
CANADA / JUDGMENT

R. v. Thompson

2018 BCSC 619

COURT

Supreme Court of British Columbia

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2018 BCSC 619 R. v. Thompson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Thompson,

2018 BCSC 619

Date: 20180417

Docket: 65718

Registry: Chilliwack

Regina

v.

Jessie Brian Thompson

Before: The Honourable Mr. Justice Jenkins

Oral Reasons for Judgment on Voir Dire

Counsel for Crown:

M. Reinhart

Counsel for Accused:

M. Klein, Q.C.

Place and Date of Hearing:

New Westminster, B.C.

December 4, 2017

February 16, 2018

Place and Date of Judgment:

New Westminster, B.C.

April 17, 2018

- [1] Mr. Thompson stands charged under two counts of possession for the purpose of trafficking in heroin, cocaine and marihuana under s. 5(2) of the Controlled Drugs and Substances Act, (S.C. 1996 c. 19).
- [2] At the opening of the trial, a voir dire was declared respecting ss. 8 and 9 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 [the "Charter"], in which Mr. Thompson challenged:
- i. his arrest without a warrant for the offences alleged to have occurred on August 27, 2015;
 - ii. the subsequent issuance of a warrant for the search of a residence he was alleged to be connected to;
 - iii. the search of Mr. Thompson's vehicle authorized by the same warrant.
- [3] The Crown evidence on the voir dire resulted primarily from surveillance of Mr. Thompson. The surveillance was carried out over fourteen days in August 2015, in Abbotsford, BC. During this time a surveillance team consisting of several officers of the Abbotsford Police Department observed what Cst. Baker testified he believed were drug transactions.
- [4] The tests applicable to the legality of an arrest have been reviewed in many cases following two Supreme Court of Canada decisions: *R. v. Debot*, [1989] 2 S.C.R. 1140, [Debot]; and *R. v. Storrey*, [1990] 1 S.C.R. 241 [Storrey].
- [5] Debot described the standard to establish reasonable and probable grounds to arrest as one of "reasonable probability" of the arresting officer, rather than "proof beyond a reasonable doubt" or "prima facie case": at 1166. Also, in Debot, Wilson J. concurred with the view that that the arresting officer is to consider the totality of the circumstances available to him or her in making the decision whether to arrest: at 1168.
- [6] Storrey prescribed a subjective and objective test at 250-251 in which the Court stated:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.

- [7] Subsequently, in *R. v. Luong*, 2010 BCCA 158 at para. 24, the Court of Appeal described the objective portion of the test as being conducted by:
- [24] . . . first looking at the observations of the officer . . . through the lens of someone who has the same experience, training, knowledge and skills as the officer who is making the observations and then deciding if a reasonable person with the same lens would come to the same conclusion as the police officer.
- [Emphasis added].
- [8] Mr. Klein for the defence has also referred the court to the decision of *R. v. Pope*, 2015 BCSC 2391, regarding the objective assessment to be made of the arresting officer's decision to arrest, referring to the following paragraphs:
- [59] Taking into account the officer's special knowledge is not the same as deferring the entire objective assessment of grounds to the officer's intuition. That would make the objective assessment meaningless: *R. v. Payette*, 2010 BCCA 392 at para. 28.
- [60] In addition, the assessment must not be done from an overly jaded, jaundiced, or negative view, as set out in the following passage from *R. v. Lahtinen*, 2011 BCPC 490 at paragraph 26:
- [26] What must be remembered however, is that a "reasonable person, standing in the shoes of a police officer" does not mean a police officer who holds a jaundiced and overly negative view of the panoply of behaviours that humans engage in on a day to day basis. It cannot mean an officer whose observations of everyday actions are made through such a jaded lens that otherwise benign activity is precipitously characterized as criminal.
- [9] I take the quote from *R v. Lahtinen*, 2011 BCPC 490, cited above, as a suggestion to beware of officers whose outlook may have become jaded to the point where so-called "benign activity" or conduct which is not admirable is automatically characterized as criminal.
- [10] Counsel for the defence has acknowledged that the officer charged with the decision to arrest in this case, Cst. Baker, had the requisite subjective belief that he had reasonable and probable grounds to arrest. The only issue that remains is whether the objective assessment component of the test has been satisfied.
- [11] I will now review the facts which were known to Cst. Baker at the time of the arrest on August 27, 2015.

