CR 03056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

WAYNE JOHN ADAM DENNIS

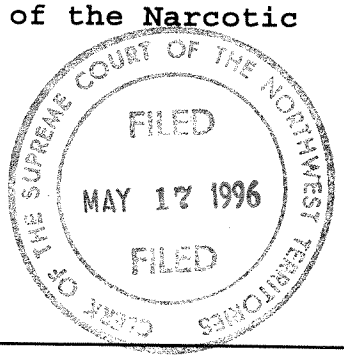
Transcript of Voir Dire Ruling delivered by The Honourable Mr. Justice J.Z. Vertes, sitting at Yellowknife, in the Northwest Territories, on Wednesday, April 15, A.D. 1996.

APPEARANCES:

Mr. L. Rose: On behalf of the Crown

Mr. Posynick: On behalf of the Defence

(Charges under s. 4(2) and 19.1(2)(a) of the Narcotic Control Act)



THE COURT: Wayne John Adam Dennis is on trial on two charges: count 1 being a charge of possession of a narcotic for the purpose of trafficking, and count 2 being the possession of property obtained or derived as a result of an offence under the Narcotic Control Act.

On this voir dire, the accused seeks to exclude evidence seized as a result of searches conducted pursuant to two warrants. The evidence in question consists of approximately 12 ounces of marijuana and $6,000 in cash seized from the accused's residence.

On September 21, 1995, at approximately 11:55 p.m., a local Justice of the Peace issued two search warrants: one under the Narcotic Control Act, s. 12, to search for narcotics; the other under the Criminal Code, s. 487, to search for Canadian currency. The warrants authorized the search of the accused's residence between the hours of 11:15 p.m. on September 21st and 4 a.m. on September 22nd.

The sworn information in support of both warrants was the same. It was contained in a document entitled "Appendix A" attached to the information sworn by Constable McVarnock of the R.C.M.P. This document contains 13 paragraphs setting out the constable's reasons for believing narcotics and currency may be found in the residence, that being Apartment Number 108 in the Shaganappy apartment building here in

Yellowknife. The paragraphs relate six distinct items of information:

First (paragraphs "a" to "d"), they relate information from a confidential source who made an anonymous call to the local "Crime Stoppers" phone number, and then spoke directly to Constable McVarnock. This source said the accused was "presently trafficking" in marijuana from Apartment Number 108; that he (the source) had personally witnessed a transaction at the apartment whereby the accused sold some marijuana; and that the accused was selling it for $425 per ounce.

Second (paragraphs "e" to "h"), they relate information from another source who said, essentially, that he had seen the accused in Apartment Number 108 and that the accused was out of town until the day before (September 20th), at which time the accused was observed back at the apartment building.

The information from both of these sources was received earlier in the evening of September 21st.

Third (paragraph "i"), there is reference to information from another source, received two weeks earlier, that the accused had driven a van containing marijuana to Yellowknife.

Fourth (paragraph "l"), there is reference to a check conducted on September 21st verifying the accused's address as Apartment Number 108 of Shaganappy

Apartments.

Fifth (paragraphs "j" and "k"), there are references to Constable McVarnock's personal involvement in previous charges against the accused.

Sixth (paragraph "m"), there is a reference to the accused's past record of four convictions for possession of a narcotic and two convictions of possession for the purpose of trafficking.

The accused argues, among other things, that the information to obtain the warrants was deficient.

The test to be applied by a judge reviewing the sufficiency of the information underlying a search warrant is set forth in the reasons of Sopinka J. for the majority of the Supreme Court of Canada in R. v. Garofoli (1990), 60 C.C.C. (3d) 161, a case concerning the review of an authorization to intercept private communications. The test, however, applies equally to the review of the validity of search warrants. The reviewing judge does not substitute his or her view for that of the justice who issued the warrant. The question is whether the justice could have issued the warrant based on the information presented at the time.

In my opinion, when one examines the whole of the information, the scenario presented is this: a known and previously convicted drug dealer had been observed just recently engaging in the sale of narcotics from

his apartment. The case law has said that the appropriate approach for the judicial review of a search warrant information is scrutiny of the whole of the document, not a limited focus upon isolated passages. Furthermore, one is able to draw reasonable inferences from the stated facts without the necessity of the affiant setting out in precise detail, or in careful legal terminology, the conclusions to be drawn.

I agree with Defence counsel that in some ways the paragraph about the accused two weeks earlier having driven a van containing marijuana to Yellowknife is unconnected to the rest of the information both in context and in time. I think that if the police wanted to add this additional information, they should have included the fact that they took no action in response to that information. But, in my view, that paragraph can be deleted from the information without detracting from the substance of the investigative facts justifying issuance of the warrants.

In a 1994 judgment, R. v. Bisson, [1994] 3 S.C.R. 1097, the Supreme Court of Canada held that errors in the information presented to the justice, even fraudulent ones, do not automatically vitiate a warrant and are only factors to be considered. The information, independent of the offending parts, should be examined to determine if there was sufficient

reliable information to support the authorization. In my opinion there was.

The information from the first source contains sufficient detail so as to make it compelling. The constable provided information as to the basis of his opinion as to the source's reliability. The constable did not provide information as to the basis of his belief in the reliability of the second source; but, in my opinion, this is not fatal since the information from this source was collateral and merely confirmed that the accused had just recently returned to his residence.

