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R. v. Wong

2017 BCSC 91

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2017 BCSC 91 R. v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wong,

2017 BCSC 91

Date: 20170117

Docket: 26748-2

Registry: Vancouver

Regina

v.

Shu Thsung Wong and Lena Truong

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

(Voir dire #2 - Tracking Warrant)

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Place and Dates of Voir Dire Hearing:

Vancouver, B.C.

January 16, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 17, 2017

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INTRODUCTION

- [1] The accused are charged with offences arising from the discovery of a methamphetamine lab and a loaded firearm at 2906 East 15th Avenue, Vancouver B.C. on June 15, 2012. On that date the Vancouver Police Department along with members of the RCMP Clandestine Lab Team searched the premises pursuant to a search warrant issued under s. 11 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. The two accused were the occupants of the house and had been under surveillance by the police for several months before the execution of the warrant.
- [2] Both accused assert various breaches of their Charter rights and seek orders excluding evidence obtained in relation to:
1. a tracking warrant issued on April 20, 2012;
 2. a transmission data recorder warrant and assistance order issued on April 21, 2012 (since abandoned);
 3. warrantless searches and seizures involving seizure of garbage and swabbing of motor vehicles on various occasions in May 2012;
 4. warrantless video surveillance commencing June 1, 2012;
 5. the search warrant for the house issued June 14, 2012;

6. a tracking warrant granted June 19, 2012;
7. a DNA warrant issued on September 5, 2014;
8. the allegedly unlawful arrest of the accused on June 14, 2012 and the searches/seizures incidental thereto;
9. the warrantless search of the accused Wong's vehicle on June 14, 2012;
10. warrantless searches of various electronic devices made in July 2012 and again in May 2013;
11. alleged non-compliance with s. 10 of the Charter subsequent to the accused's arrest on June 14, 2012; and
12. alleged non-compliance with s. 490 of the Criminal Code, R.S.C. 1985, c. C-46 ("the Code"), related to the timely completion of Form 5.2 Reports to Justice.

In addition to the exclusion of evidence at trial based on these various alleged breaches of Charter rights, the accused also seek a judicial stay of proceedings.

- [3] Each warrant was of course issued based on an Information to Obtain ("ITO") sworn at different times by Det. Tara Munro. Each ITO is being challenged on a facial and/or sub-facial basis. The accused seek excision of various portions of each ITO based on the alleged Charter breaches. The validity of each warrant and any excision of information in its respective ITO must be determined in chronological order since the outcome imports a "domino" effect upon subsequent ITOs and warrants. A separate voir dire is thus required for each challenge and, indeed, seven such voir dire have been proposed.
- [4] Voir dire #1 related to the manner in which subscriber information for Mr. Wong's cellular phone was obtained by the police in January 2012. In as yet unpublished reasons indexed at 2016 BCSC 1834, I concluded that the manner in which the police obtained Mr. Wong's subscriber information did not breach any objectively reasonable expectation of privacy and did not amount to an unreasonable search warranting condemnation under s. 8 of the Charter.
- [5] Voir dire #2 is a challenge to a Tracking Device Warrant issued on April 20, 2012 by Judicial Justice Lindsey. That warrant authorized the attachment of a vehicle tracking device to a certain 2004 Toyota Echo vehicle registered to one of the accused, Mr. Wong.
- [6] Mr. Wong submits that the ITO sworn by Det. Munro, as redacted for the purposes of these proceedings, did not disclose reasonable grounds to suspect the commission of the offences alleged and that any information or evidence derived from the execution of the warrant should be excised from the materials related to the further voir dire challenges contemplated in this matter and that such evidence should also be inadmissible at any trial.

GOVERNING LEGAL PRINCIPLES

[7] A comprehensive summary of the general principles guiding the review of search warrants can be found in *R. v. Boussoulas*, 2014 ONSC 5542, which was in large part adopted in *R. v. Baires*, 2014 BCSC 2549. The summary was based on a review of the leading case law from both the Supreme Court of Canada as well as various Courts of Appeal, including a number of decisions of the British Columbia Court of Appeal. Many of these cases were relied on by counsel in the course of this hearing. For present purposes the relevant principles can be extracted/stated as follows:

