IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Simms, 2013 NSPC 44

Date: 02042013
Docket: 2417181
Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

James Mark Simms

Defendant

DECISION

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: March 26, 2013 and April 2, 2013

Charge: Section 5(2) *Controlled Drugs and Substances Act*

Counsel: David Iannetti, for the Crown
J. Daniel MacDonald, for the Defence

Introduction

[1.] Mr. Simms applied in a *voir dire* to determine the validity of a search warrant issued by Provincial Court Judge B. Williston on February 3, 2012 to search the residence of the accused. The search warrant was issued pursuant to Section 11 of the *Controlled Drugs and Substances Act*.

[2.] I have reviewed the following cases: *R. v. Breton*, [1994] O.J. No. 2097; *R. v. Yorke*, [1992] N.S.J. No. 184; *R. v. Sanchez*, [1994] O.J. No. 2260; *R. v. Debot*, [1989] 2 S.C.R. 1140; *R. v. Berger*, [1989] S.J. No. 199; *R. v. Turcotte*, [1987] S.J. NO. 734; *R. v. Caissey*, [2008] 3 S.C.R. 451; *R. v. Caissey*, [2007] A.B.C.A. 380; *R. v. Campbell*, 2011 S.C.C. 32; *R. v. Collins* (1989), 48 C.C.C. (3d) 343 (Ont. C.A.); *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Debot*, [1989] 2 SCR 114; *R. v. Dionisi*, 2012 ABCA 20; *R. v. Darling*, 2006 NSCA 124; *R. v. Garofoli*, [[1990] S.C.J. No. 115; *R. v. Goodine*, 2006 NBCA 109; *R. v. Grant*, 2009 SCC 32; *R. v. Harrison*, 2009 SCC 34; *R. v. Morelli*, 2010 SCC 8; *R. v. Pitre*, 2011 NBCA 106; *R. v. Rocha*, 2012 ONCA 707; *R. v. Russell*, 2010 NSSC 232; *R. v. Sanchez and Sanchez*, 1994 CanLII 5271 (ONSC); *R. v. F. (K.C.)* 2004 NSPC 70; *R. v. Anthony*, [1998] NSJ No. 529; and *R. v. Cameron*, [2000] NSJ No. 148.

Issue

[3.] Mr. Simms argues that there was insufficient information in the "Information to Obtain" that would lead to "reasonable and probable grounds" and the warrant should not have been granted. The defendant takes issue with the "confidential human source" and police corroboration or lack thereof.

The Law

[4.] In reviewing this matter the court must keep in mind that it is not appropriate to substitute my view for that of the authorizing Judge. In *R. v. Anthony*, [1998] NSJ No. 529, Tufts, J. sets out the law to follow:

> In *R. v. Garofoli*, [1990] SCJ No. 115 at p. 188, Sopinka, J. stated:
>
> > If based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere….
>
> Later at p. 189, Sopinka, J. states:
>
> > The reviewing judge should not set aside this decision unless he or she is satisfied on the whole of the material presented that there was no basis for the authorization.

When assessing information obtained from informants/tipsters the starting point is *R. v. Debot*, [1989] 2 S.C.R. 1140 and *R. v. Garofoli*, *supra*. In *R. v. Garofoli*, at p. 190, Sopinka, J. refers to the decision of Wilson J. in *R. v.* Debot and states:

> "In assessing the weight to be given to the evidence relied on by the police officer, Wilson J., applied the totality of the circumstances standard which had been…."

In *R. v. Debot:*

> "…there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two."

Further, at p. 190, Sopinka, J. refers to Lamer, J.'s (Graffe) reference to the Ont.

C.A. decision in *R. v. Debot, supra*:

> "I am of the view that such a mere conclusory statement made by an informer to police officer would not constitute reasonable grounds for conducting a warrantless search…highly relevant…are whether the informer's tip contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and wheher there are any incidia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his/her story by police surveillance."

Lastly, Sopinka, J., concludes at page 191:

> "…I conclude that the following propositions can be regarded as having been accepted by this court in *Debot* and *Greffe*:
>
> (i.) Hearing 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.

(d.) The results of the search cannot *ex post facto* provide evidence of reliability of the information."

IV. Review of the Information to Obtain (ITO)

[5.] Paragraph 4 of the "ITO" sets out the "Source Qualification" –

(a.) Reliable source

(b.) Known for over (2) years

(c.) Source has received financial payment

(d.) Source has "personal knowledge" of the information based upon conversations with/observations of the defendant.

(e.) The information has been corroborated by investigation, surveillance, drug investigative techniques, other confidential human sources.

(f.) Information by Source A not yet proven pertaining to search warrant.

Paragraphs 7-12 of the "ITO" sets out information from "Confidential Informant":

(a.) January 12, 2012 the defendant is selling cocaine in/around Glace Bay. He/she gives specific amounts and specific prices.

