

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

Respondent

- and -

MELINDA JOE

Applicant

MEMORANDUM OF JUDGMENT

[1] The Applicant, Melinda Joe, stands charged with possession of cannabis and cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c. 19, as amended. She seeks an order quashing a search warrant and excluding the evidence obtained through its execution, pursuant to ss. 8 and 24(2) of the *Charter*.

BACKGROUND

[2] On December 21, 2013, a Justice of the Peace (the “authorizing justice”) issued a warrant to search the premises where Ms. Joe was residing in Inuvik, pursuant to s. 11 of the *Controlled Drugs and Substances Act*, *supra*. The application for the warrant was supported by an Information to Obtain a Search Warrant (“ITO”) sworn by Constable Ryan Gillis of the Royal Canadian Mounted Police the same day.

[3] The warrant was executed and a number of items were seized from the residence.

[4] An edited copy of the ITO was provided to Ms. Joe's lawyer on May 27, 2014. This is the same version provided to the Court for this application.

[5] The ITO contains information from four confidential informants, referred to as Sources A, B, C and D. Details are provided about each one, including:

- a. the length of time each has acted as a Source;
- b. the number of times each has provided information;
- c. the number of convictions sustained as a result of information provided by each;
- d. whether and how often the Source has been paid for information;
- e. whether the Source has been convicted, charged or investigated for perjury, public mischief or fraud;
- f. with respect to Sources C and D, a statement that they are not the subject of the investigation relating to Ms. Joe;
- g. a statement that the information from each informant was provided voluntarily; and
- h. a statement that Source A has a criminal record, but no statement regarding the existence of criminal records for Sources B, C and D.

[6] The ITO also contains a section entitled "Details of Investigation" in which specific details of the information received from each Source, are set out. The details include:

- a. when the information was received;
- b. what was being sold (crack cocaine, cocaine powder, cannabis);
- c. the price;
- d. how the product was being sold (via cell phone and by personal attendance of customers at Ms. Joe's home);

- e. a report by Source A that he or she observed an individual enter Ms. Joe's home carrying a large garbage bag which was about half full and that the individual emerged later without it; and
- f. with respect to the garbage bag, there is a statement by Constable Gillis that in his experience, this is indicative of someone transporting cannabis.

[7] The specific means by which each Source has come into the information provided is stated in a general manner, through a statement that each has obtained the information through “. . . either observing criminal activity or hearing of it directly from those involved in the criminal activity”. The identities of the individuals from whom the Sources learned of the information imparted to the RCMP are not disclosed in the ITO.

[8] There is information from Constable Gillis respecting his own observations. This includes seeing individuals in a vehicle parked and running at Ms. Joe's home, which was occupied by individuals whom, he has been advised, are drug users. He noted the door to the residence was open. Based on this, he concludes a drug transaction had taken place.

[9] He also deposes “sources”, which are unidentified and, presumably, not Sources A, B, C or D, have informed him that people go to Ms. Joe's home for a short time and leave shortly afterwards which, in his experience, is indicative of drug transactions taking place.

[10] At paragraph 46 of the ITO, Constable Gillis states that based on his own experience conducting searches for controlled substances, he believed a number of items would be found at the residence if searched. These items were listed as: crack cocaine, powder cocaine, cannabis and other controlled substances; money; debt lists; score sheets; notebooks; ledgers; address books; packaging materials; scales; mobile devices and cell phones; and identification.

THE LEGAL FRAMEWORK

[11] The warrant was authorized under s. 11(1) of the *Controlled Drugs and Substances Act, supra*, which provides:

11. (1) A justice who, on *ex parte* application, is satisfied by information on oath that there are reasonable grounds to believe that

- a. a controlled substance or precursor in respect of which this Act has been contravened,
- b. any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,
- c. offence-related property, or
- d. any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the *Criminal Code*

is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

[12] An authorizing judge or justice must have reasonable and probable grounds to issue a search warrant. Mere suspicion does not meet this standard. Rather, what is required is “credibly-based probability”: *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 168; 1984 CanLII 33 at para 43.

