

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Durling, 2006 NSPC 1

**Date:** 20060116

**Docket:** 1532283-84, 86-87

**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Jennifer Cynthia Durling

Sean Paul Cluett

**Judge:**

The Honourable Judge Alan T. Tufts

**Heard:**

Dec. 14, 2005, in Kentville, Nova Scotia

**Charge:**

7(1) CDSA

5(1) CDSA

**Counsel:**

David Greener, for the Crown

Chris Manning, for the defendant Durling

Brian Vardigans, for the defendant Cluett

**By the Court:**

[1] Jennifer Cynthia Durling and Sean Paul Cluett are charged jointly with offences under s. 7(1) and 5(2) of the **Controlled Drugs and Substances Act**. Each accused challenges the validity of a search warrant which was executed at a residence located at 6754 Highway #1, Coldbrook, Kings County, Nova Scotia in April of 2005. A *voir dire* was held prior to the commencement of the trial to consider the accuseds' application to quash the search warrant. The two accuseds challenge the sufficiency of the Information to Obtain and argue that it does not contain sufficient reasonable and probable grounds to justify the issuance of the search warrant. This is the Court's ruling on the accuseds' application.

**FACTS**

[2] The police made an application to a Justice of the Peace on April 7, 2005 to search the noted residence. The first such application was not granted for written reasons given by the Presiding Justice of the Peace. In furtherance of those reasons a second application was made.

[3] Following is a summary of the contents of the Information to Obtain in support of the application for the warrant:

1. The police were investigating a person by the name of Stephanie Cynthia Durling of 6754 Highway # 1 Coldbrook regarding production of marihuana for the purposes of trafficking.

2. The police received information from an anonymous source through CrimeStoppers on two occasions which indicated the following:

- (a) Jennifer Durling, whose phone number is 824-0885 is growing marihuana in the basement of a house she is renting on Highway #1, Coldbrook, Kings Co., NS;
- (b) There are large or huge lights plugged into outlets like those used for stoves or dryers;
- (c) Jennifer Durling is employed at Shirley's Travel Agency in the Cambrooken Court complex in Coldbrook, NS;
- (d) The grow operation is ongoing with marihuana plants and seedlings;

- (e) It is believed the plants are soon to be harvested;
  - (f) The growing is for financial gain, although the paragraph in which this information is contained is edited and portions deleted such that it is difficult to determine the full import of this information.
3. The same source provided information concerning two other persons who were “known” to the police and those matters are still under investigation. One of the individuals had previously been the subject of a search which yielded marihuana plants.
  4. The phone number - 824-0885 was confirmed to be that of Jennifer Durling. The address associated with the name and number is 6754 Highway # 1 Coldbrook, NS.
  5. The police confirmed that the car at the residence was the same as the one seen in the parking lot near Shirley's Travel Agency and that Jennifer Durling was the registered owner of that car. Her address noted for that purpose was 2600 Mount Hanley Road, Cottage Cove, NS.
  6. Police surveilled the residence and noted another vehicle whose registered owner had no criminal record.
  7. On April 6, 2005 the police conducted a FLIR test which revealed a bright white area indicating heat coming from the basement area of the building located at 6754 Highway # 1 Coldbrook, NS. The police also observed windows covered by some type of material which prevented light from being observed. This is the area where the heat was detected. This was, in the opinion of the FLIR operator, consistent with heat generated by high intensity lights used in a marihuana grow operation.
  8. Police confirmed Jennifer Durling worked at Shirley's Travel by placing a call to that business.
  9. Jennifer Durling's vehicle was seen at the noted residence.

There was no indication that Stephanie Cynthia Durling of 6754 Highway # 1 Coldbrook referred to in paragraph 6 of the Information to Obtain and Jennifer

Cynthia Durling are the same person or are related. There is no indication that the phone number 824-0885 is a cell number of Jennifer Durling or a land line at 6754 Highway # 1 Coldbrook, NS.

