
CANADA / JUDGMENT

R. v. Slemko

2020 BCCA 207

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 207 R. v. Slemko

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Slemko,

2020 BCCA 207

Date: 20200717

Docket: CA44791

Between:

Regina

Respondent

And

Andrew Ronald Slemko

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

On appeal from: An order of the Provincial Court of British Columbia,

dated July 28, 2017 (conviction) (R. v. Slemko,

Surrey Docket 207267).

Counsel for the Appellant

(via videoconference):

M.E. Bloom

Counsel for the Respondent

(via videoconference):

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

June 2, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 17, 2020

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Butler

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Summary:

The appellant appeals his conviction for offences under the CDSA on the grounds the judge erred in failing to exclude evidence under s. 24(2) of the Charter. Warrants were issued to search the appellant's residence and other properties based on certain evidence, including the odour of sassafras emanating from one property. The appellant brought a subfacial challenge to the warrants and was given leave to adduce expert evidence on the voir dire to challenge the evidence that the odour of sassafras could have been detected. The judge found the warrants should be quashed and that the searches therefore breached the appellant's s. 8 Charter rights. However, the judge found evidence obtained at the non-residential properties should be admitted and the appellant was convicted. Held: Appeal dismissed. The judge erred in quashing the warrants. The appellant's expert evidence on the smell of sassafras should not have been admitted as the judge made no assessment of the witness's qualifications. In any event, the judge exceeded the bounds of permissible review by testing the information to obtain against the ultimate truth, rather than the affiant's reasonable belief, and in failing to view the evidence as a whole. As there was no Charter breach, it was not necessary to consider s. 24(2).

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] This appeal requires us to consider whether a trial judge correctly quashed warrants and, having done so, whether he erred in admitting some of the evidence obtained on what he deemed to be unconstitutional searches.
- [2] A warrant may be quashed when the Information to Obtain ("ITO") the warrant does not set out reasonable and probable grounds to believe that an offence has been committed and that there is evidence to be found at the place of the search (a facial defect); or because the reviewing judge is satisfied the warrant was founded upon false, inaccurate or misleading evidence (a subfacial defect).
- [3] In the case at bar, the reviewing judge found the warrants should be quashed on a subfacial challenge and that searches conducted pursuant to those warrants breached the appellant's s. 8 Charter right to be secure against unreasonable search or seizure. He concluded the admission of evidence obtained on the search of the appellant's residence would bring the administration of justice into disrepute. Charges, dependent upon that excluded evidence, were dismissed; other charges, founded upon evidence found at other locations, were not.

The appellant says the trial judge erred in failing to exclude all evidence that would not have been obtained but for the warrantless search of his residence.

- [4] The Crown, in response, says the conviction should be upheld on the basis that none of the warrants should have been quashed, evidence was not improperly obtained and, if any was, the judge did not err in his assessment of the effect of its admission on the administration of justice as the appellant failed to establish that the admission of the evidence from other locations could bring the administration of justice into disrepute.

Factual Background

- [5] The appellant was charged by an Information sworn on November 18, 2014 with six offences:
- a) possession for the purposes of trafficking of MDMA, a controlled substance, at his residence on 161 A Street in Surrey (Count 1);
 - b) possession for the purposes of trafficking of MDMA, (Count 2) and production of MDMA at a dwelling and detached garage at 72 Avenue in Langley (Count 3); and
 - c) possession for the purposes of trafficking of MDMA (Count 4) and methamphetamine (Count 5), and possession of ephedrine, a precursor for the manufacture of methamphetamine (Count 6), at a storage locker on 24 Avenue in Surrey.
- [6] By a C Information sworn June 15, 2015 he was charged with three additional offences:
- a) possession of a precursor for the production of methamphetamine at the Langley property (Count 7);
 - b) possession of precursor for the production of methamphetamine at his Surrey residence (Count 8); and
 - c) possession of red phosphorus, a precursor, precursor for the production of methamphetamine, in the storage locker (Count 9).
- [7] The evidence against him was obtained in the course of searches conducted pursuant to three warrants: a warrant to search his residence in Surrey (the first warrant) and a warrant to search a dwelling and garage in Langley (the second warrant), both issued on April 23, 2014, and a warrant to search the storage locker issued on April 24, 2014.
- [8] The first two warrants were issued on the basis of ITOs sworn by Constable Moon of the RCMP, setting out his grounds to believe MDMA was being produced at the locations for which he sought the search warrants, founded upon:
- a) information provided by a confidential informant to one of his colleagues, an officer of the RCMP Federal Serious and Organized Crime, Clandestine Lab Unit;

