
CANADA / JUDGMENT

R. v. Thiessen

2020 BCCA 85

COURT

British Columbia Court of Appeal

DECIDED

3 March 2020

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2020 BCCA 85 R. v. Thiessen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Thiessen,

2020 BCCA 85

Date: 20200303

Docket: CA45729

Between:

Regina

Respondent

And

Lucas Benjamin Thiessen

Appellant

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Provincial Court of British Columbia, dated
October 25, 2018 (R. v. Thiessen, Chilliwack Dockets 66088-2C and 64331-2A).

Oral Reasons for Judgment

Counsel for the Appellant:

A.J. Lagemaat

Counsel for the Respondent:

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

March 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 3, 2020

Summary:

The appellant appeals from convictions on drugs and guns charges. At trial, the sole issue was the admissibility of evidence obtained pursuant to two search warrants. The appellant argues that the trial judge erred in his decision to uphold the search warrants and to admit the evidence, and that the trial judge erred by imposing a time limit on cross-examination at the Garofoli hearing. Held: Appeal dismissed. The imposition of a rough time limit on cross-examination of the affiant at the Garofoli hearing was within the trial judge's discretion and the appellant has not identified any prejudice that arose from the time limit. The judge did not err in his treatment of the appellant's challenges to the search warrants.

STROMBERG-STEIN J.A. (as read in court by MACKENZIE J.A.):

Introduction

- [1] The appellant, Lucas Benjamin Thiessen, was convicted on October 25, 2018, of trafficking in cocaine, possession of cocaine for the purpose of trafficking, possession of marihuana for the purpose of trafficking, possession of heroin and fentanyl for the purpose of trafficking, possession of two prohibited firearms, and possession of an unloaded prohibited firearm.
- [2] The only issue at the appellant's trial concerned the admissibility of the drugs and guns evidence obtained pursuant to two search warrants. The appellant applied to exclude the evidence pursuant to s. 8 and 24(2) of the Charter, contending there were insufficient grounds to issue the search warrants because the information to obtain the warrants (the "ITO") contained errors and omissions.

- [3] The trial judge dismissed the application. He agreed that there were minor imperfections in the ITO, but found the affiant did not intend to mislead or deceive. The judge made excisions and amplifications and found there remained sufficient reliable evidence upon which the Justice of the Peace could have issued the warrants.
- [4] On appeal, the appellant submits the trial judge erred in dismissing the application. The appellant also submits the trial judge erred by imposing a 30-minute time limit for cross-examination of the affiant.
- [5] For the following reasons, I would dismiss the appeal.

Background

- [6] The evidence in support of the appellant's convictions was obtained pursuant to search warrants executed at two Chilliwack locations: 5428 Peach Road ("Peach Road") and 21-5805 Sappers Way ("Sappers Way").
- [7] Constable Lewis swore an ITO stating he had grounds to believe that the appellant committed drug offences and that evidence of those offences would be found at Peach Road and Sappers Way. A broad summary of the grounds, as articulated in the ITO, is as follows.
- [8] Constable Lewis learned from information provided by Informant A that the appellant was selling cocaine. The appellant had previously been charged with drug offences following an RCMP investigation in 2015.
- [9] The RCMP began conducting surveillance of the appellant on May 24, 2017.
- [10] On July 13, 2017, the appellant was seen attending a known drug house.
- [11] On a number of occasions in July and August 2017, the appellant was seen at Peach Road, coming and going from the house and the detached garage. A motorcycle registered to the appellant was parked at Peach Road. Constable Lewis believed Peach Road was the appellant's primary residence.
- [12] On August 3, 2017, the appellant was seen attending Sappers Way.
- [13] On August 16, 2017, the appellant was again seen attending Sappers Way on two occasions. The appellant was observed using a key to enter Sappers Way on both visits. On the first visit, the appellant was seen carrying something as he left Sappers Way and returned to the garage at Peach Road. Constable Lewis was advised by Constable Timmerman that the appellant was seen carrying something heavy as he left Sappers Way.

