

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. McNair, 2009 NSPC 31

Date: June 25, 2009

Docket: 1880584, 1880585

Registry: Shubenacadie

Between:

Her Majesty the Queen

v.

George McNair and Virginia McNair

Judge:

The Honorable Judge Jamie S. Campbell

Decision:

June 25, 2009

Charge:

CDSA 5(2)

Counsel:

Jill Hartlen, counsel for the Crown

Brian Stephens, counsel for the Defendants

Introduction

1) This case involves the review of the granting of a search warrant by a Justice of the Peace (“JP”). As is often the case, while the standard for review is clearly expressed and well accepted, the manner in which it is applied, in a practical sense, can be the subject of some debate.

2) George McNair and Virginia McNair live in Pleasant Valley, a rural part of the Halifax Regional Municipality. Following the execution of a search warrant at their home, on 2nd February 2008, they were charged with possession of cannabis (marihuana) and cannabis (resin) for the purpose of trafficking.

3) The McNairs seek to have the seized evidence excluded on the basis that the search infringed their s. 8 Charter right to be free from unreasonable search or seizure. They contend that the Information to Obtain (“ITO”), containing largely the information of two confidential sources, discloses insufficient grounds to support the issuance of the warrant.

The Test for the Granting of a Search Warrant:

4) For a search warrant to be granted there must be a credibly-based probability both that an offence has been committed and that there is evidence of it to be found in the place to be searched. The reasonable belief of the person signing the affidavit is not enough. The ITO must disclose the substantial basis for that belief.

5) When the belief arises from information obtained from an informant, as is the case here, the reliability of that informant has to be considered. The court must consider a variety of factors including the degree of detail of the tip, the informer's source of knowledge and the informer's reliability in the past. The results of the search cannot be used to support the reliability of the informer.

6) The police need not confirm every detail of an informer's tip. The sequence of events actually observed must however remove the possibility of innocent coincidence. The level of verification will be higher where the police rely on information from an informant whose credibility cannot be assessed or where the risk of innocent coincidence is greater. (*R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.))

7) The sufficiency of grounds for the granting of a search warrant must be considered having regard to the totality of the circumstances. No single factor is decisive in determining whether a standard of reasonableness has been met. (*R. v. Durling*, [2006] N.S.J. No.453, 2006 NSCA 124)

The Role of the Reviewing Judge:

8) Fichaud, J.A. in *R. v. Shiers*, [2003] N.S.J. No. 453 (C.A), summarized the role of the judge reviewing the granting of a search warrant.

Based on these principles, the reviewing judge should have applied the following

test. 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, offence related property or any thing that would afford evidence of an offence under the CDSA was in Ms. Shiers' property. (para.15)

9) In applying the standard set out by the Supreme Court of Canada in *R .v. Garofoli*, [1990] 2 S.C.R. 1421, the court does not substitute its view or opinion for that of the issuing judge. The analysis is whether the warrant could have been issued, not whether it should have been issued.

10) This is not a splitting of grammatical hairs. The distinction appears to lie in the very nature of the kinds of logic used to formulate inferences.

11) As noted in *R. v. Durling*, supra, the reviewing judge must accord a level of deference to the decision of the issuing judge such that the issuing judge's reasonable inferences ought to be respected. The issue then is not whether the reviewing judge believes that the inferences are proper or correct but only whether the inferences upon which the issuing judge relied are reasonable. The kind of inferences made in these circumstances are not categorized as right or wrong, correct or incorrect, valid or invalid, sound or unsound, but as reasonable or unreasonable.

Deduction and Induction: Black, White and Grey

12) An inference involves the formation of a conclusion either from induction or deduction. In deductive logic an argument is valid if it is impossible for the premises to be true and the conclusion false. In that sense it is like a mathematical equation. It is, in some ways simply a way of organizing and explaining information. Deductive reasoning is “closed”. A conclusion is either valid or not valid. There is no room for compromise in Mr. Spock’s cold deductive Vulcan logic.

13) Inductive reasoning works in the opposite direction. It relies for its operation on a level of appreciation and understanding of the paradox inherent in the predictability and unpredictability of events. It goes from what is known to form conclusions about the unknown. The premises of the argument show some degree of inductive probability toward the conclusion but they do not entail the conclusion as in a deductive argument. Inductions are open. There are many conclusions that can reasonably be determined from the same premises. Problems happen when people assume the same level of certainty applies to the product of their inductive reasoning as applies to the results of deductive reasoning. If deductive reasoning is “black and white”, inductive reasoning is decidedly “grey”.

14) That fact about inductive logic is relevant here. Using that process reasonable people may reach different conclusions. The full scope of that reasonableness is the issue. There are no precise rules setting out what may be inferred by the process of induction from something else.

