SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Brimicombe*, 2017 NSSC 94

Date: 20170426
Docket: Hfx No. 456593
Registry: Halifax

Between:

Her Majesty the Queen

v.

Paul Brimicombe and Blake Brimicombe

Decision on *Garofoli* Application

Judge:	The Honourable Justice Felix A. Cacchione
Heard:	March 22, 2017, in Halifax, Nova Scotia
Oral Decision:	April 26, 2017
Written Decision:	April 26, 2017
Counsel:	Thomas Singleton and Leora Lawson, for Applicant Paul Brimicombe Luke Craggs, for Applicant Blake Brimicombe William Mathers, for the Respondent Crown

By the Court:

[1] The accused, father and son, are charged with weapons offences under ss. 86(1), 86(2), 91(1), 91(2), and 95 of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46.

[2] This is an application brought by the accused, Paul and Blake Brimicombe, to quash a search warrant and exclude evidence obtained as a result of the search of their residence.

[3] On May 7, 2015, Cst. David Botham obtained, from Justice of the Peace Allison Rose, a search warrant under s. 487 of the *Criminal Code*. A search of the Applicants' residence was carried out on May 8, 2015.

[4] As a result of the search, the police located six rifles and an overcapacity cartridge magazine in a metal gun cabinet on the lower level of the residence. One of the rifles, an M1 carbine, is a restricted firearm. The other rifles are non-restricted firearms. The overcapacity cartridge magazine is a prohibited device. Ammunition for these firearms was also located.

[5] Mr. Paul Brimicombe gave a statement identifying these items as belonging to him.

[6] The police also located a 22 caliber rifle and 41 rounds of ammunition for that rifle, a non-restricted firearm, in a bedroom of the residence.

[7] Mr. Blake Brimicombe gave a statement identifying these items as belonging to him.

[8] In another bedroom, the police located a Walther pistol and a Browning pistol, together with a shotgun, four rifles, a musket, and ammunition for all of these firearms. Mr. Mitchell Brimicombe gave a statement identifying these items as belonging to him.

[9] The Court was advised, at the hearing of this application, that Mitchell Brimicombe had pled guilty and already been sentenced for the handgun offences.

[10] Neither Blake, Mitchell, nor Paul Brimicombe possessed valid firearms licenses for any of the firearms found during the search.

[11] The applicants concede, in an Agreed Statement of Facts filed with the Court, that the search was carried out in a reasonable manner. The applicants, however, attack the facial validity of the search warrant.

[12] The information to obtain a search warrant (ITO), as initially presented to the Court, was heavily redacted and cited a confidential human source. There was limited independent corroboration of the information provided by the source.

[13] The respondent Crown, at the hearing of this matter on March 22, 2017, filed an Agreed Statement of Facts and indicated that, after speaking with the affiant, it was prepared to disclose paragraphs 8.5 and 8.6 of the ITO. It also conceded that both applicants had standing to bring this application.

[14] The affiant's basis for believing that a criminal offence had been committed and that evidence of that offence would be found at the location to be searched, as set out in the originally redacted ITO, was information provided by a confidential informant identified as Source A. The information provided to the affiant, on some undisclosed date in April 2015, alleged that Blake Brimicombe possessed a gun and that he did not possess the required firearms license. Source A also identified this person as living in the Fall River area.

[15] On some other unspecified date in April 2015, Source A advised the affiant that Blake Brimicombe possessed a 9mm handgun, together with numerous rifles in his house. The source identified the house as being set back from the road, on the right, past the railroad tracks located near Frenchman's Road, past Fall River. Source A also told the affiant that two vehicles, a Chrysler PT Cruiser and a Ford Ranger, were usually in the yard. Source A indicated, as well, that Blake lived there with his parents and two brothers, Mitchell and Clay. The source also informed the affiant that neither Blake nor Mitchell had a valid driver's license.

[16] As a result of checking police databases, the affiant confirmed the following: that Blake Brimicombe's driver's license was suspended; that he did not have any criminal convictions or charges pending; and that he resided at 6 Siding Lane, Oakfield, Nova Scotia with his father and mother, Paul and Donna, and his brothers Clay and Mitchell. He also confirmed that Mitchell Brimicombe's driver's license was suspended and that he had a criminal conviction for dangerous driving.

