of Mario KURTAKIS, located at [redacted] and saw him loading what appeared to be garbage from the residence into the back of his black Dodge pickup truck. I could see black garbage bags as well as what appeared to be cardboard boxes in the back of his truck. KURTAKIS had parked his truck in front of his residence on the lawn.
 11. That on July 2, 2013 at approximately 11:40 am I was on the Head Bay Road between Tahsis and Gold River. I had initiated a vehicle stop with a truck and was dealing with the occupants. As I was speaking with the driver, Mario KURTAKIS drove by in his black Dodge pickup truck with another male in the passenger seat. I was standing beside the driver's side of the parked truck, in the travelled portion of the road. As the truck drove by I smelled an odor of marihuana that had not been present prior to his passing. The detection of the odor was immediate as Mario KURTAKIS' truck passed. No other vehicle passed immediately prior not immediately after. I contacted Cst. Koutougos who was on shift in Gold River and advised him that Mario KURTAKIS had just driven by and that an odor of marihuana was emanating from his truck.
 12. That on July 2, 2013, I learned the following from Cst. Koutougos. He was on duty, in full uniform operating a marked police vehicle in Gold River. Cst. Koutougos set up a check stop located on Head Bay Road at the Gold River Mainline logging road and learned the following:

- a) 11:57 am Cst. Koutougos stopped a black Dodge pickup truck, British Columbia plate [redacted]
- b) Mario KURTAKIS was identified as the driver of the truck by his British Columbia drivers license
- c) Ioanios KURTAKIS, Mario's father was identified as the passenger
- d) Cst. Koutougos smelled an odor of marihuana coming from the truck and advised the occupants of the truck that they were under investigation for possession of a controlled substance

...

- 16. At 9:28 pm I spoke with Auxiliary Constable Mike Mountan (Aux Cst. Mountan) who had been tasked with going by [redacted] in Tahsis to confirm the address as well as attempt to get an odor of marihuana from the property. Aux Cst. Mountan learned the following:

...

- b) could not detect an odor of marihuana from [Mario KURTAKIS' address] in Tahsis while standing on a neighboring property

...

- d) did not appear that anyone was home
- e) that most of the windows were covered with heavy blankets

...

- 18. That based on my previous investigational service, I know what the odor of marihuana smells like; I know that marihuana growers will clip their plants to promote growth then will throw out the clippings; that growers use extensive amounts of chemicals and fertilizers to promote growth; I know that growers will sometimes use peat moss in the soil mixture used to grow marihuana; I know that indoor marihuana grows are not transient in nature due to the extensive electrical set up needed to run them as well as the extensive set up to encourage growth; I know that indoor grows are not transient in nature due to the growth cycles needed to get a seedling or even a cloned plant from immature to bud producing mature plants; I know that indoor marihuana grows will sometimes use fans to assist in the dissemination of odors from inside the grow to the outside air through vents.

- [5] With leave, the affiant Cpl. Hawkes was cross-examined (and briefly re-examined and re-cross-examined) on the ITO. His evidence disclosed an error that must be excised from the ITO. It is clear from his evidence that paragraph 16(e) is a misstatement of fact: Cpl. Hawkes acknowledged that the photos taken as part of the search process show that the windows were covered with blinds, not heavy blankets.

[6] I also find that the evidence of Cpl. Hawkes revealed a failure to disclose material facts in relation to paragraph 8 of the ITO -- the information from the neighbour given to Cpl. Hawkes in mid-June 2013 about the "strong odour of marihuana coming from the KURTAKIS' property for some time." In his evidence, Cpl. Hawkes affirmed that the reason he included this averment about the odour of marihuana is that he wanted the issuing justice to understand that a complaint had been received about the smell of vegetative marihuana. Cpl. Hawkes made no notes of his mid-June conversation with Source A, and was unable to say where they spoke, how long the conversation lasted, or recall the time of day it occurred. Cpl. Hawkes met with Source A, at the direction of Crown counsel, on 31 October 2013, and a transcript of that interview is in evidence on the voir dire. Parts of the transcript, including the following passages, were put to Cpl. Hawkes:

Q . . . [W]hat can you tell me, obviously we spoke months ago.

A Hm mm.

Q And there was a warrant done and all that jazz um, what do you feel was going on at the residence here when you, you spoke to me ah, that time ago?