Facts Relevant to the Arrest

- [12] The investigation was initiated by seven anonymous Crime Stoppers tips which alleged Mr. Thompson was engaged in drug trafficking. The source of those tips is unknown and unverified. The significance of the Crime Stoppers tips was only to initiate a possible investigation of Mr. Thompson.

- [13] Cst. Baker was assigned as the lead investigator at the time the investigation was initiated. At the time of his appointment, Cst. Baker had eight years experience with the Abbotsford Police Department. He had previous experience in drug possession investigations; had purchased drugs as an undercover officer; taken a drug investigators course; written search warrants and had dealt with drug investigations on a daily basis. Cst. Baker had also previously been involved in investigations and arrests of dial-a-dope operations in Abbotsford. He described what he understood a dial-a-dope operation to consist of: a dealer with at least one cell phone, receiving calls from customers to arrange a meeting for the purchase and sale of drugs. Often they will involve a very quick interaction and exchange and after the parties will separate quickly. More often than not, a dealer will travel to a predetermined location for the exchange, however, on occasion, the customer may come to the dealer.
- [14] Cst. Baker organized a team to investigate the allegations against Mr. Thompson and regularly held morning briefings/de-briefings with his team during which the team would exchange information on the results of their surveillance. Cst. Baker gathered information from those occasions when he was involved in the surveillance and also from his team members.
- [15] At the beginning of the investigation, Mr. Thompson was not known to Cst. Baker other than from a previous investigation which linked him to his mother's address in Abbotsford. It was soon determined that he was linked to a black Acura TL sedan, license plate ____-67C. Mr. Thompson had been seen driving the black Acura on several occasions to and from 2943 Nelson Place in Abbotsford and would often park the Acura at a parking lot west of 2943 Nelson Place which has an address of 32815 George Ferguson Way. Also, on occasion, the Acura was seen near his mother's address.
- [16] The seven days of surveillance in which Cst. Baker and his team observed what they believed to be drug transactions are summarized below. On the days when surveillance was being carried out, Cst. Baker testified that Mr. Thompson was seen to have been driving very fast, which made covert surveillance difficult. All surveillance was carried out in Abbotsford.
- [17] The seven days of surveillance can be summarized as follows:
1. August 10, 2015 - Cst. Van Unen was conducting surveillance and made notes of his observations which were provided to Cst. Baker. At 14:10 hours Cst. Baker testified from Cst. Van Unen's notes that the latter observed an unknown female approach the Acura being driven by Mr. Thompson which was located outside Chief Dan George School. The female leaned towards and reached into the drivers' side window and left after a "quick interaction", however, Cst. Van Unen's notes did not provide an estimated time for the interaction.
 2. August 12, 2015 - Mr. Thompson and others were observed by Cst. Raine at an address on Chase St., engaged in what he considered to be a drug deal occurring inside a garage. Cst. Raine took several photos of the persons engaged with Mr. Thompson at that location (all of which were included in Tab 3 of Exhibit "C" on the voir dire). Mr. Thompson was seen

leaving the Chase St. location in a white BMW with another person and eventually returned in the same vehicle followed by a black Honda Civic. The driver of the Honda exited that vehicle and approached the driver's side window of the BMW and was overheard stating "120 for 100". In Cst. Baker's experience, this statement was indicative of drug transactions where the parties are bickering over the price. Mr. Thompson soon emerged from the front passenger side door of the BMW and went into the open garage and through a door on the far side which was an entrance to a residence. Others were also seen exiting the BMW. The driver of the Honda was then seen entering the garage and re-emerging moments later carrying a plastic bag. On cross-examination, Cst. Baker admitted that Mr. Thompson had been seen entering the residence before the driver of the black Honda was seen leaving the garage with the plastic bag. Cst. Baker testified that based on his experience he believed the plastic bag contained drugs. Also on cross-examination, Cst. Baker agreed that the driver of the Honda had emerged from the garage with the plastic bag after Mr. Thompson had entered the garage and "physical sight of him [Mr. Thompson] was gone". There was no evidence of a hand to hand transaction between Mr. Thompson and the driver of the black Honda.