[17] The affiant and another officer, on some undisclosed date in April 2015, drove to Frenchman's Road and observed that just past the railroad tracks, on the right, was a laneway marked as Siding Road. They saw a Ford Ranger pickup truck and a

Chrysler PT Cruiser backed into the yard, but neither could see the license plates of these vehicles.

[18] The affiant, through database searches, determined that the Ford Ranger was registered to Paul Brimicombe and the Chrysler PT Cruiser was registered to Donna Brimicombe.

[19] On some undisclosed date in May 2015, Source A advised the affiant of the following: that Blake and Mitchell had in their possession a 9mm handgun and a 32 caliber handgun; that ammunition for the guns was in the house; and that several rifles were also in the home.

[20] The originally vetted ITO also advised that all handguns are restricted weapons and can only be possessed with a license to possess a restricted weapon and that none of the residents in the home possessed licenses for non-restricted or restricted firearms.

[21] This ITO indicated that Source A had provided information to Cst. Botham on no less than eight occasions over an unspecified period, and that some of Source A's information had been corroborated by other sources and used to further police investigations. However, the number of prior occasions that the information had been corroborated was not stated in the ITO. The ITO did not indicate whether the information had led to criminal charges and, if so, the outcome of those charges, only that the information provided was in relation to illegal drug activity, possession of illegal firearms, thefts, break and enters, possession of stolen goods, and *Motor Vehicle Act* offences.

[22] The ITO referred to the confidential source having a criminal record for offences other than perjury; however, the extent and particulars of the criminal record were not identified. The ITO also noted that the confidential source was motivated to provide information to the police, but the nature of that motivation, whether financial or otherwise, was not stated, nor was the basis for the information provided by the confidential source given.

[23] The newly redacted ITO, as presented to the Court at the commencement of the hearing, disclosed the previously vetted paragraphs 8.5 and 8.6. Paragraph 8.5 states that the information provided by Source A was based upon direct observations of and conversations with the persons subject of the information, unless otherwise stated. Paragraph 8.6 states that Source A was financially motivated to provide

information to the police and had in the past been paid for some of the information provided to the RCMP.

[24] The affiant advised the justice of the peace that he believed the information provided by Source A was true.

THE LAW

[25] There is a presumption that the search warrant is valid and correct. The onus rests with the applicants to establish, on a balance of probabilities, that there was no basis for granting of the authorization to search.

[26] Section 8 of the *Canadian Charter of Rights and Freedoms* guarantees that "[e]veryone has the right to be secure against unreasonable search and seizure". For a search to be consistent with s. 8 of the *Charter*, the police must provide "reasonable and probable grounds, established upon Oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search": *R. v. Morelli*, 2010 SCC 8, at para. 39 quoting *Hunter v. Southham Inc.*, [1984] 2 S.C.R. 145 at p. 168.

[27] Before a justice may issue a search warrant, it is necessary that there be a sworn information which contains such a statement of facts as satisfies the justice that there are reasonable grounds for believing any of the things set out in s. 487 of the *Criminal Code*. It is not sufficient that the justice should be satisfied, he or she must be satisfied on reasonable grounds; that is, the grounds of belief set out in the information must be such as would satisfy a reasonable man. If there are no such grounds shown, the justice cannot be taken to have been satisfied on reasonable grounds: *Re The Bell Telephone Company of Canada* (1947), 89 C.C.C. 196 at 198.

[28] The standard of reasonable and probable grounds for a search warrant to be consistent with s. 8 of the *Charter* was first set out in *Hunter v. Southam*, [1984] 2 S.C.R. 145, where the Court noted that the state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly based probability replaces suspicion. This has also been referred to as reasonable probability or reasonable belief: *R. v. Debot*, [1989] 2 S.C.R. 1140.

[29] The standard to be used when reviewing whether an ITO contains reasonable and probable grounds was stated by the Court in *R. v. Morelli*, [2010] 1 S.C.R. 253. Justice Fish, speaking for the majority, stated as follows at paras. 40 and 41:

> [40] In reviewing the sufficiency of a warrant application, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.
>
> [41] The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58). Furthermore, the reviewing court may have reference to "amplification" evidence — that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO — so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.

[30] In the present case, no amplification evidence was presented.

