
CANADA / JUDGMENT

R. v. Mitchell

2010 BCSC 1228

COURT

Supreme Court of British Columbia

DECIDED

16 June 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 BCSC 1228 R. v. Mitchell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Mitchell,

2010 BCSC 1228

Date: 20100616

Docket: 149285-2

Registry: Victoria

Regina

v.

Hugo Kester Mitchell

Before: The Honourable Madam Justice H. Holmes

Oral Ruling on Voir Dire and Oral Reasons

Counsel for Crown:

T. Corsi

Counsel for Defence:

T. Morino

Place and Date of Hearing:

Victoria, B.C.

April 15-16, 2010

June 16, 2010

Place and Date of Ruling/Reasons:

Victoria, B.C.

June 16, 2010

INTRODUCTION

- [1] THE COURT: Hugo Kester Mitchell is charged with three offences, all associated with the keeping of a marihuana grow operation in a residence in Colwood. The offences are theft of electricity, contrary to s. 326(1)(a) of the Criminal Code; unlawfully producing Cannabis (marihuana), contrary to s. 7(1) of the Controlled Drugs and Substances Act; and possessing Cannabis (marihuana) for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act.
- [2] In a voir dire held to consider the admission of evidence of the numerous plants, equipment and other items seized from the residence, Mr. Mitchell challenges the validity of the warrant that authorized the search. He contends that the police officer's information to obtain the warrant (which I will call the "ITO"), as redacted or edited to protect confidential source information, provided insufficient grounds to support the warrant.
- [3] He makes the submission on two main bases:
1. that certain inaccurate or misleading portions of the ITO must be removed, and
 2. that the amplification evidence on the voir dire indicates that the police officer's grounds as a whole, as set out in the warrant, cannot be considered reliable.
- [4] If the ITO is found to be defective, and the warrant therefore invalid, the Crown acknowledges that the search would be unreasonable, and that therefore the application of s. 24(2) of the Charter would determine whether or not the evidence seized in the search should be admitted.

THE REVIEW OF A WARRANT

- [5] The question on the review of a warrant is found in *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54: "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued". The reviewing court does not substitute its own view for that of the authorizing justice. Rather, the reviewing court must consider whether, on the record before the authorizing judge, after excluding erroneous information and having reference to "amplification" evidence, the authorization could have issued.

- [6] Amplification evidence may include additional evidence presented at the voir dire to correct minor errors in the ITO, so long as it corrects good faith errors of the police in preparing the ITO, and not deliberate attempts to mislead the authorizing justice (R. v. Morelli, 2010 SCC 8, [2010] 1 S.C.R. 253).

THE ITO IN ISSUE

- [7] This warrant was issued and executed on September 15, 2008. As redacted, the ITO provides essentially two main grounds for investigating officer Cst. Wellard's belief that there was a marihuana grow operation in the residence:
1. on each of September 3, 2008 at 6:20 a.m. and September 15, 2008 at 4:30 a.m., Cst. Wellard and Cst. Doke detected a strong odour of growing marihuana on two occasions, when a breeze blew from an area of the residence toward the back of the property where they were standing, and
 2. on September 15, 2008 at about 4:30 a.m. Cst. Mobbs, a trained thermographer, used a thermal detection device (a FLIR) on all four sides of the residence and found areas of the roof to be very hot. This indicated to him that man-made heat vented into the attic, as may occur where high intensity grow lamps used for marihuana growing generate considerable heat.
- [8] I am stating those two main grounds in the terms in which they are stated in the ITO. The evidence on the voir dire indicated that those statements are either inaccurate, or considered more generally, unreliable. In the following reasons I will explain why I so conclude.

INACCURACIES AND WEAKNESSES IN THE ITO

"Went for a Walk Around.."

- [9] On each of the two occasions (September 3 and September 15) Cst. Wellard's ITO reports that Cst. Wellard and Cst. Doke "went for a walk around the clearly marked address of [address in Colwood] and made the following observations ".
- [10] I agree with Mr. Morino that this language gives the impression that the police officers walked completely around the outer boundaries of the property. However, the evidence in the voir dire made clear that they did not.
- [11] Cst. Wellard testified that they did not circumambulate the property -- there was one side of the property that they did not approach at all. Cst. Wellard testified that by the expression "went for a walk around [the property]" she meant that the officers went for a walk, and that they did not walk on the property in question.

