NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Liberatore*, 2014 NSCA 109

Date: 20141210
Docket: CAC 426874
Registry: Halifax

Between: Michael Vincent Liberatore

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Hamilton, Fichaud and Beveridge JJ.A.

Appeal Heard: November 27, 2014

Held: Appeal dismissed, per reasons for judgment of Fichaud, J.A.; Hamilton and Beveridge, JJ.A. concurring

Counsel: J. Patrick L. Atherton and David Dalrymple for the appellant
Shaun O'Leary for the respondent

Reasons for Judgment:

[1] A justice of the peace issued a search warrant for Mr. Liberatore's premises based on an Information to Obtain that alleged the presence of unauthorized handguns and ammunition. The search did not locate the specified items, but did uncover retail quantities of cocaine and marihuana and a knife that opens by centrifugal force. Mr. Liberatore was charged with narcotics and weapons offences related to the seized items. Mr. Liberatore challenged the foundation for the search warrant. He submitted that the search violated s. 8 of the *Charter* and moved for exclusion of the seized evidence. After a *voir dire*, the trial judge held that the justice of the peace properly issued the warrant and the seized evidence was admissible. Mr. Liberatore was convicted.

[2] Mr. Liberatore appeals. The appeal turns on whether the trial judge made an appealable error in his ruling that the Information to Obtain sufficed for the warrant.

Background

[3] On April 17, 2012, under s. 487 of the *Criminal* Code, RCMP Constable Colby Smith swore an Information to Obtain a Search Warrant (ITO) for premises owned by Mr. Liberatore and his mother, Ms. Christine Poirier, on Sprucebrook Lane in Timberlea, Nova Scotia. The ITO said there were reasonable grounds to believe that a search would yield "a dark coloured .45 calibre semi-automatic handgun; a dark coloured 9 mm semi-automatic handgun; a .38 calibre revolver-style handgun; and .45 calibre, 9 mm and .38 calibre ammunition".

[4] The ITO cited information from other police officers and informants, termed Sources A, B and C, and from Cst. Smith's investigation. Later I will quote extracts from the ITO. Justice Cacchione, in the decision under appeal (2014 NSSC 55) summarized the ITO's content:

> [25] The ITO informed the justice that the Applicant had a criminal record dating from 2000 to 2011 for weapons and drug related offences; that on April 16, 2012 Constable Smith received information from Source A, who had been a source for less than one month. Source A's information was based on personal knowledge obtained from conversations and observations of the persons involved. Source A's information was that the Applicant was selling marijuana and cocaine from a shed located on his property on Sprucebrook Lane; that the Applicant had

three handguns, a .45 calibre pistol, a 9mm. pistol and a .38 calibre revolver which he kept in a locked toolbox in his shed; that the Applicant had two white trucks, a Chevrolet Silverado and a GMC Sierra Dinali which he parked next to a shed on his property and that the Applicant's residence on Sprucebrook Lane was under renovation.

[26] The justice was also made aware that Source A had a criminal record, associated freely with persons involved in criminal activity and that Source A's motivation for providing information was financial.

[27] The justice was advised that on April 16, 2012 Constable Smith drove to Sprucebrook Lane and personally observed two white trucks matching the description given by Source A parked next to a shed located across the land from a residence, which appeared to be under renovation. Constable Smith's investigation confirmed that the properties on which the shed and residence were located were owned by the Applicant and his mother. Constable Smith also corroborated that one of the two trucks he saw was registered to the Applicant. He could not confirm the registered owner of the second truck because he could not see the licence plate number of that vehicle.

[28] The ITO also referred to a source debriefing report read by Constable Smith on April 17, 2012. This report had been prepared by Corporal Cameron, the handler of Source B, based on information provided to him by Source B on April 17, 2012. Source B advised his handler that the Applicant was selling drugs from a shed on his property; that the Applicant had three guns in his shed; a .45 calibre, a .38 calibre and another unknown handgun; that these guns had been at the Applicant's place the previous week and that the Applicant had had these guns since before Christmas. The information provided by Source B was based on the Source's direct observation of and conversations with persons who were the subject of the information. The ITO advised the justice that information provided by Source B on prior occasions had proven to be reliable and resulted in the seizure of contraband. The justice was also aware that Source B was financially motivated.