15) Shared knowledge, experience or common sense come into play. Sometimes it “makes sense” to conclude with a practical degree of probability that a conclusion follows from certain premises. Sometimes the distance from premises to conclusion is so great the degree of probability is minimal. The process of going from premises to conclusion, in this context at least, should not be based on intuition but on factors that can be articulated and related reasonably to the conclusion.

Inferences Made by the JP:

16) In order to assess the reasonableness of the inferences made by the Justice of the Peace, it is necessary to identify what the inferences might have been. The inferences should be approached with a degree of skepticism, but the practical skepticism that allows that the process of induction can indeed lead to an assessment of probability short of certainty.

17) Counsel has argued that there is no indication for each of the statements of the sources as to whether the source had personal information or not. The ITO however contains the reference that the information is based on the personal knowledge of the source unless otherwise stated.

18) It is suggested as well that there are many pieces of relevant information that are missing. That is certainly the case. It could be said that while the scope of unanswered questions is almost limitless, the JP based her decision on the information before her. It is on that information upon which the reasonableness of her decision must be assessed. The identification of unanswered questions is helpful insofar as those unanswered questions define more precisely the scope of

what is known.

If Source "A" were Accurate:

19) The information provided by Source "A" was either accurate or not accurate. That is a valid deduction. If the information was accurate, the issue is then whether there is a reasonable probability that an offence has been committed and that there is evidence of that offence to be found at the location to be searched. The source purchased cannabis marihuana from the couple at the location in the month before the warrant was issued. If that information alone is accurate, the probability of the offence having been committed is high.

20) As to the issue of whether evidence of that offence is to be found at the property, the source indicated that he/she had seen more than an ounce and a half of pot at the residence, packaged in small quantities for individual sale, stored in a freezer. A severely skeptical approach would deny the validity of induction as a form of logic at all. Because drugs were present on one day, that approach suggests that it does not logically follow necessarily that they will be there on another day. The probability that drugs will be there is high however. The degree of that probability is increased by the assertion that the location was being used for the sale of cannabis marihuana. The drugs were said to have been in a freezer stored on the property. The drugs were not in that location for some purpose practically unrelated to the location itself.

21) There is still a possibility that the drugs had, for some reason, been removed in the intervening period. Their removal for reasons unknown would amount to speculation. There is

no reason to believe that they would have been removed. That simply means that the probability of the evidence being in the location to be searched is not at the level of certainty.

22) If the information of Source “A” is accurate, there is a strong inference that an offence has been committed and that evidence of that offence would be found at the location.

23) If the information provided by Source “A” were not accurate a different conclusion would follow.

24) If the information of Source “A” were inaccurate, it is either intentionally inaccurate, unintentionally inaccurate, or a combination of the two. That, I believe, is a valid deduction.

Could Source “A” Have Been Unintentionally Inaccurate?

25) To the extent that it is unintentionally inaccurate, the inaccuracy could be a result of a failure to recall what was initially accurately observed or the failure to observe accurately in the first place. Once again, I believe that to be a valid deduction.

26) The probability that the information was unintentionally inaccurate because of a lapse of memory is quite small. The information provided does not extend over a long period of time. It is hardly complicated. Practically it is difficult to conceive of how Source “A” might have “mis-remembered” buying the product from the McNairs and observing it at their home. Once again, there is a possibility that Source “A” had become confused about the basic facts of what had

happened, but the likelihood of that is very small.

27) The probability of unintentional inaccuracy in the initial observation is greater with regard to different things that were observed. Source "A" provided information, based on personal information, that George McNair had grown pot for several years and that he had seen George McNair trafficking pot from his residence. Even though the source claims to have had personal knowledge of that, there is at least some real possibility of misinterpretation in that information upon initial observation. What the source saw may or may not have been growing or trafficking pot. At this point the unanswered questions do come into play in defining the scope of what is known. The ITO does not disclose how Source "A" confirmed that what he or she saw being grown was in fact cannabis marihuana, nor does it disclose how the source was aware that actual trafficking was taking place. The lack of supporting details makes it difficult to conclude that there was a high degree of probability that what was initially observed was accurate.

