
CANADA / JUDGMENT

R. v. Nicholson

2016 BCSC 2099

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2016 BCSC 2099 R. v. Nicholson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nicholson,

2016 BCSC 2099

Date: 20161114

Docket: 26396

Registry: Vancouver

Regina

v.

Christopher Michael Makoto Nicholson

Before: The Honourable Madam Justice B. J. Brown

SEALED UNTIL FURTHER ORDER OF THE COURT

Reasons for Judgment

(Application to Cross Examine Affiant P.04-2013 Wiretap Authorization)

Counsel for Crown:

P. Hogg

M. Barrenger

Counsel for Christopher Nicholson:

B. Martland

P. McGowan

Place and Date of Hearing:

Vancouver, B.C.

October 17 - 19, 2016

Place and Date of Judgment:

Vancouver, B.C.

November 14, 2016

Background

- [1] Mr. Nicholson applies for an order permitting cross examination of the affiant with respect to the affidavit sworn to obtain a wiretap authorization P.04-2013.
- [2] Mr. Nicholson was charged May 6, 2013 with 10 counts, including allegations of obstruction of justice and breach of trust. The allegations arise from 2013 when Mr. Nicholson was serving as a constable in the Abbotsford Police Department. An investigation was conducted by the Vancouver Police Department.
- [3] The VPD investigation included many judicial authorizations. There are approximately 17 production orders, 4 dial number recorder orders, 6 search warrants, 6 tracking warrants, 6 general warrants and 2 Part VI wiretap authorizations. This application deals with the first wiretap authorization: P.04-2013.
- [4] This authorization was sought to investigate offences of breach of trust and obstructing justice from June 2012. Police had received information that Mr. Nicholson had warned an individual, [], that search warrants were to be executed for his residence and his mother's residence. When the warrants were executed, nothing illicit was found. This information was the basis for both offences. Ultimately, Mr. Nicholson was not charged with these offences. I am advised that the wiretaps led to other charges against Mr. Nicholson.
- [5] On February 25, 2013 a wiretap authorization P.04-2013 was issued.

Mr. Nicholson's Application to cross examine the Affiant

- [6] Mr. Nicholson seeks to cross examine the affiant on a variety of issues, but has two primary areas of concern.
- [7] The first is with respect to the specific offences to be investigated, which he refers to as the "disconnect" between the ITO and the stated offences. Nicholson argues that, to be lawful, a wiretap authorization must relate to a specified crime. The offences alleged in this ITO were said to have been committed in June 2012 when Mr. Nicholson is said to have contacted [] to tip him off about search warrants. Mr. Nicholson argues that the stated purpose was a "realistic expectation that the VPD would uncover further evidence related to the June 2012

offences using a wiretap." He argues that with so much time having passed and no communication between Nicholson and [], the true purpose could not be to uncover further evidence about that offence. Rather, the defence says that "this was a dead end street, but was dressed up to look like an open avenue."

- [8] The second primary area of concern is with respect to the investigative necessity requirement. The affiant identifies alternative investigative procedures and explains why these methods were dismissed as inadequate. Mr. Nicholson seeks to test these assertions of inadequacy. He asserts that whether the police deliberately or recklessly chose to employ other investigative procedures so sloppily that they set the stage for investigative necessity is a live issue. He says that the VPD chose to use officers known personally to Mr. Nicholson for surveillance and that this raises the question of whether investigators intentionally or recklessly spoiled this investigative technique. He seeks to cross examine the affiant on whether:
- a) there were other viable alternatives available to the investigators;
 - b) there was an option to conduct surveillance of individuals other than Mr. Nicholson; and
 - c) the affidavit is misleading in presenting surveillance evidence as something that failed, rather than something that was designed to fail.
- [9] In addition to these primary areas of concern, Mr. Nicholson proposes to cross-examine on a variety of issues:
- a) Mr. Nicholson questions whether Informant A whose evidence is referred to in the affidavit is one of the known persons, whose communications police anticipate could be intercepted. He says that he has no knowledge as to whether this is the case and whether a *R. v. Lachance*, [1990] 2 S.C.R. 1490 [Lachance] problem arises in this case, but the question should be addressed.
 - b) Mr. Nicholson points to para. 113 of the ITO and says that the affiant failed to disclose to the authorizing judge that the person identified at that paragraph was a confidential informant being handled by Mr. Nicholson. He seeks to cross examine on this issue.
 - c) Mr. Nicholson argues generally that there are assertions in the affidavit which do not withstand scrutiny. He argues that out of fairness to the affiant and to the VPD, these assertions should be put to the affiant so that he has an opportunity to respond. He argues that the Court would be far better served by receiving focused live evidence on these issues and reaching its own assessment, rather than attempting to resolve these issues on a written record.
- [10] In conclusion, he argues that the VPD and APD were colluding to bring him down. The vast majority of the evidence against him emanates from the wiretaps. In this context he argues that he is owed procedural fairness and should not be impeded in making full answer and defence.

