

CANADA / JUDGMENT

R. v. Orr

2020 BCCA 319

COURT

British Columbia Court of Appeal

DECIDED

16 November 2020

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2020 BCCA 319 R. v. Orr

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Orr,

2020 BCCA 319

Date: 20201116

Docket: CA45726

Between:

Regina

Respondent

And

Arlen Jeffrey Orr

Appellant

FILE SEALED IN PART

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated
April 9, 2018 (R. v. Orr, Victoria Docket 168272-2).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

D.J. McKay

Counsel for the Respondent

(via videoconference):

J.N. Walker

O.L. Bick

Place and Date of Hearing:

Vancouver, British Columbia

November 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 16, 2020

Summary:

The appellant applied for further disclosure, in anticipation of filing an application to adduce new evidence on his appeal from conviction in April 2018 on charges of possession of controlled substances for the purpose of trafficking and possession a prohibited weapon. The convictions rested on evidence gained from a search of premises in May 2017 in an investigation that commenced in the spring of 2017. In June 2020, a police officer who had participated in the investigation in a non-leading capacity was arrested following an investigation commenced in 2019 on suspicions he had associated with individuals associated with criminal activities. The appellant sought disclosure of documents relating to the police officer's role in his charges, and the investigation and arrest of the police officer. Held: Application dismissed. The grounds of appeal include challenges to the search warrant, execution of which produced evidence admitted at trial, and the arrest of the appellant. The question on this application is the potential relevance of the information sought in the application to the grounds of appeal. Excising all information provided by the police officer from the Information to Obtain would leave other information in it as strong or stronger than the information excised, and so the disclosure sought would not advance the ground of appeal related to the search warrant. Nor would the information sought affect the objective reasonableness of the grounds for arrest, which must be considered as of the time of arrest. There is no reasonable possibility that the disclosure sought might assist the appellant in his appeal.

- [1] SAUNDERS J.A.: The appellant Arlen Jeffrey Orr applies for an order for further disclosure of documents in anticipation of filing an application to adduce new evidence on his appeal from his conviction on April 9, 2018, on two counts of possession of a controlled substance for the purpose of trafficking and one count of possessing a prohibited weapon. By his application, Mr. Orr seeks to obtain documents related to Cst. Ferris, a police officer employed by the Victoria Police Department, who is now believed to associate with individuals associated with criminal activities. Mr. Orr contends that in light of the belief that Cst. Ferris has associated with such people, his role in the investigation leading to the charges against him justifies the order for disclosure of documents related to such matters, that he seeks.
- [2] I would dismiss the application. I conclude that Mr. Orr has not established a sufficient basis for the order sought.
- [3] Relevance of the information sought is the central issue on this application. It is important to note at the outset that the application is framed by the law of disclosure in the context of an appeal to this court, and we are directed to the possible use that the information and material sought could have to the appeal proceeding.
- [4] Mr. Orr filed his notice of appeal on November 20, 2018. His grounds for appeal set out in his notice of appeal are that the trial judge erred in:
- a) dismissing his Charter applications; and
 - b) finding that there were sufficient grounds to arrest him; finding that his arrest and subsequent detention were for a lawful purpose; finding that there was a sufficient basis for the issuance of a search warrant based on the Information to Obtain; and finding that the issuance of a warrant for his arrest was not an abuse of the court's process by the police.
- [5] The search warrant issue addresses the judge's refusal to hold a voir dire to challenge the search warrant.
- [6] I will say at the outset that the search warrant authorized a search of premises, the address for which is in the trial record. However, these reasons for judgment are being delivered by videoconference, and who is in attendance is not known to us. For privacy and security while sustaining readability, I will refer to the apartment number involved in this case as apartment 123, and the street address as 5711 Quadra Street, numbers that are not associated to the real address.
- [7] The charges against Mr. Orr derived from an investigation initiated by the Victoria Police Department in late March or early April 2016, in response to information received from three confidential informers. Sgt. Philip headed up the investigation and Cst. Ferris participated in it. During the investigation, surveillance was conducted in or near 5711 Quadra Street, Victoria, British Columbia over six days in April and May 2016. During the surveillance the police made ten observations, two of them by Cst. Ferris, that in Sgt. Philip's experience were consistent with drug trafficking. Cst. Ferris also observed Mr. Orr using a

key to enter apartment 123 - 5711 Quadra Street, and he identified an exterior balcony where Mr. Orr was seen by other investigators, which he identified as associated to apartment 123.

