IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Tremblett, 2012 NSPC 14

Date: 2012.02.26
Docket: 2288101/2288102/2288103
Registry: Sydney

Between:

Her Majesty the Queen

v.

Augustus Clarence Tremblett

Decision on the Legality of a Premises Search

Judge: The Honorable Judge A.P. Ross

Heard: November 24, 2011 – Voir Dire

Written Decision: February 23, 2012

Oral Decision: January 3, 2012

Charges: s. 5(2) CDSA, s. 5(2) CDSA, s. 4(1) CDSA

Counsel: Wayne MacMillan, for the Crown

Matthew MacNeil, for the Defense

Summary:

Police obtained a Controlled Drugs and Substances Act warrant authorizing the search of a residence "any time between February 4th and February 8th". The search was executed on the date of issuance, February 4th. A quantity of cocaine and other items were seized. It was not disputed that there were sufficient grounds to issue the warrant. Defense argued that the search was illegal because it was only authorized for February 5th, 6th and 7th thus leading to an unreasonable search under s.8 of the Charter. At the outset of the proceeding Crown was prepared to concede a Charter breach, the parties differing on whether the evidence should be excluded under s.24. Such a concession had been made in a number of previous cases on the same facts.

Issues:

Is the court obliged to accept an agreement between counsel that a Charter breach has occurred?

Did the warrant authorize a search on the first of the stipulated "between" dates? Was there a breach of the accused's s.8 Charter right?

In the event of a s.8 breach, should the evidence be excluded under s.24(2) of the Charter?

Decision:

The search was authorized on the first of the "between" dates. Contextual and other factors are considered. There was no breach of the accused's s.8 right.

Court was not bound by the agreement of counsel. There had been no previous judicial determination of the issue and no known case authority to support one view or the other. The parties were afforded an opportunity to research the point and make submissions.

In the result there was no need to consider possible exclusion under s.24(2); however, had a breach been found the court would have excluded the evidence, police having had ample opportunity to amend their past practice.

REASONS FOR DECISION

INTRODUCTION

[1] This decision concerns the meaning of the word “between” in a search warrant issued under the authority of the Controlled Drugs and Substances Act.

[2] Warrants to peace officers usually specify a time frame during which they must act. A search conducted outside the authorized time is considered a warrantless search. This in turn gives rise to a presumptive Charter infringement. If the search is not then shown to be justified, the s.8 right to be free from unreasonable search is violated and the admissibility of evidence seized from the premises called into question.

[3] In this particular case Cape Breton Regional Police conducted a search of the accused’s residence on February 4th, 2011. They had with them a warrant which authorized them to search these premises “anytime between February 4th, 2011 and February 8th, 2011”. The question is whether they acted under this authority.

[4] This is not the first time the issue has arisen in Provincial Court in Sydney. In previous cases I am advised that the Crown conceded, on similar facts, that such a search was warrantless.

[5] When the issue was identified yet again in the present case counsel for both sides approached the pre-trial *voir dire* as it had in the previous cases, i.e. conceding a s.8 breach but arguing the admissibility question under s.24. I asked what case law or other authority supported the view that “between (dates)” excluded the first-mentioned date. None was forthcoming. I thus asked for written submissions on two issues : (1) whether a court was bound by an agreement between Crown and Defence that a Charter breach has occurred, and (2) if not bound, was there nonetheless a breach of the accused’s s.8 right to be free from unreasonable search and seizure. The latter hinges on the legality of the search, which depends in turn on how the phrase “anytime between February 4th, 2011and February 8th, 2011” in a search warrant should be interpreted.

[6] If I find that there has been a s.8 breach it will then be necessary to deal with the exclusion/admissibility of evidence issue under s.24. On this too I have the benefit of briefs and submissions from both parties.

[7] Briefs were submitted and the parties made oral argument on December 13th, 2011. I issued a ruling on January 3rd, 2012 that (1) I was not bound by the agreement of counsel, and (2) that execution the warrant on February 4th was permitted on the face of the document and thus did not constitute an illegal search or Charter breach.