[13] In reviewing the decision of an authorizing justice to issue a warrant, the reviewing court must exercise deference. If, based on the record before it, the reviewing court finds the authorizing justice could have issued the warrant, that is, that there were reasonable and probable grounds to do so, then it must not interfere with that decision: *R v Garafoli*, [1990] 2 SCR 1421 at 1452; [1990] SCJ No. 115 at para 56; *R v Araujo*, [2000] SCR 992 at 1018; 2000 SCC 65 at para 51.

[14] Hearsay from confidential informants, which is the case here, can form “reasonable and probable grounds” to issue the warrant, although a tip from an informer, by itself, is insufficient to do so. The reliability of the information must be assessed in the context of the totality of the circumstances, having regard to a number of factors, including: the degree of detail; the informant’s source of knowledge; and *indicia* of the informant’s reliability, such as his or her past performance and reliability in previous investigations. The results of a search executed under authority of the warrant may not be used after the fact as evidence of reliability of the information. *Garfoli, supra*, pp. 1456-1457

POSITIONS OF THE PARTIES

The Applicant

[15] Ms. Joe argues the ITO did not give rise to reasonable and probable grounds to support the warrant being issued, nor the search being conducted pursuant to it. She has a number of concerns about the credibility and reliability of each of the

Sources. In particular, she suggests there are deficiencies in the information respecting each of the Sources and the manner in which they came to know the information provided to the RCMP.

[16] She also has concerns with the reliability of the information provided by Constable Gillis and the use of information from anonymous and unidentified sources.

[17] Accordingly, Ms. Joe submits her right to be protected from unreasonable search and seizure under s. 8 of the *Charter* has been violated.

The Crown's Position

[18] The Crown argues that in the totality of the circumstances the correct conclusion is that the ITO contains sufficient reliable information such that the Justice of the Peace was entitled to issue it.

ANALYSIS

Degree of Detail

[19] Each of the sources provided detailed information about drug transactions occurring at Ms. Joe's residence, which is set out under the heading "Details of Investigation" in the ITO.

[20] In November of 2013, Source D indicated, *inter alia*, that Ms. Joe lived at the premises which was searched; that she was selling crack cocaine from that premises for \$150.00 a gram; that she had a cell phone, the number for which Source D provided; that crack cocaine would be in on a certain date; and that Ms. Joe paid her suppliers using a money link card acquired at the Northern Store.

[21] Source A also indicated Ms. Joe had a cell phone and provided the same number as Source D. Additionally, Source A informed Constable Gillis that: Ms. Joe's customers called that cell phone number to arrange to purchase drugs; she had regular customers attending at her residence to conduct the transactions; Ms. Joe was selling crack cocaine and cocaine powder from her home; and the crack cocaine was being sold for \$150.00 a gram. All of this information was provided in November, 2013.

[22] In December of 2013, Source A provided additional information, including that: Ms. Joe was having someone sell cannabis joints at the Mad Trapper Bar in Inuvik; Ms. Joe obtained a couple of ounces of cannabis at a time; Ms. Joe

obtained crack cocaine and cannabis from someone south of Inuvik; Ms. Joe was selling cocaine powder and crack cocaine, the former for \$150.00 a gram and the latter for \$150.00 to \$200.00 a gram.

[23] In November and on two occasions in December, Constable Gillis obtained information from Sources B and C confirming that Ms. Joe resided at the premises and that she was selling crack cocaine for \$150.00 a gram from that premises.

[24] In my view, the degree of detail provided by the Sources supports the conclusion that the information is reliable. There was consistent and relatively detailed information about what was being sold, where it was being sold, for what price it was being sold. There is also specific information about the manner in which Ms. Joe paid her suppliers.

Sources of the Knowledge

[25] Ms. Joe argues there are problems with the sources of the information provided by both the four confidential Sources as well as Constable Gillis, which makes their information unreliable.

[26] With respect to the information from Sources A, B, C and D, Ms. Joe points to the use of what might be termed “boilerplate” language in identifying how of each Source obtained their information. As noted, the ITO provides that with respect to each of the four Sources, they received the information through “. . . either observing criminal activity or hearing of it directly from those involved in the criminal activity”. The source of the information is not specified further than this. There is no source pinpointed for each piece of information, nor is there delineation between which pieces of information were obtained through personal observation and which were obtained through conversations with those involved in the criminal activities.