- [14] On August 18, 2017, the appellant was surveilled between Peach Road and Sappers Way. He was seen leaving Peach Road and driving straight to Sappers Way. He carried a bag into Sappers Way and then left Sappers Way carrying a small white and purple box. After sitting on his motorcycle and using a cellphone, he met with a male driving a Dodge Durango. The appellant leaned into the front passenger side of the Durango. The appellant and the driver of the Durango left the scene approximately three minutes later.
- [15] The police conducted a licence plate search and, based on that search, believed the Dodge Durango was driven by Antonio Nalasco-Padia, who was known to the police and was prohibited from driving a motor vehicle. The police stopped the Durango and arrested Mr. Nalasco-Padia for driving while prohibited. Upon a search of Mr. Nalasco-Padia incident to arrest, the police found brass knuckles and marihuana. Mr. Nalasco-Padia was arrested for possession of a prohibited weapon and possession of a controlled substance. On a search of the vehicle incident to arrest, the police seized a small white and purple box, which Constable Lewis identified as identical to the box the appellant was seen carrying upon leaving Sappers Way. The box contained over 100 grams of cocaine.
- [16] A Justice of the Peace issued search warrants for Peach Road and Sappers Way on the strength of the ITO.

The Garofoli Application

- [17] At trial, the appellant maintained the ITO contained falsehoods, misleading language, and exaggeration. He applied to cross-examine Constable Lewis, the affiant.
- [18] The judge granted leave to cross-examine Constable Lewis on three discreet areas and prescribed a 30-minute time limit on cross-examination. Of note, defence counsel had initially projected he would need no more than an hour, but subsequently abandoned some of the potential areas of cross-examination, leading the judge to determine 30 minutes would be sufficient.
- [19] The cross-examination came to a natural close without any request for additional time. The appellant was granted leave to cross-examine Constable Timmerman, a sub-affiant, on a discrete issue.

Challenges to the ITO and the Judge's Ruling

- [20] Following the cross-examinations, defence counsel contended that the ITO contained nine flaws and the search warrants should not have been issued. On appeal, the appellant focuses more narrowly on three flaws, which he says intentionally misled the Justice of the Peace, and which he says the judge dealt with improperly. As relevant to the grounds of appeal, it is only necessary to detail how the judge dealt with those three challenges.

Challenge 1: The Informant Information (Reasons at paras. 11-22)

- [21] In the ITO, Constable Lewis stated that he learned from an informant that Lucas Thiessen was selling cocaine. The vetted report summarizing Informant A's information is Appendix B to the ITO. The report indicates that Informant A provided information on three dates in 2017, respectively: (1) "Lucas sells cocaine"; (2) "Lucas sells cocaine, and supplies dealers in Chilliwack"; and (3) "Lucas [believed to be Lucas Thiessen] operates a cocaine trafficking line in Chilliwack, BC" (square parentheses in original).
- [22] Defence counsel submitted that the information obtained from the informant was only that someone named Lucas was trafficking cocaine in Chilliwack, and that it was misleading and dishonest for Constable Lewis to state that the informant named Lucas Thiessen.
- [23] The judge responded to this argument in three ways.
- [24] First, the judge found that a plain reading of paras. 10-11 of Constable Lewis' affidavit is that someone named Lucas, whom Constable Lewis believes to be Lucas Thiessen, sells cocaine. Those paragraphs relate:
10. With regard to the history and pedigree of Informant A, see attached Appendix B.
 11. On August 18, 2017 I read a report [Vetted - V2] and learned the following:
 - a. Lucas THIESSEN sells cocaine.
- [25] Paragraph 10 directs the justice to Appendix B, where the justice would see that only the name "Lucas" is provided and "believed to be Lucas Thiessen" is added as editorial to the third piece of information. Read alongside para. 10, para. 11 would be understood as a statement that Constable Lewis believed Lucas to be Lucas Thiessen. The judge found that something must have been said the third time the Informant provided information that gave Constable Lewis the belief that Lucas was Lucas Thiessen. The judge specifically found that Constable Lewis was not dishonest and did not intend to mislead the justice; he simply stated his belief.
- [26] Second, as an alternative to the judge's plain reading of paras. 10-11, the judge found that "Lucas Thiessen" could be excised from para. 11, and amplified with "believed to be Lucas Thiessen" in the offending paragraphs. The ITO would still disclose reasonable grounds for the warrant to have issued.
- [27] Third, the judge found that the information provided by the informant on its own was weak and "only one of a constellation of factors"; the tip was corroborated by stronger evidence, and was not the "sole or substantive ground relied upon by Constable Lewis" in the ITO: at para. 19. The "basis of the warrant depended not" on the informant tip, "but on subsequent police investigation": at para. 21.