- b) observations of the appellant made during the course of surveillance conducted by RCMP officers between April 15 and April 23, 2014; and
 - c) observations made by one of his colleagues, Cpl. Sielsky at the Langley property on April 23.
- [9] The information provided by the informant was that a person named Andrew whose last name was unknown was producing ecstasy at a clandestine lab in the South Surrey area. Andrew was identified as being approximately 30 years of age, having blond hair and being associated with a white Ford panel van with a specific BC license plate number provided to the RCMP.
- [10] Constable Moon deposed to the RCMP's prior dealings with the informant since 2011, including 20 instances in which the informant had provided information, some of which had led to enforcement action. He disclosed that the informant had a criminal record but no record for perjury or crimes of dishonesty; he had been paid for information in the past and appeared to be motivated to provide information to police for financial gain. While the RCMP were unable to corroborate all information he had provided to them, his handler was not aware of the informer having provided any inaccurate information to the RCMP.
- [11] In relation to the surveillance, Constable Moon described observations by his colleagues which included the appellant obtaining and placing in his vehicle three 20 kg bags of caustic soda and five bags and a plastic container of kitty litter.
- [12] With respect to observations made at the Langley property, Constable Moon described information provided to him by Cpl. Sielsky, who said he had smelled the odour of sassafras, from a position to the east of the property under surveillance in Langley, due to a wind from the west, and observed four CCTV cameras on the property under surveillance.
- [13] Constable Moon himself confirmed that the appellant was the registered owner of a white 2006 Ford Econo van with the license plate identified by the informant. He confirmed the appellant's date of birth as May 13, 1977. He deposed to conversations with a chemist with the Health Canada Drug Analysis Service Laboratory who advised him: sassafras oil has a strong and characteristic odour; safrole, a controlled precursor found in sassafras oil, is a common starting material in the production of ecstasy and is frequently encountered at clandestine laboratories; and caustic soda and kitty litter are also commonly encountered at clandestine drug laboratories. These three items together are consistent with illicit drug manufacturing.

Proceedings at Trial

- [14] At trial the appellant sought to exclude all of the evidence obtained pursuant to the warrants on the grounds that the warrants had not been properly issued, all three searches breached his Charter rights and the resulting evidence was improperly obtained.

- [15] The record before the trial judge included the first and second warrants and the Informations to Obtain those warrants (which were identical in substance), but did not include the third warrant, authorizing the search of the storage locker, or the Information to Obtain that warrant. Counsel for the appellant advised the trial judge that the reason only the first two warrants were included in the application record was because there was an agreement between counsel that if the first two warrants were invalid then the warrant for the search of the storage locker would also be invalid. The appellant now seeks leave to introduce the third warrant and the Information to Obtain that warrant as fresh evidence on this appeal.
- [16] At the outset of the voir dire, the judge ruled that the affiant could be cross-examined, without specifying any limits with respect to scope of the cross-examination.
- [17] Counsel for the appellant also applied to adduce the expert opinion evidence of two witnesses with a view to undermining the assertion that Cpl. Sielsky had smelled sassafras at the Langley property: Dr. McKendry, a meteorologist, and Dr. Woodward, a forensic chemist specializing in olfaction.
- [18] The Crown opposed the application on the grounds that this evidence could not be relevant under a Garofoli application (see *R. v. Garofoli*, [1990] 2 S.C.R. 1421) because it could not be said that Constable Moon knew or ought to have known about the prevailing weather patterns that day, the acuity of the odour of sassafras, and how those two things might interact. The judge, after canvassing the authorities, ruled that denying the appellant the opportunity to challenge the assertion of Cpl. Sielsky that sassafras has a strong and characteristic odour would undermine his right to a full answer and defence. The judge therefore granted the appellant's application.
- [19] A report by Dr. Shafer, a chemist, was also admitted on behalf of the appellant on the voir dire on the basis of a prior agreement between the parties.
- [20] The gist of Dr. McKendry's evidence was that on the morning of April 23 when Cpl. Sielsky was at the Langley property, the wind throughout the lower Fraser Valley was blowing consistently from the southeast and that was the prevailing wind at the nearest weather station, 3.2 km from the Langley property. There was no objection to Dr. McKendry being qualified as an expert witness. In cross-examination he testified to variability in wind direction from prevailing winds and to the expected range of prevailing wind direction and turbulence.
- [21] Dr. Schafer's opinion was that the three samples of chemical products taken from the Langley property, contained very, very low concentrations of safrole (significantly less than 1%). Dr. Woodford relied on this report in giving his evidence.