3. August 25, 2015 - A blue Toyota mini-van was seen parked at an apartment complex next to 2943 Nelson Place, ie. 32815 George Ferguson Way. Mr. Thompson was observed exiting 2943 Nelson Place, walking up to the mini-van and getting into the front passenger seat. He remained there for approximately 10 seconds, got out and returned to 2943 Nelson Place. The driver of the mini-van was observed by officers after the encounter with Mr. Thompson looking down at his lap, however, there was no evidence as to what the driver may have been looking at in his lap. Cst. Baker testified that it was his belief, based on his experience, that the short meeting resulted in a drug transaction and that the driver was likely looking down at the drugs he had just obtained from Mr. Thompson.
4. August 26, 2015 - There were two incidents which attracted police attention on that day. At 13:47 hours, the same mini-van seen on August 25, 2015, arrived in the parking lot at the address on George Ferguson Way. Mr. Thompson was observed leaving 2943 Nelson Place, approaching and entering the front passenger side of the mini-van. He stayed for there 10 seconds before exiting the van and returning to 2943 Nelson Place. The mini-van then departed.
5. August 26, 2015 - At 16:23 hours, the blue mini-van returned and Mr. Thompson was observed interacting at the driver's side window for approximately five seconds. Upon leaving the mini-van, Mr. Thompson walked southward to a 7-11 convenience store. There was no mention of a hand to hand transaction during this encounter. Cst. Baker testified that in his experience, he believed that the two encounters of August 26 were drug transactions, as was the transaction of August 25 involving the same blue mini-van in that it was indicative of a repeat customer in need of drugs. He testified that it is not uncommon for users to buy small quantities of drugs over a very short period of time.

6. August 27, 2015 - Cst. Baker testified that on August 27, 2015, he anticipated that there may be another possible drug transaction with the person in the blue mini-van. He testified he intended to arrest Mr. Thompson before he reached the mini-van, anticipating Mr. Thompson would have drugs on his person for sale. Before Mr. Thompson was arrested later on August 27, 2015, at 12:50 hours Cst. Baker observed Mr. Thompson at the base of the stairs at the west door of 2943 Nelson Place where a south Asian male was waiting outside the door. Mr. Thompson emerged from the door, engaged in a brief hand-to-hand transaction of approximately 10 seconds and returned inside the building while the south Asian male departed the scene.
 7. August 27, 2015 - At 13:29 hours, Mr. Thompson was observed leaving 2943 Nelson Place in his Acura and driving to 32141 George Ferguson Way where an unknown male approached the driver's window, remained for approximately 5 seconds and left (as did Mr. Thompson in his Acura). Mr. Thompson soon returned to 2943 Nelson place after two brief, uneventful stops. Counsel pointed out that there was no mention of a hand-to-hand transaction in the surveillance report for that day.
- [18] Each of the officers on the surveillance team testified on the voir dire and confirmed their notes.

The Arrest

- [19] At 15:35 hours on August 27, 2015, officers, including Cst. Baker, observed the same blue mini-van arriving at 2943 Nelson Place and saw Mr. Thompson approaching the mini-van. At this point, Cst. Baker authorized his officers to arrest Mr. Thompson before he reached the occupants of the mini-van (which is what occurred). Cst. Baker testified that he personally gave warnings and a Charter statement to Mr. Thompson.
- [20] Cst. Baker testified that his grounds for arresting Mr. Thompson were the observations recorded in surveillance up to August 27 but that he placed significant weight on the interactions between Mr. Thompson and the person or persons in the blue Toyota mini-van. He testified he believed that those persons had purchased drugs from Mr. Thompson and anticipated there would be another drug transaction with the individuals in the Toyota mini-van on August 27.
- [21] Cst. Baker also stated that his opinion was corroborated or bolstered by the Crime Stoppers tips. He testified, however, that while the tips were helpful to identify a target that "once a target has been identified, we will provide our own grounds and make our own observations rather than relying on the tip itself". He was aware that the tips had been anonymous and that it was possible that the seven tips could have been provided by between one and seven persons. He also had no knowledge of the reliability of the anonymous tipsters.