### **THE LAW**

- [4] The constitutional standard for judicial prior authorization for searches is reasonable and probable grounds - **Hunter v. Southam** [1984] 2 S.C.R. 145. Reasonable grounds and probable grounds are synonymous: **Baron v. Canada** (1993), 78 C.C.C. (3d) 510 (SCC). Both arise where “credibly based probability replaces suspicion”: **Hunter**, *supra*. The standard is reasonable probability rather than proof beyond a reasonable doubt: **R. v. Debot** [1989] 2 S.C.R. 1440, or even the requirement to establish a “*prima facie* case”: **R. v. Storrey** [1990] 1 S.C.R. 241. Reasonable and probable grounds can mean different things in different contexts. What is important is an examination of the context in which that phrase and the values underlying that phrase arise: **R. v. Bernshaw** [1995] 1 S.C.R. 254, as quoted with authority by Sopinka, J. in **R. v. Jacques** [1996] 3 S.C.R. 312.
- [5] It is not for this court to substitute its own opinion for that of the issuing Justice of the Peace: **R. v. Garafoli** [1990] 2 S.C.R. 1421. It is not whether this court would have issued a search warrant based on the Information to Obtain but whether a Justice of the Peace could with the evidence now before me with the deletions made to protect the identity of the anonymous source, have properly reached that conclusion that reasonable and probable grounds existed.
- [6] **R. v. Shiers** [2003] NS.J. No. 453 sets out the test at para. 15:

Could the issuing judge on the material before her, have properly issued the warrant? Specifically, was there material in the information from which the issuing judge, drawing reasonable inferences, could have concluded that there were reasonable grounds to believe that a controlled substance, something in which it was contained or concealed, evidence related property or anything that would afford evidence of an offence under the CDSA was in Mr. Shier's apartment?

- [7] In short 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.

- [8] As I referred to above that requires a consideration of whether there is present credibly based probability. The whole of the Information to Obtain needs to be considered. It does not, however, need to be based on personal knowledge: **R. v. Morris** (1998), 134 C.C.C. (3d) 534. The sufficiency of the grounds will depend on the circumstances and there is no fixed formula for what constitutes reasonable grounds. This concept involves the application of common sense as well as practical and non-technical principles and is a process not dealing with certainties but with probabilities: **R. v. Gatfield** [2002] O.J. No. 166.. The task then is to determine if sufficient evidence is present, that is credible and probative to establish a probability that evidence of a crime will be found in the place named or more particularly whether a Justice of the Peace could reach that conclusion.
- [9] This becomes more challenging when the purported grounds are based substantially or in part on the evidence of an informant. **R. v. Garafoli**, *supra* and **R. v. 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.
- [10] Sopinka, J. says in **Garafoli**, *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.

[11] The totality of the circumstances requires that three areas be examined, namely: whether the information is compelling, credible, i.e., trustworthy and reliable and finally, whether the information was corroborated by other police investigation.

[12] Compelling simply means the information contains sufficient detail and other particularized features which makes the information easily confirmed or contradicted. Statements which are vague or general in nature cannot be said to be compelling. However information that is detailed and remarkable better suggests the source has first hand or accurate knowledge of the subject. The fear is always that a source is simply repeated rumours. Information which is “compelling “ in the way I have described is less likely to be rumour. Because the source says the information is firsthand is not determinative. It is whether there are compelling features in the information which makes that assertion credible which is important.

[13] Credibility as I referred to above has two aspects; namely trustworthiness and reliability. Trustworthiness in this context centers primarily on the proven “track record” of the source. Has the source given accurate information in the past. Has the source told the police about others evidence of crimes which turned out to correct before and equally important has the source given incorrect information previously. Repeated suppling of accurate information will tend to lead to a conclusion the source’s information is trustworthy especially if that same source has not provided incorrect information before. The closer the sources information compares with the actual events will add to the source’s credibility. Therefore details of the source’s prior information and results make it easier to satisfy the trustworthiness of the source. Also other information about the informant's honesty or lack thereof assist in assessing this aspect.

[14] Reliability refers to the source of the informant’s knowledge; ie, how did the informant come to learn the information. Was it first hand? Did the source actually see the events described personally - what location was the informant situate and the time frames involved relative to the application for the warrant.

Clearly first hand personal knowledge makes information more reliable especially if the observation are in close proximity to the warrant application.

[15] Corroboration means that other independent sources of information confirm, at least in part, the source's information. This can be done by police surveillance or the presentation of other information which will buttress the inferences which may be drawn from the informant's statements.

[16] It is however the total of all the circumstances that is necessary to have in mind when applying the test noted above. Weaknesses in one area may be overcome by strengths in other areas.

[17] 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 or information which is simply not logically probative of the required inference.

