C.A.C. No. 109965

NOVA SCOTIA COURT OF APPEAL

Pugsley, Jones and Matthews, JJ.A.
Cite as: R. v. Haley, 1995 NSCA 148

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - RICHARD GEORGE LEONARD HALEY Respondent	)	Christopher E. Bundy, for the Appellant Mark T. Knox, for the Respondent Appeal Heard: April 4, 1995 Judgment Delivered: June 6, 1995

THE COURT: The acquittal is set aside and a new trial ordered per reasons of Pugsley, J.A., Jones and Matthews, JJ.A. concurring.

Pugsley, J.A.:

The Crown appeals from the decision of a provincial court judge acquitting Mr. Haley of the charge of possession of a narcotic for the purpose of trafficking, contrary to the provisions of s. 4(2) of the **Narcotic Control Act** R.S.C. 1985 Chapter N-1.

The trial judge determined that certain items seized by the R.C.M.P. from Mr. Haley's residence, under the authority of a search warrant, should be excluded from evidence. Her decision was based on the ground that the Justice of the Peace ("the Justice"), who authorized the warrant, assisted the R.C.M.P. informant to prepare the Information to Obtain the search warrant, and without that assistance, the trial judge concluded, that a warrant would not have been issued.

Mr. Haley's rights under s. 8 of the **Charter** were, accordingly, violated. It was her "view that the administration of justice would be brought into disrepute by allowing the evidence obtained as a result of this fundamental defect in procedure". She accordingly excluded the evidence of the items seized, pursuant to s.24(2) of the **Charter**.

Background

At the commencement of trial on January 31, 1994, a *voir dire* was held to determine whether Mr. Haley's rights had been violated, and, if so, whether he satisfied the onus under s. 24(2) that the admission of the evidence seized from his home would bring the administration of justice into disrepute.

The only witness on the *voir dire* was Cpl. Hubley, called by the defence.

He testified that in the course of a narcotics investigation, he determined to apply for a search warrant for the premises from which he believed the drug transactions were negotiated. As the detachment did not have any warrant forms pursuant to s. 12 of the **Narcotic Control Act** (supra), he decided to apply for a warrant authorized under the provisions of s. 487 of the **Criminal Code.**

He typed in the information required to fill in the blanks of the form entitled "Information to Obtain a Search Warrant".

He also prepared an appendix which was attached to the form.

Appendix A is reproduced with that part added by the Justice of the Peace disclosed in bold type:

The informants grounds are as follows. That;

1) On October 21st, 1992 Crimestopper tipsters revealed that Richard George Leonard Haley also known as Oakie is trafficking Hashish from his residence at 862 Highway #333, Goodwood, Halifax County, Nova Scotia.

2) On October 28th, 1992 a known reliable source revealed that Richard George Leonard HALEY was trafficking in Hashish from his residence in Goodwood.

3) On February 11th, 1993 Crimestopper tipsters revealed that Oakie from Goodwood is trafficking in Hashish and Cocaine.

4) On May 31st, 1993 Cst. Paul DOWDEN received information from a source of unknown reliability that Oakie sold grams of Hash to Scott GRAHAM.

5) That the informant verily believes that Oakie is in fact Richard George Leonard HALEY.

6) That Richard George Leonard Haley was convicted for trafficking in a narcotic on November 23rd, 1984.

7) On June 14th, 1993 the informant received information from a reliable **known** source that Richard George Leonard HALEY sold grams of Hash for fifteen dollars each in the presence of the informant.

8) On June 17th, 1993 the informant maintained static surveillance on 862 Highway #333 and observed ten individuals enter the residence for short periods of time and then depart. **Known drug users were seen frequenting the premises.**

9) On June 18th, 1993 the informant again maintained surveillance on 862 Highway #333 and observed individuals entering and exiting the residence after brief visits.

10) The informant spent six years (1985 - 1991) on Halifax Drug Section and in so doing was eventually declared an expert witness on the sale, packaging, distribution and transportation of Hashish.

11) The informant verily believes that the pedestrian and vehicular traffic noted in grounds eight and nine are consistant with that of a drug trafficker.

12) The informant believes all the information to be true.

13) A reliable source purchased hashish this past week and advised the informant had more drugs in this possession. He breaks the drug of[f] and weighs it on the scales he utilizes for this purpose.

Once the documents were typed, Cpl. Hubley placed them before Justice of the Peace MacDonald and spent 30-40 minutes with him. After perusing the initial typed document, the Justice:

> "...had some questions for me... I gave him the details and he wrote it down ... It was information that I had and I related it to him; now whether he changed the grammar around in writing it, I didn't record it so I can't go back and say this is exactly what I said to him. This, in essence, is what I said to him."