- [22] Dr. Woodford was qualified as an expert (although his expertise was not specifically defined) without objection from the Crown, despite extensive cross-examination on his testimony in American cases where his qualifications and testimony had been challenged or questioned by the courts. The appellant's counsel suggested the area of Dr. Woodward's expertise could be identified after his testimony but that question was not revisited.
- [23] The gist of Dr. Woodford's evidence was that safrole produces a weak odour and "the physical and chemical evidence in this case is far too weak to believe Mr. Sielsky (sic) could have smelled Sassafras odor while standing outside the garage" and "it is my opinion that it is impossible that the Sassafras odor of Safrole (located inside the garage or elsewhere in the property) could have emanated into the air for Corporal Sielsky to have smelled it at the position he indicated on his diagram".
- [24] He testified in chief that safrole has a very low vapour pressure. It does not evaporate or vaporize to air very well; as a result, its odour tends to linger. Unless it is close, however, its air concentration is too low for a human to smell. He testified that safrole smell only travels a few feet before being diluted by outdoor air to a point where it cannot be smelled by a human.
- [25] When asked in cross-examination whether it would be possible to smell safrole from the position in which Cpl. Sielsky stood if some amount of it had been spilled on the floor of the garage and a door left open, Dr. Woodford said that would depend upon the quantity of safrole. He could imagine a quantity that might be smelled from Cpl. Sielsky's location but he did not want to answer that "because I don't have a sufficient foundation to answer such a question without - - you know, without over-speculating, or just speculating at all".
- [26] He acknowledged that he knew of no scientific publications with respect to the smell of safrole or sassafras. He had conducted two limited experiments in his backyard.
- [27] When asked about evidence that neighbours could smell the odour of liquorice coming from the outbuilding on the Langley property, he denied that could be the smell of safrole or sassafras and said: "I don't know about the liquorice. I don't know what you're talking about."
- [28] Lengthy cross-examination followed, including the following exchange:
- Q. is it your testimony that sassafras oil, safrole, does not smell anything like liquorice?
- A. That's what I'm testifying to, yes, that's correct
- Q. Okay have you ever heard that comparison?
- A. No, I heard it from you. Now, this is - - this is - - yeah liquorice. I don't know. I don't know what you're talking about. Now you're getting - - you're getting off the - -
- Q. Sir, sir, I'm asking you a question.
- A. I don't know

Q. Have you ever heard - -

A. No, I've not heard that.

Q. - - that comparison?

A. I've heard from you.

A. That sassafras smells like liquorice, no. Never have I heard that.

[29] In response to the evidence led by the appellant on the voir dire, the Crown sought leave to call evidence for the purpose of answering the testimony called by the appellant. The judge found that the Crown should be given the same latitude to call evidence as was extended to the appellant, and accepted that the Crown was not attempting to call evidence for the impermissible purpose of showing that the investigative facts were different from those set out in the ITO (see *R. v. Morelli*, 2010 SCC 8 at para. 42, and *R. v. Voong*, 2013 BCCA 527).

[30] The Crown called Anna Chkrebtti, an organic chemist employed by Health Canada as a clandestine laboratory specialist. She had attended 14 clandestine labs, two of which were MDMA labs. When asked to describe the odour of safrole she said: "It's a strong odour and it's fairly herbal, in a sense. Most of the time it's described from - - anywhere from licorice to star anise, something of that sort." She described its most common comparator as black licorice "in scientific literature for clandestine laboratory specialists and also in open source recipes that one would find online for the purification of safrole for the synthesis of MDMA".

[31] The Crown also called Trevor Lassam, a neighbour who lives immediately to the south of the Langley property. He testified on the voir dire to the presence of a faint smell of licorice in the air when he was about 50 m from the outbuilding on the Langley property about two years before the property was raided by the police; "it smelled like anise - - aniseed oil but nowhere near as strong as that though, just like a faint smell of aniseed oil". Prior to testifying he had been provided with a sample of sassafras oil by Ms. Chkrebtti and described the smell of that sample as similar to the licorice that he smelled on his property. He did not notice that smell again after the Langley property was raided by the police.

[32] At the conclusion of the voir dire, the appellant's counsel put his challenge to the warrants on the following terms:

the defence position is that the confidential informant information and the surveillance evidence, together are not enough to support the issuance of the warrant and that the warrant must stand or fall depending on the acceptance or rejection of the reliability of Cpl. Sielsky's assertion in the information to obtain that he acquired the smell of safrole in the circumstances that he described.

[33] The trial judge concluded the search warrants should not have been issued. First he concluded, at para. 44, that the information provided by the informant was unhelpful:

- [44] He was only able to provide police with the first name of "Andrew" who he claimed was operating in Ecstasy [sic] lab on 72nd Avenue in Surrey. The police were subsequently granted a search warrant to search property located at 72nd Avenue in Langley. His description of the target does not match the appearance of Mr. Slemko. The informant had given the Integrated Homicide Investigation Team information on 10 occasions; on only two occasions, as has been argued, had it resulted in enforcement action. It is not revealed what the action was, nor does it state what the informant received for such information. It was never asserted by the affiant that such information had ever been proven to be reliable. We do know that he has a criminal record but there is no indication as to what his record is, or even if he had ever been sentenced to incarceration. I agree with the defence position that this information has no more significance than to provide narrative or background as to how the police became interested.
- [34] Dealing with the evidence of observations made during surveillance, the judge concluded at para. 46:
- [46] Slemko is seen putting a large amount of caustic soda and kitty litter into a vehicle. These substances are commonly used at clandestine labs to cover up odours, but that alone does not justify the issuance of a warrant when one considers these items also have lawful uses. Furthermore, it is not stated in the ITO that these items are uniquely suited to the production of Ecstasy.
- [35] Concerning the evidence of observations at the Langley property, the judge concluded, at para. 51:
- [51] In this case, we are not dealing with the unmistakeable smell of marihuana. Given the evidence of the two defence experts I attach little, if any, weight to Cpl. Sielsky's observation of the odour of safrole emanating from the property.
- [36] He concluded the ruling on the voir dire as follows:
- [53] The deficiencies of the ITO in this case must be addressed before determining whether it can support the issuance of the warrant. In this case I have serious reservations that Cpl. Sielsky could have smelled the aroma of safrole from where he was standing. Furthermore, in my view the presence of security cameras should not be viewed as evidence that illegal activity was necessarily occurring on the property; security cameras are not only used in illegal activity, they obviously also have lawful purposes.
- [54] The relevant question is whether the ITO was misleading, not whether it was intentionally misleading. However, it is evident that it painted a less objective and more unlawful picture than would have emerged had there not been such importance attached to the aroma of sassafras.