28) Source "A", however, also indicated that he or she had purchased a small quantity of "dope" during the month before the granting of the warrant. The ITO does not specify in the relevant paragraph that the purchase was from George McNair but in the context that is an all but inescapable conclusion. The potential for misinterpretation of that information is quite small. Similarly, the source said, based on personal information, that pot was kept in two freezers, and further observed pot in small packaged quantities. Once again, it is possible that what was observed was misinterpreted. By far the more reasonable inference is that the information was not mistaken. The source purchased pot from the McNairs, knows what pot or cannabis

marihuana is and what it looks like. It is highly unlikely that he or she would have purchased something else from the McNairs, believing it to be pot. It is also unlikely that the source observed on the McNair property small packages of a substance that he or she mistakenly assumed was cannabis marihuana. It is possible that the source purchased something from the McNairs that he or she believed to be pot and also saw small quantities of something else, oregano for example, stored in small bags. That's possible. It just isn't very likely at all.

29) The possibility remains that the source purchased cannabis marihuana from someone he or she mistakenly assumed to be George and Jenny McNair. The source identified the McNairs by name and their home by a precise description. That information was confirmed to be an accurate description of the residence of George and Jenny McNair by Constable Sobieraj. It is reasonable to conclude that there is a high degree of probability that the location from which the drugs were purchased and stored was the McNair property.

30) The inference, by induction, is that Source "A" did not provide inaccurate information by mistake.

Could Source "A" Have Been Intentionally Inaccurate?

31) If the information were inaccurate and not unintentionally inaccurate, it must then have been intentionally inaccurate. The issue then is whether by inductive reasoning the degree of likelihood of an intent to mislead can be determined. Source "A" had been known to Constable Sobieraj for one month as a source and had provided information only once before. The source

had no criminal record for offences related to the administration of justice, such as perjury or public mischief. Significantly, the source was personally known to the police and was not anonymous.

32) There would be a disincentive for the source to intentionally mislead the police in this investigation. The information given was specific, in terms of who was involved and where. The information was verifiable upon execution of the warrant. The source would know that if the police executed the warrant and did not find freezers containing drugs at the back of the property he or she would be found out. The specificity of the information in that regard tends to the conclusion that there is some probability that it was not intentionally misleading. It remains open to also conclude however that Source "A" would be prepared to take the risk of being caught in the deception, perhaps on the assumption that there would be no consequences. That too would be a reasonable inference to draw from the circumstances. This is a "grey area".

33) Source "B" gave information in December 2006 that he or she had seen Jenny McNair trafficking cannabis marihuana from her residence. The source gave the precise location of the property and, significantly, indicated that the drugs were stored in a freezer located "in the residence". Source "A" indicated that there were two freezers and that they were located "at the back of the residence". The information is sufficiently similar in detail that despite being dated is capable of providing support..

34) Source "B" was noted as having been a source who had provided significant information to Constable Jackson on at least 8 occasions.

35) The similarity of the information means that either two people are mistaken or two people are intentionally providing false information. While the details provided by Source “B” were scant, they do generally support the Source “A” statement about drugs in the freezer. The chances that two people made mistaken observations that bear such a striking similarity supports the inference that they were not mistaken. Some may choose not to make that inference. It is however not an unreasonable one to make.

36) If the observations were false and not mistaken, they would have to have been intentionally false. Once again, two people would have to have decided to provide the police with generally the same, readily verifiable, false information about the same people. That could be either an independent decision or one that was the result of collusion. Once again, it is reasonable to conclude that the probability of two people giving the same false information about the same people would be low.

37) The fact that Source “A” gave information in January 2008 and Source “B” gave information in December 2006 is to some extent supportive of the conclusion that any collusion would have had to have been part of a longer term strategy or at least a strange tenaciousness in effecting a bizarre prank. It is reasonable to conclude that the likelihood that two people would concoct such a plan to provide false information to the police merely for the purpose of having a fruitless investigation take place, which would inevitably conclude that the information they had provided was false, is low.

Conclusion:

38) Based on the information contained in the ITO, the JP could reasonably conclude that it was probable that Source “A” and by implication Source “B” were not intentionally misleading the police.

39) The ITO contained information from which reasonable inferences could be made to justify the granting of a warrant. The information provided by Source “A”, if accurate, would allow one to conclude reasonably, that it was probable that an offence had taken place and that evidence with respect to that offence was present in the location to which the search warrant pertained. It is reasonable to conclude that it is not probable that the McNairs were identified through an innocent coincidence given the detailed nature of the information provided nor is it probable that the sources had either misunderstood what they had observed or suffered from inaccurate recollection with regard to the basic relevant information. It is also reasonable to conclude that there was a low degree of probability that the information was intentionally inaccurate. It is improbable that two sources would collude to provide false information over a period of months for the purpose of furthering an investigation which would prove the information provided to have been false.

40) Where inferences were made by the process of inductive reasoning the steps from the premises to the conclusion of probability were not based on intuition but on factors that can be readily articulated and from which the conclusion practically flows .

41) The decision of the JP to issue the warrant should be upheld.