Trial is now scheduled for February 23, 2012 at which time, barring some other impediment to admissibility, the evidence seized from the accused's home will be received. This is the brief statement of reasons which I undertook to provide.

FACTS

[8] The subject warrant was issued by a judge at the Sydney Justice Centre during working hours on February 4th, 2011. Six Cape Breton Regional Police officers executed the search warrant at the Sydney Mines residence of the accused at 6:55 that same evening. Police believed that the accused resided there with his two daughters. Upon arrival police found the door locked. They made a forced entry with guns drawn. The accused and two other males were inside. They found what they believed to be cocaine and oxazapam. Aside from the date and time, none of these details are relevant except to show that such an intrusion into a private residence is a significant invasion of privacy and should not occur without clear legal authorization. The grounds for the issuance of the warrant are not argued; in this sense the justification for entry is not contested. The issue is whether the police complied with the express terms of the warrant by executing it when they did.

[9] From testimony adduced at the hearing I accept that the police honestly believed that the warrant permitted them to executed on the same day it was issued, February 4th. In preparing it for presentation to the issuing judge they worked from a copy of an earlier warrant. They did not turn their minds to the experience in the prior cases referenced above. The applicant, Const. Campbell, did not know about the between-dates issue. He had come to the drug section only a few days before. There were, to his knowledge, no memos or policies put in place concerning it, no changing of precedents, no internal communication of the problem. In his ten years in policing, in previous warrants he had obtained and executed, the issue had not been raised. Certain members of the team that day who had been members of the drug section involved in the prior cases, and who reviewed the terms of the warrant just prior to execution, did not identify any possible problem with executing it that day.

THE AGREEMENT OF COUNSEL

[10] From the Defense brief I understand (as noted above) that in a number of federal drug prosecutions in 2009 in Sydney the Crown conceded that a police search on the first of "between" dates in the operative warrant gave rise to an illegal search. Defense quoted from transcripts of these proceedings but most of these cases are unreported.

One that did generate a reported decision is R. v. Routledge [2011] N.S.J. No. 433. In Routledge we find at para 2 to 5, and 64:

> 2 Police officers obtained judicial authorization to search two homes believed to be associated with the defendant, Mr. Routledge. They were the homes of his mother and wife.
>
> 3 Both search warrants contained between dates for execution. The police executed the warrants on the date issued, the 26th, instead of the 27th, 28th, 29th, or 30th.
>
> 4 The defendant argues this is a violation of his Section 8 Charter rights and the evidence should be excluded. The Crown conceded the police action was a violation of Section 8 of the Charter, but the evidence should not be excluded pursuant to Section 24(2).
>
> 5 Crown and defence agree that warrants, Exhibits 3 and 4, were defective as they specified between dates for execution but the warrants were executed on the first date, in particular August 26, 2009. The Crown does not concede the switch of addresses as a Section 8 breach, but does agree the defects in the warrant cited in the four cases of the defendant's brief relate to the between date issue. Those cases did not proceed for that reason. Those cases involved marijuana and MDA.
>
> 64 With respect, I find on a balance of probabilities that the Crown has proven that the exclusion of this evidence in all of the circumstances would bring the administration of justice into disrepute and therefore I am prepared to admit the evidence on the trial proper.

[11] The agreement is stated in para. 5 as being that “the warrants were defective”, but as the ensuing decision indicates and the previous paragraph says, the concession was not that the warrants were defective but that the police action was unauthorized, given the date that the warrant was executed.

[12] Perhaps with this history, and undoubtedly with *bona fides*, the parties approached the present case believing that only the s.24 issue was arguable. Crown conceded, as it had before, that the search was warrantless, otherwise unjustified, and thus constituted an infringement of the accused’s s.8 rights.