- When it is alleged that a judicially-authorized search warrant is invalid, the judicial review of the impugned warrant begins from a presumption of validity and the onus lies on the party seeking exclusion, here the accused Wong, to demonstrate its alleged invalidity;
- When reviewing the sufficiency of any ITO, the court does not approach the question *de novo*, substituting his or her view for that of the issuing justice. Rather, the reviewing judge must determine, based on the record that was before the issuing justice, as amplified on the review, whether the issuing justice could properly have issued the search warrant, i.e., in this case, whether there was sufficient information that could have permitted the authorizing justice to conclude there was "reasonable suspicion" justifying the issuance of the tracking warrant;
- In approaching this review, the reviewing court must appreciate that the justice who issued the impugned warrant made his or her decision based upon the contents of the ITO as a whole, and approached his or her assessment of the ITO in a practical, common-sense, non-technical manner, permissibly drawing reasonable inferences from the contents of the ITO;
- When, as here, the accused attacks only the facial validity of an ITO, the reviewing judge is required to examine the entire ITO and determine whether, on the face of the information disclosed within its four corners, the justice could have issued the warrant. The record that is examined for the purpose of determining the facial validity of the warrant is limited to the ITO itself;
- In considering the contents of an ITO, it is important to appreciate that such warrants are statutorily-authorized investigative aids typically issued before any criminal proceedings have been commenced, and almost invariably drafted by police officers, often under tight time constraints and without the assistance of any legal advice. Accordingly, the courts have recognized that it is unrealistic and inappropriate to measure the quality of the drafting of such documents by the standard of legal precision that might be expected of counsel in pre-trial and trial proceedings and "reasonable latitude" should be accorded to consideration of any imprecise language that may be used in the document. Few search warrant applications are perfect;
- Nonetheless, any police officer drafting an ITO must always act with integrity and reasonable diligence, being mindful of his or her duty to make full and frank disclosure in *ex parte* proceedings, and being careful to guard against inaccurate statements or exaggerated assertions likely to mislead the reviewing justice;

· If it appears to the court reviewing the validity of the impugned search warrant that some of the information provided in the ITO was erroneous, this erroneous information must be excised and excluded from consideration on the review. However, the reviewing court may properly consider, within reason, additional evidence that may be tendered on the voir dire proceedings to correct such errors in the ITO. While this amplification evidence can be used to correct "good faith errors" by the affiant in the preparation of the ITO, it cannot be employed to cure "deliberate attempts to mislead" the authorizing justice. Further, the amplification evidence must be evidence that was available to police investigators at the time the ITO was sworn, not information that was acquired later. No such amplification evidence has been tendered in the present voir dire; and

· When the ITO contains factual information provided by a confidential informant, and portions of that ITO have been redacted in order to preserve the confidentiality of that source, according to steps five and six of *R. v. Garofoli*, [1990] 2 S.C.R. 1421, there are two possible means by which the validity of the search warrant may be assessed. The first such option, and the one that has been adopted in this case, is to assess the validity of the warrant solely on the basis of the information revealed by the redacted ITO. If the Crown relies solely on the redacted ITO, however, and the information has been so heavily redacted that the reviewing judge cannot conclude that the remaining information was sufficient to justify the issuance of the warrant, the warrant must be set aside.

THE "REASONABLE SUSPICION" STANDARD

[8] Section 492.1 of the Code provides as follows:

Warrant for tracking device -- transactions and things

492.1(1) A justice or judge who is satisfied by information on oath that there are reasonable grounds to suspect that an offence has been or will be committed under this or any other Act of Parliament and that tracking the location of one or more transactions or the location or movement of a thing, including a vehicle, will assist in the investigation of the offence may issue a warrant authorizing a peace officer or a public officer to obtain that tracking data by means of a tracking device.

[9] Hence, in order to assess the sufficiency of any ITO used to obtain a warrant authorizing the use of a tracking device, the court must determine whether, in the totality of the circumstances, the ITO reveals the necessary "reasonable grounds for suspicion". That standard applies to both requirements, i.e., (1) that an offence has been or will be committed and (2) that tracking the movement of the vehicle will assist in the investigation of the offence.