[27] Ms. Joe argues the distinction between what information, exactly, came from personal observation and what is based on hearsay obtained through conversations is required to permit a proper assessment of the strength and reliability of each piece of information. She points out that information obtained through direct observation will be far more reliable than that which is obtained through hearsay. The general language used in the ITO to describe the source of the information does not allow this distinction to be made.

[28] Crown counsel drew the Court’s attention to the case of *Hewlett v R*, 2012 NLTD(G) 117; 2012 CanLII 46405, in which the Supreme Court of Newfoundland and Labrador dealt with this very issue. That case, although not binding on this

Court, has many of the same considerations as the case at bar and the analysis very useful.

[29] In *Hewlett*, like here, general language was used to describe the source of the information: the statement in the ITO was that the “informants had personal knowledge of the information contained herein based on conversations with and observations of the persons involved unless otherwise stated” (at para 24). The applicant argued this weakened significantly the reliability of the ITO.

[30] Goulding, J., found that in spite of a lack of detail about the source of the information, there was sufficient compensating information to allow the authorizing justice to issue the warrant. She also noted that, given the size of the community involved, a consideration which is at play in the case at bar, providing the level of information requested by the applicant (which is similar to what is requested in this application) would create a risk for the safety of the confidential informants. Her comments are set out below:

[26] While providing further details as to the informant’s source of knowledge may assist the authorizing judge in her assessment of the reliability of the information, it would be extremely risky to the safety of the informants. In this particular case, given the small community involved, such details as seemingly requested by the Applicant would have greatly increased the likelihood of identifying the informants and would likely have been edited and not available for consideration by the Applicant or the reviewing judge in any event. Disclosing such details as requested by the Applicant (when, where, with whom and what was said and observed) may have been irresponsible or negligent on the part of the police officers as it risks the identity and safety of the informants and depends totally on the success of any editing process. Having said that, if further details would not disclose the informant’s identity and jeopardize his or her safety, such details should be disclosed by police officers as boilerplate language will often weaken an affidavit. Again, it depends on the totality of the circumstances but source of the knowledge is an important consideration.

[27] In this case, there is compensating information such as the considerable details, the corroboration *inter se*, the indicia of past reliability, that give a sufficient basis to an authorizing judge to assess reliability of the informants. The police officer took limited measures to corroborate some information as time was a factor in this case and a tele-warrant was being sought. Constable McMullin had considerably more information than an anonymous tip or general information from one informant which would have absolutely necessitated delaying the obtaining of a tele-warrant until further investigative techniques were employed and corroboration was obtained.

[31] Certainly, specific information about individuals with whom each Source spoke, exactly when they had those conversations, who they observed coming and going to Ms. Joe's residence and when they made those observations, would have augmented the reliability of the information. Such an ideal standard is not always possible, nor necessary, however, for the very reasons cited in *Hewlett*.

[32] In this case, as in *Hewlett*, there is substantial "compensating" information. The authorizing justice had information from the Sources which was stated to be based on their own observations and personal interactions with those involved in the criminal activities. She had before her the general timelines during which those conversations, interactions and observations would have occurred. She also had before her information pertaining to the history of each Source with the RCMP and information about the "success record" of two of the four. The overall reliability is enhanced when one considers the consistency of the information amongst the four Sources.

[33] Ms. Joe argues information obtained and relied upon by Constable Gillis from "sources" about whom no other information is provided, was unreliable. She also questions the sufficiency of the information upon which he formed the opinion that cannabis was carried into her residence in a garbage bag.

[34] The information from sources about whom no additional information was provided in the ITO is as follows:

- a. At paragraph 18 of the ITO, Constable Gillis indicates he consulted a data base which revealed an anonymous caller reported that Ms. Joe and another person had gone to Whitehorse in April of 2012 and were bringing cannabis back with them;
- b. At paragraph 37 of the ITO, Constable Gillis indicates he personally observed Ms. Joe board a plane traveling to Whitehorse from the Inuvik Airport on December 15, 2013. He states that during the third week of December, 2013, he received information from Source A that Ms. Joe was in Whitehorse and that she was back in Inuvik. He received information from Source C that Ms. Joe was back in Inuvik as well;
- c. At paragraph 38 of the ITO, Constable Gillis states that at approximately 20:00 on December 15, 2013, he observed a truck parked but still running at Ms. Joe's residence. He indicates he was “.

