PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Brown*, 2016 NSPC 63

Date: 2016-11-04
Docket: 2802941, 2802942
Registry: Halifax

Between:

Her Majesty

v.

Michael Anthony Brown

Judge:	The Honourable Judge Paul Scovil
Heard:	May 9, 2016, in Bridgewater, Nova Scotia
Written:	November 4, 2016
Charges:	Sections 5(2) and 7(1) of the **Controlled Drugs and Substances Act**
Counsel:	Joshua E. Bryson, for The Public Prosecution Services Nicholaus Fitch, for the Accused

By the Court:

[1] Michael Anthony Brown faces charges which arise due to the execution of a search warrant on the property of the accused on the 15th of November, 2014. Mr. Brown seeks to have the search as a result of the warrant declared invalid as it offends section 8 of the *Charter of Rights and Freedoms* and that as a result of the fruits of that search be excluded from evidence pursuant to section 24(2) of the *Charter*.

Facts:

[2] On November 14, 2014, Cst. Donald E. (Ted) Munro of the Royal Canadian Mounted Police (RCMP) received information alleging that Mr. Brown had threatened his neighbour. His neighbour alleged an assault, death threats and threats to burn his property.

[3] As a result of receiving that information Cst. Munro requested that Cst. Gregory Charlton and Cst. Dan Smith, both of the RCMP, attend Mr. Brown's residence at 484 Zinck Road in Hemford, Nova Scotia and there to arrest Mr. Brown for assault and threats.

[4] Officers Charlton and Smith attended the residence in Hemford to look for Mr. Brown. In the Information to Obtain used to request a search warrant, the officers indicated, by either speaking to Cst. Munro or by Cst. Munro reviewing their notes, that they attended Brown's residence at 484 Zinck Road. There they spoke to a female at the residence. While looking for Brown in the garage both officers reported a smell of fresh marijuana. Cst. Smith described it as a strong odour while Cst. Charlton described it simply as an odour. Cs.t Smith, in the ITO, indicated he observed a light coming from a closet. Concerned that Mr. Brown might be hiding in the closet, Cst. Smith opened the door and found marijuana plants growing inside under lights.

[5] The officers left the residence at 484 Zinck Road and proceeded to the residence of the threat complainants at 380 Zinck Road. There they found Mr. Brown who they arrested and transported back to the RCMP detachment.

[6] Once they arrived Mr. Brown gave a 'warned' statement after contacting counsel. In that statement he admitted possession of those plants found (42 marijuana clones) together with a further eight plants and an amount of dried marijuana.

[7] Cst. Munro forwarded the ITO to the Justice of the Peace Centre in Dartmouth, Nova Scotia together with an unissued warrant requesting authorization to search Mr. Brown's residence.

[8] Justice of the Peace Chewter granted the Search Warrant stating as follows in a reply fax:

> I have considered your application for a search warrant.
>
> I am not satisfied that the initial search and seizure of the 42 plants in the closet in the garage was lawful as I have no information to establish that police were lawfully in the garage. You indicate that they attended the residence to effect an arrest for assault and threats. The suspect's girlfriend was present but it appears she was a visitor and could not give consent to search the property. You do not mention obtaining a Feeney warrant to enter the property to search for and arrest the suspect. The marijuana plants [to] do not appear to have been in plain view. The accused's subsequent statement comes after, and possibly as a result of, the initial search and seizure. I cannot consider any of this information as I am not satisfied that it was lawfully obtained.
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> The remaining information is that when police attended the residence they observed a strong smell of fresh marijuana and that a CPIC check revealed that the suspect has a criminal record for possession of drugs and previously had an indoor marijuana grow up.
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> This information provides me with the requisite reasonable grounds to believe that an offence has been committed and that you will find the items to be searched for in the residence.

[9] At the application the Crown introduced *Viva Voce* evidence of Cst. Ted Munro in what in practise is known as an 'amplification' of the information placed before the issuing Justice as well the Court heard from now Cpl. Dan Smith and Cst. Gregory Charlton.

[10] Cst. Munro testified that he and the other officer discussed the search and felt that it was probably not a lawful search. At first it was determined just to take the plants, however it was decided to still continue with the application for a search warrant.