Discussion

[11] Mr. Nicholson has not met the threshold for leave to cross-examine. As the Supreme Court said in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at p. 198 [Garofoli]:

Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. 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.

[12] The preconditions to the lawful issuance of an authorization are summarized in *R. v. Mahal*, 2012 ONCA 673 [Mahal]:

[39] the conditions precedent that must be satisfied before a judge of a superior court of criminal jurisdiction may grant a conventional authorization are contained in s. 186(1) of the Criminal Code. For discussion purposes, serviceable short-form descriptions are as follows:

- i. Probable cause; and
- ii. Investigative necessity.

[40] The probable cause condition precedent in s. 186(1)(a) requires that the affidavit satisfy the authorizing judge that there are reasonable and probable grounds to believe two things:

- i. A specified crime has been or is being committed; and
- ii. The interception of private communications sought will afford evidence of the specified crime.

[41] The investigative necessity condition precedent of s. 186(1)(b) requires that the affidavit satisfy the authorizing judge that, practically speaking, there is no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. No. 992, at para. 29. This requirement is to be interpreted in a practical, commonsense way with due regard for the nature and purpose of the particular investigation that police propose to undertake: *Araujo*, at para. 29.

[13] The threshold to be met for cross-examination is not high. In *Mahal*, it is described as being focussed on the pre-conditions for the authorization at para. 43:

The standard for granting leave to cross-examine opens a narrow window for cross-examination, not because the standard is onerous, but because the basis upon which an authorization may be set aside is itself very circumscribed: *Pires; Lising*, at para. 40. To determine whether cross-examination should be permitted, the parties and reviewing judge must keep a weather eye on the issue to be determined on a *Garofoli* review - whether there is a basis upon which the authorizing judge could grant the order: *Pires; Lising*, at para. 40.

[14] The principles that apply to the application before me are set out in *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 [Pires and Lising]. The following comments are relevant:

3 There is no question that the right to cross-examine is of fundamental significance to the criminal trial process. However, it is neither unlimited nor absolute. The extent to which it becomes a necessary adjunct to the right to make full answer and defence depends on the context. The Garofoli threshold test requires that the defence show a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge. It is grounded in two basic principles of evidence: relevance and materiality. It is also born out of concerns about the prolixity of proceedings and, in many cases, the need to protect the identity of informants. The leave requirement strikes an appropriate balance between the entitlement to cross-examination as an aspect of the right to make full answer and defence, and the public interest in the fair, but efficient, use of judicial resources and the timely determination of criminal proceedings.

8 The review is based on the documents relating to the authorization and the submissions of counsel. Further evidence may be adduced at the review hearing. If the reviewing judge concludes that, on the material before the authorizing judge as amplified by any evidence taken on review, there was no basis upon which the authorizing judge could be satisfied that the preconditions for the granting of the authorization existed, the reviewing judge will conclude that the search and seizure contravene s. 8 of the Charter.

10 With respect to the affiant, the Court recognized the need to circumscribe the cross-examination within reasonable limits. First, there would need to be a threshold showing a basis for embarking on an enquiry :

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 of the authorization, as for example the existence of reasonable and probable grounds.

25 the defence has access to all the documents relating to the authorization the affidavit filed in support of the application for an authorization will usually provide a comprehensive account of the investigation leading up to the wiretap application, an articulation of the grounds relied upon in support of the application, and information relevant to the reasonable believability of material gathered from informants.

26 In addition, the defence is entitled to all material in the possession or control of the Crown that is potentially relevant to the case. The defence can therefore compare the contents of the investigative file received from the Crown to the authorization supporting material to ascertain whether anything throws doubt on the reasonable believability of the latter.

27 Hence the defence does not arrive empty-handed at the evidentiary hearing. More importantly, if no basis can be shown for questioning the validity of the authorization on the strength of the disclosed material, it is generally unlikely that cross-examination of the affidavit will provide further material information.

30 the review is simply an evidentiary hearing to determine the admissibility of relevant evidence about the offence obtained pursuant to a presumptively valid court order. The reviewing judge on a Garofoli hearing only inquires into whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions existed. Hence, there is a relatively narrow basis for exclusion. Even if it is established that information contained within the affidavit is inaccurate, or that a material fact was not disclosed, this will not necessarily detract from the existence of the statutory preconditions.