[22] Finally, Cst. Baker confirmed that surveillance on four other days between July 15 and August 4, 2015, did not produce any evidence indicative of drug trafficking. He also had no knowledge of any prior involvement of Mr. Thompson in the drug trade in police files and he did not have knowledge of Mr. Thompson having a criminal record.

Did Cst. Baker have Reasonable Grounds, on an Objective Basis, to Arrest Mr. Thompson for Possession for the Purpose of Trafficking?

[23] In order to answer the above question, it is necessary to consider the facts described in each of the above interactions individually and cumulatively in relation to the totality of the circumstances noted in all of the surveillance of Mr. Thompson's activities.

[24] Counsel for Mr. Thompson submitted that the evidence was inadequate to be able to form a reasonable opinion that Mr. Thompson had been engaging in the sale of illegal drugs. Counsel emphasized the following:

- Regarding the August 10, 2015 surveillance: there was no description of any transaction between the unknown female who leaned into the passenger window of Mr. Thompson's Acura and Mr. Thompson. Regarding duration, the interchange was described as "very short".
- Regarding the August 12, 2015 surveillance: although the interactions between the several parties present are suspicious and it would appear as though the driver of the black Honda left with a small plastic bag containing a white substance (which is evidence that a transaction involving drugs had taken place) the evidence does not disclose a transaction between Mr. Thompson and the driver of the black Honda or anyone else. It appeared from the many photographs taken during surveillance that Mr. Thompson had gone through the garage and into the attached residence before the driver of the black Honda came out of the garage with the plastic bag. No hand-to-hand interaction was evident. To conclude that Mr. Thompson had been involved in a drug transaction based upon the surveillance would amount to speculation.
- Regarding the August 25, 2015 surveillance: Mr. Thompson entered the passenger side of the blue mini-van and remained for ten seconds, however, no description of a transaction was provided. Testimony that the driver of the vehicle looked to his lap after the alleged transaction is not evidence of a drug transaction as there was no description of what that person could have observed on his lap.
- Regarding the August 26, 2015 surveillance: at 13:47 hours Mr. Thompson entered the same blue mini-van for ten seconds. However, no exchange was described in the testimony.
- Regarding the August 26, 2015 surveillance: at 16:23 hours Mr. Thompson was seen at the driver's side of the same blue mini-van for five seconds, but once again, no transaction was observed.
- Regarding the August 27, 2015 surveillance: at 12:50 hours there was evidence of a hand-to-hand transaction, however, what may have been exchanged, if anything, is unknown. The defence suggests it is not clear whether Mr. Thompson was a seller or a purchaser.

· The interaction of August 27, 2015, at 13:29 hours was described as a five second meet after Mr. Thompson had been driving but, again, there is no evidence of a transaction of any kind.

[25] The Crown points to the following as indicia of drug transactions:

- a) Several very brief interactions between Mr. Thompson and others with several exchanges with the driver of the blue mini-van are typical of dial-a-dope dealer transactions.
- b) The court should consider the totality of the evidence (per Debot) which would involve an assessment of all of the interactions as well as the similarities between the interactions that are indicative of illegal drug transactions.
- c) Drug culture jargon, referring to the words "120 for 100" which, according to Cst. Baker, amounts to bartering for the value of the drugs.
- d) That the Crime Stoppers tips were bolstered by the corroborating observations of the surveillance observations.