[29] The information provided by Source C and contained in the ITO was dated. It referred to information provided in 2008 regarding the Applicant becoming a big drug dealer and keeping a 9 mm. pistol in the passenger side door of his girlfriend's vehicle. The justice was also advised that on prior occasions Source C's information had led to the search and seizure of crime related property or drugs and the laying of criminal charges.

[30] This information was so dated that it would have been of no value to the justice in deciding whether there were reasonable grounds to believe that firearms would be found in the location to be searched some four years later. The Respondent, in oral argument, quite properly indicated that it was not relying on this information in seeking to uphold the validity of the search warrant.

> [31] In addition to the foregoing the ITO also informed the justice that the Applicant's residence on Sprucebrook Lane had been the scene of three home invasions in a four year period and that little of value had been taken during these incidents. The issuing justice was made aware that during two of these incidents the perpetrators were armed with handguns and that other weapons were used during the third incident. As well the justice was informed that during the first incident when only the Applicant's mother was present she refused to allow the responding officers to enter one of the rooms in the residence. Those responding officers also noted items in the residence which were consistent with a marijuana grow operation and drug trafficking. They were also advised by the Applicant's mother that he did not want to speak to the police.
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> [32] The justice also knew that when the second home invasion occurred the Applicant did not immediately call the police but rather he called some friends and his mother. It was the Applicant's girlfriend, who had also been present during the incident, that called the police. When the police arrived the Applicant advised them that nothing was taken during the incident.
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> [33] The justice was also informed that in many cases where persons produce or sell drugs these persons often keep firearms or other weapons for protection.

[5] On April 17, 2012, based on the ITO, a justice of the peace issued a search warrant for Mr. Liberatore's premises. The warrant was executed the next day. The search uncovered several replica firearms, but not the weapons specified in the ITO. The police found a knife that opens by centrifugal force. The search also located a sandwich bag of 33.3 grams of cocaine, a sandwich bag of 5 grams of cocaine, a sandwich bag with 12.2 grams of cocaine, a dime bag with 25 ecstasy pills, a bag with 83.4 grams of marihuana, marihuana in packaging for resale (1.1, 2.0 and 3.5 gram bags), many large bags with marihuana residue, a mason jar with 701 meth pills and 5 ecstasy pills and a bottle of valium. The search found weigh scales, empty plastic bags and three spoons with white residue.

[6] Based on the seized items, Mr. Liberatore was charged with weapons offences under ss. 91(2) and 117.01(1) of the *Criminal Code*, and with offences under s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[7] Justice Cacchione of the Supreme Court of Nova Scotia was the trial judge. Mr. Liberatore moved to exclude the evidence of the seized items. He contended that the ITO lacked reasonable and probable grounds to establish a factual nexus between the weapons offences for which the search was sought and the premises to be searched. On January 23, 2014, the judge conducted a *voir dire*. He issued an oral ruling on February 5, 2014 and a written decision on February 17, 2014 (2014 NSSC 55).

[8] Justice Cacchione determined that the justice of the peace had reasonable and probable grounds to establish the factual nexus, and that the warrant was properly issued. He dismissed Mr. Liberatore's motion and held that the search evidence was admissible. Later I will discuss the judge's reasons.

[9] Mr. Liberatore then pled guilty to two weapons counts under ss. 91(2) and 117.01(1) of the *Criminal Code* and five counts under s. 5(2) of the *Controlled Drugs and Substances Act*. On April 28, 2014, he was sentenced to incarceration for three years.

[10] On May 1, 2014, Mr. Liberatore appealed to the Court of Appeal under s. 675(1) of the *Criminal Code*.

Issues

[11] Mr. Liberatore submits that the reviewing justice erred in law by determining that the ITO contained sufficient reliable information that an issuing justice, acting judicially, could find that there were reasonable and probable grounds to believe that there was a handgun and ammunition on the property.

[12] If the Court rules that the warrant should not have been issued, the Crown submits that the seized evidence is admissible nonetheless under s. 24(2) of the *Charter*.

