

CANADA / JUDGMENT

R. v. McKinnon

2013 BCSC 2061

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Supreme Court of British Columbia

DECIDED

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2013 BCSC 2061 R. v. McKinnon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McKinnon,

2013 BCSC 2061

Date: 20131118

Docket: 26074

Registry: Vancouver

Regina

v.

Troy Dax McKinnon, John Ross Powers, Cody Alexander Sleigh, Derek James Stephens and Van Van Vu

Before: The Honourable Madam Justice Fisher

Restriction on publication: Pursuant to ss. 486.5(1)(9), 648(1) CCC and Inherent Jurisdiction

Written Ruling on Voir Dire #4

Leave to Cross-examine Affiant

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Place and Dates of Trial:

Vancouver, B.C.

November 4-6, 2013

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2013

- [1] On behalf of Mr. Powers, Ms. Adams applied for leave to cross examine Constable Brad Gibson, the affiant of the Affidavit filed in support of the Part VI Authorization P-14. P-14 was granted on August 12, 2011 in relation to an investigation into two named offences: murder and conspiracy to commit break and enters. Mr. Powers was named as a principle known person, along with Jesse Margison and others, in relation to the conspiracy offence.
- [2] Ms. Adams sought leave to cross-examine in a number of areas in relation to the affiant's reasonable grounds to believe that Jesse Margison was involved in a conspiracy to commit break and enters, with Mr. Powers as part of his "crew, and the investigative necessity for a Part VI authorization in relation to that offence.
- [3] On November 7, 2013, I granted leave to cross-examine in specified areas, giving brief oral reasons and advising counsel that I would provide more fulsome reasons at a later date. These are those reasons. I have also incorporated rulings made subsequently and during the cross-examination.

Legal principles

- [4] Leave to cross-examine a wiretap affiant will be granted where cross-examination is necessary to allow the accused to make full answer and defence. As the court stated in *R. v. Garofoli*, [1990] 2 SCR 1421 at 1465:

A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.

- [5] In *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 it was held (at para. 3) that a basis for cross-examination will be shown where the defence can show there is a "reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration for the reviewing judge." The issue for consideration here involves the reasonable grounds for belief that Mr. Margison, with Mr. Powers as a member of his crew, was involved in a conspiracy to commit break and enters, and the investigative necessity for wiretap evidence in relation to that offence.
- [6] The purpose of the leave requirement is to ensure that only relevant and material evidence is admitted, thus avoiding unnecessarily prolix proceedings (*Pires* at para. 3). There is a narrow scope for review. At the leave stage, the focus is strictly on whether permitting cross examination is likely to assist in the determination of the ultimate question on the *voir dire*, that is, whether the authorizing judge could have granted the order (*Pires* at para. 40).
- [7] It is important to keep the threshold test distinct from the ultimate question. As Charron J stated in *Pires* at para. 69:

the threshold test for determining whether cross-examination should be allowed is separate and distinct from the ultimate question of whether the authorization is valid. Hence, in determining whether the threshold test has been met, the trial judge cannot decide the question simply on the basis that other parts of the affidavit would support the authorization. The focus, rather, must be on the likely effect of the proposed cross-examination and on whether there is a reasonable likelihood that it will undermine the basis of the authorization. If the test is met, it is only at the conclusion of the *voir dire* that the trial judge will determine whether, on the basis of the amplified record, there still remains a basis for the authorization.

- [8] The threshold test for leave to cross-examine will not be met simply by showing that there is a weakness somewhere in the affidavit. Weaknesses in the affidavit are more properly areas for argument and are not in themselves grounds for cross-examination. Where shortcomings in the affidavit are clear, cross-examination may not be necessary. I agree with the comments of the court in *R. v. Riley*, [2008] OJ No. 4893 (SCJ) at para. 11 on this point.
- [9] The importance for the defence to show a specific basis for cross-examination of an affiant was recently affirmed by the Court of Appeal in *R. v. MacNeil*, 2013 BCCA 162 at para. 34, where Ryan J.A. agreed with this submission of the Crown:

The Crown asserted that the appellant had not identified specific areas of cross-examination that would have assisted the trial judge in determining whether the authorizing judge could have been satisfied that investigative necessity had been established. As the Crown put it in its factum, the appellant "did not identify any facts, materials, or information relevant to the issue, beyond the four corners of the affidavit. The application to cross-examine on investigative necessity was

simply a prelude to an argument about what conclusions could be drawn from the averments in the affidavit. Cross-examination was not likely to elicit evidence relevant to the trial judge's determination of whether the facts in the affidavit were capable of establishing investigative necessity." I agree with this submission.