In accordance with information given by Cpl. Hubley, Justice of the Peace MacDonald made the following changes in Appendix "A":

(a) in paragraph 7 he wrote the word "proven" between the word "reliable" and the word "source";

(b) he wrote "known drug users were seen frequenting the premises" at the end of paragraph 8;

(c) he wrote the following as paragraph 12:

"The informant believes all the information to be true."

(d) Cpl. Hubley advised Justice of the Peace MacDonald that:

> I have also received information in this past week from the same source that the source had purchased from there, and I did not put it in the typed portion.

This additional information given by Cpl. Hubley resulted in the Justice adding the following as paragraph 13:

> A reliable source purchased hashish this past week and advised the informant had more drugs in his possession. He breaks the drug *of* and weighs it on the scales he utilizes for this purpose.

Once all the additions were made, Cpl. Hubley swore before the Justice to the truth of the entire document.

A warrant to search was then issued by the Justice, pursuant to s. 487 of the **Code**. It was executed immediately thereafter, resulting in the RCMP seizing from Mr. Haley's residence:

(a) various pieces of cannabis resin from a toilet bowl, from the floor inside the door of the main entrance, and from the pocket of Mr. Haley's gym shorts;

(b) cash in the amount of $568.00 from the pocket of Mr. Haley's sweat shirt;

(c) a set of Marrs 2000 electronic scales from the kitchen table;

(d) a hashish pipe from a drawer in the kitchen;

(e) a small chalk board with letters from the wall in the bedroom.

During the course of the *voir dire* Cpl. Hubley was questioned with respect to the grounds contained in Appendix "A".

At the conclusion of Cpl. Hubley's evidence, the matter was adjourned to permit counsel to submit written briefs.

On September 13, 1994, the trial judge initially upheld the Justice of the Peace's decision to issue the warrant and stated:

> If I am wrong in that, and it should be quashed, I would still admit the evidence. I do not think the admission of the evidence could or would bring the administration of justice into disrepute.

She then went on to advise counsel that, just before coming into court, a decision of the Manitoba Court of Appeal (**R. v. Gray** (1993) 81 C.C.C. (3d) 174) had been brought to her attention by Justice of the Peace MacDonald. She requested counsel to address the issues raised in that case by filing written submissions within the next few days.

Upon resumption of the hearing on September 20th the trial judge, having had the opportunity to read the **Gray** case and the briefs of counsel, determined that the evidence seized should be excluded under s. 24(2) of the **Charter** on the ground that:

> It seems to me that the case at hand is more similar to **Gray**; in fact, I find it exactly the same. If I disregard the interlineations and additions made by Justice of the Peace MacDonald, I would not find that there was sufficient evidence for the search warrant to have been given ... In my view in this case as in **Gray**, it creates a risk that a warrant would be issued without an impartial judicial determination that reasonable and probable grounds existed for a search and seizure; and indeed without Mr. MacDonald's assistance in my mind, there would .... would not have been a warrant issued. Because of this it is my view that the administration of justice would be brought into disrepute by allowing the evidence obtained as a result of this fundamental defect in procedure, to be admitted in evidence and for that reason then I will exclude the evidence.

Issue

The only issue in this appeal is whether the questioning of Cpl. Hubley by the Justice of the Peace and the consideration of the sworn answers obtained constituted a violation of Mr. Haley's s. 8 **Charter** rights. It was not a ground of appeal, nor was it argued, that the trial judge was in error in concluding that the warrant, as amended, established reasonable grounds justifying its issuance.

May a Justice who is considering an application for a search warrant under s. 487 of the **Code** ask any questions of the Informant, or must he base his decision solely on the written information presented to him?

Some courts have interpreted the opening words of s. 487(1), (i.e. a Justice who is satisfied by information on oath in form 1 ...) to confine the Justice to the information, and only that information, that is presented on form 1 initially.

Section 841(1) of the **Code** provides:

> The forms set out in this Part varied to suit the case or forms to the like effect shall be deemed to be good, valid and sufficient in circumstances for which, respectively, they are provided.

Justice Seaton of the British Columbia Supreme Court in **Re: United Association of Journeymen and Apprentices of Plumbing et al v. The Queen** (1972) 8 C.C.C. (2d) 364, concluded that the Justice was restricted to the information that was placed before him in form 1. He stated:

> It follows that the affidavit material as to other evidence placed before the Provincial Judge cannot assist the Crown.

He espoused the same view a few years later while sitting as a member of the Court of Appeal in **Re: BX Development Inc. v. The Queen** (1976) 31 C.C.C. (2d) 14.

Other courts have considered it appropriate, however, for the Justice of the Peace to question the applicant if not satisfied that reasonable grounds were sufficiently stated in the Information.

McQuaid, J. of the Supreme Court of Prince Edward Island concluded that it was quite proper for the Justice to press the constable for his reasonable and probable grounds for requesting the search warrant, in circumstances where the added precaution was taken of making notes, either directly on the Information, or on a sheet attached thereto. (**Campbell v. Clough** (1980) 23 Nfld. and P.E.I. Reports, 249.)