31 There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence.

40 The reason that the test will generally leave just a narrow window for cross-examination is not because the test is onerous - it is because there is just a narrow basis upon which an authorization can be set aside. A reasonable likelihood that it will assist the court to determine a material issue is all that must be shown.

41 In some cases, the proposed cross-examination may be directed at the credibility or reliability of an informant. However, cross-examination that can do no more than show that some of the information relied on by the affiant is false is not likely to be useful unless it can also support the inference that the affiant knew or ought to have known that it was false.

63 Indeed, if there is a reasonable basis for believing that an affiant deliberately attempted to mislead the authorizing judge, this would generally warrant further inquiry by cross-examination because the credibility of the entire affidavit may be brought into question.

65 I also agree with the Court of Appeal that the trial judge was correct in refusing to cross-examine Detective Richards. In my view, there was no reasonable likelihood the cross-examination on the impugned statement in para. 11 would elicit evidence of any probative value to the issue for consideration on a review of the authorization. The material issued for consideration on the voir dire is whether, at the time of granting the authorization, there existed reasonable grounds to believe that: (a) an offence was or will be committed and (b) information concerning the offence will be obtained by the proposed interception.

66 Detective Richards' personal belief, if any, in Molsberry's truthfulness is immaterial. Section 184.2 of the Criminal Code does not require that the affiant, or any peace officer, have a subjective belief in the information advanced in support of the requisite reasonable grounds. The only requirement is that there exist, on an objective basis, reasonable grounds to believe that an offence has been or will be committed and that evidence about the offence will be obtained by means of the proposed interception.

68 The appellants contend however that the impugned statement brought Detective Richards' own credibility into question and that cross-examination was necessary to explore this further. There is no doubt that an affiant's own credibility may be material on a Garofoli hearing. Indeed, if the officer reported a certain result in the face of a contrary conclusion by the polygraph examiner, one would hope that cross-examination would be permitted. On this point, I agree with the following opinion expressed by Finch C.J.A. (para. 83):

The appellants have not shown any basis to conclude the cross-examination will tend to impugn Detective Richards' credibility on any of the statements in his affidavit that form the essential basis for issuing the authorization.

69 Although the likely effect of the proposed cross-examination must be assessed in light of the affidavit as a whole, I also agree with Finch C.J.A. that 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. 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.

Probable Cause

[15] The first area on which the defence proposes to cross-examine is that the wiretap for which authorization was sought was neither intended nor expected to obtain information with respect to the offences in issue, rather it was forward-looking and intended to obtain information with respect to offences not yet committed. Again, the defence argues that the true purpose of the P.04-2013 wiretap was not to gather evidence with respect to the June 2012 offences, but "to [get] Nicholson on something, even if [the VPD] could not be sure what."

[16] The affiant swears that the purpose of obtaining the authorization is to obtain evidence with respect to the offences of June 2012. The defence theory is that the affiant is not being truthful when he swears this to be the purpose and that a critical review of the basis for issuing wiretap authorizing should be undertaken by cross-examining the affiant.

[17] This circumstance is specifically addressed in Pires and Lising where the Supreme Court says at para. 63:

Indeed, if there is a reasonable basis for believing that an affiant deliberately attempted to mislead the authorizing judge, this would generally warrant further inquiry by cross-examination because the credibility of the entire affidavit may be brought into question.

(Emphasis added.)

The defence argues that given the delay between the date of the original offences in June 2012 and the date of authorization granted in February 2013, the police could not have intended to obtain evidence with respect to the June 2012 offences via wiretap. They point to the knowledge of police that there had been no contact between Nicholson and [] since mid-summer 2012, despite other investigations involving [] by the APD. They point as well to para. 184.2 of the affidavit where the affiant says:

Undercover Operation: Investigators intend to attempt an undercover operation separate from this interception of private communications. This undercover operation will not target the original offences under investigation but will be focused on an integrity test of Constable NICHOLSON. Investigators believe that there is a very close relationship has developed over many years between Constable NICHOLSON and []. I believe that an undercover operator would not be able to obtain information about the breach of trust that has already occurred as they could not insert themselves into that precise situation. Specifically, investigators intend to use undercover operators to develop a relationship with Constable NICHOLSON, gather intelligence, and ultimately to test Constable NICHOLSON'S integrity.

The defence says that Mr. Nicholson was ultimately charged not with the events of June 2012 but with subsequent events. The defence claims that all of this information should be sufficient to satisfy the Court that there is a reasonable likelihood that cross-examination would elicit evidence of probative value to the issues for consideration on the review of the authorization.