[31] The framework for a review by trial courts of the sufficiency of evidence placed before the issuing judge was set out in *R. v. Allain* (1999), 205 N.B.R. (2d) 201 at para. 11:

> Moreover, the reviewing court must not assess the substantive quality of the Information by confining itself to the evidence which is explicitly set out in it. The court must bear in mind the undoubted power of the issuing judge to draw reasonable inferences from such explicitly stated evidence. ... It is settled law that the issuing judge is fully empowered to make all reasonable deductions which flow logically from the evidence stated in the Information, and this power must be factored into the review process.

The Court also stated, at para. 14:

> …that a warrant should only be issued where there is a credibly based probability that the items to be searched for are in the place specified in it. Where the Information does not expressly or by implication disclose the required reasonable grounds, the resulting warrant cannot be said to have been properly issued, and any search conducted under its authority can be challenged on the basis that it was not authorized by law.

[32] Furthermore, the assessment by the reviewing court must take into account the totality of the information, interpreting its constituent parts in context. It is inappropriate to subject the information to an analysis of the individual parts viewed in isolation from their context.

[33] The question to be asked by a reviewing judge is simply whether there was at least some evidence that might reasonably be believed, on the basis of which the authorization could have been issued. It is not necessary that the "criminal aspect" of the information, in the present case the possession of handguns, be corroborated. In *R. v. Caissey*, 2007 ABCA 380, Justice MacFayden stated at para. 23:

> The issue on review is whether there was some evidence that might reasonably be believed to support the issuance of the warrant, not whether there is some guarantee that the informant is telling the truth when he makes the allegation of criminal activity. Information of a crime itself being committed does not have to be confirmed: *Koppang* at para. 8. I agree with the comments of Doherty J.A. in *R. v. Lewis* (1998), 1998 CanLII 7116 (ON CA), 38 O.R. (3d) 540, 107 O.A.C. 46 at para. 22:
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> > In concluding that the totality of the circumstances did not provide reasonable grounds for an arrest, I do not suggest that there must be confirmation of the very criminality of the information given by the tipster. The totality of the circumstances approach is inconsistent with elevating one circumstance to an essential prerequisite to the existence of reasonable grounds.

[34] The determination of whether the evidence provided to the issuing justice of the peace gives rise to a credibly based probability does not involve breaking down each sentence in the ITO into its component parts. The reviewing court must identify credible facts that make the decision to authorize a search reasonable in light of all the circumstances.

[35] It is not necessary that the ITO establish a *prima facie* case against the named person. Suspicion or the mere possibility that relevant evidence of a crime may be found at a place is not sufficient. Reasonable grounds can exist only where suspicion is replaced by credibly based probability: *R. v. Wallace*, [2016] N.S.J. No. 426 at para. 29.

[36] If the ITO is based on information from a police informer, the reliability of the information provided by the informer must be apparent. Key elements of what

is required to establish "credibly based probability" was set out by Justice Cromwell, as he then was, in *R. v. Morris,* 1998 NSCA 229 at para. 30 as follows:

> (i) The Information to obtain the warrant must set out sworn evidence sufficient to establish reasonable grounds for believing that an offence has been committed, that the things to be searched for will afford evidence and that the things in question will be found at a specified place: (*R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. Ct. Gen. Div.) at 365)
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> (ii) The Information to obtain as a whole must be considered and peace officers, who generally will prepare these documents without legal assistance, should not be held to the "specificity and legal precision expected of pleadings at the trial stage." (*Sanchez, supra*, at 364)
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> (iii) The affiant's reasonable belief does not have to be based on personal knowledge, but the Information to obtain must, in the totality of circumstances, disclose a substantial basis for the existence of the affiant's belief: *R. v. Yorke* (1992), 115 N.S.R. (2d) 426 (C.A.); aff'd [1993] 3 S.C.R. 647.
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> (iv) Where the affiant relies on information obtained from a police informer, the reliability of the information must be apparent and is to be assessed in light of the totality of the circumstances. The relevant principles were stated by Sopinka, J. in *R. v. Garofoli***,** [1990] 2 S.C.R. 1421 at pp. 1456-1457:
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> > (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.