- [12] I accept that explanation as sincere, but the sincerity of an affiant and a witness cannot, and in these circumstances does not, correct the misleading impression that the imprecise language leaves. The Justice of the Peace who issued the warrant may very easily have understood, incorrectly, that Cst. Wellard and Cst. Doke had walked all around the perimeter of the property.
- [13] Nonetheless, in my view this misunderstanding could have had no direct effect on the stated ground concerning the officers' detection of marihuana odour, which, as I noted, is one of the two main grounds on which the ITO, after the redactions, is based.
- [14] The two paragraphs in which the misleading phrase "went for a walk around " appears each describe observations of the house and the condition of the property. They do not describe any detection of marihuana odour.
- [15] The paragraphs that describe the detection of marihuana odour are separate. They begin by describing the officers taking a different path of travel and the point of observation the police officers took:

Cst. Wellard and Cst. Doke walked on the public access walkway that runs in behind the back of the property of [the address], and made the following observations

Thus, nothing in the ITO suggests that the police officers based their conclusion that the marihuana odour came from the house on their having walked around the entire outer boundary of the property.

Grounds Misleading Because Contrary Information not Included

- [16] Mr. Morino submits that the reliability and weight of Cst. Wellard's reported observations in the ITO are undermined by her failure to note whether breezes also blew from the area of the house that did not carry the odour of growing marihuana.
- [17] Cst. Wellard was unable to indicate in cross-examination whether or not that may have happened. She explained that she made no notes of her observations, except in the draft ITO that she prepared later on each of the two days back at the police detachment.
- [18] More problematic than the simple absence of notes on this matter is Cst. Wellard's testimony that, had a breeze blown from the house without bringing with it an odour of marihuana, she would not have made even a mental note of that fact, because that event would have been "of no evidentiary value" to her.
- [19] I agree with Mr. Morino that such an approach is not the objective investigative approach that properly should underlie the gathering of information to be set out in an Information to Obtain a Warrant. The officer's duty required full, frank, and fair disclosure of the relevant facts to support her conclusions or beliefs, including any contrary information. That duty in turn requires the officer to have paid attention to those matters in her investigation.

- [20] The ITO appears, therefore, to have been constructed from a selective approach to the facts, and must in my view be read in light of Cst. Wellard's effective acknowledgement -- as I took her evidence -- that during the two occasions when, as the ITO reports, she and Cst. Doke noted breezes bringing a smell of marihuana from the house, breezes may also have blown that did not bring such a smell.

Misleading Description of the Terrain

- [21] More serious difficulties arise in relation to Cst. Wellard's description in the ITO of the position at which she and Cst. Doke stood behind the property when, on each of the two occasions, they twice detected the strong odour the ITO reports. The description is significant, because these grounds in the ITO rely on Cst. Wellard's conclusion, as amplified by her evidence on review, that when she and Cst. Doke detected the smell of marihuana they reliably concluded that it came from the house in issue.
- [22] The ITO states that the officers "stood directly behind the residence on the public access trail". Cst. Wellard's evidence on review made clear that they concluded that the smell of growing marihuana came from the house in question because when they detected the smell they were directly behind the property, with no obstructions between them and the house, and because, given their relative proximity to the house in question, the other houses were distant enough to each side not to have been the source of the odorous breezes.
- [23] Cst. Wellard was cross-examined at length about possible obstructions between the house (from the direction of which she testified the breeze blew) and the public pathway behind the property where, she testified, she and Cst. Doke stood. She recalled a fence around the property, but no bushes or other obstruction of any real size between the house and the police officers' position. She described the path on which they stood as rocky and uneven, "with grade to it", but recalled no significant difference in elevation between the officers' position on the rocky path and the house. This evidence gave the impression, consistent with that of the ITO, that nothing would have interfered with the travel of breezes from the position of the house to the position, just off the property and not far from the house, where Cst. Wellard and Cst. Doke stood.
- [24] However, other evidence gave a very different picture.
- [25] Mr. Morino put to Cst. Wellard a series of photographs taken during the trial that show a significant drop in elevation (perhaps 12 to 15 feet) at the back of the property on which the house is situated. The photographs show a sudden drop away, supported by what has been described by lay people as a retaining wall, and has been explained in more technical terms by defence witness Peter Schultze, a general contractor and neighbour. Other evidence, which I will describe shortly, indicated that the public pathway runs through the lower property, and not above the retaining wall at the level of the property in question.

