
CANADA / JUDGMENT

R. v. Perkins

2018 BCSC 307

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 307 R. v. Perkins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Perkins,

2018 BCSC 307

Date: 20180207

Docket: 65705

Registry: Chilliwack

Regina

v.

Corey Jim Perkins

Before: The Honourable Mr. Justice Ehrcke

Oral Ruling on Voir Dire #3 re Production Order

Counsel for the Crown:

C. Fast

O. Bick

Counsel for the Accused:

D. Markovitz

Place and Date of Hearing:

New Westminster, B.C.

February 6-7, 2018

Place and Date of Judgment:

New Westminster, B.C.

February 7, 2018

INTRODUCTION

- [1] The applicant/accused Corey Jim Perkins, who is charged, among other things, with possession of cocaine and fentanyl for the purpose of trafficking and illegal possession of various firearms, challenges the validity of a production order that was granted December 10, 2014, and a general warrant that was granted December 12, 2014, with respect to Storage Locker 1108 at Trans Canada Self Storage, 2992 Pinegrove Street, Abbotsford, British Columbia
- [2] In his notice of application dated January 2018 (no day specified), the applicant sought the following relief:

The Applicant applies for the following Rulings, Declarations and Orders:

1. a Declaration that the Applicant's right to be secure against unreasonable search and seizure, guaranteed by s. 8 of the Charter of Rights and Freedoms ["Charter"], was violated by the searches in this case;
2. a Declaration that the Tracking Warrant ["Tracking Warrant"] issued on November 6, 2014 by Judge Hayes on the blue Mercedes with the British Columbia licence plate No. AD881N registered to the Applicant [the "Mercedes"] should not have been granted.
3. a Declaration that the General Warrant issued on December 8, 2014 by Judge Rounthwaite to covertly open, examine, photograph, and take samples of any package delivered by the Applicant ["General Warrant 1"] should not have been granted.
4. a Declaration that the General Warrant ["General Warrant 2"] issued on December 12, 2014 by Judge Point to view, access, examine, photograph, and take samples of the contents inside Storage Unit, No. 1108, rented by Courtney Evans at Trans Canada Self Storage located at 2992 Pinegrove Street ["Storage Locker"] should not have been granted.
5. a Declaration that the four CDSA warrants issued on December 15, 2014 by Justice Brown to search the Mercedes, the Storage Locker, the Applicant's residence at 34329 Green Avenue, Abbotsford, BC ["Home"], and a rural property, owned by Tom Feland at 29939 Taylor Road in Abbotsford ["the Barn"] should not have been granted.
6. a Declaration that the Information to Obtain ("ITO") sworn by Constable Davies ("the Affiant") did not contain reasonable and probable grounds to search
 - a. the Home

- b. the Barn
 - c. the Storage Locker
 - d. the Mercedes
 - e. the Tracking Warrant
 - f. the General Warrant 1
 - g. the General Warrant 2
 - 7. an Order pursuant to s. 24(2) of the Charter excluding all the evidence obtained; and
 - 8. such further relief as this honourable Court deems just.
- [3] On February 6, 2018, the applicant applied to amend his notice of application, and he was given leave to do so. Following paragraph 2, a new paragraph was added, which reads:
- 3. a declaration that the Production Order ["Production Order"] issued on December 10, 2014 by a Justice of the Peace should not have been granted.
- [4] The subsequent paragraphs were then renumbered accordingly, and the old paragraph 6, now numbered 7, was amended by adding clause (h) as follows:
- h. the production order for the storage locker.
- [5] Even as amended, the notice of application is not happily worded. Paragraph 7, formerly paragraph 6, of the prayer for relief in relation to the ITO sworn by Cst. Davies is confusing and redundant. It is confusing because Cst. Davies swore separate ITOs with respect to the various orders and warrants, and this paragraph does not particularize or distinguish between them. Moreover, it is difficult to understand what is meant when it seeks: "... a Declaration that the Information to Obtain ... does not contain reasonable and probable grounds to search ... (e) the Tracking Warrant, (f) the General Warrant 1, (g) the General Warrant 2; and (h) the production order for the storage locker." It makes no sense to talk of having grounds to search a warrant.
- [6] I believe that what that paragraph is getting at is the allegation that the various warrants and authorizations are not properly grounded by the ITOs that were filed in support of them. In that case, it is redundant with the paragraphs that precede it. What the applicant, in the end of the day, is seeking, is an order striking down the various authorizations and warrants on the basis that the material filed by Cst. Davies in applying for them was not sufficient to satisfy the legal requirements for their issuance.
- [7] In dealing with the application, we entered a voir dire. The bound volume of materials containing each of the authorizations and warrants, along with the ITOs in support of them, was marked as Exhibit 1 on the voir dire. As well, Cst. Davies took the witness stand for cross-examination by the applicant with respect to an apparently erroneous date. Cst. Davies testified on the voir dire that in all of the ITOs, wherever he wrote "on October 21, 2014, I