- [8] On May 11, 2016, Sgt. Philip directed Mr. Orr's arrest for possession of cocaine for the purpose of trafficking. On the same day the team led by Sgt. Philip executed a search warrant of apartment 123 - 5711 Quadra Street, obtained on an Information to Obtain sworn by Cst. Niederlinski. The contents of the Information to Obtain overlapped with the grounds of arrest subsequently articulated at trial by Sgt. Philip. In the Information to Obtain, Cst. Niederlinski deposed that:
- a) Mr. Orr's address was listed as 123 - 5711 Quadra Street on his driver's license;
 - b) on May 5, 2016, Cst. Ferris saw Mr. Orr use a key to unlock and enter 123 - 5711 Quadra Street;
 - c) on May 15, 2016, Cst. Ferris confirmed that the balcony on which Mr. Orr had been seen by other investigators was associated to apartment 123; and
 - d) on May 16, 2016, Cst. Gill was told by the property management company that "Arlin Orr" was the sole tenant of 123 - 5711 Quadra Street.
- [9] During the search of 123 - 5711 Quadra Street, evidence was seized from the apartment that supported charges under the Criminal Code, R.S.C. 1985, c. C-46 and the Controlled Drugs and Substances Act, S.C. 1996, c. 19. Evidence supporting the charges was also seized from Mr. Orr upon his arrest.
- [10] Mr. Orr's trial began in September 2017 with a series of preliminary applications. In respect of the search warrant, on the "Vukelich" issue, the trial judge ruled that Mr. Orr had not shown any basis to enter into a voir dire to challenge it and that even if the challenged portions of the Information to Obtain were excised, the remainder was sufficient to satisfy the Garafoli test. The trial judge did declare voir dires in relation to Mr. Orr's Charter challenges to the grounds for his arrest and the form of process that issued after he was initially arrested, dismissing them all.
- [11] The trial that followed was brief. Mr. Orr consented to certain parts of the voir dire evidence becoming evidence at trial, made several admissions, and invited convictions on three counts. He was convicted on April 9, 2018.
- [12] Two plus years later, on June 17, 2020, Cst. Ferris was arrested by members of the RCMP Anti-Corruption Unit. The hearing of Mr. Orr's appeal scheduled for June 22, 2020 was adjourned to allow the Crown to consider the question of further disclosure. On July 17, 2020, the Crown advised Mr. Orr that Cst. Ferris had been arrested on June 17, 2020, that the arrest followed an investigation into activities of Cst. Ferris that were inconsistent with his duties as a police officer; and that Cst. Ferris was believed to be associating with individuals known to police to be associated with criminal activities. The Crown also disclosed, for the first time, that Cst. Ferris had been a co-handler of one of the three confidential informers

relied upon in the investigation leading to Mr. Orr's conviction.

- [13] The Crown subsequently advised Mr. Orr of the details of Cst. Ferris's service with the Victoria Police Department, the fact Cst. Ferris remains employed by the Victoria Police Department but is presently suspended, and that Cst. Ferris does not have a "McNeil" disciplinary record.
- [14] Further, Sgt. Tomiye of the RCMP Anti-Corruption Unit swore an affidavit deposing that the information leading to Cst. Ferris's arrest first came to the attention of members of the Victoria Police Department in 2019, causing the Victoria Police Department to refer the information to the RCMP Anti-Corruption Unit. Sgt. Tomiye deposed that the RCMP investigation into the activities of Cst. Ferris was opened in 2019, that the investigation revealed that Cst. Ferris was associating with and providing sensitive information to suspects of police investigations between January 2020 and May 2020; that the investigation did not identify Mr. Orr as an associate of Cst. Ferris; that the investigation did not identify any other police officer as being involved with Cst. Ferris's alleged activities; and that disclosure of details of the Anti-Corruption Unit investigation would compromise informant privilege. Sgt. Tomiye has sworn a second affidavit that is currently sealed.