[13] Defense has very fairly brought forward cases and legal commentary to support the view that a court is *not* bound by agreements of counsel on Charter violations. In R. v. Chaisson 2005 NLCA 55 at para. 10 and 11 the court states : “ However, in this appeal, given the particular factual situation, a proper analysis cannot proceed under s.24(2) in the absence of a clear understanding of whether a Charter guaranteed right has been infringed, and if so, the nature of that infringement. . . . I recognize that it is unusual not to accept concessions made by the Crown. However, where such concessions interfere with a proper analysis of the law, and indeed, lead to a result that

may be inconsistent with the law, it is incumbent on the court to reject those concessions."

[14] Crown counsel in the present case points out that the prior concessions may have been given for any number of reasons – different facts, different s.24 considerations, unwillingness to devote resources to the argument, etc.

[15] Obviously there may be situations where the law is so clear that a court would hardly think to question a concession or agreement stipulated by counsel. The position initially taken by Crown here, and in the prior cases above, is not obviously the wrong one. Future developments may indeed prove it correct in law. But as will be seen the view that "anytime between (dates)" does not include the first date, while reasonable, is also contestable.

"BETWEEN"

[16] Neither Crown nor Defense were able to find any cases which dealt specifically the meaning to be attributed to "between (dates)" in a search warrant.

[17] A number of cases cited by the Defense support the view that "between (dates)" in a charging document does not include the first or last of these. These include R. v. Brown (1961) 132 C.C.C. 104 (NBSCAD), R. v. Emory (1916) 33 D.L.R. 556 (Alta SCAD), and R. v. Hancock(No.6) [1975] B.C.J. No. 985 (PC).

[18] In R. v. Graham (1994) 151 N.B.R. (2d) 81 a person was charged with an assault "between September 16 and September 17". The court declared the Information void, stating at para 32a that ". . . no such time exists either at law or in fact . . . the interval between the two days mentioned does not exist at all . . "

[19] I must say that in my experience criminal charges are often amended by combining a number of counts arising on different days into one charge "between" the first and last of those. If the above statement of law is correct courts should be employing the day before the first incident and the day following the last when making such amendments.

[20] With respect to the argument based on the law about "between (dates)" in charging documents I note, in addition to the rather sparse and dated nature of the case law, that a delict is a defined, known, past event, whereas a search warrant operates prospectively.

[21] Responding to this argument Crown points out that in many of the above cases the charging document expressly used the word “days”, and that in none was the phrase “at any time” employed.

[22] The Crown has a different view of time. It argues that the phrase “anytime between (dates)” in a warrant should not be read as though the relevant unit of time is the day, with each day being indivisible. Instead it suggests that hours, minutes and even seconds are the relevant time units, with each day being a continuous period of time extending throughout each. Under this interpretation February 4th would include all the seconds, minutes and hours of February 4th. Crucial to this interpretation is the use of the modifier “anytime”. If police had wanted the warrant to be valid only on February 5, 6 and 7 it would have been prepared to read “on any *day* between February 4th and February 8th”. Crown contends that by using the word “time” instead of “day” the phrase captures all the seconds, minutes and hours on all mentioned dates.

[23] In this same vein, Crown cites R. v. Perry 41 C.C.C.(2nd) 182 (BCCA) which deals with the meaning of the phrase “with an interval of at least fifteen minutes between the times when the samples were taken.” In that case the court at para 27 says “I do not think 3:00 a.m. describes the minute following 3:00 o’clock, the minute preceding 3:00 o’clock or any other minute. It is a precise time of no duration.” By this reading, the 60 seconds following 3:00 a.m. are included in a calculation of the number of minutes “between the times when the samples were taken.”

[24] In reply Defense says that s.258 is an evidentiary shortcut, not a Criminal Code provision which potentially implicates a person’s Charter rights, and that the analytical process in s.258 unfolds over a matter of minutes, whereas the process of issuing and executing a warrant involves a longer time frame and requires a different interpretation.

