

CANADA / JUDGMENT

R. v. Phommaviset

2003 BCSC 81

COURT

Supreme Court of British Columbia

DECIDED

15 January 2003

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2003BCSC0081

Citation:

R. v. Phommaviset

Date:

20030115

2003 BCSC 81

Docket:

XO62291-2

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

AGAINST

SOUPHANE PHOMMAVISET

RULING ON VOIR DIRE

OF THE

HONOURABLE MADAM JUSTICE DILLON

Counsel for the Crown:

D. Majzub

Counsel for the Accused:

R. Albertson

Date and Place of Hearing:

January 13, 2003

New Westminster, BC

- [1] Souphane Phommaviset is charged with unlawfully producing cannabis and with possession of cannabis for the purpose of trafficking contrary to the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19. A voir dire was declared to determine whether the arrest of the accused on May 16, 2001 was lawful and whether the subsequent warrantless entry by police into a residence located at 13380 67A Avenue, Surrey, British Columbia was contrary to s. 8 of the Canadian Charter of Rights and Freedoms. The defence seeks to excise portions of the information to obtain the search warrant that includes information obtained in the warrantless search of the house.
- [2] On May 16, 2001, Constable Toomer of the Surrey R.C.M.P. received information from an unknown informer that the informer had that same day observed marijuana plants as well as bright lights in the basement of the house located at 13380 67A Avenue, Surrey, British Columbia. The informer said that a male named Souphane Phommaviset rented the house. Constable Toomer began to prepare an information to obtain to assist in obtaining a search warrant based upon the information of the informer. Constable Toomer testified that he was of the opinion that he had reasonable and probable grounds for a warrant based upon the information of the informant. However, he continued to access the police information retrieval system to gain information about the residence and about the renter while other officers were sent to hold the perimeter of the residence and establish surveillance.
- [3] Constables Leeson, Bulmer, and Jodrey were sent by a supervisor to the residence at 13380 67A Avenue for the purpose of surveillance of the property prior to execution of the search warrant that was expected. There is no evidence that Constables Leeson, Bulmer nor Jodry were informed of the details of the information received by the informant and knew only that Constable Toomer was preparing an information to obtain a search warrant and that it was believed that there was a marijuana grow operation at that address. Constable Leeson testified that he assumed that Constable Toomer believed that he had reasonable and probable grounds and that he would not have been sent out for surveillance unless the police thought that there were reasonable and probable grounds to obtain the search warrant. There is no evidence that any of these three officers discussed the information with Constable Toomer before they were dispatched to survey and maintain continuity of the residence. Both Constables Leeson and Jodry testified that their purpose was not to obtain more evidence to buttress the information to obtain. The officers were in plainclothes in two unmarked police cars. Constable Leeson said that the purpose was to report back observations on surveillance of the residence to the affiant and to make a decision on the spot with respect to any arrivals or departures from the residence. Constable Leeson said that he would have detained or arrested anyone who departed from the residence.