Challenge 2: The Observation that the Appellant Used a Key at Sappers Way (Reasons at paras. 50-57)

- [28] In the ITO, Constable Lewis stated that the appellant was seen using a key to enter Sappers Way on August 16. The appellant was being video-taped at this time. Constable Lewis viewed the video in cross-examination and agreed the appellant could not be seen actually using the key. The appellant could be seen approaching the door with keys in his hand but the view of the doorknob is blocked in the video.
- [29] Constable Lewis testified that Constable Timmerman's notes indicated that the appellant used a key to access the door. When cross-examined, Constable Timmerman confirmed that he did not in fact see the appellant put the key in the doorknob because his view was obstructed.
- [30] The judge excised the words "using a key to enter" and amplified the ITO by substituting "approaching with a key in hand before entering."
- [31] The judge found the excision and amplification did not impact the grounds for issuing the warrants. Constable Lewis' inference, that a person who approaches a door with a key does so to use the key on the door, was clearly available. However, the judge observed, Constable Lewis "sometimes in the material, stated his conclusions instead of precisely setting out the observations and then stating what conclusions he drew from those observations": at para. 54.

Challenge 3: The Observation that the Appellant Carried Something Heavy Out of Sappers Way (Reasons at paras. 58-64)

- [32] Paragraph 16(c) of the ITO reads:

THIESSEN was observed carrying something as he left [Sappers Way] and returned to his garage at 5428 Peach Road. I was advised by Constable TIMMERMAN that THIESSEN appeared to be carrying something heavy as he departed from 21-5805 Sappers Way, Chilliwack.

- [33] On cross-examination, upon being shown a video, Constable Lewis agreed he could not definitively see the appellant carrying something. Constable Lewis said the observation that the appellant was carrying something heavy was made by Constable Timmerman.
- [34] On cross-examination, Constable Timmerman agreed that he could not see anything in the appellant's hands. On re-examination, Constable Timmerman clarified that he believed there was something heavy in the appellant's hands because of the way he was walking. His arms were stiff and he was leaning towards his right as if he was counter-balancing himself. In the video, Constable Timmerman is heard commenting that it appears Thiessen is carrying something heavy, but he cannot see what it is.

- [35] The judge found that the second sentence of the impugned paragraph clarifies that Constable Lewis was advised by Constable Timmerman that the appellant appeared to be carrying something heavy. Read as a whole, the two sentences were not incorrect or misleading.
- [36] In the alternative, the judge found that "at the most only the first sentence would be excised": at para. 63. The second sentence would still be included and the excision would not affect the grounds for issuing the warrant.

Issues on Appeal

- [37] The appellant's arguments on appeal fall into three categories. First, the appellant says the judge erred by limiting the appellant's cross-examination to 30 minutes. Second, he says the judge improperly amplified the ITO on review and made impermissible inferences. Third, the appellant says the judge erred by failing to exercise a residual discretion to quash the warrant in order to avoid a subversion of the judicial authorization process.

Was the Limit on Cross-Examination an Appropriate Exercise of Discretion?