[11] Cpl. Smith indicated that when he and Cst. Charlton arrived at Mr. Brown's residence they saw a female standing just inside the garage door. Cst. Charlton was just inside the door when the female advised that Mr. Brown had left the premises. Cpl. Smith testified that they were not searching the garage but they had a concern over one area of the garage. The closet was searched for officer safety. Cpl. Smith could smell fresh marijuana.

[12] Cpl. Smith stated that he had some concern over how the clones were seized and was trying to resolve the strong smell of marijuana with the small number of clones. He then felt it was a 'no case seizure' and they seized the cloned marijuana plants. In cross examination, Cpl. Smith indicated that he noticed a distinct smell of marijuana coming from the garage. He described it as persistent, substantial and strong.

[13] Cst. Charlton testified that he, and the then Cst. Smith, had been called to 484 Zinck Road to respond to a call regarding threats and assault. He added that

his information was that Cst. Munro had spoken to a girl at the residence and she had advised him she had been threatened and assaulted by Mr. Brown. Based on that Cst. Charlton felt he was in a position to arrest Mr. Brown.

LAW:

[14] The law relating to the review by a judge of search warrant was set out in *R. v. Liberatore*, 2014 NSCA 109. There Justice Fichaud stated at paragraph 15 to 18 as follows:

> What principles govern the task of the reviewing judge? In R. v. Morelli, [2010] I S.C.R.253, Justice Fish for the majority explained:
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> Under the *Charter*, before a search can be conducted, the police must provide "reasonable and probably 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" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 168). These distinct and cumulative requirements together form part of the "minimum standard, consistent with s. 8 of the *Charter*, for authorizing search and seizure" (p. 168).
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> 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 probably grounds to believe that an offence had been committed and that evidence of that office would be found at the specified time and place.
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> 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 (*Arau*jo, 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 that deliberate attempts to mislead the authorizing justice.

Ten years earlier, in *Araujo, supra*, Justice LeBel for the Court said:

> The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application for wiretap. This is the starting place for any reviewing judge, as our Court stated in *Garofoli, supra*, [*R. v. Garofoli*, [1991] 2 S.C.R. 1421] at p. 1452:
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> > 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 in good faith by the police in the material submitted to the authorizing justice of the peace:
> >
> > These cases stress that errors, even fraudulent errors, do not automatically invalidate the warrant.
> >
> > This does not mean that errors particularly deliberate ones, are irrelevant in the review process. While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases are referred to do not foreclose a reviewing judge, in appropriate circumstances, from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subservice of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves. [emphasis added by LeBel J.]
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> (*R. v. Morris* (1998), 134 C.C.C. (3d) 539, AT P. 553)

An approach based on looking for sufficient reliable information in the totality of the circumstances appropriately balances the need for judicial finality and the need to protect prior authorization systems. Again, the test is whether there was reliable evidence that might reasonably be believe on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge. [emphasis added by LeBel J.]

Recently, in *R. v. Vu,* [2013] 3 S.C.R. 657, Justice Cromwell for the Court summarized the test:

> The question for the reviewing judge is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge". [citing *Araujo* and *Morelli*]. In applying this test, the reviewing judge must take into account that authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious: [citations omitted].
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> To the same effect, in this Court*: R. v. Morris*, 1998 Carswell NS 489 (N.S.C.A.), PARAS. 38-43; *Shiers, supra*, paras. 9-15 and *Durling, supra*, paras. 14-20.

[15] It is clear, therefore, that I am not to replace my opinion of whether the warrant sought to have been granted but rather is there reliable evidence that might reasonably be believed on the basis of which authorized, could have issued.

[16] Here the justice based her authorization on the fact the officer observed a strong smell of fresh marijuana together with a CPIC check revealing that the accused had a criminal record for possessing drugs and had in the past had an indoor marijuana grow op.

[17] I am satisfied that the conclusion of the issuing Justice based solely on those limited facts were sufficient to provide reasonable and probably grounds establishing a factual nexus between the offences for which the warrant was issued and the places that were to be searched.

[18] I therefore dismiss the application and find that 5.8 of the *Charter* was not infringed.

Scovil, J.