read a debrief completed on November 4, 2014, where Cst. Toews and Cst. Nugent met with Source D", the date "November 4, 2014," is accurate, but the date, "on October 21, 2014," was in error and should rather be, "between November 4 to 6, 2014." Accordingly, in all the ITOs, for the purposes of review, the date, "on October 21, 2014," must be excised and replaced with the date contained on amplification, namely, "between November 4 to 6, 2014."

- [8] Some of the items in the applicant's prayer for relief have already been dealt with. On February 1, 2018, I dismissed the application for a declaration that the tracking warrant for the blue Mercedes, issued November 6, 2014, should not have been granted. That is, I upheld the validity of the tracking warrant.
- [9] On February 2, 2018, the Crown conceded that in light of the provisions of s. 40(3) of the Canada Post Corporation Act, R.S.C. 1985, c. C-10, the General Warrant 1 issued on December 8, 2014 to examine packages delivered to Canada Post by the applicant should not have been granted. I so order, although I note that the Crown reserves the right to make submissions subsequently that the evidence obtained from the Canada Post warrant should not be excluded under s. 24(2) of the Charter.
- [10] These reasons will deal with the application to strike down the production order in relation to the storage locker.

STANDARD OF REVIEW

- [11] The test on a review such as this was summarized by Frankel J.A. in *R. v. Whitaker*, 2008 BCCA 174 at para. 43:
- [43] When a judicial order authorizing a search or seizure is challenged at trial, the trial judge's role is to determine whether the order could have been granted. This determination is made based on the record which was before the authorizing judicial officer as amplified on the review: *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65 at para. 51. As succinctly stated by Madam Justice Rowles in *R. v. Al-Maliki*, 2005 BCCA 157, 201 C.C.C. (3d) 96, "[t]he test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether, in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge": para. 19.

REASONABLE GROUNDS STANDARD

- [12] Unlike a tracking warrant, where the application materials must satisfy a reasonable suspicion standard, the legislation in relation to production orders and general warrants sets the bar higher and requires that the prerequisites be established on the standard of reasonable grounds to believe.

- [13] Reasonable grounds are something more than suspicion, but less than the civil standard of a balance of probabilities, and less than a prima facie case. It is a practical, non-technical, and common sense standard that requires a consideration of the totality of the circumstances: *R. v. Debot* (1989), 52 C.C.C. (3d) 193 at p. 213 (S.C.C.); *R. v. Whitaker*, at paras. 39-42; *R. v. Lam*, 2002 BCCA 99 at paras. 7-8; and *R. v. Liu*, 2014 BCCA 166 at paras. 33-39.
- [14] In reviewing the application materials submitted for a production order or a warrant, the grounds must be assessed from the standpoint of a reasonable person standing in the shoes of the police officer, and in this respect the experience of the affiant is relevant: *R. v. Tran*, 2007 BCCA 491 at paras. 12-13.
- [15] Where the affiant relies on information obtained from a confidential informer, the court must assess the informer's reliability, including past performance, motive, and whether the information was compelling, credible, and corroborated, although weakness in one area may be compensated for by strengths in the others: *R. v. Debot* at p. 215.
- [16] Reasonable grounds can be based in part on reputation evidence, including the reputation of the suspect and the reputation of people with whom the suspect associates, although the weight to be given to such evidence will depend in part on its reliability: *R. v. Debot* at pp. 215-216.