[10] Finally, where leave is granted, cross-examination should be circumscribed by the trial judge to ensure that questions go only to the ultimate question: see Pires at para. 45, Garofoli at 1465.

Leave granted in the following areas

[11] Applying these principles, I determined that leave should be granted in the following areas.

1. The basis for the belief that multiple rips were being planned

[12] Paras. 170 to 172 of the affidavit set out Cst. Gibson's belief that Mr. Margison and a "crew", which included Mr. Powers, were conspiring to commit break and enters, referred to as "rips". In para. 170 he states his belief that Mr. Margison has multiple rips planned. He relies on the facts set out at para. 169.

[13] Para. 169 details facts taken from earlier paragraphs that describe reports about an incident on May 30-31, 2011, when Mr. Margison and two others (Roming and Krake) were seen by surveillance "scouting" a residence on Accacia Avenue in Coquitlam, after which they were arrested. Para. 63 is referenced regarding the arrest. Para. 63(h) states that the arresting officer was told by Sgt. Mark Jordan that Mr. Margison was to be arrested for break and enter with intent to commit an indictable offence. Para. 62 is not referenced here, but in that paragraph, it is stated that Sgt. Jordan reported that Mr. Margison and his associates had been seen in the back yard of the residence. This statement is not supported by the surveillance reports, as the men were seen in the back lane.

[14] Cst. Gibson may be cross-examined about the basis for Mr. Margison's arrest on May 31, 2011 for break and enter as it relates to his belief that Margison had multiple rips planned. This may include the discrepancy between the surveillance reports and the information in Sgt. Jordan's report. Leave is not granted, however, to cross-examine on the night of May 30 to 31, 2011 generally.

[15] In para. 174, Cst. Gibson again states his belief that Mr. Margison has multiple rips planned. He bases his belief in part on surveillance observations of Margison and his crew scouting out three residences. He does not identify the residences in that paragraph.

[16] However, in para. 169 (n) - (r) he identifies four residences referred to in surveillance reports. These paragraphs cross-reference other paragraphs that provide further detail. Two residences, one on 58 Avenue in Surrey, and another on Winslow in Coquitlam, refer to observations made on July 14, 2011 involving Mr. Powers. The two other residences, one on 224 Street in Maple Ridge and the other on Elwell in Burnaby, refer to observations made between about July 19 and 29, 2011.

[17] There is information referred to in para. 168 that as of July 30 the residence at 224 Street in Maple Ridge appeared to be unoccupied. Cst. Gibson relies in part on a report of (then) Cpl. Wells, which is said to include information that this residence was no longer a target.

[18] Cst. Gibson may be cross-examined about which three residences he is referring to in para. 174. If 224 Street is included, the cross-examination may address the issue raised in Cpl. Wells' report.

2. Investigative necessity

[19] The investigative necessity section of the affidavit is inconsistent in identifying whether the subject matter relates to the murder or the conspiracy to break and enter offence. There are several areas where reference is made only to the "the named offences".

[20] For example, para. 193 states: "While witnesses have provided information that has assisted the investigation of the named offences, police have been unable to identify any witnesses present for the murder of Krake." Paras. 197 and 198 discuss interviews of Mr. Margison and Mr. Roming regarding the named offences, and para. 200 states that Mr. Margison, Mr. Roming and Ms. McAuley refused to provide information about "the break and enter they were arrested for" on May 31. Para. 208 refers to production orders and dialed number recorder warrants obtained during the course of this investigation.

[21] The defence may cross-examine the affiant about the availability of witness information in relation to the conspiracy to break and enter offence, if any.

[22] The defence may cross-examine about the refusal of Mr. Margison, Mr. Roming or Ms. McAuley to talk to police so far as this relates to the conspiracy offence. It is not clear how the issues raised regarding Mr. Margison and Mr. Roming in particular relate to investigative necessity on this offence, as all of the facts referenced relate to the murder offence. With respect to Ms. McAuley, the matter of her relationship with police may be raised in relation to the conspiracy offence.

[23] The defence may cross-examine about what, if any production orders or dialed number warrants were obtained in respect of the conspiracy offence.

[24] In para. 224, Cst. Gibson states his belief that surveillance is unlikely to provide evidence necessary to achieve the investigational objectives in part due to Mr. Margison's awareness of surveillance techniques. One example given, in (ii), (that Margison was looking at vehicles that passed him while parked in a driveway) is not supported by surveillance reports.

[25] The defence may cross-examine about this example as forming part of the affiant's belief.

