NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Durling*, 2006 NSCA 124

Date: 20061117
Docket: CAC 263729
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Jennifer Cynthia Durling

Respondent

Judges:	MacDonald, C.J.N.S.; Cromwell and Fichaud, JJ.A.
Appeal Heard:	October 5, 2006, in Halifax, Nova Scotia
Held:	The appeal is allowed and a new trial is ordered, as per reasons for judgment of MacDonald, C.J.N.S.; Cromwell and Fichaud, JJ.A. concurring.
Counsel:	Monica G. McQueen and David R. Greener, for the appellant Christopher Manning, for the respondent

Reasons for judgment:

OVERVIEW

[1] The RCMP received a *Crime Stoppers* tip suggesting that the respondent, Ms. Jennifer Durling, was growing marijuana in a home she rented in Coldbrook, Kings County. Acting on this tip, Constable Gary R. Huett applied to Justice of the Peace Elizabeth Mullaly ("the JP") and received a warrant to search the home. In executing the warrant, the RCMP found evidence confirming the grow operation. Ms. Durling was charged with producing and possessing marijuana for the purpose of trafficking.

[2] At trial before Provincial Court Judge Alan T. Tufts ("the judge"), Ms. Durling challenged the validity of the search warrant, alleging that it was issued without sufficient information. The judge agreed and quashed the warrant. This rendered the search unlawful and thereby a presumptive breach of Ms. Durling's *Charter* rights. Consequently the judge excluded the evidence obtained in the search. This led to Ms. Durling's acquittal.

[3] The Crown has appealed to this court. It submits that the JP had ample evidence to justify the warrant and that the judge misapplied established legal principles in ordering it quashed. Alternatively, the Crown maintains that even had the warrant been properly quashed, the police conduct did not justify excluding the evidence obtained in the search.

[4] After carefully reviewing the record, I believe, respectfully, that the judge misapplied the legal standard upon which he was to review the JP’s decision. Applying the proper standard of review of the decision to issue the warrant, I conclude that the warrant was validly issued and that the judge erred in law by holding otherwise. Consequently, the evidence obtained as a result of the search was wrongly excluded and had it been admitted, the result would not necessarily have been the same. Therefore, I would allow the appeal and order a new trial.

BACKGROUND

[5] On April 7, 2005, Officer Huett applied for the search warrant by faxing the prescribed *Information to Obtain* to the JP. This was his second attempt that day to secure the warrant. The first application, an hour or so earlier, had been rejected by another justice of the peace, in part due to insufficient information. Officer Huett

then made certain amendments and applied a second time. The amended application went before a different justice as a result of a shift change at the JP Centre and not because of any attempt by Officer Huett to "judge shop".

[6] The amended application included details that I summarize as follows:

- On March 17, 2005, Officer Huett received an anonymous *Crime Stoppers* tip reporting that one Jennifer Durling was growing marijuana in the basement of a white house she was renting on Highway #1, Coldbrook. In the basement were "huge lights" plugged into outlets similar to those used for large appliances like stoves and dryers. The tipster also provided a phone number for Ms. Durling and reported that she worked at Shirley's Travel Agency in the Cranbrooken Court complex, also in the Coldbrook area.

- On March 18, 2005, a follow up investigation confirmed that this reported phone number was in fact subscribed to one Jennifer Durling at 6754 Highway #1, Coldbrook.

- On March 21, 2005, the investigators confirmed that the property was in fact a rental property, as the tipster reported.

- On March 22, 2005, Officer Huett made a patrol past this residence and noted it to be a small white single storey bungalow with a brick chimney. There was a small wine coloured vehicle parked near the rear door.

- On March 23, 2005, investigators patrolled the parking lot of Cranbrooken Court and noted a parked vehicle similar to the one earlier spotted at the suspect residence. They checked the license plate number and it turned out to be registered to one Jennifer Cynthia Durling, albeit at an address other than 6754 Highway #1. On this same date, the officers called the number for Shirley's Travel Agency and a Jennifer Durling answered.