REASONABLE GROUNDS FOR A PRODUCTION ORDER

- [17] The production order for the storage locker was issued on December 10, 2014. At that time, the preconditions for issuance were set out in s. 487.014(2) of the Criminal Code which read:
- 487.014 (2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that
- (a) an offence has been or will be committed under this or any other Act of Parliament; and
 - (b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.
- [18] That section came into force just one day earlier, on December 9, 2014.
- [19] Before that, the issuance of production orders was governed by a similarly worded section of the Criminal Code, but that section had a different number prior to December 9, 2014, namely s. 487.012. That explains why both the ITO and the production order mistakenly refer to s. 487.012 rather than s. 487.014. Nothing turns on this typographical error.
- [20] What should be noted, however, is that prior to December 9, 2014, the old s. 487.014(1) of the Criminal Code, which is now s. 487.0195, provided:

487.014 (1) For greater certainty, no production order is necessary for a peace officer or public officer enforcing or administering this or any other Act of Parliament to ask a person to voluntarily provide to the officer documents, data or information that the person is not prohibited by law from disclosing.

- [21] This is significant because, as set out in the ITOs, from December 3 to 8, 2014, the Abbotsford Police obtained various information from Trans Canada Storage voluntarily before applying for the production order. The applicant has argued that that was improper and the police should have waited until they had been granted the production order, but this argument cannot succeed in light of that section.
- [22] In Cst. Davies' December 10, 2014 ITO, he affirmed that he had reasonable grounds to believe that an offence of trafficking or possession for the purpose of trafficking in a controlled substance had been committed, and that data including video, customer information, contracts and passcodes for Locker #1108 would afford evidence with respect to that offence, and that the data was in possession of Trans Canada Self Storage, 2992 Pinegrove Street, Abbotsford, British Columbia.
- [23] On this review, no issue is taken with the fact that Cst. Davies subjectively had these beliefs and that the data was in possession of Trans Canada Self Storage. The issue on review is whether the ITO, as amplified and redacted, provides a basis on which the justice could have found that there were reasonable grounds for Cst. Davies' belief that Corey Perkins had committed a drug offence, and that production of the data relating to Storage Locker #1108 would afford evidence respecting the commission of that offence.

REASONABLE GROUNDS TO BELIEVE THAT COREY PERKINS COMMITTED A DRUG OFFENCE

- [24] The first question is whether the ITO, as amplified and redacted, provides reasonable grounds to believe that Corey Perkins had committed an offence of trafficking or possession for the purpose of trafficking in a controlled substance. This was also a requirement for the issuance of the tracking warrant on the blue Mercedes, but the standard there was only reasonable suspicion.
- [25] In my reasons for judgment delivered February 1, 2018, I found that the ITO affirmed by Cst. Davies on November 6, 2014 met this standard, and I held that the tracking warrant was properly issued.
- [26] Although it was not necessary to address the point in those reasons, I would not have found that the standard of reasonable grounds for belief had been attained on the basis of the November 6, 2014 ITO.
- [27] The application for the production order was supported by Cst. Davies' ITO affirmed December 10, 2014. Much of that ITO is virtually identical to the November 6, 2014 ITO, but there is additional information added.