[26] The Crown has also referred to cases in which a single transaction or a very small number of brief meetings is relied upon without background checks of the subjects involved as constituting reasonable and probable grounds to arrest. The Crown refers to *R. v. Tran*, 2007 BCCA 491 [Tran], which involved what appeared to be one drug transaction. The police had been following a known drug user who had recently been released from jail and in respect of whom one of the user's relatives had warned police that the user was engaging in drug use and property crimes. The user was observed entering a van and engaged in what appeared to be a brief drug transaction. In *Tran*, the drug user they had been following was seen kneeling in the front seat of the van facing the driver. Police then saw the user leave and subsequently arrested the driver of the van for trafficking.

[27] The situation in *Tran* is quite different than in the case at bar. In *Tran*, the drug user was well known to police who had been following him while he and another were attempting break-ins in a residential neighbourhood. They also had a tip from a relative of the individual they were tracking that he would be engaging in property crimes to fund his drug addiction. They also knew that he had a history of drug use. All of this was considered when determining if the driver of the van was likely to have been providing the individual with drugs. The court concluded that an individual in the officer's shoes would have considered the driver to have been selling drugs. In the case at bar, Mr. Thompson was not known to Cst. Baker, nor was Cst. Baker aware of Mr. Thompson having a criminal record or history relating to illegal drug transactions. While there were seven tips suggesting he was engaged in trafficking, they were made by anonymous informers or even by one informer multiple times. These informers were also of unknown reliability.

[28] The Crown also referred to the decision of *R. v. Gill*, 2015 BCSC 310 [Gill], in which Schultes J. reviewed several decisions relating to the reasonableness of an arrest in a drug case and dismissed a defence application alleging a breach of s. 9 of the Charter. Again, in that case there was only one transaction observed by a police officer who suspected a drug

transaction was going down. The officer observed the driver of a van reach into the rear of the van followed by "the flash of a plastic bag and that 'my brain tells me it was a dime bag'", ie. a type of packaging in which drugs are commonly sold. The officer then saw the driver holding money in his hand, saying it was "definitely money". In Gill, seeing a "dime bag" and money was clear evidence of a drug transaction having taken place.

- [29] In Gill, Schultes J. reviewed several cases to determine how many transactions need to be observed before the objective standard for arresting a suspect is satisfied. I find his comments at para. 45 helpful:

I think that Crown Counsel is correct that the more closely what the police observe comes to demonstrating an actual purchase and sale of drugs, then the less repetitive conduct by the suspect will be required to meet the requirement of objective reasonableness.

- [30] Schultes J. went on to say that the decision of the Alberta Court of Appeal in *R v. N.O.*, 2009 ABCA 75, was an "outlier" so far as the single hand-to-hand transaction was only sufficient to constitute a suspicion. He went on to say it was "contradicted by British Columbia authority": see para. 46.
- [31] Finally, I refer to the decision of *R. v. Biadi*, 2014 ONSC 2493, in which there was evidence of an unreliable tip and no evidence of the accused having a criminal record, no evidence of money or drugs being exchanged and short meetings with the accused. The court concluded, at para. 43:
- [43] As such, it was as if the officers were investigating an individual who, as far as everyone knew based upon the unreliable tip and the lack of criminal record, may or may not have been involved in any criminal activity. At the beginning of the investigation, there was no objective basis to believe that Mr. Biadi was involved in the drug trade. And without such a foundation, I believe that the police officers' duty to adequately investigate in order to determine reasonable and probable grounds for an arrest increases in scope. In other words, had the investigating officer's reason to believe that Mr. Biadi had a known connection with the drug trade, the four transactions could likely be explained as drug transactions. Without a known connection in the drug trade, an objective person standing in Detective Torres' shoes may very well have entertained other reasonable explanations for the various meetings and transactions as suggested by defence counsel.
- [32] I note however, that the setup of Mr. Biadi's residence was such that it was impossible for the police to see if the individual's entering the property went into his residence, or even met with Mr. Biadi at all. At most, they could see different individuals entering the back gate and then leaving again 5 to 10 minutes later. I also note that one interaction witnessed by the police was described by some officers as a potential "romantic encounter" in a parking lot lasting 10 minutes: see para. 23. This length of time exceeds the usual amount of time for a drug transaction. Finally, the police in this case did not witness a single hand-to-hand transaction, drug, plastic bag, or exchange of money.