- [26] Cst. Wellard testified that she did not remember any such drop as shown in the photographs, or any such retaining wall.
- [27] It is only fair to note that when Cst. Wellard made her observations in September 2008, she did so in the darkness of the very early morning. Cst. Wellard emphasized also, in her testimony, that the events being a year and a half ago, her recollection is vague and imprecise.
- [28] Nonetheless, it was evident, in my assessment of her testimony, that Cst. Wellard considered the photographs to show a very different view than she remembered from September 2008. She testified that she did not recall the property "going that low", at the cutaway to the foot of the retaining wall, and she wondered aloud whether the property had been developed since September 2008.
- [29] However, Mr. Schultze testified that the property behind the residences has not changed since September 2008 (except in relation to the area shown in photograph 12, which is not relevant to this discussion). He testified that the terrain at the foot of the retaining wall and the retaining wall itself have not changed since September 2008. Because Mr. Schultze is a general contractor he is likely to be more aware than many of the lay of the land and the construction around the area of his home, and I have no hesitation accepting his evidence.
- [30] Cst. Wellard's description of her and Cst. Doke's location, in relation to the house, is also strikingly inconsistent with the description of the terrain given by Cst. Mobbs, the thermographer who took the FLIR readings, and who also lives in the general area. He described quite different terrain from Cst. Wellard, despite the fact that, as he testified, he and Constables Wellard and Doke were generally together throughout the events on September 15, not in close proximity all the time but always within the general vicinity of each other.
- [31] In particular, there was no doubt in Cst. Mobbs's mind that at the back of the property was a gravel pit. He described numerous large gravel piles that he and the other officers had to navigate in order to conduct their investigation. He had a strong memory of going up some loose gravel piles -- "we had to crawl up a few" -- because at one point he fell. He estimated that from the base of the pile to the top of the pile from which he took his FLIR readings was between 40 and 50 feet.
- [32] It is clear from the photographs and the evidence of Cst. Mobbs and Mr. Schultze that if Cst. Wellard was in the position equivalent to the bottom of the retaining wall, she was in no way at a level comparable to the level of the house, and there would not have been a clear and direct path between the house and her position.

- [33] If, as Mr. Corsi suggests, Cst. Wellard was with Cst. Mobbs atop one of the 40 to 50 feet gravel piles, several difficulties apply. These include that she would have been then approximately 300 feet from the residence, in sharp contrast to the impression given by her ITO and her evidence that she was directly at the back of the property, a short distance from the property line.
- [34] In this regard I accept Cst. Mobbs's estimate that from the position where he took the FLIR readings, which I infer was in the general vicinity of where Constables Wellard and Doke were when they detected the smell they described, was about 300 feet from the residence.
- [35] Also, with Constables Wellard and Doke approximately 300 feet back from the residence, the scope for error in assigning a passing breeze to a particular residence increases. Cst. Wellard described the neighbouring residences as being about 20 to 25 feet from the residence in question.
- [36] The location of the police officers was not accurately described in the ITO, and the issuing justice was therefore unable to assess the reliability of their conclusion that a smell of growing marihuana came from the residence in question.

Misleading Description of FLIR Results

- [37] In his testimony, Cst. Mobbs said that, in taking his FLIR readings from the front of the house, he noted that the front gable was warmer than the rest of the house; from the sides he noted nothing; and from the rear of the house, he noted that the gable ends of the house were warm. He testified that he sent that information to Cst. Wellard.
- [38] The ITO describes things rather differently.
- [39] In paragraph 27 it includes the information that Cst. Mobbs noted nothing remarkable from the sides. However, in relation to the rear the ITO say this, before proceeding to outline Cst. Mobbs's conclusions:

Cst. Mobbs did note that from the rear (east) that the roof was remarkably hot with both peaks on the house very hot. From the front (west) he noted that the gable end or attic was hot.

- [40] The evidence did not canvass any reason for the inconsistency between Cst. Mobbs's testimony that he detected that the gables were "warm" and the ITO statement that the roof and the gables were "remarkably hot", and "hot". It is a marked difference, and it is troubling.

EXCISIONS FROM THE ITO

- [41] As I have already noted, after the redactions from the ITO made to protect the identity of confidential informer(s), there are only two main grounds set out in the ITO to support the warrant. The reliability of each of these is, I conclude, seriously undermined by the evidence in the voir dire.

- [42] The applicable portions in the ITO must be entirely excised, leaving no support for the warrant.
- [43] I am not persuaded by Mr. Corsi's submission, in relation to the ground concerning the odour of marihuana, that it is appropriate to simply excise the words "directly behind" from the statement that the officers "stood directly behind the residence on the public access trail". In my view, the lack of reliability in the stated grounds is more fundamental than can be corrected in this manner.

