IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: R. v. K.C.F., 2004 NSPC 70

Date: 20041112
Docket: 1434378
Registry: Halifax

Between:

Her Majesty the Queen

v.

F. (K.C.)

Restriction on publication: 110. (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Judge: The Honourable Judge Alan T. Tufts

Heard: September 22, 2004; September 28, 2004, in Halifax, Nova Scotia

Written release date: May 17, 2005

Charge: 5(2) Controlled Drugs and Substances Act

Counsel: David Bright, Q.C., for the Crown
Stanley MacDonald, for the Defence

By the Court (orally):

[1] This is the matter of R. v. F. (K.C.). Throughout this decision the young person will be referred to as "K" and the other person who resided in the residence will be referred to as "H".

[2] This young person is charged under s. 5(2) of the **Controlled Drugs and Substances Act.** It is alleged he was in possession of marihuana for the purposes of trafficking.

[3] A *voir dire* was conducted to determine the admissibility of certain evidence that was seized from an apartment located in Bedford, Nova Scotia. This is the decision with respect to the *voir dire*.

FACTS

[4] Constable MacLaughlin was the investigating officer with H.R.M. Police. On April 20, 2004 she received information from a confidential source regarding certain activities at the subject apartment in Bedford, Nova Scotia. As a result of this she did a further investigation. Later the same day she obtained a search warrant for the subject apartment. At 11:15 p.m. that same evening Constable MacLaughlin together with six other officers attended the apartment and effected a "hard entry" - that is to say they did not knock or announce their presence before smashing the door in with a steel ram, although the police had a key to the apartment. As the door was hit the officers called out, "Police". The young person was not in the apartment.

[5] The young woman "H" who resided in the apartment was present. She was searched together with the entire apartment. Marihuana and other drug paraphernalia was found, such as scales and sandwich baggies. The young person was subsequently arrested outside the apartment. He and the persons with him were searched.

[6] When Constable MacLaughlin obtained the search warrant she swore an "Information to Obtain", which is an exhibit before the Court in this proceeding. The grounds for obtaining the warrant can be briefly summarized as follows:

1. The source told her on the day in question as follows: that K was selling marihuana at the subject residence. K was a white male about eighteen years of age. K is a roommate of H who moved in three weeks previous. Blond hashish had been sold from the apartment.

2. The source had provided information previously which proved reliable and had been corroborated through investigations on other police informants.

3. This source was used before by another officer, which resulted in four charges under the **Controlled Drugs and Substances Act**.

4. H had no criminal convictions.

5. Constable MacLaughlin went to the apartment complex and spoke to the superintendent and her husband who told her the following:

    a) that H lived with K and that they had recently moved in, and

    b) the superintendent had received numerous complaints from tenants of marihuana smell, high foot traffic volume and door knocking late at night from the subject apartment;

    c) K and H had been given an eviction notice,

    d) Both the superintendent and her husband smelled marihuana at the subject apartment, and

    e) The superintendent had been the superintendent since March of 2004.

6. The source stated to the informant that he/she attended at the apartment and had purchased marihuana from K.

Parts of an “Information to Obtain” have been sealed from disclosure by the Crown and are not relied upon now to justify the search warrant.

ISSUES

[7] The defence argues as follows:

1. The grounds for the search warrant are deficient and that the search warrant should not have been granted and hence the search is warrantless, unreasonable and violated the young person's s. 8 **Charter** rights;

2. The manner in which the search was conducted was unreasonable; that is, the hard entry was not necessary, the search therefore was unreasonable and violated the young person's s. 8 **Charter** rights;

3. The search warrant did not specify the items and drugs to be searched for and hence the search warrant is invalid, the search is warrantless and the young person's s. 8 **Charter** rights were violated;

4. The Report to the Justice of the Peace was deficient and not filed with the Minister of Health.

For all or any of the reasons above the defence argues that the violations of the young person's s. 8 **Charter** rights require the items seized as a result to be excluded from evidence.

ANALYSIS
ISSUE NO. 2

[8] I will deal with the second issue first. Section 8 of the **Charter** provides that everyone has the right to be secure against unreasonable search and seizure.