- [33] In the case before me, there was at least one hand-to-hand transaction witnessed. There was also evidence of a bag typically used to transport drugs in the hands of a man leaving a residence at which Mr. Thompson was present. While the police did not witness a transaction between Mr. Thompson and the unknown male, they did witness both men enter the premises and then one man exit the premises with a bag believed to contain drugs. There were also transactions of a duration more typical of a drug transaction than a "romantic encounter" or a casual meeting between acquaintances.
- [34] While there was a lack of any prior known drug activity on the part of Mr. Thompson, the interactions that occurred August 10-27, 2015, are, when considered in their context, sufficient to satisfy me that a "reasonable person, standing in the shoes of a police officer" having witnessed the interactions would have reasonably inferred that Mr. Thompson was selling drugs. Similar to Schultes J. in Gill, I conclude the observations were objectively consistent with the specific characteristics of dial-a-dope transactions Cst. Baker had seen. Unlike the situation in Gill where there was only one transaction, in this instance we have at least two transactions where either a hand-to-hand exchange occurred, or Mr. Thompson exchanged something with the driver of the mini-van in a quick exchange before the driver (and Mr. Thompson) left. Additionally, there were other brief interactions which Cst. Baker testified had the indicia of drug transactions. As such, I conclude that the arrest and subsequent search of Mr. Thompson's person was not arbitrary or in violation of his rights under ss. 8 and 9 of the Charter.
- [35] Having found the arrest of Mr. Thompson to be lawful, the search of Mr. Thompson incidental to the arrest was accordingly lawful since Cst. Baker has been found to have reasonable grounds to indicate Mr. Thompson was trafficking. The fruits of that search are therefore admissible at trial.

The Search Warrant of an Apartment on Nelson Place

- [36] Subsequent to the arrest of Mr. Thompson on August 27, 2015, an Information to Obtain a Search Warrant ("ITO") of what was assumed by the officers to be the residence of Mr. Thompson was issued. In these reasons, I will not refer to the actual apartment number for which a warrant was sought at 2943 Nelson Place in Abbotsford.
- [37] In *R. v. Morelli*, 2010 SCC 8, the Supreme Court of Canada discussed the test for sufficiency of a warrant application as follows:
- [39] Under the Charter, before a search can be conducted, the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 168). These distinct and cumulative requirements together form part of the "minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure" (p. 168).

- [40] In reviewing the sufficiency of a warrant application, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (R. v. Araujo, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.
- [41] The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (Araujo, at para. 58). Furthermore, the reviewing court may have reference to "amplification" evidence -- that is, additional evidence presented at the voir dire to correct minor errors in the ITO -- so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.
- [42] It is important to reiterate the limited scope of amplification evidence, a point well articulated by Justice LeBel in Araujo. Amplification evidence is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds. The use of amplification evidence cannot in this way be used as "a means of circumventing a prior authorization requirement" (Araujo, at para. 59).
- [43] Rather, reviewing courts should resort to amplification evidence of the record before the issuing justice only to correct "some minor, technical error in the drafting of their affidavit material" so as not to "put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made" such errors (para. 59). In all cases, the focus is on "the information available to the police at the time of the application" rather than information that the police acquired after the original application was made (para. 59).
- [38] I summarize the above direction to be that a reviewing judge should exclude or excise erroneous information in the ITO and may amplify minor errors based upon additional evidence presented on the voir dire so long as the errors were made in good faith.
- [39] The deponent of the ITO was Cst. Raine of the Abbotsford Police Department who was also a member of the surveillance team assembled for this investigation. There was no application to cross-examine Cst. Raine as the affiant of the ITO.