A . . . Um, I'd met the neighbor and he seemed like a, like a nice clean cut guy. Um, but there was always like regularly a strong smell of, of marijuana at least smoked marijuana emanating from the house ah, whenever I'd walk outside or, or walk by the house you could smell it. And so I, I know I mentioned that to you and an, and then you ah, asked me awhile later if I could still smell it and it, it stopped for a while.

. . .

Q Okay um, now you knew or you mentioned ah, about a smell. Can you describe a little more about what you thought was, the smell was?

A Well I just thought they were smoking pot on their patio all the time. Um, it was that kind of smell. It was strong and consistently there.

[Emphasis added]

[7] Cpl. Hawkes testified that he does not specifically recall what he was told by Source A in mid-June 2013, but he accepted the proposition put to him by counsel -- based on Source A's witness statement -- that he was told by Source A that the odour of marihuana from the Kurtakis residence was the odour of smoked marihuana. I acknowledge that before this admission and later, in response to a leading question put to him in re-examination, Cpl. Hawkes gave evidence that if he had been told by Source A that it was an odour of smoked marihuana, he would have put that particular in the ITO. While the details in the ITO of his experience with investigation of grow operations are sketchy, Cpl. Hawkes does have some of that experience. The impression I took away from his evidence is that he well understands the important distinction in such an investigation between the odour of smoked marihuana and the odour of vegetative marihuana. A police officer with any

experience in investigating marihuana grow operations, if told of a regular strong smell of marihuana emanating from a neighbouring property, would naturally be expected to ask a question to discern if the smell was of smoked or vegetative marihuana. The odour of vegetative marihuana can be important evidence in the investigation of a potential grow operation. On the other hand, the odour of a neighbour or a neighbour's visitors smoking marihuana is a commonplace and of virtually no probative value in a marihuana grow-op investigation.

- [8] I think it likely that if Source A did not volunteer that the odour was of smoked marihuana, then Cpl. Hawkes would have asked a question to elicit this information. Not having made a note, it is unsurprising that Cpl. Hawkes is not able to recall the contents of one conversation amongst many citizen reports he would have received as the sole member of the Tahsis satellite detachment. On the other hand, it is unlikely that Source A was in frequent contact with the police and he could be expected to recall what he told Cpl. Hawkes.
- [9] In this context, Cpl. Hawkes' acknowledgment, when pressed, that he had "no trouble accepting" that he was told what Source A says he was told accords with the preponderance of the surrounding probabilities. I find that Cpl. Hawkes was told by Source A in mid-June 2013 that the smell from the Kurtakis property was of smoked marihuana. The facts in an ITO must be presented fully and frankly in a manner that equips the issuing justice to determine whether the information satisfies the requisite standard. I find that this did not occur with respect to the complaint by Source A of the odour of marihuana and the ITO will be amplified to include the voir dire evidence in this respect.
- [10] Cross-examination of Cpl. Hawkes elicited other relevant information that ought to have formed part of the information conveyed to the issuing justice as part of the ex parte application for a search warrant. Cpl. Hawkes testified that people smoke marihuana "all over the place" in Tahsis, a small village with just over 300 people. He drove by the Kurtakis residence on a daily basis, and sometimes several times per day, and he saw Mario Kurtakis on many occasions -- this information would have put the one-time presence of one bale of peat moss in the Kurtakis truck in proper context. Cpl. Hawkes also conceded in his evidence that peat moss is a common soil amendment for all manner of growing, and that the Kurtakis residence was surrounded by a yard. He also acknowledged that it was a sunny and warm day in the Tahsis area on 2 July 2013.
- [11] Taking this amplification evidence alongside the material in the ITO after excisions, the information that is available to arguably form the basis for issuing a warrant can be summarized as follows:
1. A Kurtakis neighbour smelled a strong odour of smoked marihuana coming from the Kurtakis property for some time. The auxiliary constable was unable to detect an odour of marihuana coming from the Kurtakis property when standing on a neighbour's property.

2. On a single occasion, Mario Kurtakis had one large brick of peat moss in the back of his truck that was parked in front of his residence. The residence is surrounded by a yard. Peat moss is a common soil amendment for all manner of growing, including the growing of marihuana.
3. The conclusory statement of an auxiliary constable that, on a sunny and warm day while standing on a neighbour's property, he could hear "what sounded like industrial fans running from inside the residence." Fans are sometimes used by indoor marihuana grow operators to assist in the dissemination of odours from inside the grow operation to the outside air through vents. There is no information about the auxiliary constable's background or experience in the ITO that might assist a justice in judging the reliability of his conclusion that he heard something that sounded like industrial fans versus, say, an HVAC (heating, ventilation, and air-conditioning) system.
4. On the road to Gold River, there was an odour of marihuana coming from Mario Kurtakis' truck.