[13] The Crown acknowledges that, if this Court determines the ITO was insufficient and the evidence is inadmissible, Mr. Liberatore may withdraw his guilty pleas.

Court of Appeal's Standard of Review

[14] The issue is not whether the Court of Appeal would issue the warrant. Rather it is whether the reviewing judge erred in law by interpreting and applying the standard to determine whether the issuing judge properly issued the warrant. This Court applies correctness to extractable issues of law, such as the reviewing judge's interpretation of the legal principles, and palpable and overriding error to the judge's findings, inferences and assignment of weight to the evidence. *R. v. Araujo*, [2000] 2 S.C.R. 992, para. 18; *R. v. Durling*, 2006 NSCA 124, paras. 13-14; *R. v. Shiers*, 2003 NSCA 138, paras. 9-10.

Analysis

[15] What principles govern the task of the reviewing judge? In *R. v.Morelli*, [2010] 1 S.C.R. 253, Justice Fish for the majority explained:

> [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).
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> [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.
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> [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.

[16] Ten years earlier, in *Araujo*, *supra*, Justice LeBel for the Court said:

> 51 The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application for the wiretap. This is the starting place for any reviewing judge, as our Court stated in *Garofoli, supra*, [*R. v. Garofoli*, [1990] 2 S.C.R. 1421] at p. 1452:
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>> 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. [emphasis added by LeBel J.]

As I noted as a judge at the Quebec Court of Appeal in *Hiscock, supra*, [*R. v. Hiscock*, [1992] R.J.Q. 895] at p. 326 C.C.C., even a basis that is schematic in nature may suffice. However, as our Court has recognized, it must be a basis founded on reliable information. In *R. v. Bisson*, [1994] 3 S.C.R. 1097, at p. 1098, the requirement was described as "sufficient reliable information to support an authorization". The Court concluded that this requirement had still been met despite the excision of retracted testimony. In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued. [emphasis added by LeBel J.]

52 In oral argument, counsel for the appellant Grandmaison made much of a passage in *R. v. Grant*, [1993] 3 S.C.R. 223, at p. 251, where Sopinka J. explained the test applicable on a review of a search warrant when some of the information supporting the warrant had been obtained in violation of the Constitution. Sopinka J. wrote that "it is necessary for reviewing courts to consider whether the warrant would have been issued had the improperly obtained facts been excised from the information sworn to obtain the warrant: *Garofoli, supra*. In using the word "would", Sopinka J. did not set out to alter the test that comes from *Garofoli*, given that he cited this judgment in the same sentence. I take the word in this context not as setting a different standard of review but simply as suggesting the sincerity of the inquiry that a reviewing judge should undertake. As this Court confirmed in *Bisson, supra*, the reviewing judge must carefully consider the existence of sufficient reliable information, that is, information that may reasonably be believed on the basis of which the authorization could have issued." [emphasis added by LeBel J.]

53 Other appellate court jurisprudence confirms this understanding. In the context of reviewing a search warrant, appellate courts have looked to whether the authorization could have issued: e.g., *Mitton v. British Columbia Securities Commission* (1999), 123 B.C.A.C. 263; *R. v. Allain* (1998), 205 N.B.R. (2d) 201 (C.A.), at p. 217; and *R. v. Krist* (1998), 113 B.C.A.C. 176, at p. 179. But they look at this in context. For example, in *R. v. Monroe* (1997), 8 C.R. (5th) 324 (B.C.C.A.), at p. 333, Esson J.A. stated that, after looking for whether there was sufficient grounds on which the judge could have authorized a warrant, "The judge was then required to assess the evidence placed before the justice, in the light of the evidence brought out at trial, in order to determine whether, after expunging any misleading or erroneous information, sufficient reliable information remained to support the warrant" [emphasis added by LeBel J.]

