PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Burgoyne*, 2018 NSPC 13

Date: 2018-05-10
Docket: 809795, 8097953
8097952, 8097954
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Wanda Jane Burgoyne

and

Andrew Donald Veinot

Judge:	The Honourable Judge Paul Scovil, JPC
Heard:	April 17, 2018, in Bridgewater, Nova Scotia
Decision	May 10, 2018
Charge:	Section 5(1) **CDSA** and 7(1) **CDSA**
Counsel:	Joshua Bryson, Crown Attorney Nicholaus Fitch, Defence Attorney Michael Power, Q.C., Defence Attorney

By the Court:

[1] The applicants, herein, seek to quash a search warrant granted on May 28, 2017, which allowed a search of the applicant's home. They argue that the Information to Obtain the Search Warrant was insufficient to justify the granting of a search warrant and the subsequent search, thereby, breached the applicant's rights against unreasonable search and seizure under Section 8 of the **Charter of Rights and Freedoms Act**. All accused face charges of trafficking in cannabis marijuana under Section 5(1) of the **Controlled Drugs and Substances Act** along with unlawfully producing cannabis marijuana under Section 7(1) of the **Controlled Drugs and Substances Act**.

The ITO:

[2] On the 28th day of March, 2017, an Information to Obtain a Search Warrant (ITO), was sworn by Constable Zianddin Hanidi and granted by Justice of the Peace, J. Langille. On the same date, the search warrant was executed on the premises of the accused.

[3] The ITO set out that on the 4th day of February, a 911 call was placed by Jessica Feener and Kirk Burgoyne advising that Burgoyne's 14 year old son, Seth

Burgoyne had been found in their basement smoking catnip. Seth told them that he smoked marijuana at his mother's house (Wanda Burgoyne) along with his 18 year old brother and his mother's boyfriend. This was passed onto police.

[4] On the same date, the police interviewed Seth Burgoyne regarding the allegations. The police recorded that statement. Seth stated that when he was at his mother's home he smoked marijuana several times a day with his brother, his mother and her boyfriend at their residences. The statement further provided that his mother, her boyfriend and his brother all had provided him with marijuana.

[5] Seth provided details of how they smoked marijuana, what they used to smoke it, how it smelled and its appearance. He advised there was marijuana growing under lights in both his mother and brother's bedroom closets. Further the plants were small.

[6] The police confirmed the civic location of the residence of the accused. The police also consulted a drug expert who stated likely harvest dates for the marijuana plants would be mid April of 2017.

[7] Additionally, the ITO set out that Wanda Burgoyne and Andrew Veinot were the subject of a search at the same residence in 2011, at which time police seized a quantity of cannabis marijuana, cocaine, scales, packaging and score sheets.

Issues:

[8] The accused persons argue that the information the police acted on was that of a child. Further, that a child of 14 would not know what marijuana looks like. They argue that the ITO's information lacked the request proximity in time to the search to grant warrant. The statement provided by Seth was given on February 4th 2017, yet the search was only conducted on March 28th, 2017. This space of two months was such a lengthy passage of time, there would be no reliable information that cannabis was in the house on the date the search warrant was granted. In other words the information was stale.

[9] The Crown argues that because the source was 14 years of age it does not mean that information from a child must be discarded. The 14 year old implicated both himself and his mother. The Crown points to the fact that the marijuana plants being grown would only mature in mid to late April.

Law:

[10] The starting point in relation to courts reviewing whether a search warrant ought to have been granted is the presumption the search warrant is valid and correct.

The onus is on the application to establish, on the balance of probabilities, that there was no basis for the granting of the authorization to search. (**See R. v. Brimicombe**, [2017] N.S.S.C. 94)

[11] In order to be within the legal parameter of an appropriate search consistent with s. 8 of the **Charter**, the issuing justice must be satisfied there are reasonable grounds to believe that a controlled substance is to be found at the place being searched. (See **R. v. Morelli**, [2010] S.C.C. 8)

[12] 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 credibility based probability or reasonable belief exists that the items searched for would be found.**(R. v. Debot**, [1989] 2 S.C.R. 1140.)

[13] 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 [page272] 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.

[14] In **R. v. Allain**, (1998), 205 N.B.R. (2d) 201, at para. 11, the Court set out the framework for the review by trial court of the sufficiency of evidence placed before an issuing justice.

> 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. This power has been recognized by our Court on several occasions. See R. v. MacDonald (F.D.) (1992), 128 N.B.R. (2d) 447 (C.A.), and Valley Equipment Ltd. v. R. (1998), 198 N.B.R. (2d) 211 (C.A.). It has also been acknowledged by the Ontario Court of Appeal in the oft-quoted case of R. v. Breton (1994), 93 C.C.C. (3d) 171 (Ont. C.A.). In that case, the Court had no hesitation in deciding that the issuing judge had the power to draw the inference from the stated evidence that a particular individual had committed an offence, and that a narcotic was present at a particular location. 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.

[15] 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.

[16] The process regarding a court review of the sufficiency of an ITO was examined further in **Brimicombe** (supra) at paragraph 32.

> **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.
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> **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:
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> > 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* [2004] A.J. No. 1300, 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:
> >
> > > 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.
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> **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.
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> **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)
>
> (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.
>
> (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:
>
> > (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, [1984] O.J. No. 3395 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.

Analysis:

[17] The applicants argue that the age of the source and his relationship to the accused render his evidence of a lower standard that is legally acceptable. In other words, the child has not provided reasonable grounds to believe the drugs were at his mother's home.

[18] I must disagree. Here the issuing Justice had evidence of the 14 year old son of the search target being given marijuana to smoke at the place in question. He described this happening regularly at the home. He gave cogent details of how the marijuana was smoked, how it smelled and how it looked. He described two separate growing operations on a small scale in the home. He was also able to describe the size of the plants growing. He provided that he was given cannabis to smoke by all three accused.

[19] Unlike most ITOs, this one did not contain unmoved sources but relied on an unpaid, fully cooperating, part-time member of the household that was to be searched. The fact Seth was trying to smoke catnip plays into his knowledge of getting high from plant based material. As well, Seth implicated not only close family members but himself as well.

[20] The probability that Seth's mother and her boyfriend were drug users was corroborated by the evidence of past successful seizures of cannabis in 2011, at the same residence.

[21] As to the staleness of the information, the issuing Justice had before them evidence that Seth had been provided marijuana not once, but on a regular on-going basis. Seth described a small grow-up in early stages being carried on in the home. Experts consulted indicated maturity of the plants and expected harvest dates would be after the execution of the search warrant. The evidence showed on-going cannabis use in the home from as far back as 2011. This evidence, again, shows credible fact based evidence that would give the issuing Justice reasonable grounds to believe that cannabis marijuana would be in the residence at the time of the search.

[22] For all the above, I dismiss the application.

Paul Scovil, JPC