[10] The "reasonable suspicion" standard was recently reviewed in detail by the Supreme Court of Canada in *R. v. Chehil*, 2013 SCC 49. Various principles were articulated in *Chehil* including the following:

- The reasonable suspicion standard is a robust standard determined on the totality of the circumstances, based on objectively discernible facts, and is subject to independent and rigorous judicial scrutiny (para. 3);
- The reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are objective ascertainable grounds to suspect that an individual is involved in criminal behaviour (para. 6);
- "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds (para. 26 citing *R. v. Kang-Brown*, 2008 SCC 18);
- While "reasonable grounds to suspect" and "reasonable and probable grounds to believe" are similar in that they must both be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard (para. 27);
- The fact that reasonable suspicion deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in a crime factors that give rise to a reasonable suspicion may also support completely innocent explanations. This is acceptable, as the reasonable suspicion standard addresses the possibility of uncovering criminality, and not a probability of doing so (paras. 28 and 32);
- Reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience. A police officer's grounds for reasonable suspicion cannot be assessed in isolation (para. 29); and
- A police officer's training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, hunches or intuition grounded in an officer's experience will not suffice. Specific evidence of the investigating officer's experience and training may be required to support any probative link between the constellation of factors relied on by the police and criminality (para. 47).

[11] Where the police rely upon information from a confidential informant to meet the standard of "reasonable suspicion", the court must consider the extent to which the information from the informant is compelling, credible, or corroborated by other aspects of the police investigation. These are not discrete, isolated inquiries, however, and weaknesses in one area may be offset by strengths in another.

[12] In *R. v. Lal* (1998), 113 B.C.A.C. 47, the Court stated:

... Reasonable suspicion like reasonable belief is dependent on both the content of the information provided to the police and its degree of reliability. Since the standard for reasonable suspicion is less demanding than that for reasonable belief it can arise from information that is less reliable than that required to show reasonable belief (para. 30).

[13] And in the most recent B.C. Supreme Court decision respecting s. 492.1 of the Code, *R. v. Grandison*, 2016 BCSC 1712, which confirmed the constitutionality of the "reasonable suspicion" standard, the court stated at para. 49:

A reasonable suspicion is a lower standard of proof than reasonable and probable grounds to believe. While reasonable belief is an objective test that requires the affiant to articulate why they believe that an offence has been committed, a reasonable suspicion is when one has grounds to suspect that an offence may have occurred or when there is a possibility of finding evidence. This can be a subjective belief. Contrasted with the reasonable and probable grounds to believe standard, the reasonable suspicion standard can be as a way to investigate and gather evidence. [Emphasis in original.]

APPLICATION TO THE PRESENT CASE

[14] As indicated earlier, the ITO in the present case was sworn by Det. Munro of the Vancouver Police Department. The ITO has been heavily redacted to protect the confidentiality of an informant. The redacting process has altered and, indeed, possibly butchered the syntax in certain paragraphs of the ITO, particularly the paragraphs relating to the extent to which information provided by the confidential informant on previous occasions has led to arrests, seizures and criminal charges.

[15] Quite apart from difficulties posed by redaction, there are various other shortcomings in the ITO some of which were seized upon by counsel for the accused and some of which have been identified by the Court itself. Such shortcomings include:

- Det. Munro swears "reasonable belief" rather than "reasonable suspicion" and seems to have invoked the incorrect standard. The syntax in that particular statement in the ITO is garbled;
- While the accused Wong is identified as the alleged producer of methamphetamine in Count 1 on the first page of the ITO, Count 2 (possession of methamphetamine) does not contain any language identifying any individual said to have committed the offence;
- While Det. Munro says that she has been a member of the Vancouver Police Department for seven years and that she is "currently assigned" to the drug squad, she does not describe the details of her training or experience as a police officer beyond stating that she had been involved in investigations involving surveillance since May 2010 and that she has familiarity with the preparation of surveillance reports ... hence her expressions of opinion arguably attract little weight;

- While the information received from the confidential informant identifies a certain phone number for the accused (8788), different numbers (8778, 8799) appear in different paragraphs relating to subscriber information obtained from Rogers Wireless and which purportedly links Mr. Wong to the cell phone in question counsel refers to this as a complete "muddle";
- While paragraph 22 of the ITO plainly states that the confidential informant has provided information 100 times, that paragraph together with paragraph 22.1 seems to indicate that the information has led only to a single search warrant and no other history of result "pedigree" or reliability is supplied;
- While paragraph 23 suggests that the source handler, Det. Stephen, has determined the source of information provided by the confidential informant "and has reported the same", the actual sources are not identified and so any assessment of reliability is impaired;
- Paragraph 35.1 refers to a query respecting the link between "Tsu Tshung Wong" and the name Richard/Rich, yet the accused's name is Shu Tshung Wong and Det. Munro's statement that the confidential informant "confirmed that Richard or Rich is Shu Tshung Wong" is arguably without foundation; and
- Some of the information in the ITO, particularly as it relates to "Rich's girlfriend" is stale, having been obtained a year and a half before the events giving rise to the warrant and Det. Munro's purported identification of Ms. Truong as Mr. Wong's girlfriend lacks corroboration.