The Application

- [15] Mr. Orr's application is for disclosure of all materials related to Cst. Ferris of the Victoria Police Department in relation to his involvement in the investigation of Mr. Orr and in relation to the investigation and arrest of Cst. Ferris on charges of criminal corruption. He says:

There are two aspects to this Application, one involving the obligation of the Crown under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 to provide all relevant materials in relation to the offence that the accused must answer to, and one involving the disclosure of third party records and disclosure of police misconduct records under the combination of *R. v. O'Connor*, [1995] 4 S.C.R. 411 and *R. v. McNeil*, 2009 SCC 3. The totality of the elements of this Application fall under the Applicant's rights under section 7 of the Canadian Charter of Rights and Freedoms.

The application for materials arising out of *Stinchcombe* include but are not limited to, any previously undisclosed materials in relation to the details of every aspect of the involvement of [Cst. Ferris] into the investigation of [the appellant], either directly or indirectly, including the details of any involvement in any other investigations into [the appellant] that gives rise to any information, knowledge or believe held by [Cst. Ferris] in support of the investigation in the matter before the Court.

- [16] Mr. Orr says the application encompasses "all source handler information in relation to any confidential informant that was accessed, questioned, or indirectly or directly involved in the investigation into [Mr. Orr] in relation to the matter before the Court, including the details of any source handler information from any other investigations into [Mr. Orr] that gives rise to any information, knowledge or belief held by [Cst. Ferris] in support of the investigation in the matter before the Court".
- [17] Mr. Orr says the application for materials includes any materials in possession of the Crown, the Victoria Police Department and any other police agency involved in the investigation into the criminal wrongdoing of Cst. Ferris.
- [18] Mr. Orr contends that the disclosure is necessary to fully address Cst. Ferris's involvement in the case under appeal. He says it may be that Cst. Ferris sought "to disguise his role as an agent provocateur in the furtherance of his corrupt activities, specifically to take down rival drug dealers in favour of the criminal associates that he was corruptly working for" and that "it is not beyond reason to suspect that Cst. Ferris may have been tailoring [information supplied by the informant] to this particular case, given the nature of the criminal corruption charges." He says that:

A matter of great concern is that Cst. Ferris may well be involved with members of the criminal community who are, or may be, associated with or involved in drug-related criminal activities. If so, these people would derive a benefit from the investigations which, in this case, turns upon the evidence of at least one [confidential informer] who may have been made available to Cst. Ferris in furtherance of their criminal activities or who could be the criminal associates of Cst. Ferris disguised as [confidential informers].

- [19] The Crown contends that the disclosure sought is not relevant to the appeal and that the disclosure it has provided describing Cst. Ferris's alleged misconduct provides sufficient information to demonstrate that the Crown has discharged its duty. The Crown categorizes the materials sought concerning the allegation against Cst. Ferris of misconduct as not being first party disclosure but rather third party disclosure, because there is no connection between the alleged misconduct and the investigation of the appellant.

The Applicable Legal Principles

- [20] It is common ground that the Crown has an ongoing duty to disclose all relevant non-privileged material in its possession or control. I will not embark here on a discussion of the two differing regimes for disclosure, that for first party records and that for third party records, discussed in detail in *R. v. Gubbins*, 2018 SCC 44, and *R. v. Johnston*, 2019 BCCA 107.
- [21] Where the disclosure relates to police misconduct, *R. v. McNeil*, 2009 SCC 3, establishes that the records relating to such misconduct will be considered as falling within the scope of first party disclosure where the police misconduct is either related to the investigation before the court or the finding of misconduct could reasonably impact the case: at para. 15. Not every

case of police misconduct will fall within the first party records regime, and the Crown will weigh factors such as the role of the misconduct in the laying of charges or obtaining convictions, the type and seriousness of the misconduct, the role the officer played in the investigation leading to the charges, and whether the misconduct could have any realistic bearing on the credibility or reliability of the officer's evidence. Notably for the purposes of this application, Justice Charron made this observation in McNeil about the disclosure of police misconduct that is not shown to have played a role in the investigation or in the prosecution that led to a conviction:

15. As I will explain, records relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the "first party" disclosure package due to the Crown, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under Stinchcombe. Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the O'Connor regime for third party production.
59. Of course, not every finding of police misconduct by an officer involved in the investigation will be of relevance to an accused's case. The officer may have played a peripheral role in the investigation, or the misconduct in question may have no realistic bearing on the credibility or reliability of the officer's evidence. The kinds of information listed in the Ferguson Report can provide useful guidance on those types of matters in respect of which a police force may well be advised to seek the advice of Crown counsel.
- [22] The essential issue on disclosure is relevance to the proceeding. This question dovetails with the Crown's obligation under McNeil to determine whether disclosure of police misconduct should be provided.
- [23] The Crown's obligation of disclosure in any case is ongoing through the appeal process. In an appeal, relevance is assessed with reference to the grounds of appeal, and concerns the possible use in the appeal of information that may be contained in the records sought. In Johnston, Madam Justice Griffin approved the approach in R. v. Trotta (2004), 23 C.R. (6th) 261 (Ont. C.A.), which separated the relevance question into two steps, first whether there was a reasonable possibility that the material sought could assist on an application to adduce fresh evidence on appeal, and second whether the applicant had demonstrated a reasonable possibility that the evidence to which the request for production was linked might be received as fresh evidence on appeal. Necessarily the issue of relevance engages the issue of the admissibility of fresh evidence, in the event disclosure is ordered. In Johnston, Madam Justice Griffin summarized the test of relevance in this fashion:
- [80] In summary, I agree with the analysis in Trotta [(2004), 23 C.R. (6th) 261 (Ont. C.A.)] and Singh [2010 ONCA 11] which I read as consistent with McNeil [(2006), 43 C.R. (6th) 370 (Ont. C.A.)]. Leaving aside the onus of disclosure or production, I conclude that, on appeal, the

relevance test for disclosure or production of records is generally whether there is a reasonable possibility the records might assist the appellant in prosecuting an appeal. This requires consideration of the possible uses of the newly sought information to support grounds of appeal, for example, whether the information might support a fresh evidence application under either the Palmer [[1980] 1 SCR 759] test or the Dixon [[1998] 1 S.C.R. 244] test.

Discussion

- [24] In the case before us, the utility of information concerning what is believed to be misconduct on the part of Cst. Ferris must be assessed in the context of the issues raised in the appeal. Concerning the role of Cst. Ferris in the investigation, this means Mr. Orr's challenge to the search warrant, execution of which produced evidence used at trial against him, and his challenge to his arrest that was based upon some of the same information. In respect to both, we must ask whether there is a reasonable possibility the records might assist Mr. Orr in prosecuting his appeal, that is, whether disclosure of the information will reasonably enhance his opportunity to succeed on either question.
- [25] In a submission I take to relate to the McNeil consideration of the relationship of the alleged police misconduct to the investigation of Mr. Orr, the Crown invites us to ask also whether the temporal nexus between the investigation of Mr. Orr and the suspicions that gave rise to the investigation of Cst. Ferris is so weak as to erode any reasonable possibility that the information now known about Cst. Ferris could have affected the police investigation or the evidence leading to his convictions. If so, the Crown says the disclosure sought is not relevant to the appeal, and the application should be dismissed on that basis alone.
- [26] In my view, the application should be dismissed. While I consider the temporal gap between the two investigations - of Mr. Orr and Cst. Ferris - fatally erodes the possibility that the records sought might assist Mr. Orr in his appeal, I prefer to base my decision on the absence of any material effect that the disclosure sought could have on the grounds of appeal that engage Cst. Ferris's role in the investigation, being the validity of the search warrant and Mr. Orr's arrest. In my view, the criminal corruption charges against Cst. Ferris do not call into question either the search warrant or the arrest.
- [27] I will address the issue of the search warrant and the issue of Mr. Orr's arrest separately.
- [28] In respect of the search warrant, the judge did not conduct a voir dire to determine whether the search warrant was valid. Mr. Orr challenges that determination on appeal. On this application he says that the "criminal corruption charges call into question all of the information he is said to have provided in this case". He contends that the search warrant is predicated on this information.

