R. v. *B.G.T.*, 2007 NWTSC 75

Date: 2007 09 20
Docket: S- 0001-YO2007-000002

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN and HER WORSHIP
JUSTICE OF THE PEACE SHEILA LEONARDIS

Respondents

- and -

B.G.T. (A YOUNG PERSON)

Applicant

Restriction on Publication: No one may publish any information that may identify a person as having been dealt with under the *Youth Criminal Justice Act.*. See the *Youth Criminal Justice Act*, s. 110(1).

Certiorari application for an order quashing a search warrant authorized by a Justice of the Peace. Application dismissed.

Heard at Yellowknife, NT, on September 17, 2007.

Reasons filed: September 20, 2007.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Applicant: James D. Brydon

Counsel for the Respondents (Crown): Janice K. Walsh

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REASONS FOR JUDGMENT

[1] The applicant, a young person within the meaning of the *Youth Criminal Justice Act*, seeks an order in the nature of certiorari quashing the search warrant authorized by Justice of the Peace Leonardis on March 3, 2007. For the reasons that follow the application is dismissed.

[2] On March 3rd, a search warrant was issued pursuant to s.11 of the *Controlled Drugs and Substances Act*, on the *ex parte* application of an R.C.M.P. officer, for the search of an apartment in the City of Yellowknife seeking drugs and related objects in suspected drug trafficking activities from that apartment. A search was conducted and various items were seized. The applicant was subsequently charged with three counts of possession of a controlled substance, contrary to s. 4(1) of the *Controlled Drugs and Substances Act*, and one count of possession for the purpose of trafficking, contrary to s. 5(2) of that Act. His trial is scheduled to commence on November 7th in Youth Justice Court.

[3] This application is brought on the basis of jurisdictional error by the Justice of the Peace. The applicant argues that there was insufficient information provided to the

Justice by the officer so as to enable the Justice to form the reasonable ground to believe that a search of the premises in question will afford evidence with respect to the commission of an offence. Specifically, the applicant submits that the information was deficient since much of it depended on information provided by a confidential source and there were no details provided as to the basis for the officer's belief in the reliability of the source.

[4] In this case, the applicant has in his possession only an edited copy of the information provided by the officer to the Justice of the Peace. The original information was sealed to protect the integrity of the investigation and the identity of the source. The sufficiency of the information is therefore assessed on the basis of the edited version: see *Canada* v. *Falconbridge Ltd.*, [2003] O.J. No. 1563 (C.A.), at para. 23.

[5] I have concluded, however, that I need not, indeed should not, go into an extensive review of the information in support of the search warrant or the jurisprudence relating to the requirements when an officer relies on a confidential source. Counsel are well aware of that jurisprudence: see, for example, *R.* v. *Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), affirmed on appeal at 52 C.C.C. (3d) 193 (S.C.C.); *R.* v. *Berger* (1989), 48 C.C.C. (3d) 185 (Sask. C.A.).

[6] In my opinion, this application should be heard by the trial judge. This is the conclusion urged on me by Crown counsel and I agree with it.

[7] A certiorari application can only review the jurisdictional basis for the issuance of the search warrant. It cannot go beyond that to declare that the search was unreasonable, as that term is understood in s. 8 of the *Charter of Rights and Freedoms*, or order that the items seized be excluded from evidence at the trial pursuant to s. 24(2) of the Charter. For that reason, where a charge has been laid, the preferred practice is not to hear the motion to quash but to defer the matter to the trial judge to be heard as a s. 8 Charter motion: see Ewaschuk, *Criminal Pleadings and Practice in Canada* (2nd ed., looseleaf), at para. 3:1360. The trial judge is in a better position to explore the legality of a search and seizure, in the context of all of the evidence and circumstances of the case, and to determine whether the administration of justice would be brought into disrepute by admitting the evidence realized by the search and seizure.

[8] Crown counsel's position rests on the authority of *R.* v. *Zevallos* (1987), 37 C.C.C. (3d) 79 (Ont. C.A.). There the accused was charged with possession of narcotics for the purpose of trafficking. The narcotics had been found during the course of a search conducted under the authority of a search warrant issued by a Justice of the Peace. The accused, after his committal for trial, applied for an order in the nature of certiorari to quash the search warrant. The application was dismissed and that dismissal was subsequently affirmed by the court of appeal.

[9] The appellate judgment held that where the ultimate issue sought to be resolved is that of admissibility at trial of the evidence seized, it is preferable that it be decided by the trial judge as part of the totality of evidentiary issues that would have to be resolved, rather than to have different issues decided by different judges. In that case, as in this one, although the attack on the search warrant was based on the insufficiency of the information provided to obtain the warrant, the ultimate purpose of the application was to aid in obtaining a ruling that there had been an unreasonable search and seizure contrary to s. 8 of the Charter and an exclusion of the evidence seized under s. 24(2). The court in *Zevallos* held that the pre-trial quashing of the warrant by way of certiorari was an idle exercise, even assuming it was invalid in substance, because the evidence was still presumptively admissible unless the accused satisfied the requirements of s. 24(2). Based on these factors, it was proper for the judge hearing the certiorari application to refuse the relief sought.