A search will be reasonable if it is;

1) Authorized by law;

2) If the law itself is reasonable;

3) If the manner in which the search was carried out is reasonable, see **R. v**. **Collins** (1987), 33 C.C.C. (3d) 1 (S.C.C.) and **R. v**. **Debot** (1989), 52 C.C.C. (3d) 193 (S.C.C.).

It is the manner in which the search here is carried out that the defence takes issue with.

[9] The defence relies on **R**. **v**. **Genest**, (1989), 45 C.C.C. (3d) 385 (S.C.C.) and **R. v**. **Schedel**, [2003] B.C.J. No.. 1430 (BCCA), principally. These cases have been extensively reviewed by counsel. The defence relies on these two cases to support its position. The defence argues that there is a common-law rule to "knock and announce" which requires police, even if they are executing a valid search warrant, to knock and announce their presence before making any forced entry. The defence argues that notwithstanding this rule the police were authorized only to use as much force as necessary in the circumstances - see s. 12(b) of the **CDSA.** In either case the defence argues that exigent circumstances do not exist to justify an exception to the common-law knock and announce rule and that the force necessary to effect this search did not include a forced or hard entry as was effected here.

[10] The Crown argues that it is for the defence to establish that the police used more force than was required, which the Crown maintains was not shown here. Specifically, the Crown argues that the decision made to use a forced entry was a considered one and necessary because of the necessity to protect against easy destruction of evidence and the respect for officer safety.

[11] It is not my intention to exhaustively review the authorities, which counsel has so ably done. I have reviewed those cases referred to, in particular **R. v**. **Genest,** *supra***, R. v**. **Shedel**, *supra*, **R. v**. **Lau** (2003), 175 C.C.C. (3d) 273, **R. v. Grimson** (1990), 54 C.C.C. (3d) 232 (OntCA) and **R. v**. **Brown** [2003] O.J. No. 5089. In my opinion there is a common-law "knock and announce" rule, which was confirmed by the Supreme Court of Canada in **R. v**. **Genest**, *supra* and which was recognized by **R. v**. **Grimson**, *supra*. Unlike the **Narcotics Control Act**, the **CDSA** does not specifically replace or abrogate that rule as the **Narcotics Control Act** may have in accordance with the judgment in **R. v**. **Grimson,** *supra***.** Section 12(b) in my view does not

replace that rule, although it does permit forced entry without knocking and announcement if the circumstances make it necessary, see **R. v. Lau**, *supra*.

[12] This, in my view, suggests that s. 12(b) is an exception to the "knock and announce" rule, rather than a replacement or an aborgation of it. Accordingly, in my opinion, the analysis must be viewed from the prospect that the police must knock and announce and need to justify any entry which otherwise fails to include this requirement and therefore justify the force that was necessary in the circumstances and that justifiable circumstances existed which prevented them from knocking and announcing their presence.

[13] Here the evidence from the officer confirmed that the hard entry was an accepted mode of entry for "drug" searches, except for grow operations or occasions when young children were believed to be present. Otherwise, there appears to be no discretion shown. One officer testified he had performed a hundred and fifty such searches. The officers had confirmed that in drug investigations there is a concern regarding the presence of weapons and the possibility that drugs will be destroyed, i.e., flushed down the toilet. Some of the testimony related incidents of drug dealers barricaded in their apartments and concerns about rival drug gangs terrorizing each other. There was some suggestion that a number of individuals are often found in locations during drug searches. The police officers testified that a hard entry incorporated the element of surprise which had helped eliminate the concern for officer safety. Police also indicated that this method of entry was also necessary because there could be a number of individuals inside the apartment, given the indication about foot traffic and the suspicions concerning drug trafficking.

[14] It is clear to me that these officers were operating under an established practice or policy regarding hard or forced entries in drug searches, except for very specific incidences where children were present or where there was a grow operation. Whether this is a formally adopted policy or simply an accepted police practice is unclear, although there is no evidence that there was a formally entrenched policy in the H.R.M. Police. It appears to be an accepted practice, at least amongst the officers who testified based on their experience. In my view experienced officers such as those who testified should be given considerable deference to their opinions regarding officer

safety in particular and their experience with police investigations. After all, they are most often the best ones to assess any particular situation.