[16] Both parties agree that in my review of the ITO sufficiency in this voir dire, I cannot correct the grammatical or typographical errors that appear in the document. This is because the Crown has elected not to adduce any amplification evidence on these points. Nevertheless, notwithstanding the various shortcomings identified above, the Crown argues that the remaining information in the ITO is more than sufficient to meet the "reasonable suspicion" standard in this case such that the Judicial Justice could have issued the warrant in any event. In particular, the Crown points to the following information:

- The drug unit began an investigation named Project TETRA to target the accused, Mr. Wong;
- The investigation started with information from a confidential informant that an Asian male named "Rich" was a methamphetamine cook, that he had a cellular telephone with a certain number (8788), that he lived in the area of East 22nd Avenue and Lillooet Street in Vancouver, B.C., and that he drove a white compact, import car;
- Subscriber information from Rogers Wireless identified the phone as being registered in the name of Donald Yong Attn: Mr. Richard Wong at 3161 East 22nd Avenue Vancouver B.C.;
- Surveillance of that address resulted in the observation of a white Toyota Echo being driven by an Asian male;
- The licence plate on the vehicle was issued to a white 2004 Toyota Echo registered to Shu Tshung Wong at 3161 East 22nd Avenue;

- Shu Tshung Wong had a valid B.C. driver's licence and also had been convicted for possession for the purpose of trafficking in Winnipeg in 2005;
- The confidential informant has provided Det. Stephen with information on approximately 100 occasions and his information has led to suspect identification, arrest of individuals, seizures, multiple search warrants, and criminal charges;
- The informant has built a rapport with Det. Stephen, has given information voluntarily, has been paid for information provided, and does not have any arrests or convictions for offences involving perjury;
- The informant advised that Rich, believed to be Mr. Wong, is very smart and is constantly on the lookout for the police;
- The drug squad surveillance had difficulty in finding Mr. Wong and had only briefly seen him at his residence on two occasions in April 2012;
- Because of the information received that Mr. Wong is a methamphetamine cook, it is a priority for the drug unit to locate him and dismantle any meth lab by a specially trained unit;
- The chemicals used in such meth labs can be explosive and can put the safety of the general public at high risk; and
- The use of a tracking device would afford evidence of the offences under investigation by assisting surveillance in identifying any other persons and/or places involved in the offences.

[17] Crown Counsel points out that some of the information from the confidential informant has actually been corroborated. For example, the subscriber information for the cell phone number provided does contain a link to Mr. Wong. Similarly, the information that Mr. Wong drives a white compact, import car has been confirmed by the registration in his name of a 2004 white Toyota Echo, which he has been observed to drive.

[18] While I agree that the ITO contains various shortcomings which combine with the effects of redacting to constitute rather thin gruel, I nonetheless agree with the Crown that, after setting aside the shortcomings, there nevertheless remains sufficient information in the ITO that could have permitted the authorizing Justice to conclude there existed a reasonable suspicion both that a drug offence had been or was being committed and that the use of a vehicle tracking device would assist in the investigation of that offence. This is not a case like *R. v. Payette*, 2010 BCCA 392, where police officers are acting merely on a hunch, albeit perhaps one grounded in experience. To the contrary, this is a case where an investigation is triggered by information from a confidential informant perceived to be reliable. The information from that informant fingered Mr. Wong as a methamphetamine cook, an activity that is not only illegal but in some cases can pose a significant risk of injury to the public. The corroboration through investigation of other pieces of information provided by the confidential informant relating to Mr. Wong combined with Mr. Wong's history as a convicted drug offender, is more than sufficient to elevate the totality of circumstances past

the post of reasonable suspicion.

CONCLUSION

[19] The validity of the Tracking Warrant is affirmed and Mr. Wong's application for an order excluding the evidence obtained in relation to the Tracking Warrant is dismissed.

KENT J.

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