- [38] An accused person does not have an absolute right to cross-examine an affiant on an ITO for a search warrant; leave is required. For leave to be granted, the accused person must show the proposed cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, such as reasonable and probable grounds: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1465; *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 at para. 10; *R. v. Frederickson*, 2018 BCCA 2 at para. 26. The trial judge's role in determining whether a search warrant was properly issued is set out succinctly by Justice Donald in *R. v. Bacon*, 2010 BCCA 135 at para. 25, leave to appeal ref'd [2010] S.C.C.A. No. 213:

The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant. While evidence of fraud, material non-disclosure, or misleading information are all relevant to this enquiry, their sole impact is to determine whether there is a continuing basis to support the warrant .

Granting leave is a matter of the exercise of a trial judge's discretion, which should not be interfered with on appeal unless it is not exercised judicially: *Garofoli* at 1465; *Pires* at paras. 10, 47.

- [39] In *Pires*, the Supreme Court of Canada reiterated that the "concern over prolixity was expressly stated as the reason for placing reasonable limits on cross-examination in *Garofoli*," and added, "[t]he concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli* was decided": *Pires* at para. 35; *Garofoli* at 1465. The same can be said today with the passage of an additional 15 years since *Pires* was decided: see *R. v. Jordan*, 2016 SCC 27.

- [40] The trial judge's role is to keep proceedings focused. This is engaged by deciding not only whether to grant leave to cross-examine an affiant (or sub-affiant), but also by limiting the scope of cross-examination when leave is granted. By imposing limits, the judge ensures "the inquiry can remain focussed on the material issues": Pires at para. 45. The issue on a Garofoli hearing is "whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions existed" and "there is a relatively narrow basis for exclusion": Pires at para. 30.
- [41] The nature of the issue on a Garofoli hearing provides a narrow window for the permissible scope of cross-examination based on relevancy. As noted by Justice Fisher in *Frederickson* at para. 29, "Cross-examination that can show only that some of the information relied on by the affiant is false will not likely be useful unless an inference can be made that the affiant knew or ought to have known that the information was false." (See also Pires at para. 30). Cross-examination on a Garofoli hearing cannot be allowed to devolve into a lengthy inquiry into minor errors or falsities.
- [42] The Court in Pires specifically addressed the issue of imposing limits on the scope of cross-examination in advance, as opposed to simply limiting cross-examination as it is ongoing. Endorsing *R. v. Silvini* (1997), 96 O.A.C. 310, leave to appeal ref'd [1997] S.C.C.A. No. 145, the Court held that the trial judge has "discretion to direct the scope of the cross-examination in advance if the judge considers it advisable to do so": Pires at para. 45.
- [43] While these observations were made with respect to limits imposed on subject matter, they apply equally to the imposition of a time limit. To keep cross-examination focused, a judge may exercise discretion to impose a rough time limit in advance. Prescribed limits are flexible and can be revisited if it appears to the judge that the limits are restricting the accused's ability to demonstrate the grounds upon which the search warrant is attacked. If it appears that legitimate inquiries would be cut off by the time limit, the judge would undoubtedly consider permitting cross-examination to continue.
- [44] In my view, the appellant is misguided in his reliance on case authorities concerning the right to cross-examine at trial. As in Pires, the appellant "fails to distinguish between the right to test evidence introduced at the trial on the merits and the threshold evidentiary hearing to determine the admissibility of that evidence," which was obtained pursuant to a presumptively valid court order: see Pires at paras. 28-30.
- [45] The appellant has failed to identify any basis to conclude that the judge improperly exercised his discretion to limit cross-examination. The appellant does not identify any specific prejudice arising from the time limit. Counsel was not cut off by the judge due to the expiry of time and there is no indication that more time was desired. The cross-examination appears to have elicited all of the information available on the issues and came to a natural close.
- [46] In my view, there is no merit to this ground of appeal.