[10] The judgment in *Zevallos* reflects a general preference for the trial court, as compared to a superior court exercising a supervisory function, as the most convenient forum for determining Charter issues and issues generally concerning the admissibility of evidence. The reasoning in *Zevallos* has been adopted and followed by numerous appellate courts in other jurisdictions: *R.* v. *Williams* (1987), 38 C.C.C. (3d) 319 (Y.T.C.A.); *R.* v. *Tanner* (1989), 46 C.C.C. (3d) 513 (Alta. C.A.); *R.* v. *Jamieson* (1989), 48 C.C.C. (3d) 287 (N.S. C.A.); *Prime Realty Ltd.* v. *British Columbia* [1994] B.C.J. No. 561 (C.A.); *R.* v. *King* (1997), 187 N.B.R. (2d) 185 (C.A.).

[11] The applicant's counsel quite properly points out that, notwithstanding this preferred practice, it is still appropriate for the court to exercise its supervisory function in the case of clear jurisdictional error. I agree. I do not rule out the appropriateness of such a remedy in cases where the interests of justice demand it. An example may be where a trial has not been set and it is not unlawful *per se* to possess the materials seized. Such was the case in *R.* v. *Branton* (2001), 53 O.R. (3d) 737

(C.A.) But that is not the situation in this case. Certiorari is a discretionary remedy and, even if jurisdictional error is demonstrated, it may not be in the interests of justice to grant the relief sought where a more appropriate forum is available to decide all questions of legality and admissibility.

[12] There are other reasons why it is preferable for the trial judge to deal with these types of issues.

[13] The first is that the remedy of certiorari is limited by the scope of review. The court is generally only entitled to consider the record of the proceedings below. However, on a pre-trial motion for a remedy under s. 24(1) of the Charter, or the exclusion of evidence under s. 24(2), there is no limitation on the evidence that can be considered by the trial judge. This means that the trial judge is in a far better position to explore all of the factors relating to the legality of the search and whether evidence should be excluded. This accords with the jurisprudence from the Supreme Court of Canada that stresses the importance of a contextual analysis, the need to examine the totality of the circumstances so as to determine whether there was reliable evidence to support issuance of the warrant, the reasonableness of the search, and the ultimate issue of admissibility: see, for example, *R.* v. *Araujo* (2000), 149 C.C.C. (3d) 449 (S.C.C.). This approach leaves all matters relating to the admissibility of evidence resulting from a search and seizure to the person who is primarily responsible for all admissibility issues, the trial judge.

[14] This approach is preferable because it avoids various potential problems in having two different judges address the same subject-matter. Because the review of a search warrant on a certiorari application is limited to the question of jurisdictional error, a trial judge is still not precluded from ruling on the validity of a warrant in the context of the Charter. The warrant may have been issued with jurisdiction but it may still be prone to Charter attack. And, likewise, a Charter violation is not presumptively a jurisdictional error which gives rise to certiorari. So, again, it can be seen that an application like the present one may be a pointless exercise if there is a trial pending.

[15] There is also the question of the binding effect of an order issued by a superior court when the trial is yet to be held in another court. In this case, the Youth Justice Court could not revisit any ruling I may make because of the prohibition against a collateral attack on an order. For example, if I were to determine, in this certiorari application, with its limited scope of review, that the search warrant was

jurisdictionally valid, it would not be open for the trial judge in proceedings to obtain an exclusion order under s. 24(2) of the Charter to conclude that it was jurisdictionally invalid even though the trial judge would have the benefit of a full evidentiary background. Similarly, a finding on certiorari that the warrant lacked jurisdictional validity would bind the trial judge if he or she comes to the opposite conclusion with the benefit of all of the evidence.

[16] Finally, the preferred approach would remove any doubts as to appeal procedures. A decision granting or refusing an order in the nature of certiorari may be appealed to the court of appeal by virtue of s. 784(1) of the Criminal Code. An appeal from a trial judge's ruling admitting or rejecting evidence would be part of an appeal from conviction or acquittal. Whether that be to the court of appeal or to the superior court depends on whether the proceedings are summary or by indictment. If the issues were all dealt with by the trial judge there would be no confusion as to which court would be the appropriate appellate venue nor the appropriate time to appeal. It would also avoid the possibility of intervening appeals delaying the trial.

[17] I do not suggest that every challenge to a search warrant must await the trial. But, in most cases, because the ultimate objective is the exclusion of evidence from the trial, the circumstances are usually such that it would be convenient and appropriate to have all issues relating to a search and seizure determined at the trial.

[18] For these reasons, the application for certiorari is dismissed but without prejudice to the right of the applicant to apply to the trial judge to quash the warrant and any other consequential relief.

J.Z. Vertes
J.S.C.

Dated this 20th day of September, 2007.

Counsel for the Applicant: James D. Brydon

Counsel for the Respondents (Crown): Janice K. Walsh

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