- In the ensuing week or so, the police drove past this residence on several occasions. Although lights were on and cars were in the driveway, nothing of any consequence was observed.

- Around this time there was a second *Crime Stoppers* report from the same tipster re-confirming that the grow operation was ongoing and asserting that approximately 150 plants would soon be harvested.

- On April 6, 2005, in an effort to confirm these tips, the investigators utilized a device designed to detect variances in heat as it is emitted from different structures. It is known as a Forward Looking Infrared device or "FLIR". The hand held device was aimed at the suspect residence. It detected an increased level of heat coming from the basement, as compared to the rest of the house. This would be consistent with a marijuana grow operation where high powered lights emit significant heat. It is also consistent with the tipster's report that the alleged operation was located in the basement. Furthermore, at this time, the investigators also noted that the basement windows were covered with a material apparently designed to prevent light from being observed. On the same date, the FLIR was, as well, directed at several neighbouring residences. No similar elevated heat levels were detected.

[7] On this information, the warrant was issued and the impugned search ensued.

[8] At trial, the judge commenced a *voir dire* to consider Ms. Durling's *Charter* challenge. By agreement, the investigators were cross-examined by Ms. Durling's counsel. This resulted in the information being supplemented in one aspect; namely, that the tipster reportedly had first hand information (as opposed to hearsay). The parties agreed that the judge could consider this additional information in his review.

[9] The judge, troubled by what he felt was insufficient information to justify the warrant, declared it quashed. As noted, the evidence obtained in the search was then excluded resulting in Ms. Durling's acquittal.

THE ISSUES

[10] The Crown lists the following grounds of appeal:

1. That the trial judge erred in law in finding that there was a violation of the Respondent's rights under section 8 of the *Canadian Charter of Rights and Freedoms* by the execution of a search warrant upon the residence of the Respondent;

2. That the trial judge erred in law in failing to place appropriate weight upon the evidence gathered by the affiant Cst. Gary R. Huett, to corroborate the information provided by the confidential informant when

evaluating the sufficiency of the grounds for obtaining the search warrant, as outlined in his information to obtain a search warrant and amplified in his *viva voce* testimony at the trial;

3. That the trial judge erred in law in failing to place appropriate weight upon the evidence provided by the examination of the Respondent's house by police with the Forward Looking Infrared (FLIR) imaging device, when evaluating the sufficiency of the grounds for obtaining the search warrant;

4. That the Learned Trial Judge erred in law in the application of the test enunciated in *R. v. Garofoli* for the review of an information to obtain a search warrant, in determining that the evidence contained in the information to obtain a search warrant was not sufficient to conclude that the issuing justice could have issued the warrant;

5. That the Learned Trial Judge erred in law in his application of the test for admitting or excluding the evidence seized by the police upon the execution of the said search warrant, pursuant to section 24(2) of the *Canadian Charter of Rights and Freedoms.*

[11] As will become evident, to dispose of this appeal I need only consider ground #4 dealing with the judge's role in reviewing the JP's decision to issue the warrant. It involves the so-called *Garofoli* test.

ANALYSIS

[12] I will begin my analysis by exploring the standard upon which we should review the judge's decision. I will then analyze the judge's role when reviewing the JP's decision to issue the warrant. Finally I will assess whether, in this case, the trial judge properly executed his role.

Standard of Review

[13] Under s. 676(1) of the *Criminal Code*, the Crown's right to appeal is limited to questions of law. A trial judge's interpretation or application of a legal standard involves a question of law. See **R. v. Araujo**, [2000] 2 S.C.R. 902.