- [55] In my view, once the material facts relating to the odour emanating from the building and the assertions of an unreliable informant are taken into consideration and omitted, none of the evidence contained in the ITO can elevate mere suspicion into sufficient grounds for a warrant. Because the warrant should not have been issued, the subsequent search violated s. 8 of the Charter.
- [37] After quashing all three warrants the trial judge heard submissions on whether the evidence obtained on the searches should be excluded pursuant to s. 24(2) of the Charter. He excluded the evidence obtained pursuant to the first warrant, but permitted the Crown to adduce the evidence obtained as a result of the search of the dwelling and garage in Langley and the storage locker because those searches were less intrusive, the appellant had a limited expectation of privacy in relation to non-residential property and the locker, and permitting the evidence obtained in those searches to be adduced would not bring the administration of justice into disrepute.
- [38] The judge set out his reasons as follows:
- [32] In the case at bar, although the police did not act in bad faith, it does not automatically follow that they acted in good faith. Furthermore, the ITO will act as sufficient factual foundation for Cpl. Sielsky to conclude that the smell of safrole could be detected from the outbuilding. As stated in [R. v. Vanhorn, 2017 BCSC 379] the search of the accused's townhouse in Surrey required a better effort at full, frank and fair disclosure even when not intentionally misleading. Accordingly, I have concluded that the impact of the accused's legitimate privacy interest in his own residence leads me to conclude that the resulting evidence of the warrantless search of the home should be excluded.
- [33] However, the search of a home that is not being lived in and the nearby outbuilding is a different matter. Clearly, the outbuilding was used solely for the purpose of illegal activity and the house on that property was clearly not being used as a residence and the clear inference is that it was simply used to facilitate the unlawful purpose of the garage. As stated in Grant, an unreasonable search that intrudes on an area in which the individual reasonably expects a high expectation of privacy or that demeans his dignity is more serious than one that does not.
- [34] I draw a clear distinction between a house that is resided in and one that is not. There is a minimum expectation of privacy in these circumstances, in my view. The fairness of the trial would not be affected by the admission of real non-conscripted evidence given the serious nature of the crime being investigated. The same reduced expectation of privacy applies to the search of the storage locker.

- [39] The appellant applied to have the judge reconsider the decision to admit the evidence from the storage locker and to adduce the evidence relied upon in support of the warrant to search at that location (with a view toward establishing that the locker was only identified as a result of the searches of the appellant's residence and the evidence would not otherwise have been obtained). The judge dismissed that application, on the basis he considered himself to be *functus officio*.
- [40] At the conclusion of the trial the Crown conceded that Count 1, which related to the possession of MDMA at the appellant's Surrey residence, had not been made out, as a result of the exclusion of evidence.
- [41] The Crown also conceded that Count 7, which related to the possession of precursor chemicals at the house and outbuilding on 72nd Avenue in Langley had not been made out. There remained for consideration in relation to the evidence seized at that address, two charges: one of possession of MDMA for the purposes of trafficking; the other of which related to its production.
- [42] Finally, the Crown conceded that Count 8, which related to the possession of a precursor chemical at his residence, had not been made out because of the exclusion of evidence. There remained for consideration in relation to the evidence seized from the storage locker, Counts 4, 5, 6 and 9.
- [43] Count 3, which charged the appellant with unlawful production of MDMA at the Langley house and garage, was dismissed for the following reasons:
- [44] On reviewing the evidence in this case, I agree, in part, with the defence submissions that it was a non-operational lab on the date the search was executed and the date of production is particularized as April 24, 2014 on the Indictment. Accordingly, I find the accused not guilty of Count 3, as I agree with the defence argument on this point.
- [44] The trial judge then turned to the charges of possession for the purposes of trafficking, describing the evidence in relation to those charges as "substantially stronger". He accepted the Crown submission that the amounts of MDMA and methamphetamine found in the appellant's possession were inconsistent with possession for personal use and consistent only with possession for the purposes of trafficking. He concluded his judgment as follows:
- [54] Accordingly, I find the accused guilty of Counts 4, 5, 6 and 9.
- [55] I find him not guilty on the remaining count, Count 2.
- [45] I can see no explanation in the reasons for judgement for the dismissal of the possession charges arising out of the seizure of MDMA on the Langley property set out in Count 2.
- [46] In the result, the appellant was convicted of the charges in Counts 4, 5, 6 and 9 and acquitted of all other charges.