APPLICATION OF CHARTER s. 24(2)

- [44] The Supreme Court of Canada recently reformulated the approach to exclusion of evidence under s. 24(2) of the Charter of Rights and Freedoms: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.
- [45] The court said that fundamentally s. 24(2) protects the justice system's overall and long-term repute. The s. 24(2) inquiry is an objective one, and it asks whether a reasonable person, informed of all the relevant circumstances, and informed of the values underlying the Charter, would conclude that the admission of the evidence in issue would bring the administration of justice into disrepute.
- [46] The reformulated approach to the application of s. 24(2) thus rests on the assessment of the public interests that are engaged by s. 24(2) as those interests are viewed in a long-term perspective. It engages three avenues of inquiry, concerning:
1. the seriousness of the Charter-infringing state conduct
 2. the impact of the breach on the Charter-protected interests of the accused, and
 3. society's interest in the adjudication of the case on its merits.
- [47] A court applying s. 24(2) will balance the assessments in relation to each of these lines of inquiry in order to determine whether unlawfully obtained evidence will nonetheless be admitted.
1. The Seriousness of the Charter-Infringing State Conduct
- [48] This inquiry requires the court to assess whether the admission of the evidence would bring the administration of justice into disrepute, by sending the message to the public that the courts "effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct" (*Grant* at para. 72).
- [49] It follows that the more severe or deliberate the state conduct that led to the breach, the greater the need for the courts to dissociate themselves from it in order to preserve public confidence in, and ensure state adherence to, the rule of the law (*Grant* at paras. 72-74).

- [50] I agree with Mr. Morino that there is no basis to conclude that Cst. Wellard deliberately set out to breach Mr. Mitchell's or anyone else's Charter rights. Indeed, she made some effort to comply with the requirements of law, by obtaining a search warrant for the residence in a lawful manner. For example, she made efforts not to trespass on the property of the residence in question. Nonetheless, what Mr. Corsi acknowledged to be "sloppiness" in the preparation of the ITO and in some of the investigation to gather the necessary grounds is, I find, troubling.
- [51] While I accept that Cst. Wellard is clearly an honest witness, I will observe that she is also clearly an unusually vague and impressionistic witness for a police officer; her oral testimony does not increase my confidence in relying on statements in the ITO that may have a subjective element to them.
- [52] The Charter-infringing state conduct was not purposeful, but it was at least negligent, bordering on reckless, in a context that demanded a much higher standard of care on the affiant investigator's part.
2. The Impact of the Breach on the Accused's Charter-Protected Interests
- [53] It is common ground that the search of a residence is one of the more intrusive types of searches that therefore has considerable impact on the accused's Charter-protected interests.
3. Society's Interest in the Adjudication of the Case on its Merits
- [54] This avenue of inquiry brings the most challenge in this case.
- [55] The circumstances of the offence have been presented as agreed facts. The seizures included about 460 marihuana plants, at various stages of maturity, from three of seven rooms in the basement of the home. It was, as Mr. Corsi describes, a moderate-sized grow operation, perhaps bordering on large in its size and scope, using pots and soil rather than hydroponic facilities.
- [56] As to Mr. Mitchell's own personal involvement, the Crown accepts his explanation that he was the caretaker, but not otherwise in charge of, or responsible for the grow operation. It is common ground that Mr. Mitchell was entirely cooperative with the investigators from the outset.
- [57] There is no doubt that these charges are serious charges in which, as Mr. Corsi submits, society has a very strong interest in investigating, prosecuting, and most of all, preventing.
- [58] At the same time, society must do so in accordance with the rule of law and in a manner that preserves the long-term repute of the very system by which society acts to condemn the conduct and prevent future similar conduct. As I have noted, the reformulated approach to s. 24(2), expressed through the court's reasons in *Grant*, requires a particular focus on the long-term repute of the administration of justice.

Conclusion re: s. 24(2)

- [59] The procedures for warrants to search private residences require, for their legal validity and social acceptance, prior judicial authorization based on fair and objective disclosure of sufficient grounds for a search. Particularly where, as here, there is no indication of urgency, society can reasonably expect more of its police officers than was given in this particular case before intrusive investigative measures are taken.
- [60] Given the circumstances as I have described them, including the nature of the deficiencies in the ITO, on a balancing of the assessments I have made in relation to each of the three avenues of inquiry, I conclude that this evidence must be excluded.
- [61] Mr. corisi: Thank you, My Lady. That is the Crown's case, calling no further evidence.
- [62] THE COURT: Mr. Mitchell, the Crown is calling no further evidence. I take it you have no submissions?
- [63] MR. CORSI: That's correct.
- [64] THE COURT: There is, therefore, no evidence that is being called in the trial, and I take it I am to acquit?
- [65] Mr. Corsi: Yes, I would invite that, thank you.
- [66] THE COURT: You are acquitted. I find you not guilty.
- [67] MR. MORINO: Thank you, My Lady. I thank you my friend.

"H. Holmes J."

The Honourable Madam Justice H. Holmes

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/10/12/2010BCSC1228.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-mitchell-2010>

Prepared on 28 October 2026 · Esheria