3. Criminal record of Mr. Roming

[26] Although listed in the application for leave, the defence did not make submissions on the issue of the criminal record of Mr. Roming, but raised this after the oral ruling was pronounced.

[27] Para. 39(c)(ii) of the affidavit contains an error regarding the criminal record of Mr. Roming. Cst. Gibson refers to two relevant convictions "of note", the second being for break and enter. I was advised that the conviction was for a lesser included offence. The defence suggested that this error is material in that it states a conviction for the very same offence for which Roming, Margison and Krake were arrested on May 31, 2011, and it may go to the affiant's belief regarding the facts underlying the May 30-31 incident.

[28] I granted leave to the defence to cross-examine about this error in so far as it related to the basis for arresting Mr. Margison for break and enter on May 31, 2011.

4. Surveillance of Mr. Powers

[29] Para. 220 states that surveillance was initiated on May 26, 2011 on various persons with the objective of obtaining "lifestyle information". There is information that surveillance of Mr. Powers' residence was established on August 3, 2011. During cross-examination, I extended leave to the defence to question Cst. Gibson about this.

Leave is not granted in the following areas:

[30] Applying the same principles, I also determined that leave should not be granted in the following areas.

1. Naming of Powers in relation to the July 14, 2011 incident

[31] The defence sought leave to cross-examine Cst. Gibson about a discrepancy between the surveillance reports of July 14, 2011 and the information presented in the affidavit. The surveillance reports from that date refer to Mr. Margison and to four unidentified males. In the affidavit, Cst. Gibson names Mr. Powers as the person who was named in the surveillance reports as unidentified male #2.

[32] The basis for naming Mr. Powers in the affidavit stems from a surveillance report addendum dated July 16, 2011, in which Det/Cst. Ritchie, one of the members of the surveillance team on July 14, identified the unidentified male #2 observed on that date as Mr. Powers. Cst. Gibson had both of these reports available to him in preparing the affidavit. In relation to the ultimate question on this voir dire, the fact that Mr. Powers was not identified by surveillance until July 16 is immaterial. The affidavit was not sworn until August 11, 2011. Moreover, the information in the affidavit reveals that Mr. Powers was arrested on July 14, 2011.

[33] In my view, there is no reasonable likelihood that cross-examination on this issue will elicit any evidence that would detract from the reasonable and probable grounds for Cst. Gibson's belief of the existence of a conspiracy to commit break and enters.

2. The use of the term "crew"

[34] The defence sought to cross-examine Cst. Gibson on the use of the term 'crew' in the affidavit on the basis that the liberal use of this term gives rise to the misleading inference that Mr. Powers was involved with the 'crew' from the beginning to the end of the investigation.

[35] I see no reasonable likelihood that cross-examination on this matter would elicit evidence discrediting the existence of reasonable grounds. It is clear in the affidavit that Mr. Powers was only seen by surveillance on July 14, 2011. There is also informant information that Mr. Powers was part of the crew. It is a matter for argument whether this information is a sufficient basis for Cst. Gibson's belief that Mr. Powers was a member of the crew.

3. Investigative necessity generally

[36] The defence sought to cross-examine on the topic of investigative necessity generally, including Cst. Gibson's involvement in the investigation, what police were looking for, how the investigation proceeded, what investigative routes were followed, whether actual break and enters had occurred, and why Part VI was resorted to early on.

[37] It is not open to the defence to simply point to one of the grounds for authorization and claim that the affidavit is deficient on that ground. It is a matter for argument as to whether the affidavit contains sufficient information to justify the necessity of intercepted communications for the investigation of the conspiracy offence. My view is that the defence has not shown a basis that cross-examination on these general matters would elicit evidence tending to discredit the ground of investigative necessity.

4. The nature of surveillance reports

[38] The defence sought to cross-examine Cst. Gibson about the nature of surveillance generally, as it pertains to "boilerplate" language found in para. 36 of the affidavit. In that paragraph, Cst. Gibson describes his involvement in investigations involving surveillance and his familiarity with the preparation of surveillance reports, the roles of the members of a surveillance team, including the officer responsible for reporting the observations of all team members.

[39] This paragraph, which is contained in the "background information" section of the affidavit, does not contain boilerplate language that is misleading in the sense described in *R. v. Araujo*, 2000 SCC 65 at para. 47:

At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an authorization (there is, after all, no formal legal requirement to avoid it), I cannot stress enough that judges should deplore it. There is nothing wrong - and much right- with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic

omissions.

[40] In my view, there is no reasonable likelihood that cross-examining Cst. Gibson about his familiarity with surveillance reports generally, without some basis related to an identified issue, meets the test for leave.

"Fisher J."

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