54 The authorities stress the importance of a contextual analysis. The Nova Scotia Court of Appeal, while reviewing the cases from our Court cited above, explains this in a judgment dealing with problems arising out of errors committed

> in good faith by the police in the material submitted to the authorizing justice of the peace:
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> > These cases stress that errors, even fraudulent errors, do not automatically invalidate the warrant.
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> > This does not mean that errors, particularly deliberate ones, are irrelevant in the review process. While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases just referred to do not foreclose a reviewing judge, in appropriate circumstances, from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves. [emphasis added by LeBel J.]
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> > (*R. v. Morris* (1998), 134 C.C.C. (3d) 539, at p. 553)
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> An approach based on looking for sufficient reliable information in the totality of the circumstances appropriately balances the need for judicial finality and the need to protect prior authorization systems. Again, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge. [emphasis added by LeBel J.]

[17] Recently, in *R. v. Vu*, [2013] 3 S.C.R. 657, Justice Cromwell for the Court summarized the test:

> 16 The question for the reviewing judge is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge": [citing *Araujo* and *Morelli*]. In applying this test, the reviewing judge must take into account that authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious: [citations omitted].

[18] To the same effect, in this Court: *R. v. Morris*, 1998 CarswellNS 489 (N.S.C.A.), paras. 38-43; *Shiers*, *supra*, paras. 9-15 and *Durling*, *supra*, paras. 14-20.

[19] Justice Cacchione quoted those principles (paras. 8, 17), then explained how he would apply them:

> [15] Before a justice may issue a search warrant, it is necessary that there be a sworn information which contains such a statement of facts as satisfies the justice that there are reasonable grounds for believing any of the things set out in s.487. It is not sufficient that the justice should be satisfied, he must be satisfied on reasonable grounds; that is the grounds of belief set out in the information must be such as would satisfy a reasonable man. If there are not such grounds shown, the justice cannot be taken to have been satisfied on reasonable grounds: **Re: Bell Telephone Company of Canada** (1947), 89 C.C.C. 196 at 198.
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> [18] In determining whether a warrant has been properly issued I am not entitled to substitute my decision for that of the authorizing justice. Rather, the question for determination is whether the authorizing justice, acting reasonably and judicially, could have issued the warrant on the basis of the information provided.
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> [34] As a reviewing judge I am required to assess the information in its totality and in the context of the whole document.
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> [36] Assessing all the facts on a practical, non-technical and common sense basis this Court must determine whether the issuing justice had sufficient objective factual information of a reliable nature to determine that there were reasonable grounds to believe that firearms, more particularly handguns, would be found in the Applicant's residence, outbuildings or vehicles. In other words whether the justice had sufficient credible and reliable information to find reasonable and probable grounds to believe the Applicant had committed the offences of unlawful storage or unauthorized possession of a firearm and that evidence of these offences would be found at his residence.
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> [37] In this regard the comments of Justice Hill in **R. v. Sanchez** (1994), 93 C.C.C. (3d) 357 at paragraph 20 are instructive. He stated:
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>> ...An issuing Justice is entitled to draw reasonable inferences from stated facts and an informant is not obliged to underline the obvious... In this regard, some deference should be paid to the ability of a trained peace officer to draw inferences and make deductions which might well elude an untrained person... Probable cause does not arise however from purely conclusory narrative.

[20] Turning to this ITO, Justice Cacchione reasoned:

> [38] I am of the view that when the ITO as amended is considered as a whole it contained sufficient facts to establish reasonable grounds for believing that the things to be searched for would be found at the Applicant's residence or outbuildings. The ITO established a factual nexus between the items to be searched for and the location to be searched. It was not based on mere conclusory statements but rather on the personal observations and conversations of two Sources with the Applicant. These Sources both indicated that the Applicant was dealing drugs from a shed located on his property; that the Applicant had three firearms; the Sources described the calibre of weapons they had seen or been told of by the Applicant in the previous one to four weeks. Some of the information provided by Source A was corroborated by the affiant Constable Smith such as the location of the shed; that it was across the road from the Applicant's residence which was under renovation; the make, model and colour of the Applicant's vehicles and where they were parked.
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> [39] The ITO also contained facts regarding the Applicant's criminal record for drug and weapons offences; the three home invasions over a four year period, two of which were by armed gunmen; and the affiant's statement, based on experience and training that drug dealers often keep firearms or other weapons for protection.
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> [40] In conclusion, the justice had before him reasonable and probable grounds establishing a factual nexus between the offences for which the warrant was sought and the places to be searched. The search warrant was properly issued and the evidence obtained as a result of the search is admissible.