Grounds of Appeal

- [47] The appellant submits the judge erred in principle, first, by considering himself to be *functus officio* and unable to reconsider the admissibility of the evidence obtained from storage and, second, by admitting the evidence from storage which was, in the appellant's submission, "fruit of the forbidden tree".
- [48] The Crown argues the trial judge erred in concluding the warrants were improperly obtained. While the Crown does not appeal the acquittal on Counts 1-3, 7 and 8, it says none of the material evidence should have been excluded and the appeal should be dismissed.

Discussion and Analysis

- [49] Although the reviewing judge referred to and cited from the leading cases on challenges to warrants, he engaged in precisely the exercise those authorities caution against: testing the affidavit against the ultimate truth rather than the affiant's reasonable belief, turning the hearing into a trial of every allegation in the affidavit: *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 at para. 30; *R. v. Ebanks*, 2009 ONCA 851 at para. 21; *World Bank v. Wallace*, 2016 SCC 15 at para. 122.
- [50] In my view, for the following reasons, the trial judge exceeded the bounds of permissible review by reweighing the evidence, considering evidence that was not available to the affiant, and rejecting available inferences. For that reason I am of the opinion that he erred in quashing the warrants.
- [51] I consider it to be unnecessary for us to address the appellant's submission that the s. 24(2) analysis was faulty because the trial judge failed: to hold a second *voir dire*; to address the evidence that the locker was only identified by evidence obtained on the search of the Surrey residence; and, to weigh the significant privacy interest in a storage locker identified in *R. v. Buhay*, 2003 SCC 30.
- [52] It is important, however, to recognize that it was open to the trial judge to reconsider the conclusion of the s. 24(2) *voir dire*. He was not precluded by the doctrine of *functus officio* from doing so. In *R. v. Le (T.D.)*, 2011 MBCA 83, an appeal from a judgment on a challenge to a warrant where the trial judge had dismissed an application to reconsider a question addressed on a *voir dire*, Scott C.J.M. observed:
- [123] The law is clear that the trial judge had inherent jurisdiction to reconsider or revisit the previous rulings made at trial, but as stated by the Supreme Court in *R. v. Adams*, [1995] 4 S.C.R. 707 at paras. 30-31, an order relating to the conduct of a trial can be varied or revoked only if the circumstances have materially changed. See, as well, *R. v. Hunter* (1980), 58 C.C.C. (2d) 190 (Ont. C.A.), *R. v. Calder*, [1996] 1 S.C.R. 660, and the recent decision of this court in *R. v. Farrah (D.)*, 2011 MBCA 49 (at paras. 22-23):

What is a judge to do when the evidence at trial no longer buttresses an earlier voir dire ruling? To begin with, a judge is not *functus officio* once the voir dire has ended (see *R. v. Hunter* (1980), 58 C.C.C. (2d) 190 (Ont. C.A.)).

.

In circumstances where the evidence at trial departs significantly from that of the voir dire and where it relates to a matter that justified the voir dire ruling, a court may, on its own motion, reopen the voir dire and decide the matter afresh (see *R. v. Smith* (1986), 38 Man. R. (2d) 184 (C.A.); *Adams*, [1995] 4 S.C.R. 707 at paras. 29-30; *R. v. Calder*, [1996] 1 S.C.R. 660 at para. 21; and *R. v. Underwood*, [1998] 1 S.C.R. 77 at para. 13).

Applicable Law

- [53] The law with respect to challenges to the validity of warrants is helpfully summarized by Watt J.A. in *R. v. Sadikov*, 2014 ONCA 72:
- [84] The scope of warrant review is narrow. The review is not a *de novo* hearing of the *ex parte* application. The reviewing judge does not substitute his or her view for that of the issuing judge: *Garofoli*, at p. 1452; *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 20, leave to appeal to S.C.C. refused, [2010] 1 S.C.R. ix; and *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40. The standard is whether there is sufficient credible and reliable evidence to permit a justice to find reasonable and probable grounds to believe that an offence has been committed and that evidence of that offence would be found at the specified time and place of search: *Morelli*, at para. 40. Said in another way, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the warrant could - not would - have issued: *Morelli*, at para. 40; *Araujo*, at para. 54; and *Garofoli*, at p. 1452.
- [85] The reviewing court does not undertake its review solely on the basis of the ITO that was before the issuing judge. The reviewing court must exclude erroneous information included in the original ITO, but may also consider, within limits, additional evidence adduced on the voir dire to correct minor errors in the ITO. Amplification evidence corrects good faith errors of the police in preparing the ITO, but does not extend to deliberate attempts to mislead the authorizing judge: *Morelli*, at para. 41; and *Araujo*, at para. 58. Evidence relied upon to amplify the record must be evidence available to investigators at the time the ITO was sworn, not information acquired later: *Morelli*, at para. 43.
- [86] Warrant review is an integral part - a first step - in an inquiry into admissibility of evidence proposed for reception. It is not a trial and must not take on the trappings of a trial in which the truth of the allegations contained in the indictment is explored: *Ebanks*, at para. 21. In establishing the record for the purposes of review, what is to be excised from the ITO is information that is erroneous, not information that is correct, or information that contradicts other information, or information with which the reviewing judge does not agree: *Ebanks*, at para. 21.