[14] In this case, the Crown suggests that the judge misapplied well established legal principles when reviewing the JP's decision to issue the warrant. Specifically they say that the trial judge applied an incorrect standard of review in that he failed

to accord the JP's decision sufficient deference. If so, this would involve an extricable legal issue which in this context we would review on a *correctness* standard. As this court in **R. v. Shiers**, [2003] N.S.J. No. 453 (C.A.) observed:

> ¶ 9 The issue here is not whether the Court of Appeal believes that the Information was sufficient. The issue is whether the reviewing judge applied the appropriate standard of review to the issuing judge's determination that the Information was sufficient.
>
> ¶ 10 *Whether the reviewing court applied the appropriate standard of review to the decision of the lower tribunal is an issue of law which is reviewable by this Court under the principles stated in* ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235 at para 8 - 9 and **Dr. Q. v. College of Physicians and Surgeons of British Columbia**, [2003] S.C.J. 18, 2003 SCC 19 at para 43 - 44.
>
> [Emphasis added.]

The Reviewing Judge's Role

[15] What then was the judge's role when reviewing the JP's decision to issue a search warrant? Simply put, he was to consider not whether he would have issued the warrant but instead whether the warrant *could* have been issued based on the relevant information provided.

[16] This test can be traced back to the Supreme Court of Canada decision in **R. v. Garofoli**, [1990] 2 S.C.R. 1421, where in the analogous context of a wiretap authorization, Sopinka, J concluded:

> ¶ 56 The reviewing judge does not substitute his or her view for that of the authorizing judge. 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. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[17] In what circumstances could a warrant be justified? The prescribed test is an objective one. The issuing JP would have to have reasonable and probable grounds that an offence had been committed and that the search would uncover material evidence. In other words, a *credibly-based probability* must replace suspicion.

Thus, in **Hunter v. Southam Inc.**, [1984] 2 S.C.R. 145 at pp. 167-168, the Supreme Court concluded:

> Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue. Section 443 [now s. 487] of the *Criminal Code* authorizes a warrant only where there has been information upon oath that there is "reasonable ground to believe" that there is evidence of an offence in the place to be searched. The American *Bill of Rights* provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation ...." The phrasing is slightly different but the standard in each of these formulations is identical. *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.* History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where in the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. *In cases like the present, 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, constitutes the minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure.* In so far as subss. 10(1) and 10(3) of the *Combines Investigation Act* do not embody such a requirement, I would hold them to be further inconsistent with s. 8.
>
> [Emphasis added.]

[18] These same principles would apply to this case where the search warrant was sought under s. 11 of the **Controlled Drugs and Substances Act** (1996, c. 19).

[19] This reference to the issuing judge having a “credibly-based probability” has been the subject of much judicial discussion over the years. In **R. v. Morris**, [1998] N.S.J. No. 492 (C.A.), Cromwell, J.A. of this court provided the following guidance:

> ¶ 30 Without attempting to be exhaustive, it might be helpful to summarize, briefly, the key elements of what must be shown to establish this "credibly based probability":

(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)

(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.

> ¶ 31 The fundamental point is that these specific propositions define the basic justification for the search: the existence of "credibly-based" probability that an offence has been committed and that there is evidence of it to be found in the place of search.

[20] Incorporating these principles, Fichaud, J.A. in **R. v. Shiers**, *supra*, succinctly summarized the test:

> ¶ 15 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 Mr. Shiers' apartment?

Did the Judge Apply the Proper Test?

[21] In a thorough and careful analysis, the judge unquestionably articulated the appropriate legal principles. Quite properly, he acknowledged that his task was not to rehear the matter or to substitute his views for those of the issuing JP:

> ¶ 5 It is not for this court to substitute its own opinion for that of the issuing Justice of the Peace: **R. v. Garofoli**, [1990] 2 S.C.R. 1421. It is not whether this court would have issued a search warrant based on the Information to Obtain but whether a Justice of the Peace could with the evidence now before me with the deletions made to protect the identity of the anonymous source, have properly reached that conclusion that reasonable and probable grounds existed.
>
> . . .
>
> ¶ 7 In short it is whether reasonable inferences can be drawn from the contents of the Information to Obtain which could establish reasonable and probable grounds to determine if evidence of a crime could be found in the impugned place.
>
> ¶ 8 As I referred to above that requires a consideration of whether there is present credibly based probability. The whole of the Information to Obtain needs to be considered. It does not, however, need to be based on personal knowledge: **R. v. Morris** (1998), 134 C.C.C. (3d) 539. The sufficiency of the grounds will depend on the circumstances and there is no fixed formula for what constitutes reasonable grounds. This concept involves the application of common sense as

> well as practical and non-technical principles and is a process not dealing with certainties but with probabilities: **R. v. Gatfield** [2002] O.J. No. 166. The task then is to determine if sufficient evidence is present, that is credible and probative to establish a probability that evidence of a crime will be found in the place named or more particularly whether a Justice of the Peace could reach that conclusion.

[22] However, despite this, I remain concerned with how the trial judge *applied* the test that he so ably articulated. In reviewing his judgment as a whole, regrettably, I believe that what began as an analysis of whether the warrant *could* have been issued became transformed into an exercise where the judge ultimately considered whether he *would* have issued it. In other words, respectfully, the judge in the end substituted his view of the evidence for that of the issuing JP. This led him down the road to reversible error. Let me elaborate by referring to the relevant passages in his judgment.

[23] From the outset, the trial judge expressed concern about the lack of corroboration regarding the alleged illegal acts. In other words, while many of the perfectly legal details provided by the tipster were corroborated - i.e. name, address, place of work - there was limited corroboration of any alleged illegal activity. He observed:

> ¶ 29 In my opinion, therefore, corroboration of only a portion of the source's information, particularly innocent information such as his/her place of residence and employment particulars, only marginally adds to the strength of the informant's evidence and in particular where these corroborated pieces of information could be easily known by a wide number of persons it adds very little to the source's credibility.
>
> ¶ 30 In this case the primary evidence which could form the required grounds comes from information received from an anonymous source. There is no other evidence of a crime. The other evidence is only capable, at best, of corroborating the source's information.
>
> ¶ 31 The source is unproven and anonymous. There is very little to support the source's trustworthiness. The references to information provided concerning two other persons is only slightly helpful and adds very little if any to support the source's credibility.
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> ¶ 32 For the reasons I expressed above, corroboration of the suspect's connection to the impugned residence and her employment particulars, while

> confirming who the information pertains to and the location referenced, does little to strengthen the allegations regarding the marihuana grow operation.
>
> ¶ 33 There are some compelling features of the source's allegation, being the reference to the basement of the residence and the reference to the "huge lights plugged into outlets like those for stoves or dryers." References to the type of drugs, that is marihuana, and the fact that they are soon to be harvested, while somewhat detailed, are in my opinion not compelling details.
>
> ¶ 34 Although the Information to Obtain does not appear to reveal if the information's source of information was firsthand or not, Constable Huett in his testimony during the *voir dire* indicated that the source's information was firsthand.

[24] The judge then acknowledged that some information did in fact corroborate the alleged illegal activity. This included the FLIR test results and the covered windows. This is where I believe the judge began to slip into error. He clearly acknowledged that this information was probative. However he then proceeded to weigh this evidence; thus effectively substituting his views for those of the issuing JP. For example, he weighed the FLIR results and found them to be more probative than evidence of hydro usage:

> ¶ 36 It is, however, the totality of the circumstances or the whole of the evidence which needs to be examined. Here the source has provided information about a specific individual -- the accused Jennifer Durling. The source is unproven and anonymous. The information about the grow operation, while disclosing a few details is not, in my opinion, compelling. In my opinion the source is neither credible nor is the information compelling. Is the corroboration therefore of the FLIR testing and the observations about the covered windows sufficiently strong to overcome the weaknesses I identified in the other aspects under consideration. In my opinion it is not. *Clearly the FLIR testing is supportive and consistent with the allegation however because of the limited information it conveys, i.e. heightened levels of heat at a single instance, it is not sufficiently strong or probative to confirm the existence of the marihuana grow operation and to overcome the weaknesses in the source's information I noted above. While I recognize that the FLIR testing has some probative value, I cannot agree that it is equivalent to hydro readings such that this case is on all-fours with* ***Plant*** *as the Crown suggests.*
>
> [Emphasis added.]