[21] Mr. Liberatore challenges the judge's reasoning by deconstructing the ITO.

[22] His counsel submits that the ITO's only evidence of the presence of weapons on the premises at Sprucebrook Lane was Constable Smith's hearsay derived from Sources A and B. Everything else, such as Mr. Liberatore's criminal history, was propensity evidence, reputational and distracting.

[23] Constable Smith's ITO stated that Source A said he "has seen the .45 calibre hand gun and the 9 mm. handgun at Liberatore's". According to Mr. Liberatore's factum, Source A was unreliable because the information was stale, being a month old, "Source A had a criminal record and was motivated by financial gain", and "Source A was an unproven informant whose information had not yet led to an arrest". That, he says, disposes of Source A.

[24] This leaves only Source B. The ITO cites Source B as saying that "Liberatore has three handguns in his shed. … He has a .45cal and a .38cal handgun and another unknown handgun", "Liberatore has had these guns since before Christmas" and "The guns were still at Liberatore's place last week." Source B was an informant of four years whose information had been proven

accurate in prior investigations and led to arrests. Mr. Liberatore's factum says these are "bald" assertions "with no details as to the date, time, place and frequency of these observations". The ITO stated that Source B's information "is based upon direct observations of, and conversations with persons who are the subject of the information". Mr. Liberatore's factum asserts that this is "mere boilerplate, intended to whitewash over perceived deficiencies in the ITO".

[25] And so, according to the argument, the dismantled ITO crumbles with no reliable basis for a warrant.

[26] I respectfully disagree.

[27] The reliability of the information is assessed by recourse to "the totality of the circumstances", including its degree of detail, the informer's source of knowledge and indicia such as the informer's past reliability and confirmation from other sources. *Garofoli*, *supra*, paras. 82-83. *Araujo*, *supra*, para. 54. Even an anonymous tip attracts the inquiries - how compelling was the information, how credible was the source, and was the information corroborated by other evidence? *R. v. Debot*, [1989] 2 S.C.R. 1140, page 1168. *R. v. Plant*, [1993] 3 S.C.R. 281, 1993 CarswellAlta 94, para. 35. The body of evidence isn't anatomized for a segregated analysis of each fragment. Viewed as a whole, its bits may be cross-confirmatory.

[28] Source A was a tipster. But the tip's detail demonstrated specific knowledge of the weapons and their recent location, Mr. Liberatore's premises, shed and vehicles, and his drug trafficking activities. The detail was sourced in the informant's personal observation. Source A was untested, and his past reliability unknown. But his information was corroborated externally in several respects – Mr. Liberatore's ownership of the premises, its layout, shed and description of the house renovations, and the make of vehicles observed by the police on the premises.

[29] Source A's information was significantly corroborated by Source B.

[30] Source B was a tested informant of four years, whose information had proved to be accurate and actionable, leading to arrests. His information was current, and from personal observation. He gave specific details of the guns, Mr. Liberatore's premises and drug trafficking operations.

[31] The evidence of Mr. Liberatore's criminal history of convictions showed that possession of a firearm was not an isolated event. Drug and weapons offences going back ten years tended to corroborate the inference that weapons pertained to Mr. Liberatore's activities in the drug trade.

[32] The ITO set out the history of three home invasions and a robbery at Mr. Liberatore's premises, and the reluctance of Mr. Liberatore and his mother to allow the police entry or to cooperate with the police investigation of those offences. As Justice Cacchione noted (paras. 31-34), these facts also occupied the broad field of circumstances from which a corroborative inference of illicit activity may spring.

[33] I agree with Justice Cacchione that the justice of the peace, having recourse to the totality of the circumstances, could conclude that there were reasonable and probable grounds to establish a factual nexus between the offences for which the warrant was sought and Mr. Liberatore's premises.

Conclusion

[34] The reviewing judge made no error in his ruling that the warrant was properly issued. I would dismiss the appeal. It is unnecessary to consider the Crown's submission under s. 24(2) of the *Charter*.

Fichaud, J.A.

Concurred: Hamilton, J.A.

Beveridge, J.A.