[15] At the same time, in my opinion, the police should not fetter their assessment or discretion as to what force is necessary to be exercised in any given situation. In other words the police should individually assess the situation, especially where the use of force is statutorily restricted and the common-law requires restraint, in this case in the form of the "knock and announce" rule. This is not to say that the well-established police practices which are solidly grounded and consistent with public policy should not be respected. However in my opinion the practice which effectively dictates a forced entry in all situations should not necessarily be regarded as reasonable, given the law in this area as I described above.

[16] I believe that this in the import of the judgment in **R. v**. **Schedel**, *supra*, which thoroughly examines this issue and which concludes, in the particular circumstances of that case, a forced entry pursuant to such policy was unreasonable and violated the accused's s. 8 **Charter** rights. In my view one has to examine the individual characteristics of this entry to determine whether these circumstances made it necessary to use force and to deliberately require no knocking or announcing preceding the police entry.

[17] The Crown argues that the police were aware that drug trafficking was probable, that the trafficking was in small amounts and drugs could be easily destroyed. The Crown argues that while forced entries are the general rule each search is looked at individually. In my view the totality of the evidence does not support the conclusion that any individual assessment was made regarding this search. It is clear that the decision to use forced entry was in accordance with a general rule or practice for drug searches. There was no reason to expect violence or the presence of guns here. The police did not anticipate encountering a barricade door or weapons, dogs or persons known to be violent. H and K were both known to be young. There was certainly an opportunity to further investigate the "foot traffic" to determine the age, characteristics and background of others who may frequent the premises to determine if that risk existed. This was not done.

[18] Although the marihuana which was believed to be sold in small quantities, i.e., in small plastic baggies, it is not necessarily accurate to conclude that

the drugs as suspected here and the suspected packaging could necessarily be easily destroyed as with other more concentrated controlled substances such as cocaine or drugs in other forms. Also, the presence of hard drugs, in my opinion, would have more easily justified an inference that violence could be anticipated given the more serious nature of the crime of possession for trafficking in such substances.

[19] For the above reasons I find that the force used was not necessary. This is especially so since the police had a key and they did not attempt to open the door before using the battering ram. In my view based on the evidence and the circumstances present the police were required by law, I believe, to at least knock and announce their presence before a forced entry could be made. There was no evidence that there was a peep hole which could have revealed their undetected presence which may have mitigated against knocking and announcing. This in my opinion could have been done but was not. In my opinion the force used was excessive and the search is accordingly unreasonable and the young person's s. 8 **Charter** rights were violated.

[20] Although it is not necessary to the determination of whether there was a **Charter** violation, I do want to address some of the other issues raised by the defence. In my opinion Constable MacLaughlin's movements relative to the apartment door after speaking with the superintendent did not amount to a s. 8 **Charter** violation. She did not enter the accused's property and was always within the hallway of the apartment complex, unlike in **R. v**. **Evans**, (1996), 104 C.C.C. (3d) 23. There is little or no expectation of privacy in my opinion regarding odours or sounds which emanate from private residences into other less private ones, in this case the hallway. While there may be some objections to placing the ear up to an apartment door, it is not clear how Constable MacLaughlin exactly "listened" and in any event it was inconsequential. Her vigil to determine if there was foot traffic again is permissible in my opinion. She was simply furthering her investigation of the tip in a manner which did not interfere with the accused's privacy expectation.

[21] The search warrant itself clearly contains a deficiency in that it fails to specify what drug was being sought in the search. While it is not necessary to determine if this deficiency renders the search warrant invalid, it does

> indicate a less than diligent attention to detail and regularity which is required when warrants to search, particularly dwelling houses, are sought.