Was the Judge's Review of the Sufficiency of the ITO in Error?

[47] The reviewing judge's task in determining whether an ITO sufficiently supports the issuance of a warrant is described in *Garofoli* at 1452:

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[48] In conducting a review, the judge excises erroneous or misleading information from the ITO. Where information is excised due to simple error, and not from a deliberate attempt to mislead the authorizing judge, amplification may be in order: *R. v. Araujo*, 2000 SCC 65 at para. 57. If minor errors were made in good faith, the reviewing court may resort to amplification evidence to correct the errors: *Araujo* at paras. 57-59; *R. v. Morelli*, 2010 SCC 8 at paras. 41-43.

[49] Relying on *R. v. Van Diep*, 2015 BCCA 264 at para. 32, the appellant notes that good faith in this context means that the errors were based on an honest and reasonably held belief. The appellant's arguments on this ground are in large part a veiled attack on the trial judge's factual findings, which amounted to findings of good faith and which I would not disturb. Repeatedly throughout the judge's reasons, Constable Lewis' errors are identified as imperfections in drafting made with no intention to mislead, based sometimes on his statement of reasonably held conclusions rather than simply the observations underlying those conclusions: see paras. 17, 28, 35, 44, 48, 54, 62, 73-74, 76, 78, 80-81.

[50] That said, I will consider each of the appellant's three complaints.

[51] First, the appellant says the judge should not have amplified the record to show that the appellant was seen approaching the door at Sappers Way with a key in hand. He says Constable Lewis' excised statement that the appellant used a key to enter Sappers Way was not made in good faith, which would make amplification unavailable.

[52] This argument is contrary to the reviewing judge's factual findings. The judge found it was reasonable to infer that one who approaches a door with a key in hand does so in order to use the key on the door. The judge said Constable Lewis was "not trying to mislead," but that he should have precisely stated his observations prior to stating the conclusion he drew from those observations. In these circumstances, amplification was appropriate.

[53] Second, the appellant says the judge erred by amplifying the record regarding the appellant carrying something heavy out of Sappers Way. This too is contrary to findings of fact. The judge found that para. 16(c) of the ITO, read as a whole, was "not incorrect" and "not misleading," and he saw no need for excision or amplification. In the alternative, the judge

reasoned that even if he excised the first sentence, the second sentence would remain, stating Constable Lewis' observations without his conclusion. This would not affect the grounds supporting the warrants. To the extent that there was any error in the first sentence, it was described as a drafting imperfection. In my view, there are no reviewable errors in the judge's treatment of this matter.

- [54] Third, the appellant argues that the judge made improper inferences and improper amplification with respect to the information from Informant A. Within the report summarizing the informant's information, only the name "Lucas" is given in the first two points and "believed to be Lucas Thiessen" is added in square brackets in the third point. The report is heavily redacted, making it difficult to draw any meaningful conclusions from its contents. As the reviewing judge noted, the Crown in this case supported the authorization on the basis of the edited material and did not attempt to engage step 6 of the Garofoli process (that is, to "apply to have the trial judge consider so much of the excised material as is necessary to support the authorization": Garofoli at 1461).
- [55] The appellant argues that the ITO, including the vetted informant report at Appendix B, discloses no basis for Constable Lewis' belief that the Lucas referred to by the informant was Lucas Thiessen. The appellant says it was improper for the judge to infer, in the absence of supporting evidence, that the informant must have said something which led Constable Lewis to believe Lucas was in fact Lucas Thiessen. The consequence of the appellant's argument is that any references to an informant identifying Lucas Thiessen--first name and last--ought to have been excised without amplification.
- [56] It is not necessary to decide if the judge's inference constitutes an error, as the judge's analysis in paras. 18-21 makes it clear that the warrants would have issued nonetheless. The judge recognized that the informant tip in the circumstances of this case was "weak." It was "not the sole or substantive ground relied on." It was background information. The "basis of the warrant depended not on those tips but on subsequent police investigation." In my view, this amounts to a finding that the ITO contained a sufficient basis on which the justice could have issued the warrants even without Informant A's tips.
- [57] In my view, there is no merit to this ground of appeal.