. . aware the vehicle is driven by [A.B.]¹ and [C.D.] as [he has] been involved in investigations linking those individuals with vehicle”. He goes on to state “I am also aware through source information that [A.B.] and [C.D.] are drug users . . .” Under “Investigator’s Comments” he states his belief that he observed a drug transaction.² ; and

- d. At paragraph 39, Constable Gillis comments that “Sources have stated that people go into the house for a short period of time and then leave shortly”. He goes on to state his opinion, based on his experience as a police officer, this is indicative of drug transactions occurring.

[35] Ms. Joe’s concern is that because there is no information provided about these other sources, such as how long they have been providing information and whether they were paid or rewarded for information, there is nothing that would allow the authorizing judge to assess reliability.

[36] On this point, I agree.

[37] The information about Ms. Joe traveling to Whitehorse in April of 2012 is a bare-bones, anonymous tip, with no other information about the source who provided it or the circumstances under which the information was obtained. It could be something based entirely on rumour or speculation.

[38] Similarly, the information in paragraph 38 about whether the people in the truck were drug users and the information about the frequency and duration of visits by people to the premises in paragraph 39 of the ITO are not attributed to any particular sources. Unlike Sources A, B, C and D, the authorizing justice had no *indicia* of reliability³ about them upon which she could base an assessment.

[39] Finally, I turn to the matter of what may have been in the garbage bag.

[40] Constable Gillis’ provided his opinion under “Details of Investigation” that cannabis may be what was contained in the garbage bag one of the Sources observed being carried into Ms. Joe’s residence. In my view, this equates to

¹ Initials have been substituted for the names of these parties

² On this point, Ms. Joe also raised a specific concern about the information Constable Gillis provided about her travel to Whitehorse. She points out that if she left Inuvik and travelled to Whitehorse by plane on December 15, 2013, it would not be possible for her to be trafficking drugs from her residence in Inuvik that night at 8:00 p.m.

³ *Indicia* of reliability are discussed *infra*

speculation and is not something which would support a finding that there were reasonable and probable grounds for the search warrant.

[41] While I have found there are deficiencies in the information provided by Constable Gillis, I am unable to conclude that this undermined the overall reliability of the ITO and I am also unable to find that it would have left the authorizing justice with an insufficient basis upon which to issue the warrant. Notwithstanding the deficiencies, there was substantial information from the four confidential informants, which was based on their own personal observations or upon knowledge gained through conversations with those involved in the activities, and upon which the authorizing justice could rely.

Indicia of Reliability

[42] As noted, things like past performance and success rates may be examined by the Court in assessing the reliability of hearsay information from confidential sources in an ITO.

[43] This information is included for each of the Sources, with varying degrees of precision. However, Ms. Joe points to a number of factors which she suggests render the information provided by each of the four sources unreliable. These are:

- a. imprecision with respect to the number of times each has provided information;
- b. there is no indication of past “success rates” for Sources C and D;
- c. an absence of information about whether Source B does or does not have a criminal record;
- d. Constable Gillis does not indicate that Sources A and B are not the subject of the investigation as he does with Sources C and D;
- e. a lack of clarity about the length of time and by whom each of Sources A, B and C has been “handled”; and
- f. difficulties in determining if information provided to another RCMP officer by Source D the second week of November, 2013, and set out at paragraphs 19-21 of the ITO, was obtained by Constable Gillis as a result of one report prepared by that RCMP officer or three separate reports.

[44] In my view, none of these factors, either on their own, or in any combination, ought to have caused the authorizing justice to find the information unreliable and thus decline to issue the warrant.

[45] Each of the Sources has a history of providing information. While a statement setting out precisely the number of times each has provided information might have enhanced that informant's reliability, its absence does not make the information unreliable. One can readily imagine a situation where an informant comes forward with information for the first time. If the information was otherwise detailed and precise, surely the information would not be treated as unreliable simply because the informant has not previously provided information.