[18] Finally, before analysing this "Information to Obtain" it should be remembered that it is the information relating to the impugned evidence itself that is critical. Compelling, credible information that has been corroborated which is not information related to the "sought for" evidence is only partially helpful. It is information which is compelling and credible upon which an inference can be drawn that the **impugned evidence of a crime is present** which is important.

[19] Informants or sources are not before the Justice of the Peace. They are not subject to questioning by the Justice of the Peace. The only measure of the knowledge and information of the source is what is contained in the "Information to Obtain". The only means to determine if the proffered grounds are compelling and credible is in the contents of the Information to Obtain. While the police may have confidence in the source's knowledge unless the basis of that is clearly set out, in my opinion, the Justice can not assume **anything**.

[20] The Justice is performing a critical function: i.e., determining independently whether there is sufficient ( in the sense I described above) information upon

which reasonable inferences can be drawn which to conclude that there are reasonable grounds to believe that the evidence sought is located in the subject “place”; in this case a dwelling house. As I stated above this Court’s function is simply to determine whether it is possible, given the law in this area, for such a conclusion to be reached by a Justice of the Peace. While the information which this Justice had is clearly different from the information now before the Court - certain parts having been excised - the test remains the same. Even though the Court is not actually reviewing what this Justice actually had before him/her the issue is simply could a Justice make reasonable inferences based on the information as it now stand to possibly conclude that reasonable and probable grounds existed.

[21] The primary issue in this application centres around whether the source's evidence or information is sufficiently credible and corroborated. The Crown argues very strongly that this case is very similar to that in **R. v. Plant** [1993] 3 S.C.R. 281. The Crown argues that the source's information about the accused Jennifer Durling's employment and residence particulars have been corroborated by an independent source and as such this makes the source sufficiently credible that along with the “details” of the grow operation and the FLIR testing and other police observations, the Information to Obtain is sufficient to establish reasonable and probable grounds . The Crown is specifically not relying on the FLIR testing as the only source of corroboration.

[22] It is quite clear that the source's references were to the accused Jennifer Durling, given the references to her employment and that she is residing or at least has some connection with the residence at 6754 Highway # 1, although there may be some doubt about her residing at that residence given the reference to Stephanie Cynthia Durling, the Mount Hadley address of Jennifer Cynthia Durling and the uncertainty of whether the phone was a land line to the Coldbrook address. However, given the presence of the accused Jennifer Durling's motor vehicle at the residence it is “probable” to conclude she was either residing at that residence or had some sufficient connection to that residence.

[23] The defence argues that it is corroboration of the presence of the marihuana growing other than the FLIR that is absent. The defence argues that the corroboration of the employment and the residence particulars are all publicly-known information that is not unique and adds little if anything to the source's overall credibility.



- [24] In **R. v. Plant**, *supra*, on which the Crown relies, the Information to Obtain was based on an anonymous tip. The Information to Obtain referred to the subject location as being a “cute house” located within the 2600 block of 26<sup>th</sup> Street near a house with many windows. The police subsequently confirmed the exact location. The Supreme Court of Canada concluded that the information given by the anonymous source was compelling in that it identified the location of the cultivation operation and located the accused's house in a fairly specific geographic region which was corroborated by subsequent police reconnaissance. The Supreme Court of Canada concluded that the tip was compelling enough in its specification of the place in which the alleged offence was being committed.
- [25] In that case the police further corroborated the source's tip with hydro records which showed four times the normal amount of electricity being consumed. It was the manner in which these hydro records were obtained that was the primary subject of the appeal before the Supreme Court of Canada. The Supreme Court of Canada upheld the trial judge's finding that on the whole of the evidence sufficient grounds were present to issue the warrant.
- [26] In my opinion the Supreme Court of Canada simply acknowledged that the source's reference to a specific location was credible, ie. the place which was mentioned in the tip was that of the accused. Not only does there need to be credible information about a crime but also credible information about the correct location. The Supreme Court of Canada in **R. v. Plant**, *supra*, in my opinion, simply acknowledged that, in that case, there was credible evidence of the location, given the details provided of the location, which were corroborated. Undoubtedly, in my opinion, the evidence of the hydro records provided the necessary corroboration regarding the presence of the grow operation, although I do acknowledge that credibility on some aspects can support overall credibility, including other aspects of the source information. However, in my opinion **R. v. Plant**, *supra*, does not stand for the proposition that because the information pertaining to the location is credible that other aspects of information received from the source is also credible, without consideration of other corroborative evidence. I do not agree with the Crown's submission in that regard.
- [27] In **R. v. Zammit** (1993), 81 C.C.C. (3d) 112 (Ont. C.A.), this very point was addressed. There surveillance of the suspect yielded nothing other than “what would probably have been known by anyone familiar with the

appellant”. There the informer accurately provided the address of the accused, a description of the accused, his motor vehicle and the name and address of his workplace. The Ontario Court of Appeal held that this did not make the informer credible “with respect to information predicting criminal activity”. The Court said, “they would be known to anyone familiar with the appellant and would not in any way substantiate the allegation that the appellant was involved in drugs”.