[37] Mere conclusory statements by an informer cannot satisfy reasonable grounds. In *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.) at para. 17, Justice Martin stated:

> … On an application for a search warrant, the informant must set out in the information the grounds for his or her belief in order that the justice may satisfy himself or herself that there are reasonable grounds for believing what is alleged: see *R. v. Noble*, *supra*, at p. 161. Consequently, a mere statement by the informant that he or she was told by a reliable informer that a certain person is carrying on a criminal activity or that drugs would be found at a certain place would be an insufficient basis for the granting of the warrant. The under-lying circumstances disclosed by the informer for his or her conclusion must be set out, thus enabling the justice to satisfy himself or herself that there are reasonable grounds for believing what is alleged.

[38] The distinction between a mere conclusory statement by an informer and where reliability can be reached by a consideration of such factors as the degree of detail, source of knowledge, prior reliability, or police confirmation of some part of the information was set out by Justice Martin in *R. v. Debot*, *supra*, at pp. 218-219 as follows:

> Highly relevant to whether information supplied by an informer constitutes reasonable grounds to justify a warrantless search or an arrest without warrant 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 whether there are any *indicia* of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance. I do not intend to imply that each of these relevant criteria must be present in every case, provided that the totality of the circumstances meets the standard of the necessary reasonable grounds for relief.

[39] Where an informer's tip is nothing more than a bare conclusory statement unsupported by details, demonstrated reliability or confirmation of part of the information by police surveillance or other police work, it cannot be sufficient evidence to establish reasonable and probable grounds.

[40] The position of both applicants is that the ITO was deficient and resulted in the issuance of an invalid search warrant which led to the illegal search of the property. On this basis, it is submitted that the evidence obtained should be excluded in accordance with s. 24(2) of the *Charter*.

[41] It is argued that Cst. Botham's entire grounds for belief, that a criminal offence has been committed and that evidence of such an offence would be found at the location to be searched, was based on a single source. It is submitted that little is known about Source A other than that he or she had a criminal record but no convictions for perjury, and that he or she had provided information to the police on no less than eight occasions. Some of the information that was provided by Source A had been corroborated by other sources; however, the number of prior occasions in which that information had been corroborated is not specified. The ITO also indicated that Source A's information had been corroborated by other police investigation techniques; however, the depth of this corroboration is not clear in that there is no indication whether the information provided was insider information or information that would be available to the general public.

[42] The ITO in the present case was based on information provided by a single informant. The applicants argue that the ITO is not only weak in detail but also in reliability and corroboration. It is submitted that there are only bald statements with no detail and that the corroboration provided by the affiant is minimal, in that it only consisted of the affiant and another officer confirming by a drive-by, the location of the residence, and the presence of the two motor vehicles referred to by the informer. It is argued that this is not sufficient for a finding of the reliability of the informer.

[43] The respondent acknowledged, in its pre-hearing brief and prior to the disclosure of the newly vetted ITO, that little information is provided about Source A and that there is no information as to whether past information provided by Source A resulted in arrests or successful prosecutions. It argued, however, that the information provided by Source A in the three conversations he or she had with the affiant increased in detail. During the first conversation, the only information provided was that Blake Brimicombe lived in the Fall River area and possessed a gun for which he did not have a license. In the second conversation, detail was

provided with respect to the caliber of one handgun which Blake Brimicombe possessed, a 9mm pistol, together with his possession of multiple rifles, the location and description of the residence in question, and the presence of specific vehicles parked in front of that residence. The third conversation provided further detail with respect to the caliber of a second handgun, a 32 caliber handgun, and that both Blake and his brother Mitchell possessed these handguns.

[44] The respondent submits that with the inclusion of the newly disclosed paragraphs 8.5 and 8.6 the newly redacted ITO rises above suspicion and establishes credibly based probability.

[45] The respondent submits that the police were able to confirm the presence of a house matching the description and location provided together with the presence of two motor vehicles, as described by the informer, and that no one in the Brimicombe family was the holder of a license to possess the firearms.

[46] The *Garofoli* decision at para. 98 outlines the procedure to be followed in cases where portions of the ITO have been vetted to comply with informer privilege. The six step procedure is as follows:

1. Upon opening of the packet, if the Crown objects to disclosure of any of the material, an application should be made by the Crown suggesting the nature of the matters to be edited and the bases therefore. Only Crown counsel will have the affidavit at this point.