The Exercise of a Residual Discretion to Quash the Warrant

- [58] The appellant's final argument is that misstatements and incomplete disclosure in the ITO amounts to a subversion of the judicial process and the reviewing judge ought to have exercised his residual discretion to quash the warrants even if they survived Garofoli review.
- [59] As Justice Groberman explained in *R. v. Beaumont*, 2018 BCCA 342 leave to appeal ref'd [2018] S.C.C.A. No. 448 at paras. 40-44, this Court has not clearly decided that a reviewing judge has a residual discretion to quash a warrant that withstands scrutiny under the Garofoli test.

- [60] The appellant does not cite Beaumont, but has relied on two dated decisions of this Court to argue that there exists a residual discretion to quash a warrant to avoid the corruption of the judicial process.
- [61] The first is *R. v. Dellapenna* (1995), 28 W.C.B. (2d) 188, 1995 CanLII 428 (B.C.C.A.). As I understand it, the appellant relies on *Dellapenna* simply as a restatement of a comment made in *R. v. Sismey* (1990), 9 W.C.B. (2d) 536, 1990 CanLII 1483 (B.C.C.A.): "when the justice of the peace is intentionally misled the search warrant cannot stand The quashing of the warrant is to avoid the corruption of the judicial process."
- [62] It has since been held in very clear terms that *Sismey* (and by extension *Dellapenna* to the extent that it endorses *Sismey*) has been overtaken. In *Bacon*, Justice Donald commented:
- [23] The judge's reasons for invalidating the search warrant are explicit. He set aside the warrant because of process, not because of substantive deficiency. In doing so, he relied on *Sismey*. But *Sismey* has been overtaken by *R. v. Garofoli* and *R. v. Araujo*, a development acknowledged by this Court in *R. v. Nguyen*, 2007 BCCA 264 at paras. 12-13

[Citations omitted; emphasis added.]

- [63] In *Bacon*, as in *Beaumont*, the Court acknowledged there "may be a residual discretion to strike down a warrant for abuse of process" but, on the facts of that case, the affiant's mistakes were "a long way from an abuse of process": *Bacon* at para. 27; *Beaumont* at para. 45; see also *R. v. Wilson*, 2011 BCCA 252 at para. 60.
- [64] The second binding authority relied on by the appellant is *R. v. Monroe* (1997), 34 W.C.B. (2d) 451, 1997 CanLII 3034 (B.C.C.A.). *Monroe* is simply an application of *Garofoli* on unique facts. In *Monroe*, the affiant's proven deceptiveness in the excised portions of the ITO tainted the reliability of the affiant's remaining observations, such that there was insufficient reliable evidence in the excised ITO to support the warrant.
- [65] No such argument can be made on the facts of this case.
- [66] To summarize, this Court has held that there may be a residual discretion to strike down a warrant for abuse of process, but has not found occasion to firmly adopt and apply such a rule. As in *Beaumont*, this case does not present the occasion, because the police conduct "is very far from the point where its application could be seriously considered": *Beaumont* at para. 45. The reviewing judge in this case made findings amounting to good faith on the part of the affiant. The ITO was tainted by imperfect drafting, and not by misconduct that comes anywhere close to an abuse of process.
- [67] I would not accede to this ground of appeal.

Conclusion

- [68] I would dismiss the appeal.

[69] GROBERMAN J.A.: I am going to ask Madam Justice Stromberg-Stein to confirm that those are her reasons.

[70] STROMBERG-STEIN J.A.: Those are my reasons.

[71] GROBERMAN J.A.: I agree.

[72] MACKENZIE J.A.: I agree.

[73] GROBERMAN J.A.: The appeal is dismissed.

"The Honourable Madam Justice Stromberg-Stein"

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