[25] Crown also argues that the purpose of s.11 of the CDSA (and of search warrant provisions generally) supports the view that this search was authorized on the very day it was issued. The more recent the facts on which a warrant is sought, the more likely those facts will still pertain when the warrant is executed; thus, an issuing judicial official will mean to authorize a search immediately. It is worth noting that in drug investigations the grounds given by police in the Information to Obtain can become stale very quickly. Delay in execution may well result in police coming up dry.

[26] Defense contends that its position is supported by the Interpretation Act. Sections 26 to 30 of this statute speak to the computation of time. A search warrant is not an enactment, and so this statute would not necessarily be determinative of the issue. Neither does the Act give a clear indication how to read the phrase “between (dates)” Modifiers and prepositions such as “before”, “on”, “after”, “from”, and “clear days” are used in these sections but the word “between” nowhere appears.

[27] I searched out the Interpretation Act on the CanLII site. I arrived at the following URL : http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-21/latest/rsc-1985-c-i-21.html The current statute was prefaced with links to prior versions of the Act. Such were described as follows:

Access version in force:

4. since Apr 1, 2005 (current)

3. between Jul 2, 2003 and Mar 31, 2005 (past)

2. between Apr 1, 2003 and Jul 1, 2003 (past)

1. between Jun 1, 2001 and Mar 31, 2003 (past)

[28] If the Defense logic from the Interpretation Act is correct, it seems to have eluded the editors of the website. On the Defense's reading of such language, the above text means that there was no version in force on March 31, 2005, July 2, 2003, July 1, 2003 *et seq.*

CONTEXTUAL FACTORS

[29] S.11(1) of the Controlled Drugs and Substances Act states that where there are reasonable grounds to believe that a controlled drug or precursor/offence-related property/thing that will afford evidence/etc. "*is* in a place" a justice may issue a warrant "authorizing a peace officer, at any time, to search the place."

[30] A fundamental precondition for the issuance of the warrant is the presence, then and there, of the drug, etc. The sought-after material must be present in the place to be searched (according to reasonable belief) at the time of issuance, i.e. at the very time the Information to Obtain is presented to the justice. A warrant cannot be issued prospectively, on the expectation that the material will be there at some future date or time. In my view this lends support for the Crown's position that by authorizing a search "anytime between (dates)" the document is meant to include the date of issuance.

[31] Unquestionably police may choose to defer execution to a subsequent date for operational or safety reasons which may not always be apparent at the time of issuance. But the longer police wait to execute, the more stale the information used to generate it becomes and the less compelling the grounds. Furthermore, it is difficult to conceive of a reason why an issuing justice would *preclude* execution until a future date.

[32] The phrase “at any time” distinguishes a CDSA warrant from a conventional s.487 Criminal Code search warrant. The time for execution of such warrants is spelled out in s.488 where it says that the warrant “shall be executed by day” unless grounds exist to justify execution at night. As such, the phrase “at any time” could be interpreted to refer only the time *within* a given date, giving authority to execute by night and day within any given date, but not to qualify the meaning of the phrase “between (dates)”. I recognize this as giving support to the Defense argument.

[33] Defense says that the ordinary grammatical meaning of “between” does not refer to the limiting elements themselves. Indeed the Crown itself points out that the Canadian Oxford Dictionary (1998) gives its first definition of “between” as follows: “. . . at or to a point in the area or interval bounded by two or more other points in space, time, etc.”

[34] In common usage the word “between” may be understood in different ways. The Online Cambridge Dictionary of American English indicates that it can be a preposition connecting two things; hence “the money was divided equally between her three children”, or “you’ll have to choose between dinner and a movie”, or “trade between the two countries has increased sharply”.

[35] A person wishing to catch a train which runs “between Halifax and Montreal” would not expect to catch it at the outskirts of the city.