- [40] The defence first challenges the references to the seven Crime Stoppers tips referred to in the ITO as objectionable on the basis that the information has been redacted from the ITO. Mr. Thompson submits that the information gained through Crime Stoppers should be given no weight as almost all of that evidence was redacted. Cst. Raine deposed that the Crime Stoppers tips were stated in para. 9 of Exhibit "D" of the ITO as "believed to have originated from an unknown and anonymous source, of unknown reliability" and in para. 10 stated:
10. I do not know the identity of the Crime Stoppers caller and therefore cannot attest to their general credibility. As well, because I do not know the source's identity, I cannot say what information this source provided (in the sense of exact quotes of what they said to Crime Stoppers) because I cannot be sure what information might tend to identify them.
- [41] The deponent, Cst. Raine, also stated that the summary of the Crime Stoppers tips in Appendix "A" of the ITO detailed criminal activities of Mr. Thompson. He wrote in the ITO, "I will be basing the majority of the ITO on information provided by seven Crime Stopper tips and surveillance". However, he also deposed that he had read tips that could benefit Mr. Thompson. This admission shows reasonableness in that he considered some facts that may not be typical of drug transactions and some that were. However, ultimately he concluded there was sufficient evidence to justify a search.
- [42] Given the anonymous nature of the Crime Stoppers tips, the unknown reliability or credibility of the informants (if there was more than one informant) and, indeed, the complete deletion of any information which may have been imparted by the informant, I give no weight to the Crime Stoppers tips and the conclusions expressed by the deponent and Cst. Marsales in the ITO as to Mr. Thompson's alleged activities.
- [43] The Crown has made reference to the decision of *R. v. Liepert*, [1997] 1 S.C.R. 281 [Liepert], which involved a defence application for unredacted or partially redacted Crime Stoppers tips which was denied. The principal issue in Liepert was the protection of informer privilege. In the case before me, the issue is the sufficiency of reasonable and probable grounds to issue the search warrant. The Crown stated in written submissions (para. 42, p.13) "the ITO does not rely on the tips with any significance", which appears to be contrary to the statement in para. 8 of Appendix "D" of the ITO that "I will be basing the majority of the ITO on information provided by seven Crime Stopper tips and surveillance". While this may lead to the inference that the information in the ITO stating Mr. Thompson was trafficking in illegal drugs did not originate from surveillance but from the Crime Stoppers tips, I conclude that even if the tips are excised from the ITO there was still a sufficient basis for the search of the home and the Acura as a result of the drugs found on Mr. Thompson during the search incidental to his arrest.

[44] The second challenge by the defence alleges that there was an insufficient connection between Mr. Thompson and the target apartment in Nelson Place. Included in this allegation is that false information is contained in para. 23 of Appendix "D" the ITO. That evidence, if accurate, was relevant to link Mr. Thompson to the target apartment in Nelson Place and consisted of Cst. Raine deposing in the ITO:

On August 27th, 2015 at 0915 hours I spoke to Cst. Baker of GDU who advised of the following:

- a) On August 24th, 2015, Cst. C. Baker conducted surveillance of Thompson;
- b) No formal surveillance notes were created; and
- c) At 1815 hours Cst. C. Baker observed Thompson use a key to gain access to suite ____ of 2943 Nelson Place.

[45] The statements above are inaccurate in that Cst. Baker did not conduct surveillance of Mr. Thompson on August 24, 2015. Cst. Baker testified on the voir dire that he did not recall the above incident, had no notes of the observations and agreed he had not personally observed Mr. Thompson leave the apartment.

[46] On his direct examination on the voir dire, Cst. Baker did state that prior to August 27, surveillance had observed Mr. Thompson leave the target apartment on August 26 as well as on the day of the arrest, ie. August 27, 2015. Cst. Baker testified that Cst. Sean Alton had been the officer who observed Mr. Thompson leave the apartment on August 26.

[47] On cross-examination, while relying on surveillance notes, Cst. Baker testified that Cst. Alton had seen four males, including Mr. Thompson, exit the target apartment with three other males at 18:28 hours on August 26 and that Cst. Alton was conducting surveillance from inside the building.