- [4] Constables Leeson and Jodry were together when they took up position outside the residence. They observed a maroon van in the driveway of the house. About a half hour after they arrived, three males exited the house holding six large garbage bags that appeared full. The bags were placed into the van and the three men got into the van. Both officers concluded that there was marijuana in the garbage bags. The two unmarked police vehicles immediately moved to block off the van in the driveway. The three occupants of the van were told to get out of the van, that they were under arrest for production of marijuana. They were removed from the van, handcuffed, and put face down. Constable Jodry arrested the accused and read him his rights. Constable Jodry testified that he understood that an information was being prepared that alleged that there was a marijuana grow operation at this house and that when he saw the full garbage bags, he thought that they contained marijuana based upon his experience of seeing marijuana transported in that fashion. He said that he believed that he had reasonable and probable grounds to arrest for cultivation of marijuana. Constable Leeson also stated that he believed that there were reasonable and probable grounds to arrest.
- [5] A frisk search of the accused produced some keys in his top pocket that Constable Jodry gave to Constable Leeson. While Constable Jodry remained with the three accused, Constables Leeson and Buttar used the keys given by Constable Jodry to enter the residence at 18830 67A Avenue. Constable Leeson testified that he thought it prudent to clear the residence because he had no clear information on the number of suspects and they had lost the element of surprise. He had been unable to tell if anyone had been left in the house when the others left. He said that he wanted to search the house to look for others to eliminate the potential threat to the officers and to prevent the loss or destruction of evidence. He anticipated that there could be evidence other than the marijuana grow operation itself such as documents, firearms, or other controlled substances and he thought that they could be destroyed if there was still someone in the house. He testified that he did not enter the house to search for evidence of a marijuana grow operation.
- [6] The officers announced their presence and did a cursory search for persons. They did not open drawers or handle any items. They did not unlock the downstairs room that appeared to house a marijuana grow operation from the observation of ballasts, transformers, capacitors, and venting hose in the laundry room area and the sound of fans coming from the locked room. Constable Leeson said that he did not think it likely that there was anyone behind the locked door based upon his observations within the house including that there was no television or radio on, there was no food preparation apparent, and the door to the grow area was locked. He was satisfied that there was not anyone else in the house.
- [7] Constables Leeson and Buttar then left the residence and re-established surveillance of the house along with Constable Jodry. Constable Leeson said that he arranged for uniformed members to assist in the transport of the accused. Constable Leeson reported his observations of the ballasts, capacitors, and venting material and the sound of fans to Constable Toomer. Constable Buttar also reported that he smelled growing marijuana in the

house. Although Constable Toomer said that he was not waiting for more information, he did include this additional information in the still unfinished information to obtain.

Constable Toomer then obtained a search warrant. Both the Crown and the defence agreed that there was insufficient information to obtain a warrant based only upon the informant's information. It was also agreed that there was sufficient information once the details obtained in the warrantless search of the residence by Constables Leeson and Butar.

- [8] The garbage bags contained household garbage. This was discovered after the arrest of the accused. The subsequent search of the residence did reveal a marijuana grow operation in the basement behind the locked door. Police also found documents in the name of the accused at the house.
- [9] The accused asserts that there were not reasonable and probable grounds for his arrest. He also says that the subsequent warrantless search of the residence was for the purpose of gaining more information to buttress the information to obtain that police knew was insufficient. The failure to search the locked basement area indicates that this was not a real search for people still in the house. Consequently, the search was illegal because it was not incidental to a valid arrest, it was an unreasonable search contrary to s. 8 of the Charter, and was unreasonably conducted.
- [10] The Crown asserts that there was both subjective and objective basis for reasonable and probable grounds to arrest the accused. The police had attended at the residence believing that Constable Toomer had reasonable and probable grounds and the three males loading garbage bags believed to contain marijuana into the van then augmented this. They attended to secure the perimeter of the house prior to execution of the search warrant. The decision to enter the residence was in exigent circumstances within s. 11(7) of the Controlled Drugs and Substances Act for the protection of the officers and to prevent the destruction of evidence.
- [11] Generally, the search of a private residence without a warrant is an infringement of the s. 8 protection in the Charter to be free of unreasonable search or seizure. A search will be reasonable within s. 8 if it is authorized by law, where the law itself is reasonable, and where the search itself is conducted in a reasonable manner (*R. v. Duong and Tran*, 2002 BCCA 43 at para. 7; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R.v. Collins*, [1987] 1 S.C.R. 265). It is not contended here that the law under which the search was conducted is unreasonable. The first question, then, is whether reasonable and probable grounds existed for the arrest of the accused. If so, then the next question is whether the subsequent entry into the residence was lawful within s. 11(7) of the Controlled Drugs and Substances Act.