- [87] Warrant review requires a contextual analysis. Inaccuracies in the ITO, on their own, are not a sufficient basis on which to ground a finding of bad faith or an intent to mislead, much less to provide a basis on which to set aside the warrant: Araujo, at para. 54. The existence of fraud, non-disclosure, misleading evidence, and new evidence are all relevant but are neither a prerequisite to, nor dispositive of, the review: Garofoli, at p. 1452; and Ebanks, at para. 20.
- [88] It is no part of the reviewing judge's mandate to determine whether she would issue the warrant on the basis of the amplified record. Nor is it the reviewing judge's role to draw inferences, or to prefer one inference over another. The inquiry begins and ends with an assessment of whether the amplified record contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued: Morelli, at para. 40.
- [89] A final point. An appellate court owes deference to the findings of the reviewing judge in her assessment of the record as amplified on the review and her disposition of the s. 8 application. Absent an error of law, a misapprehension of evidence, or a failure to consider relevant evidence, an appellate court should decline to interfere with the reviewing judge's decision: Ebanks, at para. 22; and R. v. Grant (1999), 132 C.C.C. (3d) 531 (Ont. C.A.), at para. 18, leave to appeal to S.C.C. refused, 150 C.C.C. (3d) vi.
- [54] The importance of focusing the inquiry at this stage on the accuracy of the information provided to the issuing justice was re-stated by Moldaver and Côté JJ., writing for the Court in World Bank:
- [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).
- [55] These principles are given effect in the decisions of this Court in cases bearing some similarity to the case at bar: R. v. Wilson, 2011 BCCA 252 and R. v. Voong, 2013 BCCA 527; and the decision of the Quebec Court of Appeal in O'Reilly v. R., 2017 QCCA 1283.

Application to the Case

The evidence of the informant

- [56] The reviewing judge reweighed the evidence of the informant. His description of the evidence is not entirely accurate. The ITO states simply that the informant advised the police that a male named "Andrew" was involved in the production of ecstasy in the south Surrey area. It does not refer, as the judge suggested, to a residence on 72nd Avenue in Surrey. The information provided by the informant was not as inaccurate as the trial judge supposed.
- [57] "Andrew" was described as being "about 30" and blonde. That is not entirely consistent with his appearance; he was in fact 37 and had brown hair. However, when Constable Moon swore the ITO he did not consider the description provided by the informant to be inconsistent with the target's appearance. More importantly, he provided the informant's description, photographs of the target and the evidence of his date of birth to the judicial justice.
- [58] In addition to providing the police with the name of the individual said to be involved in the production of ecstasy, the informant gave the police a BC license plate number that corresponded to a vehicle registered in the appellant's name. This evidence suggests the target was not mistakenly identified.
- [59] The affiant had been advised by one of the constables who had been a handler of the informant that the informant had provided information to the police on 20 occasions since 2011, not 10 occasions, as was suggested by the reviewing judge. From November 2013 to the date the ITO was sworn the informant had provided information to his then current handlers on approximately 10 occasions. He had not been paid by the current handlers. While not all the information provided by the informant was able to be corroborated, the constables were not aware of the informant having provided any inaccurate information. This suggests some evidence was corroborated and accurate. There is no basis to say the

informant was known by the police to be unreliable, and no suggestion the information with respect to the informant provided to the judicial justice was inaccurate or misleading in this regard.

- [60] It is true that particulars of the informant's criminal record are not disclosed in the ITO but the affiant swears that the informant has no criminal record for perjury or crimes of dishonesty. The judge does not appear to have examined the sealed package attached as exhibit B to the ITO and he makes no reference to that material.
- [61] In my view, there was no basis to conclude the affiant should have discounted the information provided by the informant, or to conclude the judicial justice could not reasonably place some weight upon that evidence in considering the application for a warrant. All of the apparent frailties in the evidence of the informant were disclosed by the affiant and they did not establish unreliability. The reviewing judge does not appear to have considered the ITO from the justice's perspective, but rather came to a conclusion with respect to what weight he would place upon the informant's evidence himself.
- [62] Finally, while the judge in this case referred to the leading case on the assessment of informant credibility at the authorization stage, *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), in coming to the conclusion that the informant's "tip" in this case amounted to mere rumour, he did not address the informant's evidence in light of the other evidence, the approach described by Martin J.A. at pp. 218-19 of *Debot*:

a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search. Highly relevant are whether the informer's "tip" contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance.

[Emphasis added.]

The Surveillance Evidence

- [63] In my view, there are two problems with the judge's consideration of the observations made by the police in the course of surveillance. First, his observation that the items collected by the appellant may have lawful as well as unlawful uses suggests he was not considering whether this evidence should have been given some weight by the judicial justice in determining whether there were reasonable and probable grounds to believe that an offence has been committed but, rather, that he was weighing the evidence to determine whether the commission of the offence could be established. It is apparent from the treatment of this evidence that the reviewing judge was not asking the appropriate question: what inferences could the justice have reasonably drawn from the evidence of the purchase of large amounts of caustic soda and kitty litter?