2. The trial judge should then edit the affidavit as proposed by Crown counsel and furnish a copy as edited to counsel for the accused. Submissions should then be entertained from counsel for the accused. If the trial judge is of the view that counsel for the accused will not be able to appreciate the nature of the deletions from the submissions of Crown counsel and the edited affidavit, a form of judicial summary as to the general nature of the deletions should be provided.

3. After hearing counsel for the accused and reply from the Crown, the trial judge should make a final determination as to editing, bearing in mind that editing is to be kept at a minimum and applying the factors listed above.

4. After the determination has been made in step three, the packet of materials should be provided to the accused.

5. If the Crown can support the authorization on the basis of the material as edited, the authorization is confirmed.

6. If, however, the editing renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying that, if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be prejudiced, it can withdraw tender of the wiretap evidence.

[47] The respondent's written position, filed before the disclosure of paragraphs 8.5 and 8.6 of the ITO, was that even with the original editing there was some evidence on which the authorizing judge could have issued the warrant. It submitted that even if the Court found that editing rendered the ITO insupportable, this did not mandate an immediate finding of a s. 8 breach. The respondent, under step six of the *Garofoli* procedure, could apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The respondent, in its written brief, advised that it would not proceed with an application pursuant to step six, regardless of whether the challenge is successful.

[48] The disclosure of previously vetted paragraphs 8.5 and 8.6 of the ITO can therefore be viewed as an application pursuant to step six of the *Garofoli* procedure.

[49] The accused were aware of the contents of the newly disclosed paragraphs 8.5 and 8.6 of the ITO: Refence to these paragraphs was made in argument.

[50] The contents of paragraphs 8.5 and 8.6 can therefore be considered in determining the sufficiency of the evidence presented to the issuing judge.

[51] A deponent is obliged to make full, fair, and frank disclosure of the material facts so that the issuing judge is able to make a judicial assessment of whether the facts rise to the standard required to meet the test for issuance of the warrant. If full disclosure of all relevant facts in the search warrant information are not disclosed, this is a factor that may be considered not only in quashing the warrant but also in the outcome of a s. 24(2) application.

[52] In the present case, the underlying circumstances disclosed by the informer for his or her conclusion was redacted to protect the identity of the informer. It was apparent, even from the ITO as originally redacted, that Source A had personal knowledge of the information he or she provided to Cst. Botham. The newly disclosed information in paragraph 8.5 of the ITO confirms this. Nowhere in the ITO is it indicated that the informer's source of knowledge was, other than based on direct observation of and conversations with the persons subject of the information.

[53] The information provided became more detailed at every encounter Source A had with Cst. Botham. It progressed from Blake Brimicombe having a gun in his possession without having a license for that gun and a general description of where Blake lived, to Blake having a 9mm handgun in his house and a more precise description of where the house was located, together with the usual presence of two motor vehicles in the yard of that house. Finally, it progressed to Blake and his brother Mitchell having both a 9mm handgun and a 32 caliber handgun, with ammunition for those guns in the house, and also rifles in the house.

[54] Source A's information about the location of the house, the presence of two vehicles being a Chrysler PT Cruiser and a Ford Ranger in the yard, the names of the other residents in the house, and that neither Blake nor Mitchell had a valid driver's license was confirmed by Cst. Botham's subsequent investigation through police databases and his personal observation of the two vehicles and their location as described by the informant.

[55] The ITO established a factual nexus between the items to be searched for and the location to be searched. The ITO was not based on mere conclusory statements but rather on the source's personal observations and conversations with the persons subject of the information.

[56] A review of the redacted ITO, together with the disclosure of un-redacted paragraphs 8.5 and 8.6, shows the presence of sworn evidence sufficient to establish reasonable grounds for believing that an offence had been committed, that the things

to be searched for would afford evidence, and that those things would be found in the specified location.

CONCLUSION

[57] The totality of the circumstances establishes that there was a substantial basis for the existence of the affiant's belief that an offense had been committed, that the things to be searched for would afford evidence, and that that evidence would be found at the location of the search.

[58] I am satisfied that the totality of the circumstances established reasonable grounds on which the authorizing justice could have issued a search warrant. Accordingly, the search warrant was properly issued and the evidence obtained as a result of the search is admissible.

[59] The application to quash the search warrant and to exclude evidence obtained as a result of the search is dismissed.

Cacchione, J.