This practice, in my opinion, is only appropriate if responses are made to the Justice under oath (**Re: Dodge v. Queen** (1985) 16 C.C.C. (3d) 385).

I adopt the words of Clarke, J. (as he then was) of the Supreme Court of Nova Scotia, as being directly applicable to the present situation, notwithstanding he was considering an application for a search warrant pursuant to the **Narcotic Control Act** (S. 10 of the **Narcotic Control Act** does not prescribe any specific form, but requires a belief by the police officer on "reasonable grounds there is a narcotic by means of or in respect of which an offence under this Act has been committed."):

> The issue of a search warrant is a serious matter. It is not an exercise to be taken lightly by the Justice. He must make an enquiry. He must obtain sufficient facts and information upon which he can

> determine the action he will take. He must consider the facts and information which are placed before him. Then he must make a decision. In such an exercise the Justice of the Peace is acting judicially. ... I want to be satisfied that [the Justice] did not perform his function as though he were applying a rubber stamp to the proceedings. (**Chedrawy v. A.G. Canada and Wilton** (1984) 46 N.S.R. (2d) 146 at 151).

Cst. Hubley testified that his responses to the Justice were written down on Appendix "A" and that after all changes were made, Cst. Hubley swore to the truth of the document.

In my opinion, the Justice committed no error in following this practice. Indeed, he was taking appropriate steps to ensure that he had sufficient facts and information upon which he could determine the action he would take.

In **Gray** the Court concluded that the magistrate had operated "as if she were an adjunct of the police investigation rather than as a neutral and detached assessor of the evidence".

Chief Justice Scott, on behalf of the majority, concluded at p. 182:

> In my opinion the impugned practice disclosed by the evidence resulted in the failure of the judicial officer to properly exercise her detached independent function. Where direction is given by a judicial officer respecting the contents of the Information to Obtain on a material point going to the merits of the application, he/she simply becomes an agent or arm of the police.

The situation in the case at bar is, in my opinion, analogous to that considered by the Court of Appeal for British Columbia in **Regina v. Howe** (December 2, 1994, C.A.O. 7198).

The facts disclose that Cpl. Bruce of the West Vancouver Police Department applied for a search warrant on the ground that he had received information from a confidential source (proven to be very reliable in the past) that one of the accused was "in possession of a quantity of cocaine".

The informant had been in the house in the past eight hours and had seen the cocaine there. Cpl. Bruce said that the residence had been watched and it was confirmed to be the residence in question.

In the course of discussion with the Justice of the Peace, and at his suggestion, another sentence was added, to the effect that "vehicle traffic to the residence is consistent with drug trafficking". The warrant was then issued.

Cpl. Bruce testified in the *voir dire* that the last sentence in the Information was added because the Justice of the Peace had asked whether any vehicles had been seen coming to the house during the surveillance and whether the vehicles had been consistent with drug trafficking. Cpl. Bruce answered both questions in the affirmative. Cumming J.A., with whom the other members of the Court concurred, noted:

> ...that the participation of the justice of the peace in this case, which was confined to the last sentence, was limited to a peripheral and narrow point. Unlike the judicial officer in **Gray**, by no stretch of the imagination could she be said to have abandoned her detached independent function and become an agent or arm of the police. ...

The addition made in **Howe** is similar to that added in paragraph 8 of Appendix "A" (known drug users were seen frequenting the premises).

The Justice of the Peace in the case at bar added a clause "the informant believes all the information to be true". Such a provision is essential, although in this case it is implicit from the totality of circumstances set out in the Information, that Cpl. Hubley relied on, and believed the sources of information referred to in Appendix "A". (**R. v. Yorke** (1992) 115 N.S.R. (2d) at 437).

Justice of the Peace MacDonald also added paragraph 13. The trial judge excluded this paragraph because it made no sense. I agree with her decision to exclude this paragraph.

I disagree, however, with the trial judge when she equated the practice in the case at bar to that which existed in the **Gray** case. This is not a case where advice

was sought by Cpl. Hubley as to how to word the document to satisfy the Justice, but rather a case where information was supplied in response to questions on limited points. It was a case where questions were advanced rather than amendments suggested. Cpl. Hubley considered there was some urgency to apply for the warrant in view of the increase in traffic he observed attending at Mr. Haley's residence. His omission to provide the details elicited by the Justice were characterized by Cpl. Hubley as an "oversight" on his part. In the circumstances of this case, that is a reasonable characterization of information to remedy a limited deficiency.

The onus is on Mr. Haley to establish on a balance of probabilities that his rights under section 8 of the **Charter** have been breached. In my opinion he has not satisfied this onus.

I would accordingly set aside the acquittal, and order a new trial.

Pugsley, J.A.

Concurred in:

Jones, J.A.

Matthews, J.A.

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	)	Pugsley, J.A.
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