- [64] Second, there is no suggestion by the affiant that the observation of the collection of caustic soda and kitty litter, standing alone, gave rise to reasonable and probable grounds. It was an error to consider whether the collection of these substances by the appellant would, in and of itself, justify the issuance of a warrant.

The Evidence of Cpl. Sielsky

- [65] In my opinion, and with respect, the evidence on the voir dire did not support the conclusion that the affiant could not reasonably have believed the evidence of Cpl. Sielsky. Nor does it support the conclusion that the affiant should have made enquiries that would have revealed the evidence by which the record was augmented on the voir dire.
- [66] The critical opinion evidence of Dr. Woodford with respect to the odour of safrole should not have been admitted. His qualification to express that opinion was not established, and the relevance of his opinion to the question on voir dire was not considered. Further, it appears that the reviewing judge attributed to Dr. Woodward opinions that he did not express or did not maintain on cross-examination.

Qualification of Dr. Woodford

- [67] The judge described Dr. Woodford as a witness who was "qualified as a forensic chemist, as a specialist in olfaction science and particularly the smell and detection of controlled substances, including safrole". I see in the record no attempt to qualify Dr. Woodford as anything other than a forensic chemist. The question of his specific qualification was left open to be addressed following examination in chief and cross-examination on the voir dire but there was no ruling on qualification.
- [68] Dr. Woodford himself demonstrated remarkably little familiarity with safrole and did not testify to any particular expertise in the detection of safrole. In fact he denied such expertise. He could not speak to any academic studies addressing the question of whether the substance smelled. His own "experiment", which consisted of dropping 15 ml. of safrole oil on the ground, dirt or grass in his backyard, and trying to smell it, was anecdotal only and remarkably unscientific; it was not recorded or documented in any fashion and was not referred to in his expert report. His opinion was not scientifically tested. His views had not been the subject of an academic study and hence had not been subjected to peer review. There was no suggestion his theory that safrole cannot be smelled at a distance has been generally accepted. Having regard to the criteria described by Binnie J. in *R. v. J.-L.J.*, 2000 SCC 51, Dr. Woodford should not have been permitted to express an opinion on the smell and detection of safrole.
- [69] These questions should have been considered by the trial judge in addressing whether Dr. Woodford was qualified to express an opinion on the critical question in the case. We are, of course, required to defer to a trial judge's assessment of the qualification of an expert to express opinion evidence at trial. In this case, however, there was no such assessment. The

Crown did not object to Dr. Woodford being qualified as an expert in general; that certainly put the trial judge in a difficult position. There were no submissions on his specific qualification, despite the fact the Crown had a volume of material from American judgments impugning Dr. Woodford's qualifications and his evidence. The trial judge should have addressed that evidence in exercising his role as a gatekeeper in relation to this evidence.

- [70] Where it is apparent that the trial judge has not exercised the judicial discretion to determine whether an expert should be allowed to express an opinion on a critical question, this Court must determine whether that failure led the court to admit evidence that should not have been received, and should set aside judgments clearly founded upon that evidence: *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308.

Relevance of Dr. Woodford's evidence

- [71] Dr. Woodford's evidence was received in an attempt to engage in an exercise that was not appropriate on the voir dire: determining whether Cpl. Sielsky could have detected the odour of safrole from property adjacent to the Langley property in April 2014, when the proper question was whether the affiant had any reason not to accept or to question his evidence.
- [72] There was no evidence that Dr. Woodford's views with respect to human ability to smell safrole were generally accepted or well-known. It cannot fairly be said the affiant ought to have been aware that anyone held the opinion attributed to Dr. Woodford: that it would be difficult or impossible to detect the scent of safrole emanating from a drug-manufacturing laboratory.
- [73] Constable Moon testified that he knew Cpl. Sielsky to be an experienced drug enforcement officer, and he accepted Cpl. Sielsky's evidence that he smelled safrole emanating from the Langley property. There is no basis upon which the trial judge should have concluded that Constable Moon should have distrusted that evidence or that he failed to make full disclosure to the judicial justice when he swore his ITO. If there is any doubt in that regard, it may be resolved by considering the evidence of the expert from Health Canada, whose opinion was sought by the affiant, who testified that the odour of safrole is readily recognizable by humans.
- [74] It seems to me that expert opinion evidence will rarely be helpful in the limited enquiry that should be conducted on a subfacial challenge to a warrant. In *Voong*, the reviewing judge heard expert opinion evidence on the ability of an officer to smell marijuana as he had reported (including evidence with respect to prevailing winds and the local geography). MacKenzie J.A., for the Court, found it was open to the trial judge to find the officer's evidence with respect to what he could smell was not reliable, so as to justify its excision from the ITO. In doing so, she noted:

- [35] Mr. Voong makes extensive submissions as to the lack of reliability of Constable LaValley's "smell" belief set out in the ITO and his alleged failure to present all material facts in the ITO relevant to the origin of the marihuana odour. The argument is based largely on Constable LaValley's failure to "square off" the property by walking around its perimeter as described by Sergeant Wicentowich.
- [36] While I would not want to endorse the calling of expert evidence in these circumstances, the propriety of adducing it was not raised before us, so I will say no more.
- [75] Similarly, in the case at bar, the parties did not make extensive submissions on the appropriate use of opinion evidence on Garofoli hearings. I would say no more than that care should be used in defining the particular issue before the court on such hearings and tailoring the opinion evidence so as to assist the judge in addressing that issue.