The criteria for assessing the reliability of informer information were outlined as well in the Garofoli decision and reviewed by me in R. v. Goulet, [1992] N.W.T.R. 366 (at page 374). As noted therein, the reliability of such information must be assessed in the totality of the circumstances. In this case, the main factor is the first source's alleged first-hand account of the accused's sale of marijuana. There were indicators of that informant's reliability.

In my opinion, there was evidence upon which the justice could satisfy himself that there are reasonable grounds for issuance of a search warrant. Hence I rule both warrants valid.

The accused, however, also argues that the manner in which the search was executed constituted an

infringement of his constitutional right to be free from "unreasonable" search and seizure.

The police, prior to obtaining the warrants, had contacted the landlord of the Shaganappy Apartments and obtained keys both for the outside door to the building and for the door to Apartment Number 108. When Constable McVarnock arrived with the warrants, they entered the building, went to Apartment 108 and used the key to unlock the door. The four police officers, with Constable McVarnock leading the way, rushed into the apartment. As they rushed in, Constable McVarnock, and perhaps one or two other officers, yelled, "Police. Search warrant." Constable McVarnock and perhaps one or two others had their side arms drawn. The apartment was dark and the accused was located asleep in the bedroom. A subsequent search of the apartment uncovered the evidence previously noted.

There was no knock and announcement at the door prior to entry. Constable McVarnock testified that in drug raids there is always a concern about evidence being destroyed or hidden, so an emphasis is put on moving quickly and decisively to secure the premises. Furthermore, in a situation where police receive news of current ongoing transactions, they wish to move quickly before the narcotic supply on hand is depleted or sold off completely.

The accused's complaint about the manner of the

search is twofold: first, there were no exigent circumstances to warrant a midnight raid; and, second, there were no exigent circumstances to justify an unannounced entry into the premises.

In this case we have two warrants: one under the Narcotic Control Act and one under the Criminal Code. There are significant differences between the two.

A warrant under s. 12 of the Narcotic Control Act may be executed at any time. In addition, s. 14 of that Act authorizes the use of force to gain entry. A warrant under the Criminal Code, by virtue of s. 488, must be executed by day unless the justice specifically authorizes otherwise. Further, the police are authorized to use force, but only if the degree of force is justifiable in the circumstances. That is the import, as I understand it, of the Supreme Court's decision in R. v. Genest (1989), 45 C.C.C. (3d) 385.

There is nothing in the information in support of the warrants setting out why the warrant has to be executed in the middle of the night. If we were dealing with a warrant only under the Criminal Code, this deficiency may be fatal. There should be some grounds on which the justice can base his authorization of a night-time search. But there is no such requirement under the Narcotic Control Act. The warrant may be executed at any time.

In this case I am of the opinion that the Criminal

Code warrant is superfluous. The police could have seized the currency as an incidental aspect of the Narcotic Control Act warrant. I believe s. 11 of that Act may provide explicit authority to do so.

In any event, even if there is a requirement to justify a night-time raid, I think there are sufficient factors present to justify it. The police had received information just a few hours earlier that the accused was presently involved in trafficking. For the reasons given by Constable McVarnock, I think there were ample grounds to justify the police decision to move quickly.

This leads to the second objection, that the police entered the apartment without first knocking and announcing their presence. The general rule as set forth in Eccles v. Bourque (1974), 19 C.C.C. (2d) 129 (S.C.C.), is that, except in exigent circumstances, police officers must make an announcement prior to entry into a dwelling house. In the ordinary case, police officers, before forcing entry, should give notice of presence by knocking, notice of authority by identifying themselves as police officers, and notice of purpose by stating their lawful reason for entry. That case recognized, however, that there will be occasions when notice may not be required (such as to prevent violence or to prevent destruction of evidence).

In this case, Defence counsel submits that there were no exigent circumstances. The accused was known to the police as a non-violent person. Surveillance and other investigative techniques could have been used. And the requirement to at least knock and announce does not necessarily mean that evidence would be destroyed since there is no requirement that the police wait for any specified period of time before entering.

With respect, I think these arguments miss the point about the nature of drug crimes. As noted in numerous cases, elicit drug activities are particularly difficult to police because they are usually carried out by willing participants. The threat of evidence being destroyed or hidden away from discovery is always present. The nature of the product makes it easily disposable (by flushing it down a toilet, for example).

Here the police had information that trafficking activities were being carried on by a previously convicted drug dealer. I believe that they were entitled to assume that, if they did not move quickly to enter the premies, there was a realistic likelihood of evidence being destroyed.

I recognize that the Supreme Court of Canada in R. v. Gimson (1992), 69 C.C.C. (3d) 552, specifically declined to decide whether the Narcotic Control Act

provides a blanket authorization to enter a dwelling house to search for drugs without a prior demand. I also recognize that the Court acknowledged in that case that the police may enter without a prior announcement if it is necessary to do so to prevent the destruction of evidence. In my opinion, the police were justified in doing so in this case. In coming to that conclusion, I remind myself that hindsight is easy and one must consider the circumstances in the position of the police officers at the time in question.

Defence counsel raised a number of other points, but, for reasons discussed during oral argument, I have not addressed them specifically in this decision. In my opinion, the substantial issues raised by the Defence on this motion are the ones discussed here.

For these reasons, I dismiss the Defence motion, I rule the warrants valid, and the items seized are admissible in this case.

Certified Pursuant to Practice Direction #20
dated December 28, 1987.

Jane Romanowich
Court Reporter