ISSUE NO. 1

[22] Finally I wish to address the sufficiency of the warrant and while it is not necessary in order to determine this issue it does impact to some extent on my
s. 24 analysis. Determination of this issue is also informative with respect to determination of the entire issue of admissibility of the impugned evidence. **R. v. Shiers** [2003] N.S.J. No. 453 (N.S.C.A.) sets out the test which the Court is to apply with respect to this matter. While this information has been excised of certain information such that I do not have the identical information which the Justice of the Peace had before her, the test remains the same. It is whether reasonable inferences can be drawn from the contents of the Information to Obtain which could establish reasonable and probable grounds to determine if evidence of a crime could be found in the impugned place. **R. v**. **Garofoli** (1990), 60 C.C.C. (3d) 161 and **Debot,** *supra***,** define the test to be applied in evaluating the evidence of an informant or informants to determine if reasonable and probable grounds exist.

[23] Sopinka, J. says in **Garofoli**, *supra*, at p. 191 as follows:

> I conclude that the following propositions can be regarded as having been accepted by this Court in Debot and Greffe.
>
> (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
>
> (ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:
>
> (a) the degree of detail of the "tip";
>
> (b) the informer's source of knowledge;

> (c)indicia of the informer's reliability such as past performance or confirmation from other investigative sources.
>
> (iii) The results of the search cannot, ex post facto, provide evidence of reliability of the information.

[24] There are in fact three areas to examine, namely: whether the information is compelling, credible, i.e., the trustworthiness and reliability and finally, whether the information was corroborated by other police investigation.

[25] While the Court is required to look at all of the circumstances, it is critical to evaluate the probative aspects and to separate those from less valuable information which in some cases amounts to nothing more than rumour. I refer particularly to para. 4 of the information which, while it may be supportive, is of little value on its own. It is not clear on what source or knowledge this information is based. No details are offered relative to this aspect which could make it compelling. Its credibility depends in part on the trustworthiness of the informant. It is not clear whether it is reliable given the lack of details regarding the time and points of observation and source of knowledge.

[26] The observations of the superintendent, while again supportive are not particularly probative. High traffic volume and the complaints are not particularly indicative of anything. It is not clear whether the complaints relate to one event or more than one or whether the complaint was made by one tenant several times or several tenants on one occasion. It is not clear whether the superintendent smelled marihuana just once or more times or just when the complaint or complaints were made or what position the superintendent was in to determine her basis of knowledge for the smell of marihuana. It should be noted that the superintendent was only in that position since March of 2004 and these events occurred in April of 2004.

[27] Obviously the piece of information which is critical is the statement from source “A” which I quoted earlier which says as follows, para. 7, that Source “A” stated to the informant that he/she had attended the apartment. “_____ purchased marihuana from K.” This appears to be personal knowledge

although this is not precisely clear given the deletion which I noted. Source "A" does have some track record with the police in that this source has provided information in the past, although this is not without some comment which I will return to. Clearly without this statement, in my view, a justice could not conclude reasonable and probable grounds existed, notwithstanding the other supporting information. We must look therefore at the statement carefully, examine it in the context of the principles set out in **Debot,** *supra***,** and **Garofoli,** *supra***,** and analyse it along with all the other supporting information to determine if the justice could reach the conclusion that reasonable and probable grounds existed.

[28] There is no indication on what date this transaction, i.e., the purchase, occurred; at what time or whether it was once or on more occasions. There is no detail of who else may or may not have been present, what amounts of marihuana are involved, how the drug was packaged and the amounts of money, if any, which were transferred. It is not even clear whether it was the source who purchased the marihuana or whether the source was present after reading that paragraph carefully. I say that because of some of the other lack of detail, it is important to read the paragraphs and the contents of the information precisely.

[29] These are all details which make evidence and information compelling and reliable. They are missing here. I might add, it appears that some information was excised concerning this statement which the justice of the peace would have had. This of course is not before me.