II

- [12] The issue in this case is whether the ITO, after proper excisions and as amplified on the review, is capable of supporting the issuance of the search warrant. Could an issuing justice, assessing the material as a whole, on a practical, non-technical, and common sense basis, be satisfied that there were reasonable grounds to believe that the production offence had been committed and evidence related to marihuana production sought by the police would be found inside the Mario Kurtakis residence?
- [13] For the reasons that follow, I find that the ITO, after excisions and amplification, could not establish a credibly-based probability that either the marihuana production offence had been committed or that evidence related to marihuana production would be found inside the residence. The challenge to the search warrant succeeds, and I find that the s. 8 Charter right to be secure against unreasonable search or seizure has been infringed.

III

- [14] When this search warrant issued, the judicial justice of the peace was acting on the authority granted by s. 11(1) of the Controlled Drugs and Substances Act:

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 or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the Criminal Code

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.

- [15] A search warrant is presumed valid; the onus is on the accused to establish invalidity: *R. v. Stewart*, 2003 BCCA 636 at para. 13. A demonstrated failure to substantially comply with the statutory provisions amounts to a s. 8 Charter breach because of the congruency between those provisions and the constitutional requirements: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452; *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 at para. 8.
- [16] In order to provide the basis for the exercise of the statutory authority, the ITO must set out sworn evidence sufficient to establish reasonable grounds for believing that: (1) an offence has been committed; (2) the things to be searched for will afford evidence of the offence; and (3) the things will be found at a specified place: *R. v. Morris* (1998), 134 C.C.C. (3d) 539 at 549 (N.S.C.A.), per Cromwell J.A. (as he then was).
- [17] In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Mr. Justice Dickson (as he then was) explained the need to balance the state's interest in detecting crime against the individual's interest in being left alone, and gave this guidance to those entrusted with the critical role of scrutinizing the evidence during the prior authorization process: "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" (p. 168). Dickson J. made clear that in order to make the prior authorization process meaningful, it is necessary that the person authorizing the search be able to assess the evidence. This important point was echoed over 25 years later by the majority judgment in *R. v. Morelli*, 2010 SCC 8 at para. 73:

The main difficulty with these generalizations about certain "types of offenders" is that they are entirely devoid of meaningful factual support. The ITO contains no evidentiary material in this regard, even anecdotal, apart from the bald assertion of the two police officers. Furthermore, there is virtually nothing to describe, let alone establish, the expertise of the officers to whom the claims are attributed. The only information provided in the ITO consists in the officers' names, positions, and places of work. This is surely an insufficient evidentiary basis to enable a justice of the peace, hearing an application *ex parte*, to determine that the generalization is sufficiently credible or reliable to form the basis for a finding of reasonable and probable grounds.

- [18] The *Morelli* case also confirmed, at paras. 44 and 60, that there is an obligation on an *ex parte* applicant for a warrant to make full and frank disclosure of material facts, and if the applicant falls short of complying with this duty then evidence adduced at the *voir dire* should be used to fill the gaps in the ITO. As the authorities including *Morelli* make clear, misleading passages in an ITO are to be excised.

[19] The principles governing search warrant reviews are well-settled. In *R. v. Liu*, 2014 BCCA 166 at para. 39, after reviewing the leading cases, Madam Justice Garson summarized the main points as follows:

- 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.
- The trial judge should examine the information in its totality, not on a piece meal basis, [on] a "practical, non-technical, and common sense basis".
- The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so.
- 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.
- Reasonable grounds may be said to exist at "the point at which credibly-based probability replaces suspicion".

[Emphasis in original]

IV

[20] An ITO need not alleviate all doubts or answer all questions. Neither the justice examining an ITO nor the reviewing judge is conducting a trial. If, despite uncertainty, there remains a basis upon which the justice could have concluded that there was a credibly-based probability that the warrant prerequisites were met, this is sufficient to authorize a search. In this case, it comes down to whether the ITO with excisions and amplification surpasses suspicion and enters into the realm of credibly-based probability. Mr. Green, who advanced argument for both accused on the voir dire, submitted that it does not.