[emphasis added]

[28] **R. v. Philpott** [2002] O.J. No. 4872, which includes an exhaustive review of the subject of the sufficiency of search warrants, makes the same point. At para. 98, J. W. Quinn, J. says:

Corroboration of a tip must relate to details associated with the alleged offence. Confirmation of innocent facts, which could have been known by any number of the suspect’s acquaintances, fall short of what is required: see *R. v. Lewis*, (1998), 122 C.C.C. (3d) 481 (Ont. C.A.)

[29] In my opinion, therefore, corroboration of only a portion of the source's information, particularly innocent information such as his/her place of residence and employment particulars, only marginally adds to the strength of the informant's evidence and in particular where these corroborated pieces of information could be easily known by a wide number of persons it adds very little to the source's credibility.

### **APPLICATION TO CASE AT BAR**

[30] In this case the primary evidence which could form the required grounds comes from information received from an anonymous source. There is no other evidence of a crime. The other evidence is only capable, at best, of corroborating the source's information.

[31] The source is unproven and anonymous. There is very little to support the source's trustworthiness. The references to information provided concerning two other persons is only slightly helpful and adds very little if any to support the source's credibility.

[32] For the reasons I expressed above, corroboration of the suspect's connection to the impugned residence and her employment particulars, while confirming

who the information pertains to and the location referenced, does little to strengthen the allegations regarding the marihuana grow operation.

- [33] There are some compelling features of the source's allegation, being the reference to the basement of the residence and the reference to the “huge lights plugged into outlets like those for stoves or dryers”. References to the type of drugs, that is marihuana, and the fact that they are soon to be harvested, while somewhat detailed, are in my opinion not compelling details.
- [34] Although the Information to Obtain does not appear to reveal if the information's source of information was firsthand or not, Constable Huett in his testimony during the *voir dire* indicated that the source's information was firsthand.
- [35] Finally, the FLIR testing and the covered windows do provide some corroboration of the source's information regarding the grow operation, although in my opinion this evidence is not as strong as the evidence of hydro usage, for example, as seen in **R. v. Plant**, *supra*, and in many other cases. Constable Doyle acknowledged that the testing only disclosed increased levels of heat on a single occasion which he acknowledged could exist for various reasons, although other homes in the area did not have the same profile.
- [36] It is, however, the totality of the circumstances or the whole of the evidence which needs to be examined. Here the source has provided information about a specific individual - the accused Jennifer Durling. The source is unproven and anonymous. The information about the grow operation, while disclosing a few details is not, in my opinion, compelling. In my opinion the source is neither credible nor is the information compelling. Is the corroboration therefore of the FLIR testing and the observations about the covered windows sufficiently strong to overcome the weaknesses I identified in the other aspects under consideration. In my opinion it is not. Clearly the FLIR testing is supportive and consistent with the allegation however because of the limited information it conveys, ie. heightened levels of heat at a single instance, it is not sufficiently strong or probative to confirm the existence of the marihuana grow operation and to overcome the weaknesses in the source's information I noted above. While I recognize that the FLIR testing has some probative value, I cannot agree that it is equivalent to hydro readings such that this case is on all-fours with **Plant** as the Crown suggests.

- [37] In my opinion considering the totality of the circumstances, the evidence does not rise above the level of suspicion, albeit strong suspicion. It does not amount, in my opinion, to credibly-based probability. It is not possible, in my opinion, for a Justice of the Peace, given the evidence contained in the Information to Obtain, as edited, to properly draw the required inferences necessary to conclude that reasonable and probable grounds existed that evidence of a marihuana grow operation were present in this residence.
- [38] Therefore the defence motion to quash the search warrant is granted.
- [39] I will hear counsel further about whether either accuseds' s. 8 **Charter** rights were violated and if necessary whether the evidence found should be excluded relative to either accused or both.

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ALAN T. TUFTS, J.P.C.