- [12] In order to effect an arrest, the arresting officer, Constable Jodry, must have a subjective belief that there are reasonable and probable grounds for the arrest. In addition, it must be objectively established that those reasonable and probable grounds exist (*R. v. Duong and Tran*, supra, at para. 11; *R.v. Storrey*, [1990] 1 S.C.R. 241 at 250-51). The standard for reasonable and probable grounds is "reasonable probability" (*R.v. Duong and Tran* supra; *R.v. Debot*, [1989] 2 S.C.R. 1140 at 1166).
- [13] I accept the testimony of Constable Jodry when he said that he believed that he had reasonable and probable grounds to arrest based upon his assumption that Constable Toomer had reasonable and probable grounds to swear the information to obtain and based upon his observation of three males exiting the house identified in the information to obtain with loaded garbage bags that the officer concluded contained marijuana. It was not suggested before me that Constable Jodry could not rely on the assumption that Constable Toomer had reasonable and probable grounds to believe that there existed a marijuana grow operation at that residence. Nor was it suggested that the failure to relay to Constable Jodry the contents of the information to obtain, in terms of the specific information of the informant, was material to Constable Jodry's subjective belief.
- [14] Objective reasonable and probable grounds also existed. Reliance can be placed on the informant's information in the circumstances where the information is compelling and corroborated by police investigation prior to arrest following the reasoning in *R. v. Debot*, supra. Here, although the informant was unknown to police, the information was compelling in that it identified a specific street address and renter. The report of the informant was corroborated by the observation of the garbage bags reasonably believed to contain marijuana. This gave credibility to the tip. In these circumstances, the tip of the informer is sufficiently reliable to form part of the reasonable and probable grounds for arrest. Accordingly, the arrest of the accused was lawful.
- [15] The next question is whether the subsequent entry of Constables Leeson and Butar into the residence was lawful. This involves consideration of s. 11(7) of the Controlled Drugs and Substances Act which allows for the search of a residence without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one. Two conditions must, therefore, be present: first, the conditions ordinarily required to obtain a search warrant must be present and, second, exigent circumstances must exist which make it impracticable to obtain a search warrant (*R. v. McCormack*, 143 C.C.C. (3d) 260 at 267, para. 17 (B.C.C.A.)).
- [16] There was sufficient information to obtain a search warrant when the officers entered the residence. There was the information of the informant which has been determined to have been reliable, verification of the address as given, and the observation of three males with green garbage bags that police officers reasonably believed contained marijuana. The first requirement has been established.

- [17] "Exigent circumstances" exist if immediate action is required for the safety of the police or if there is an immediate danger of the loss, removal, destruction or disappearance of the evidence if the search is delayed (R. v. Grant, [1993] 3 S.C.R. 223 at 241-42; R. v. Feeney, [1997] 2 S.C.R. 13 at 53; R. v. McCormack, supra, at 266-267, para.s 19-21; R. v. Duong and Tran, supra, at para. 26. Exigent circumstances involve the subjective belief of the police as well as an objective basis for the belief (R. v. McCormack, supra, at 268, para. 25; R. v. Duong and Tran, supra, at para. 26). The exigent circumstances asserted by police must be objectively reasonable (R. v. Duong and Tran supra at para. 32). In R. v. McCormack, exigent circumstances were established because the police had a reasonable basis to believe that a female seen in an automobile was the accused's girlfriend, that she had access to his apartment, and that there was evidence in the apartment that could be destroyed. In R. v. Feeney, however, exigent circumstances did not exist when there was no apparent jeopardy to safety of the police and when police had no knowledge of evidence at the premises but only suspected or had a hunch that evidence might be found.
- [18] In this case, there were not exigent circumstances arising from a concern for safety of the police or the public. Although Constable Leeson testified that weapons are often found at marijuana grow operations, he did not suggest that he believed that weapons were present at 13380 67A Avenue. If any safety concerns existed, the officers falling back away from the house and maintaining a watch over the premises could have met them. With respect to a concern for the destruction of evidence, it was reasonable to assume that there would be documents and other evidence at the location based upon the information from the informant and the observation of the garbage bags. It was also reasonable to assume that there could be others in the house when there was no information on the number of suspects, the element of surprise was gone, and the officer had been unable to determine that there were no others in the house. As in R. v. Duong and Tran, Constable Leeson's expectation of documentary evidence to link the accused or others to the residence and to the grow operation was realistic and not just based upon a hunch or suspicion given all of the circumstances. There were exigent circumstances arising from concern for the destruction of evidence. I have been careful not to refer to the subsequently found documentation of a motor vehicle ticket and immigration papers in the name of the accused found at the residence in consideration that ex post facto justification of searches by their results is not allowed.
- [19] The warrantless entry into the residence at 18830 67A Avenue was justified under s. 11(7) of the Controlled Drugs and Substances Act. There was no Charter breach.

"J.R. Dillon, J."

The Honourable Madam Justice J.R. Dillon

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