[48] There was evidence of Cst. Charest on the voir dire of surveillance by him in the hallway near the target apartment on August 27, 2015. He testified on direct examination that at 15:38 hours on that day he observed Mr. Thompson exit the target apartment and that Cst. Charest "walked past as he [Mr. Thompson] was at the door", he "had come out of the door and was facing the apartment".

[49] On cross-examination, Cst. Charest stated he heard a door open and close and then saw Mr. Thompson facing the door of the target suite and saw him walk away. He added that Mr. Thompson was the only person he saw in the hallway and "no one else could have exited the hallway".

[50] Also, Cst. Wiens testified that on August 27, 2015, he saw Mr. Thompson exiting the target suite of the building "using a key to lock the door", then went down the hall to the west stairwell at 12:50 hours. Cst. Wiens testified "when Mr. Thompson exited the suite he was probably 10-12 feet away . . . he walked past me, I held the door for him to exit the west stairwell". He added that he knew it was Mr. Thompson from photos.

- [51] Also, it was alleged in paras. 26 (c) and (d) of Appendix "D" that on August 27, 2015, Mr. Thompson left the apartment and conducted a transaction with an unknown male. Cst. Raine attributed this to the surveillance notes of Cst. Toews:
- c. At 1251 hours, Thompson was observed leaving unit ____ of 2943 Nelson Pl, and walked down the west stairwell;
 - d. At 1251 hours, Thompson met with the unknown male standing at the west doors of 2943 Nelson Pl. The two stood less than one meter apart, their arms reached toward each other briefly. Their interaction last for roughly ten seconds [These quick hand to hand transactions are consistent with drug trafficking]. Thompson went back inside 2943 Nelson Pl.
- [52] Reviewing the testimony of Cst. Wiens above, it was apparent that Cst. Raine, when referencing notes he thought were those of Cst. Toews, was most likely reviewing the notes of Cst. Wiens. Cst. Toews did testify on the voir dire, and was present on August 27 but did not testify to having seen Mr. Thompson leave the target apartment.
- [53] Having reviewed the evidence which may have linked Mr. Thompson to the target suite, I am satisfied that errors were made in what was likely a rush on August 27, 2015, to complete the ITO and obtain a search warrant. The errors were principally that Cst. Raine referred to the wrong officers on more than one occasion when referring to surveillance notes and conversations regarding the connection of Mr. Thompson to the target suite.
- [54] Referring to Morelli quoted above, I am satisfied that the errors in the ITO were of form as opposed to substance. Cst. Raine had deposed to Mr. Thompson's connections to the target suite and any errors were made in good faith. Using the evidence from the voir dire to amplify or correct the ITO, I find that the ITO used to obtain the search warrant shows a substantial link between Mr. Thompson and the target suite and a reasonable belief that he resided in that suite.
- [55] Finally, the defence submits, relying on the surviving passages of the ITO after excising the conclusions reached as a result of the Crime Stoppers tips, leaves no reasonable basis to believe that controlled substances would be found in the target suite.
- [56] To establish a reasonable basis that illegal drugs would be found in the apartment one is left with a consideration of the surveillance evidence of the several officers involved in this investigation and the evidence of drugs found on his person during the search incidental to his arrest. Mr. Thompson was observed leaving the subject apartment on more than one occasion and participating in what the police believed to be hand to hand drug transactions with the individual in the Toyota van and others, including the occasion on which he was arrested. This information along with the illegal drugs found on Mr. Thompson's arrest reasonably lead to the conclusion that more illegal drugs would be found in the apartment.

[57] Even once the Crime Stoppers tips are excised from the ITO I find there was sufficient evidence remaining to conclude there was a reasonable basis to consider that illegal drugs would be found in the apartment associated with Mr. Thompson. I find Mr. Thompsons rights under ss. 8 and 9 of the Charter were not breached by his arrest and the subsequent search of the apartment. Accordingly, the drugs and other objects associated with trafficking found on Mr. Thompson and in the apartment are admissible at trial.

"Jenkins J."

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