[18] In my view, the defence theory, together with the various portions of the evidence to which they have referred me do not form a reasonable basis for believing that the affiant deliberately attempted to mislead the authorizing judge.

[19] First, the affidavit sets out that the offences in issue are those stemming from June 2012. It also sets out that Nicholson and [] had apparently not been in contact since mid-summer of 2012 and that [] had indicated to the confidential informer that he wanted nothing to do with Nicholson. The affidavit also sets out the basis upon which the affiant believes that Nicholson and [] will discuss the favour that Nicholson did for [] in June 2012, particularly at paras. 180.7 through 180.9 of the affidavit. This information was before the authorizing judge and would permit him to determine whether there was an objective basis to believe that evidence about the offence will be obtained by means of the proposed interception. It does not persuade me that there is a basis for believing that the affiant misled the authorizing judge.

[20] Of course, the affiant does not know what the targets will ultimately discuss, or if they will have discussions. As has been stated in various cases, there is "an umbrous quality" to future communications. They may or may not take place. This does not detract from the belief that evidence about the offence will be obtained by means of the proposed interception. Again, the authorizing judge had to determine whether there was an objective basis to believe that evidence about the offence will be obtained by means of the proposed interception.

[21] Finally, the reference in para. 184.2 of the affidavit to an undercover operation is clearly stated to be separate from the interception of private communications, to not target the original offences and to be focused on the integrity of Constable Nicholson. The affiant deposes, at para. 184.2: "I believe that an undercover operator would not be able to obtain information about the breach of trust that has already occurred as they could not insert themselves into that precise situation." The affiant explains that this is so, at para. 196 of the affidavit:

It has been my experience as a police officer that drug traffickers are very reluctant to deal with new people because they are cognizant of the fact that they may be undercover operators. Also, as one of the targets is a police officer, it is highly unlikely that he would talk openly with new people about a very serious offence involving professional and criminal misconduct that could result in being fired and being charged criminally. Further, this occurred in the past with an associate that Constable NICHOLSON has known for a long time.

[22] Although the affiant properly discloses other lines of investigation that the police intend to pursue, that does not suggest that the true purpose of obtaining authorization is to obtain evidence with respect to other offences, rather than those stated to be in issue.

[23] Mr. Nicholson has not produced any material outside of the affidavit and his theory to support his contention that the affiant misled the Court. He claims that no police force would be so foolish as to disclose such a plan. I am left with the affidavit and the argument that a wiretap in February 2013 could not be expected to produce evidence of the June 2012 offences. That is the very issue that the authorizing judge was required to consider: that the authorization will afford evidence of that offence. The defence may argue this point at the sufficiency hearing. However, there is nothing that the defence has put before me which provides a reasonable basis for cross-examination.

[24] The defence argues that had the issuing judge been provided with a fuller picture and a less results-oriented presentation of the investigation, the issuing judge would have declined the authorization because it was not in the best interests of justice. The defence has not identified anything which was not put before the authorizing judge. The defence submissions come from the material that was before the authorizing judge. I am not persuaded that there is a basis for cross-examination on the limited areas contemplated by Garofoli and subsequent decisions.

[25] In conclusion, the defence theory and the various portions of the affidavit they have identified, as well as the charges that were ultimately laid, do not provide a reasonable basis for believing that the affiant deliberately attempted to mislead the authorizing judge, or that there is a reasonable likelihood that the cross-examination will undermine the basis of the authorization. This is at best a theory.