Effect of Dr. Woodford's evidence

- [76] The judge not only attributed expertise to Dr. Woodford that he did not possess but also attributed opinions to him that he did not express. He wrote: "Dr. Woodford's evidence was that even if there was some unidentified quantity of safrole that had been absorbed onto the interior surfaces in the garage, that could not have been detected from Cpl. Sielsky's location." However, it became clear in cross-examination that while he was of the opinion Cpl. Sielsky could not have smelled the minute quantities of safrole described in the analyst's report, Dr. Woodford was unable to say anything about other or larger quantities of safrole that might have been present in the past when Mr. Lassam claimed to have smelled anise, or on April 24 when Cpl. Sielsky was on the neighbouring property. That is apparent from the following exchange:

Q. How much safrole would be needed to be dumped outside for someone to be able to smell it, if they were standing up a few feet away?

A. I do not know.

Q. Well we do know it would have to be more than 15 millilitres right?

Q. Your experiment with 15, you couldn't smell it from a few feet away, correct?

A. Yeah, but your question is could [a] person -- and I can -- myself, I can tell you the parameters that I did but my question, could a person, I cannot answer that.

Q. Okay.

A. A person other than me.

Q. Sure, but it's possible.

A. I'm not going to say it's possible. I'm not going to fall into that anymore because I'm not going to put myself in that position to admit to the facts you want me to when I don't have any quantitative basis or scientific basis to do it. I'm saying it is impossible that Corporal -- and with the facts of how much safrole I know was there, where it was found, your testing -- your crime lab testing, your photographs, your evidence, everything, the distances, everything about that garage, everything, I can say with -- with a scientific certainty he did not smell it there.

Q. How many windows were there in the garage?

A. I didn't see any windows and the pictures that you -- I don't know.

Q. Okay so you don't know everything about the evidence, right?

A. I don't know everything about the evidence but --

Q. Right.

A. -- but I stand by my opinion that I've given so far. He didn't smell it. That which is in evidence. He did not smell it.

Q. Sir there's -- there hasn't been any evidence. I believe you're referring to assumptions that you been asked to make, is that right?

A. No, I think you have no evidence that there was any safrole other than less than 1 percent and solution in three samples inside the garage in another liquid that you have not even identified. But when you put safrole into another liquid, that even lowers even more of the vapour pressure because the -- the -- one liquid will affect the vapour pressure of another liquid and it'll -- it will cause them to be more viscous and more -- the boiling point goes up.

The whole thing changes and I can tell you that there's a little 1 percent here and half a percent there and another one, the little percent, in those evidentiary items were not -- or that stuff sticking that were spilled may be in the room in the closed -- he did not smell that in that yard in the neighbour's yard on that day.

Q. And -- and the neighbours couldn't smell anything coming from the house too, right?

A. They didn't smell safrole either, sassafras, yeah, that's my --

Q. Did they smell anything for the lab?

A. I have no -- I don't know these neighbours. I don't know -- I don't know what those neighbours did. I don't know who they are. Are they little kids? Are the two years old? Are they --

Q. Why would that matter?

A. Well, little kids don't even know how to say safrole. Who knows? They don't know what it is. Were they trained? Where they -- I just don't know. I can't answer your question, I'm sorry.

[Emphasis added.]

[77] Dr. Woodford's evidence that safrole does not smell of anise or licorice was contradicted by another expert witness, and by a lay witness, whose evidence was not addressed by the trial judge. The expert witness who testified for the Crown spoke to published literature that describes the smell of safrole as resembling black licorice. Dr. Woodford was unfamiliar with any descriptions of the smell of safrole.

Consideration of the evidence as a whole

[78] The judge did not expressly disbelieve the evidence of Cpl. Sielsky but appears to have concluded that little weight should be placed upon it. He does not conclude that the presence of security cameras on the property was irrelevant, he simply concludes that it was not "evidence that illegal activity was necessarily occurring on the property". He appears to conclude that the ITO was misleading because it attached undue importance to the aroma of sassafras, without concluding that aroma was unimportant. He appears to conclude the informant was unreliable but does not conclude that it was an error for the issuing justice to place some weight upon the information he provided.

[79] Most importantly, the reviewing judge did not address at all the cumulative effect of the identification of the target by the informant, the collection of caustic soda and kitty litter by the appellant, the presence of the numerous security cameras on the Langley property and Cpl. Sielsky's evidence of a smell emanating from the property. Identifying weaknesses in any of these aspects of the evidence or establishing that any one piece of evidence standing alone is insufficient to justify the issuance of a warrant is not sufficient to displace the presumption that the warrant was validly issued. The warrant can only be set aside if the applicant satisfies the reviewing judge, on the whole of the material presented, that there was no basis for the authorization.

Disposition

[80] I would, therefore, hold that the trial judge did not err in admitting the evidence obtained on the search of the storage locker, for reasons other than those upon which he did so, and dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Butler"

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