(b.) January 16, 2012 the defendant has cash (several thousand) to buy cocaine from (Shawn MacNeil – who police know and confirm sells drugs and has been convicted). The source knows the seller's nickname. He/she gives a specific place/thing on his person in which he carries cocaine (specific amounts).

(c.) January 29, 2012 the source gives a specific place where the defendant keeps the cocaine on his person, and a specific room in his house.

(d.) February 1, 2012 the course gives a specific amount of drug purchased from a known seller. He/she also knew the defendant would return to his residence to cut, weigh, and package to sell, (which is consistent with the defendant's behavior on January 12, 2012 – specific amounts/prices).

(e.) February 3, 2012 the source tells the police officer the defendant is at his residence cutting, weighing and packaging to sell that night (consistent with January 12, 2012 that the defendant is selling cocaine in/around Glace Bay).

(f.) September 2011 – a concerned citizen informed Constable Shaw that the defendant was actively selling cocaine and prescription pills around Glace Bay.

Paragraph 13 explains the surveillance by police:

(a.) The neighbourhood does not allow for "extensive" surveillance (but some was carried out).

Paragraphs 14-19 lists the "Points of Corroboration":

(a.) February 2, 2012 – Constable Shaw did surveillance of the defendant's residence. (This is after receiving specific information on January 12, 16, 29 and February 1.) He determined no artificial lighting was on in residence and the defendant's father's truck not in the driveway.

(b.) Later on the same date February 2 the source tells the police officer that the defendant is returning home to 27 Wadman Street to cut, weigh and bag cocaine to sell in specific amounts.

(c.) The police officer conducts brief surveillance on the defendant's residence (basement) lights on, and the truck is in the driveway.

(d.) Police confirm through CPIC/JEIN, S. MacNeil had convictions for possession and trafficking.

(e.) February 3, 2012 – digital photos confirm residence as described by source A.

Analysis

[6.] The burden of proof lies with the applicant to satisfy the court on a balance of probabilities that there has been a *Charter* infringement such that a remedy under Section 24(2) of the *Charter* may be granted (*R. v. Collins*, [1987] 1 S.C.R. (265).

[7.] The applicant must satisfy the court on a balance of probabilities "having regard to all the circumstances" that the admission of the evidence would bring the administration of justice into disrepute.

[8.] A presumption of validity exists with respect to a search warrant and the sworn information supporting the warrant. The burden lies on the accused to displace this presumption. (*R. v. Collins, supra)*

[9.] A search warrant for a residence authorized under Section 11 of the *Controlled Drugs and Substances Act* must conform to Section 8 of the *Charter*. The law is that for a search to be reasonable under Section 8 of the *Charter* it must be:

(1.) Authorized by law;

(2.) The law must be reasonable; and

(3.) The manner of the search must be reasonable (*R. v. Collins, supra*).

[10.] As Judge Tufts stated in *R. v. Anthony, supra* at para. 10:

> The salient concerns to keep in mind when assessing evidence from informers are:
>
> (a.) Is the evidence compelling. Is there sufficient detail and is the informer's source of knowledge described. How did the informer come to have this information?
>
> (b.) Is the source credible? Are there past experiences with the source or other confirmations which will strengthen its reliability?
>
> (c.) Was information received corroborated by police investigation?

[11.] Source A came by the information because of his direct conversations or observations of the defendant. He/she gave specific dates, and specific information about amounts, prices and whereabouts. The police officer knew source A for two years and although information provided by source A had not been proven pertaining to search warrants, the information was corroborated and he/she was considered a reliable source (had received payment from police in the past for other information).

[12.] Source A provided information regarding a "drug buy" from a person police knew and later confirmed was convicted for possession and trafficking in drugs.

[13.] Source A had personally witnessed where the defendant kept his "baggies and cocaine" and observed the defendant with 2/3 ounces of cocaine after the purchase from "Wooler" (Shawn MacNeil), a known and convicted drug dealer.

[14.] On the date of warrant (February 3, 2012) the police officer received "first hand knowledge" that the defendant was at his home "cutting, weighing and packaging" to sell.

[15.] Although the information came from a single source, it was based on "personal knowledge and observations." It was detailed and specific. The police were told he was returning to his residence. Surveillance corroborated that information.

[16.] Weaknesses, if any, in one area require varying degrees of strength in other areas for the information received from the source to be properly considered as supporting reasonable grounds to justify the authorization for a search warrant.

[17.] Mr. MacDonald argues that there was no substantial investigation or corroboration of the information which is critical. That the police could have done more, needed to do more.

> "None of the so-called corroboration actually corroborates anything of value in terms of the information received from Source A" (p. 10 – defendant's brief)

[18.] However, the court's test is not just of one factor but the "totality of the circumstances." Based on all of the above, I find the information does provide the necessary reasonable grounds for the Provincial Court Judge to have issued the search warrant.

Conclusion

[19.] Therefore, on a balance of probabilities, the applicant has failed to meet the burden that his Section 8 *Charter* rights have been violated. Application dismissed.

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The Honourable Judge Jean M. Whalen, J.P.C.