Investigative Necessity

- [26] The second major area on which the defence proposes to cross-examine the affiant was whether other types of investigation were designed to fail. The defence argues "There is a live issue as to whether the police deliberately or recklessly chose to employ such other investigative procedures so sloppily that they set the stage for investigative necessity." In particular, the defence argues that by choosing to conduct surveillance using VPD officers, particularly officers known to Mr. Nicholson, the VPD undermined its surveillance of him, thereby creating a false investigative necessity. They say that the VPD initially used RCMP members to conduct surveillance and then switched to VPD members, without explanation. They say that surveillance could have been maintained with RCMP officers. They wish to cross-examine in this regard to elicit evidence that, as set out above, the VPD intentionally undermined their surveillance efforts.
- [27] This proposed cross-examination also assumes that the affiant is deliberately misleading the authorizing judge.
- [28] In my view on this argument as well the affidavit and submissions do not meet the threshold required for cross-examination. First, when the affidavit is read carefully, at para. 138, it is apparent that Mr. Nicholson recognized that surveillance was being conducted on January 9, 2013 not because he recognized the individuals involved but because he, being a police officer, was familiar with standard surveillance procedures and recognized the pattern of surveillance. He saw a "foot" at the end of the street and, in the view of the affiant, started to conduct counter-surveillance to determine whether surveillance was taking place. He contacted the APD and learned that the VPD, specifically his acquaintance Cst. Fraser, was involved in surveillance in the area. Mr. Nicholson contacted Cst. Fraser to ask if he was conducting surveillance. Accordingly, it does not appear that Mr. Nicholson was alive to surveillance as a result of recognizing the individuals involved; rather, he was alive to it because he recognized patterns he associated with normal surveillance.
- [29] I am advised that the VPD conducted surveillance before January 9, 2013 without discovery, which undermines the defence theory.
- [30] Apart from the affidavit, the defence points to nothing to support its theory that the VPD "set up" investigative necessity itself.
- [31] Moreover, cross-examination is limited to the areas relevant to the authorization. Here, the affiant says that surveillance (as well as various other methods of investigation) will not produce the necessary evidence for the charges being investigated and explains his reasons for saying so. It is not simply that Mr. Nicholson recognized that surveillance was taking place. It is that surveillance is insufficient; it will not elicit the type of evidence necessary to pursue the offences of June 2012.
- [32] In my view, cross-examination on this issue will not assist the Court in reviewing the authorization.

[33] Finally, Mr. Nicholson identified a number of subsidiary issues he wishes to cross-examine on:

1. Whether there is a potential "Lachance" problem;
2. Whether the VPD was in a conflict of interest in investigating Nicholson because his wife was a VPD member;
3. What information the affiant had with respect to the status of []. What did he know with respect to the status of the other targets (i.e. was any of them a confidential informant);
4. An individual at para. 113 who was not identified as a confidential informer. Mr. Nicholson argues that it is misleading to simply identify him as an acquaintance and not as a confidential informant and he wishes to cross-examine on this point;
5. The legitimacy of investigations of []. He claims that they were a "sting" for Mr. Nicholson;
6. Why the undercover operation was not started earlier;
7. Whether there was possibility of making a police officer a confidential informant;
8. Whether it would be possible to take other steps using A;
9. Whether an undercover operation would have obtained information with respect to the offences of June 2012. He says that, at one point, the VPD considered bringing in the Sûreté du Québec to conduct undercover operations;
10. The possibility of using police agent; and
11. Why the tracking devices that were warranted were not installed.

[34] Many of these are simply questions with regard to the investigative decisions made by the VPD that do not have any particular foundation and do not refer to the issues to be addressed in reviewing the authorization. As such, the defence has proposed the accused be allowed to conduct a wide ranging cross-examination and to use limited judicial resources against which the Supreme Court of Canada has cautioned us. Some of these areas can be addressed on the challenge to the authorization, without cross-examination.

[35] There is no evidence in this case, as there was in Lachance, that the informer was also one of the targets. Mr. Nicholson proposes to cross-examine the affiant to see whether this was the case here.

[36] The status of the individual at para. 113 and the significance of that status can be argued at the sufficiency challenge. Cross-examination on this point would not further assist the Court.

- [37] There is no basis to suggest that any of the targets is a confidential informer, apart from a defence argument that [] was an informer handled by Nicholson. This is disputed by the Crown. Even if [] were an informer, Mr. Nicholson does not elaborate on the relevance of that to any of the factors to be considered by the authorizing judge. He does not suggest, for example that if [] were an informer, there would be no reasonable grounds to believe that the offence had been committed.
- [38] There is no basis to find, apart from theory, that the APD investigation of [] was not legitimate or that it was a 'sting' to trap Nicholson. The affidavit discloses a successful investigation of [] in October 2012 and information to the effect that [] continued to deal in drugs.
- [39] The many "what ifs" with regard to potential areas of investigation are without foundation and may be argued on the sufficiency hearing.
- [40] Whether the VPD was in a conflict in investigating Nicholson may be an issue at trial, but is not pertinent to the issues on review of the authorization.
- [41] In brief, I am not persuaded that there is a reasonable possibility on the evidence before me or on argument based on the affidavit, that cross-examination on these areas will assist the Court. There is no reasonable likelihood the cross-examination of the affiant on these areas will elicit testimony of probative value to the issues for consideration by the reviewing judge: see *World Bank Group v. Wallace*, 2016 SCC 16 at para.126, *Pires and Lising* at para. 3, and *Garofoli* at p. 1465.
- [42] To meet the test, the accused must show that the cross examination is reasonably likely to be useful on the application. I am not persuaded that it would be.

"B. J. Brown J."

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