[29] In *World Bank Group v. Wallace*, 2016 SCC 15, Justices Moldaver and Côté explained a challenge to a wiretap authorization. In passages equally apt to challenges to a search warrant, they explained:

[120] As a general rule, there are two ways to challenge a wiretap authorization: first, that the record before the authorizing judge was second, that the record did not accurately reflect what the affiant knew or ought to have known, and that if it had, the authorization could not have issued (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at paras. 50-54; *Pires*, at para. 41; see also *R. v. Grant*, [1993] 3 S.C.R. 223, on the exclusion of unconstitutionally obtained information from warrant applications). The challenge here is brought on the second basis, sometimes referred to as a subfacial challenge.

[121] In view of the fact that a subfacial challenge hinges on what the affiant knew or ought to have known at the time the affidavit was sworn, the accuracy of the affidavit is tested against the affiant's reasonable belief at that time. In discussing a subfacial challenge to an information to obtain a search warrant, Smart J. of the British Columbia Supreme Court put the matter succinctly as follows:

During this review, if the applicant establishes that the affiant knew or should have known that evidence was false, inaccurate or misleading, that evidence should be excised from the [information to obtain] when determining whether the warrant was lawfully issued. Similarly, if the defence establishes that there was additional evidence the affiant knew or should have known and included in the [information to obtain] in order to make full, fair and frank disclosure, that evidence may be added when determining whether the warrant was lawfully issued.

(*R. v. Sipes*, 2009 BCSC 612, at para. 41)

[122] Smart J.'s comments apply equally to a *Garofoli* application (see *R. v. McKinnon*, 2013 BCSC 2212, at para. 12); see also *Grant*, at p. 251; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 40-42). They accord with this Court's observation in *Pires* that an error or omission is not relevant on a *Garofoli* application if the affiant could not reasonably have known of it (para. 41). Testing the affidavit against the ultimate truth rather than the affiant's reasonable belief would turn a *Garofoli* hearing into a trial of every allegation in the affidavit, something this Court has long sought to prevent (*Pires*, at para. 30; see also *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 21).

[123] When assessing a subfacial challenge, it is important to note that affiants may not ignore signs that other officers may be misleading them or omitting material information. However, if there is no indication that anything is amiss, they do not need to conduct their own investigation (*R. v. Ahmed*, 2012 ONSC 4893, [2012] O.J. No. 6643 (QL), at para. 47; see also *Pires*, at para. 41).