[25] The judge then appears to address the very question that the issuing JP was tasked to answer, i.e.: Was there enough evidence to establish a credibly-based probability?

> ¶ 37 In my opinion considering the totality of the circumstances, the evidence does not rise above the level of suspicion, albeit strong suspicion. It does not amount, in my opinion, to credibly-based probability.

[26] I acknowledge that later in this same paragraph the judge appears to address whether it would be *possible* for the JP to have acquired the requisite reasonable and probable grounds. This is reflective of the proper test:

> [37] ... It is not possible, in my opinion, for a Justice of the Peace, given the evidence contained in the Information to Obtain, as edited, to *properly* draw the required inferences necessary to conclude that reasonable and probable grounds existed that evidence of a marihuana grow operation were present in this residence.
>
> [Emphasis added.]

[27] Yet in this same passage, the judge seems to suggest that the issuing JP had to draw *proper* inferences as opposed to *reasonable* inferences as the test prescribes (and as the judge carefully articulated earlier in his judgment). Respectfully, this is an incorrect approach. The issuing JP was entitled to draw her own inferences as long as they were *reasonable*. She was not restricted to only those inferences deemed *proper* (presumably by the reviewing judge). This approach therefore unduly restricted the level of deference to which the JP was entitled. By misapplying the standard of review in this way, the judge erred in law.

[28] In summary, it appears that the judge began his analysis by properly considering whether the JP *could* issue the warrant, but effectively ended up considering whether he *would* have issued the warrant in these circumstances. Again, that was not his role.

[29] For all these reasons I conclude that the judge's approach to this issue reveals an extricable legal error which we must address. Specifically, it now falls to us to apply the proper test. For example, in **R. v. Shiers**, *supra*, Fichaud, J.A. observed:

> ¶ 27 By overturning the warrant without considering whether there was evidence in the Information from which the issuing judge could reasonably draw

> the connecting inferences, the reviewing judge substituted her discretion for that of the issuing judge, which was an error of law.
>
> ¶ 28 As the Supreme Court of Canada stated in *Dr. Q,. supra*, para 43 - 44, if the lower court has not applied the correct standard of review, *this Court must apply that standard.*
>
> [Emphasis added.]

[30] Thus, based on the information provided in this case, as supplemented in the *voir dire*, I ask whether the JP *could* have issued the warrant? For the following reasons, I would say that she could:

- The tipster was specific as to the respondent's identity, her phone number, her employment, the location of her residence, and the fact that the premises were leased. This was all corroborated by the police.

- As revealed in the *voir dire*, the tipster reported to have personal knowledge as opposed to reporting hearsay.

- The FLIR results were probative not only in relation to other nearby dwellings, they also confirmed that the increased heat was coming from the basement. This corroborates the tipster's report.

- The covered basement windows further corroborated the alleged illegal activity.

[31] Thus, on the evidence presented, I conclude that the search warrant was quashed in error. The warrant having been valid, the search was lawful and there was no allegation that it was otherwise unreasonable. Accordingly, on the evidence, there was no breach of s. 8 of the *Charter* and no basis on which to exclude the fruits of the search. Had that evidence not been excluded, the result of the trial would not necessarily have been the same. It follows that the appeal should be allowed and a new trial ordered.

DISPOSITION

[32] I would allow the appeal and order a new trial.

MacDonald, C.J.N.S.

Concurred in:

Cromwell, J.A.

Fichaud, J.A.