[21] The Crown's submissions began with a reference to *R. v. Plant*, [1993] 3 S.C.R. 281. I was provided with the remarkably concise ITO that passed muster in that case. The ITO, after part was excised, consisted of (1) an informant's tip that there was a large crop of growing marihuana at the target residence; (2) the fact that the target residence was utilizing approximately four times the electricity of comparable houses on the same block; and (3) this electricity consumption is consistent with other hydroponic marihuana operations and the usage of high-voltage grow lights. The *Plant* case illustrates that the quantity of information provided to the issuing justice is not nearly as important as the information's quality. On its facts, this case is readily distinguishable. The reliable tip in *Plant* stood as compelling evidence of a large marihuana crop growing in the residence. There is no issue as to the reliability of the tip or the credibility of the informer in the case at bar, but Source A's tip of a strong smell of smoked marihuana coming from the Kurtakis property is hardly worthy of mention as evidence of marihuana production. Further, the evidence of electricity

consumption in Plant is of considerable probative value, far exceeding the import of one bag of peat moss and the sound of a fan.

- [22] Mr. McFadgen's submissions, as they continued, focused on a line of cases on corroboration of informer tips, and cases on the probative value of the odour of marihuana. The informer tip cases, led by *R. v. Debot*, [1989] 2 S.C.R. 1140, direct reviewing courts to consider whether the information is compelling, whether the tip's source is credible, and whether the information is corroborated by the police prior to the police making the decision to conduct the search -- the totality of the circumstances must meet the reasonableness standard. I do not understand the accused in this case to contest the reliability of the information or the credibility of the source of the information. Rather, the accused submitted that the strong smell of smoked marihuana is of little or no assistance to the Crown, standing alone or in combination with other averments in the ITO, in constituting reasonable grounds to believe that a production offence had been committed or that evidence of a production offence might be found in the residence.
- [23] On the subject of the odour of marihuana, I accept the proposition that in other cases it may be probative. Context is critical. The smell of burning or smoked marihuana may, for instance, be very important in a case examining the grounds for an arrest for possession of marihuana. And, the odour of vegetative marihuana may play an important role as part of the grounds for belief in support of a warrant in a grow operation case. In this case, the strong smell of smoked marihuana stands as good evidence that someone on the Kurtakis property often smokes marihuana. But exercising common sense, the question that arises is whether that information could persuade an ITO reader to think it any more likely that there is marihuana production occurring in the residence. I suppose, at a very speculative level, the most that could be postulated is that people who smoke marihuana or permit others to smoke marihuana on their premises might be more likely to engage in growing marihuana than someone who does not smoke or permit others to smoke the substance. Even if this untested hypothesis as to correlation were true, it would be a very insubstantial piece of the puzzle. Put another way, in my opinion an issuing justice making a decision whether or not to issue a warrant in this marihuana production case would be making a serious error if he or she attached significant weight to the information that marihuana is often being smoked on the property.
- [24] The individual grounds in this case do not carry much probative weight, but it is an error to examine the ITO grounds on a piecemeal basis. Taking the information as a whole, and viewing it practically and with common sense, could there be a credibly-based probability? No. An odour of smoked marihuana, one bale of peat moss, what sounded on a sunny and warm July day to an auxiliary constable standing on a neighbour's property like industrial fans at work inside the residence, and a truck being driven by Mario Kurtakis that gave off the odour of marihuana, taken together, along with any available inferences, could not amount to reasonable grounds to authorize the search of this dwelling house.

[25] Various alternative expressions of the "reasonable grounds to believe" standard refer to the requirement of probability or use the word "probable", I wish to be clear that I am deciding this case on the basis that the test does not require proof to the civil standard. And, although I certainly would not issue a warrant to search a dwelling house on the basis of this thin gruel, that is neither here nor there. The proper question is whether a justice could reasonably issue a warrant. I think not. The ITO, as excised and amplified, does not provide a basis for anything more than suspicion. I am persuaded by the argument of the accused that the information available is a fair distance short of the "credibly-based probability" requirement. In the key passage in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 114, referred to by Frankel J.A. in *R. v. Whitaker*, 2008 BCCA 174 at para. 39, leave to appeal ref'd, [2008] S.C.C.A. No. 296, it was explained that "[i]n essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information." The ITO, as excised and amplified, cannot be fairly described and could not reasonably be found by an issuing justice to be compelling information capable of founding an objective basis for the belief. Any available reasoning pathway would, in the words of Mr. Justice Fish in *Morelli*, at para. 63, "culminate in suspicion and conjecture, never reaching the mandatory threshold of reasonable and probable grounds to believe."

"Thompson J."

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