[36] Even when used in respect to dates or times, “between” is often understood to include the first and last of the delimiting terms. If court starts at 9:30 and ends at noon, I would be surprised to hear it described as running “between 9:29 and 12:01”. If a manager requested the sales data of a company “between January 1st and March 31st” she would likely be chagrined if the numbers did not include sales on both of these dates. Needless to say, terms other than “between” could be used to define a time interval more precisely, but I think it is safe to say that “between” is frequently used this way in common parlance.

CONCLUSION ON S.8

[37] Given the contextual factors within the CDSA which authorized the issuance of the subject warrant, given the many senses which attach to the word “between” in common speech and in the absence of any clear legislative or case authority on the specific point, I interpret the phrase “any time between February 4, 2011 and February 8th, 2011” to authorize a search of the subject premises from the time of issuance on February 4th through to midnight on February 8th.

SECTION 24(2)

[38] Had I agreed with the Defense submission on the s.8 issue I would have granted the remedy of excluding the evidence pursuant to s.24 of the Charter. If I am adjudged to be in error in my foregoing interpretation of the phrase “anytime between (dates)”, and the resulting conclusion that there was no breach of the accused’s s.8 Charter right, the following comments may (or may not) have relevance.

[39] A private dwelling is a place where one has the highest expectation of privacy. The present case follows on a number of others involving the same police force where warrants were considered to have been executed outside the stipulated time limit, i.e. on the first of the “between” dates. In Routledge the evidence was salvaged only by a successful s.24 argument. While police received no clear ruling from a court on the issue, the prosecuting attorney clearly took the position that such drafting was leading to Charter violations. There is no indication that police took steps to change either how they worded the warrants or when they executed them.

[40] In R. v. Buhay [2003] 1 S.C.R. 631 the court stated that an officer’s subjective belief that an accused’s s.8 rights were not affected did not make the violation less serious unless that belief was reasonable. In the facts of this case it is difficult to see how police could claim good faith given the course that recent related cases had taken.

[41] In R. v. Morelli 2010 SCC 8 the court states at para 102 : “. . . there was no deliberate misconduct on the part of the police officer who swore the Information. The repute of the administration of justice would nonetheless be significantly eroded, particularly in the long term, if such unacceptable police conduct were permitted to form the basis for so intrusive an invasion of privacy as the search of our homes . . . “

[42] If the search was not authorized on February 4th, the position of the local Crown in the previous cases noted above being vindicated, we would have here a pattern of Charter-infringing conduct. This would weigh heavily in the Defense’s favour in considering the first of the Grant factors. The impact on the Charter-protected interests of the accused is found in the fact that it was a secured, private dwelling. R. v. Silveira (1995) 97 C.C.C. (3d) 450 is yet another case which speaks to the importance of privacy in the home. While drug offences are of great concern locally and nationally, and the drug found here is a so-called “hard” drug, and while society thus has a strong interest in seeing such cases adjudicated on the merits, the court has to weigh the impact on society of an acquittal against the impact on society of a failure to observe Charter standards.

[43] Applying a s.24 “Grant” analysis to the facts here, I would, in the event of a s.8 breach, exclude the evidence from the trial.

DICTA

[44] Constable Campbell testified that the drug section of the CBRPS now drafts its warrants to read simply “at any time”. My own experience in considering CDSA warrants recently bears this out. It seems “between” has become *dicta non grata.* In one sense the current practice accords with the statute, but in another it appears to equip police with something approaching a writ of assistance. Constable Campbell went on to say that they had a policy to execute CDSA warrants within a defined number of days. So long as this is followed there may be no concern, but if it is wiser to limit the time period on the face of the warrant, perhaps they could be drafted to read “at any time prior to (date)”. This would authorize execution from the time (second, minute, hour) of issuance but not include any part of the specified date. The warrant would expire at midnight of the day before. It would ensure the reasonable currency of grounds and avoid any ambiguity.

Dated at Sydney, N.S. this 23 day of February, 2012

Judge A. Peter Ross