- [30] Mr. Orr says that without the information gained by Cst. Ferris in the investigation, there would have been no ability to obtain the search warrant. That is, he relates his application for disclosure to the ground of appeal challenging the Vukelich ruling denying him a voir dire on the validity of the search warrant.
- [31] The judge denied a voir dire on the basis that there was no reasonable prospect that even if the challenged portions of the Information to Obtain (which were not related to Cst. Ferris at that time) were excised, what would remain would be sufficient to satisfy the test of reasonable grounds for the search. On this application, he expands the portion of the Information to Obtain that he says should not have been before the judge. This challenge to the search warrant is the first type of challenge identified in *World Bank Group* at para. 120 - that the Information to Obtain was insufficient to make out the statutory preconditions for issuance of a search warrant.
- [32] In the Information to Obtain, Cst. Ferris is a sub-affiant. The most that counsel suggests might be achieved from a challenge to an information provided by the sub-affiant Cst. Ferris is excision of that information from the Information to Obtain. That information is: Cst. Ferris saw Mr. Orr use a key to gain entrance into apartment 123 - 5711 Quadra Street, Victoria; Cst. Ferris confirmed that the balcony on which Mr. Orr had been seen was associated to the apartment; and certain knowledge gained by him as the handler of one of the confidential informers referred to in the Information to Obtain. Excising this information would leave the assertions in the Information to Obtain that Mr. Orr's address listed on his driver's license was the same address identified in the search warrant, and that the property management company told Cst. Gill that "Arlin Orr", a name phonetically the same as the name of the appellant, was the sole tenant of those premises. Considering those assertions in the context of information disclosed in the Information to Obtain received by police from confidential informers who were not handled by Cst. Ferris, and the observations made by investigators other than Cst. Ferris of Mr. Orr's brief encounters between himself and others with persons in and around the building, I cannot say such excision would advance the claim that the judge erred in his Vukelich ruling. I consider that what would then remain in the Information to Obtain is, for the purposes of the validity of the search warrant, as strong or stronger effect than the information that would have been excised as relating to Cst. Ferris.
- [33] In reaching this conclusion, I express no views on Mr. Orr's appeal as it relates to the refusal to hold a Vukelich hearing or the validity of the search warrant. I say only that excising Cst. Ferris's information from the Information to Obtain would not reasonably be expected to affect the outcome of the appeal. That being so, I am not satisfied that such disclosure could satisfy a test for admissibility as fresh evidence related to the sub-affiant.
- [34] I would note that the second basis for challenging an authorization addressed in *World Bank* is a challenge to the affiant, here Cst. Niederlinski. No basis is asserted before us for concluding that Cst. Niederlinski knew or ought reasonably to have known of any improper behaviour of Cst. Ferris in 2016 when he swore the Information to Obtain. There is

accordingly, no basis on which to challenge Cst. Niederlinski's assertions directly on the basis of the disclosure sought, so as to undermine the Information to Obtain: World Bank Group at paras. 138-9. Here, para. 141 of World Bank Group is apt in respect of Cst. Niederlinski's reliance on information provided by Cst. Ferris:

While affiants must not allow themselves, either knowingly or through wilful blindness, to be misled by informer handlers and other officers, there is no evidence of any discrepancies or errors that should have put [the affiant] "on notice" to investigate further.

[35] Likewise, I see no basis on which to consider that the disclosure sought is relevant to the ground of appeal relating to the sufficiency of grounds to arrest Mr. Orr. Sufficiency of grounds to arrest depends on the objective reasonableness of the arresting officer's subjective grounds for arresting. In *R. v. Jir*, 2010 BCCA 497, Justice Frankel said that this question:

[29] involves an assessment of the factual matrix that existed at the time the arrest decision was made. That other information, had it been available, might have strengthened or weakened those grounds is not a relevant consideration.

[36] Mr. Orr raises several questions concerning his arrest that do not engage the involvement of Cst. Ferris in the events, but I understand the grounds of appeal also may refer to the role of Cst. Ferris in the arrest through a challenge to Sgt. Philip's basis for directing the arrest of Mr. Orr. The challenge to sufficiency of Sgt. Philip's basis for directing the arrest involves his subjective belief in the information on which he relied, which must be objectively reasonable. Some of that information was the information gained from Cst. Ferris recited in the Information to Obtain. That is, this ground of appeal may address the trial judge's conclusion that Sgt. Philip's belief that there were grounds to arrest Mr. Orr was objectively reasonable. On this question I consider that there is no assistance to be had by Mr. Orr from information about Cst. Ferris gained through the 2020 investigation of Cst. Ferris or his subsequent arrest. In other words, information that might be provided on such a disclosure order would not be relevant to the sufficiency of grounds for arrest, in my view.

[37] In my view, there is no reasonable possibility that the information or material sought might assist Mr. Orr in the pursuit of his appeal. Accordingly, I see no basis upon which to consider that the material could be admitted as fresh evidence in relation to the appeal, as now framed. I would dismiss the application.

[38] DICKSON J.A.: I agree.

[39] FITCH J.A.: I agree.

[40] SAUNDERS J.A.: The application is dismissed.

"The Honourable Madam Justice Saunders"

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Prepared on 29 October 2026 · Esheria