

CANADA / JUDGMENT

R. v. Pedersen

2010 BCSC 2030

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 2030 R. v. Pedersen IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Pedersen, 2010 BCSC 2030 Date: 20101015 Docket: 149340 Registry: Victoria Regina v. Scott Everett Pedersen Vincente Serrano Hernandez Restriction on Publication: Pursuant to 486.5(7) C.C.C. Before: The Honourable Madam Justice J. A. Power Oral Ruling on Voir Dire Re Reliance on Confidential Source Information for Reasonable and Probable Grounds Counsel for the Crown: P. Eccles and S. Steele Counsel for the Accused Pedersen: R. Mulligan, Q.C. Counsel for the Accused Hernandez: J. Mills Place and Dates of Hearing: Victoria, B.C. October 12-15, 2010 Place and Date of Judgment: Victoria, B.C. October 15, 2010

- [1] THE COURT: We are in the midst of a voir dire to establish whether or not the arrest and subsequent warrantless search of the accused Pedersen and Hernandez was based on reasonable and probable grounds.
- [2] The defendants are challenging their arrest and search as a violation of the Charter, ss. 7, 8, 9, and 11(d).
- [3] Sergeant Barry Pierce, a member of the Royal Canadian Mounted Police, Greater Vancouver Drug Section, is testifying on the voir dire as the first witness for the Crown. Sergeant Pierce was appointed primary investigator of this cocaine importation investigation. He is an officer of 31 and a half years' experience and has been working in the area of drug-related offences for approximately 27 years.
- [4] Sergeant Pierce has testified on this voir dire, in direct examination, that he received information from a confidential informant. That information is summarized in his will-say, which is at Tab 1, Exhibit 3, of the Crown materials on the Vukelich hearing, and at Exhibit 4 of this voir dire. That summary is as follows: I was provided with confidential source information in early November, 2009 relative to an organized group of individuals who were planning to import into west coast of British Columbia a large quantity of cocaine. I advised Sgt Clarke that I had received confidential source information in early December, 2009. I received confidential source information which indicated that a boat containing 1000 kg of cocaine had departed Panama and was headed towards Ecuador to receive its shipment of cocaine. The vessel would then travel to a location off the west coast of Vancouver. Arrival off the coast of British Columbia coast is expected sometime in March.

- [5] Exhibit 4 is an expanded version of the will-say document which was prepared as a result of the issues at play in this voir dire.
- [6] As a result of that source information, Sergeant Pierce took certain actions, including liaising with Sergeant Anne Clarke in order to prepare a formal request for the assistance of the Department of National Defence. Ultimately, as a result of information received from Sergeant Anne Clarke relating to observations on March 6, 2010, of a suspicious vessel named Huntress off the coast of British Columbia near Port Hardy, Sergeant Pierce directed the arrest of the occupants of the Huntress.
- [7] Sergeant Pierce is currently under cross-examination. Just prior to this argument, Mr. Mulligan, defence counsel for Mr. Pedersen, asked a series of questions respecting the number of entries in Sergeant Pierce's notebook that relate to confidential informants. Mr. Mulligan asked whether there were entries in the notebook in 2010, and the officer replied, "I don't think I can get into when in 2010."
- [8] He was asked whether he was able to identify dates. He answered, "Yes, I would prefer not to identify dates."
- [9] He was asked if he was able to tell how many entries, with respect to confidential informants, were in the notebook. He answered, "Yes, it would take some time."
- [10] At that point, the Crown objected on the basis of relevance, and I upheld that objection, on the basis that I failed to see the relevance of such a broad question to the issues at play in this voir dire.
- [11] Defence counsel Mr. Mulligan now seeks a ruling that the Crown is not entitled to rely on confidential source information as part of its argument for reasonable and probable grounds. The defence argues that he is not trying to pierce informant privilege, but is seeking to test the reliability of the confidential informant information and to test the credibility and reliability of Sergeant Pierce. He argues that there can be no reliance on confidential source information at all if he is not allowed to test its reliability through cross-examination.
- [12] The Crown argues that I can consider the confidential source information, and that I should look not to exclude individual pieces of evidence, but rather look to the totality of the evidence at the conclusion of the voir dire.
- [13] The Crown pointed the court to the decision of the Supreme Court of Canada in *R. v. Debot*, [1989] 2 S.C.R. 1140, a decision of the New Brunswick Court of Appeal in *R. v. Goodine*, 2006 NBCA 109, and the decision of the Supreme Court of Canada, *R. v. Leipert*, [1997] 1 S.C.R. 281 among other cases.
- [14] I am of the view that the Crown is entitled to rely on the confidential source information as part of its argument for reasonable and probable grounds, and that evidence will be considered in the context of the totality of the evidence at the conclusion of the voir dire.

- [15] In Debot, an oft-quoted passage, at p. 1168, from the reasons of Madam Justice Wilson, is as follows: In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.
- [16] Without prejudging the strength of the confidential source information in the context of the totality of the evidence, which I have not heard yet, I note that it may be possible to conclude that the information was compelling in relation to its detail and the action taken by the police as a result, and further, that it was corroborated by police investigation prior to making the decision to arrest and search.
- [17] While there may be a difficulty in ascertaining whether or not the source was credible, other than by surrounding indicia of reliability, that in and of itself does not preclude the consideration of confidential source information, in my view.
- [18] As the cross-examination continues, I am not ruling that no further questions can be asked around the issue of the confidential source information. I will, however, be guided by the nature of the question and the officer's answer regarding the issue of informant privilege. I will be guided by the principles enunciated in the case law, including the principle that since identification of informers can be revealed by seemingly innocuous pieces of information, scrupulous care must be taken in protecting from disclosure anything that may indicate their identity.
- [19] I will, when the officer returns, ask the officer in his answers to clearly assert the privilege when he thinks it arises, so that the position is clear and we are not in a position of having to determine what he means by language like, "I don't think I can get into that" or "I would prefer not to". J. A. Power, J. The Honourable Madam Justice J. A. Power

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