[30] I do not find the statement compelling or particularly reliable, however, the Court is required to look at the totality of the circumstances to assess the reliability of the informant's evidence and recognize that weakness in one area may be overcome by strengths in another area. The test as I stated above is whether a justice of the peace based on information now before the Court drawing proper inferences could conclude that reasonable and probable grounds existed. A central and critical aspect of the tip from the information is the statement which I just alluded to. As I indicated, I do not find the statement particularly compelling. The information in para. 4 is not helpful. It is not clear whether it relates to other activity or the statement

just referred to. It amounts to rumour. It adds little or no support to the informant's evidence. There is some support for the informant's credibility in that he/she was used on one prior occasion by Constable MacLaughlin and on one occasion by Constable Seabold. However, regarding prior experience with Constable MacLaughlin the source's information did not produce the result to the extent expected, that is, there were less drugs found than were indicated by the source and further, contrary to what was included in the information the source's primary information was not corroborated. Constable MacLaughlin felt corroborating simply meant the source was used by other officers. Nothing really turns on this point except that the officer was not particularly accurate with her phraseology. It is important to be accurate, precise and forthcoming when stating grounds to ask for authority to search an individual's home, however this source would appear on the whole to have provided reliable information before.

[31] To summarize, the information provided while on its face appears to have some measure of sufficiency it is not compelling or reliable for the reasons stated above. The other so-called "indicia" is equivocal and lends little support, in my view. While the source appears to be of proven reliability and is somewhat credible these features do not in my opinion outweigh the deficiencies I described earlier. In my opinion the lack of detail and source of knowledge and the absence of corroboration are not outweighed by the proven reliability or credibility of the source. The totality of the circumstances when viewed as set out in **Debot,** *supra***,** and **Garofoli,** *supra***,** do not support the conclusion of reasonable and probable grounds. In my view a reasonable and proper inference cannot be made that reasonable and probable grounds could exist that drugs could be found in this apartment nor that drugs or other evidence of drug sales could be found.

S. 24(2) of Charter

[32] Finally I must determine if the evidence obtained from the search should be excluded pursuant to s. 24(2). In the event that the warrant is found to be deficient in the sense that not sufficient reasonable and probable grounds existed then the search would be warrantless. It is quite clear that in the event of a warrantless search the evidence should be excluded. The issue

then is whether the evidence should be excluded on the basis that the manner in which the search was conducted was unreasonable and breached the young person's s. 8 **Charter** rights.

[33] The test employed for a s. 24 application is reviewed by the Supreme Court of Canada in **R. v. Buhay** [2003] S.C.J. No. 30 (S.C.C.). There are three considerations:

1. Trial fairness;
2. The seriousness of the **Charter** breach;
3. Whether the exclusion of the evidence would bring the administration of justice into disrepute.

[34] Trial fairness - because the evidence obtained was real the issue of trial fairness was not engaged.

[35] Seriousness of the **Charter** breach - here the Court must consider among other things whether the police acted in good faith, the degree of expectation of privacy, obtrusiveness of the violation and whether the evidence could have been otherwise obtained. While I will not consider the police action here to be in bad faith this does not necessarily mean that the police acted in good faith. The police acted on past practice. They did not, in my opinion, exercise an individualized discretion relative to the search but fettered their discretion by following a past practice. It is not clear whether this practice was authorized or the subject of official consideration pursuant to an endorsed policy and subject to other guidelines. While I feel constrained to comment adversely about the practice of experienced police officers who are the front line personnel whose duty it is to enforce our laws and "fight crime", I am persuaded for the reasons contained principally in **R. v. Schedel,** *supra***,** that the hard entry searches should be subject to close scrutiny and should only be used when appropriate circumstances are present, which in my view did not exist here. One's own residence attracts a high expectation of privacy. This search was clearly intrusive and it is not clear that the items seized would necessarily have been discovered otherwise. The **Charter** violation was serious.

[36] Finally, the administration of justice in my opinion would not be brought into disrepute if these items were excluded. It is not clear that these items

are critical or not to the Crown's case, although I recognize that they are important. The offence, while serious - possession for the purposes of trafficking, does involve soft drugs, as in **Buhay**, *supra*, and not hard drugs such as heroin or cocaine or other similar substances. In my view the evidence should be excluded.

[37] I might add that I have not made any ruling with respect to any evidence which was seized, if it was, from the young person outside the residence and that would be subject to another ruling if that was argued.

[38] So, in short, the Court's ruling is that the search violated the young person's s. 8 **Charter** rights and the evidence found is excluded.

ALAN T. TUFTS, J.P.C.