- [28] One way of framing the issue before me then is whether, on the question of Corey Perkins committing a drug offence, the additional material in the December 10, 2014 ITO is sufficient to raise the level of confidence from that of reasonable suspicion to that of reasonable grounds to believe.
- [29] To answer this question, we need to consider what has been added to the December 10, 2014 ITO that was not present in the November 6, 2014 ITO.
- [30] The new information falls into four categories. First, there is additional evidence that Corey Perkins regularly drove the blue Mercedes. Paragraphs 49 to 53 of the December 10, 2014 ITO provide evidence that Corey Perkins was driving the Mercedes on November 6, November 10, November 19, December 1, and December 2, 2014. This strengthens the inference that it was Corey Perkins in the Mercedes when it was seen on October 21, 2014, meeting in suspicious circumstances with Himpfen's Yukon in the parking lot of Twister Gym.
- [31] Next, there is additional information that even after his arrest on October 28, 2014, Himpfen continued to be involved with activities that, in Cst. Davies' view, were consistent with drug activities. This strengthens the inference that there may have been a drug transaction between Himpfen and Perkins near a rural farm road on November 3, 2014.
- [32] Third, the December 10, 2014 ITO provides evidence of two further instances where Perkins met briefly with another vehicle in circumstances that are consistent with drug activities. Paragraph 51 describes a meeting in a parking lot at 6418 Mount Lehman Road, where an unknown male entered the front passenger seat of Perkins' Mercedes, then exited after one minute and drove away in a red Dodge pickup.
- [33] Paragraph 52 describes a meeting on December 1, 2014, in a McDonald's parking lot, where Perkins' Mercedes was parked adjacent to a vehicle with licence 067 RKF. Perkins entered the passenger seat of that other vehicle, then left and drove away after two minutes. The driver of that other vehicle was someone with a record for possession of a controlled substance for the purpose of trafficking.
- [34] The fourth additional piece of information is from Confidential Informer E, who had not been referred to in the earlier ITO. At paragraph 17 of the December 10, 2014 ITO, we are told that Source E has only been providing information since 2014, but that the information he provided resulted in one tracking warrant and two CBSA search warrants in which controlled substances were located and seized.
- [35] We are told that his motivation is consideration of current charges and money, and that he is awaiting disposition on something. We are told that the information he provided was based on personal knowledge.

- [36] Paragraph 43 then sets out the information Source E provided in relation to the current investigation. There are 13 sub-clauses to paragraph 43, and all of this information would have been available to the justice who issued the production order.
- [37] On this review, however, almost the entirety of paragraph 43 has been redacted. What is left unredacted is just parts of clause (f), clause (g), and clause (i). Clause (f) speaks of Source E identifying a booking photo of Corey Perkins as, and then there is a redaction. Clause (g) says that Source E described, and then there is a redaction, followed by the words, "as white and skinny with a long skinny face and had a tattoo on the top of his hand", after which Cst. Davies added the comment that Cst. Toews observed a tattoo on the top of Perkins' hand. Clause (i) states that Source E picked up cocaine, and then there is a redaction, followed by the words "directly from" followed by another redaction, and then the comment of Cst. Davies that Perkins has a criminal record for drug trafficking.
- [38] Depending on what is in those portions that have been redacted, this information from Source E could be very significant or it could be completely inconsequential. In its current redacted form, it is impossible to tell, and it would be wrong to speculate.
- [39] Accordingly, it falls to me to decide this matter without placing any weight at all on information from Source E. What is left is what I have described above.
- [40] Clearly the additional information in the December 10, 2014 ITO provides a stronger basis for believing that Corey Perkins was involved in a drug offence than was the case with the November 6, 2014 ITO.
- [41] The question is whether the addition is enough to move the level of confidence from the reasonable suspicion required for the tracking warrant up to the reasonable grounds for belief required for a production order or warrant.

CONCLUSION

- [42] Although I consider this case to be very close to the line, I find that the reasonable grounds for belief standard has not been met on the basis of the December 10, 2014 ITO as currently redacted.
- [43] On the basis of the redacted ITO, there were not grounds upon which the justice could properly have issued the production order.
- [44] In light of this conclusion, I do not find it necessary to go on and consider whether there were reasonable grounds to believe that the production order would have afforded evidence respecting the commission of the offence.

The Honourable Mr. Justice W.F. Ehrcke

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