[46] Similarly, that Sources A and B have provided information leading to convictions is a factor which makes their information more reliable. Source A, who has been a confidential informant since 2008, has provided information resulting in the seizure of controlled substances on five prior occasions, three of which resulted in convictions. Source B had been a confidential informant for over six months at the time the ITO was sworn and had provided information used in one criminal conviction.

[47] That Sources C and D do not have a "track record" for information leading to convictions does not mean their information, which is otherwise detailed and consistent, is unreliable. There can be any number of reasons that information provided does not lead to criminal charges or convictions.

[48] Information in an ITO that informants have a criminal record, as well as whether that criminal record includes convictions for crimes which bear directly on credibility, such as perjury, public mischief or fraud, is important in allowing the authorizing justice to assess reliability.

[49] As noted, information about criminal records was provided with respect to Sources A, C and D. It would, no doubt, have been helpful, to have information about whether Source B did nor did not have a criminal record, particularly since that information was supplied for the other Sources. In the circumstances, however, the omission of that information is not fatal.

[50] Like the other three sources, Source B provided detailed information about where Ms. Joe was living, that she was selling crack cocaine from that premises and that she was selling it for \$150.00 a gram. Moreover, even if Source B's information was rejected because the existence or non-existence of a criminal record was not disclosed, the authorizing justice was still left with the information

provided by the other three sources which, in my view, was a sufficient basis for issuing the warrant.

[51] Ms. Joe does not advance any basis for her assertion that the question of whether Sources A and B are the subject of the investigation would make the reliability of their information difficult to assess. Again, while consistency in the information provided about each of the four Sources in the ITO would have been helpful, there is nothing to suggest this would be a basis for treating their information as unreliable. This is particularly so given the statements in the ITO pertaining to each Source that none of them received any remuneration or inducements in exchange for the information.

[52] Ms. Joe suggests the ITO is unclear with respect to how long and by whom Sources A, B and C have been “handled” as confidential informants. However, her concerns stem from what is clearly a typographical/proofreading error.

[53] Constable Gillis is the “informant” for the purpose of the ITO. He identifies himself as such, starting at paragraph 7 of the ITO. The Sources are referred to not only as Source A, B, C, or D, but also as “confidential informants”. Using these two terms in the same sentence is somewhat confusing. The situation is compounded by what appears to be the erroneous inclusion of the word “and” after the word “informant” in paragraphs 11(A), 12(A) and 13(A). At paragraph 11(A), for example, one finds the following:

Source A is a confidential informant and the informant **and** has handled Source B for over six months. [Emphasis added]

[54] If the word “and” is treated as the obvious typographical/proofreading error that it is, however, it is clear that Source A (and, in paragraphs 12(A) and 13(A), Sources B and C, respectively) is a confidential informant whom Constable Gillis, (the “informant”) has handled for over six months.

[55] Great care should always be taken in drafting documents to be put before the courts. An ITO is the evidentiary foundation for a search warrant. In some cases, what appears to be a minor error or omission may result in a level of ambiguity such that the authorizing justice simply cannot rely upon it. In this case, however, the error is not one which makes the meaning unclear, given the context.

[56] Finally, I find there is no merit to the argument that Source D's reliability is undermined because it is unclear whether Constable Gillis was relying on three reports or one report with respect to information Source D provided to another RCMP officer the second week of November, 2013. What is relevant is that Source D provided information to the RCMP the second week of November, 2013 that Ms. Joe was selling crack cocaine for a certain price; that she lived at the premises which was ultimately searched; that she had a cell phone and what the number to that cell phone was; that crack cocaine would be arriving in Inuvik on a certain date; that Ms. Joe would be selling it; that she goes to the Northern Store to load money on a money link card to pay her suppliers the information respecting drug transactions. Whether that information was contained in one report or three, or provided on separate occasions the second week of November, 2013, does not affect reliability.

CONCLUSION

[57] Although there are certain weaknesses in the information which was presented to the authorizing justice through the ITO, I find it contains sufficient reliable evidence which could reasonably be believed and which gave rise to reasonable and probable grounds to issue the warrant. The information provided by Sources A, B, C and D was detailed, obtained through either observation of the criminal activity or through information obtained directly from the participants, and compensated for weaknesses in other parts of the ITO. Therefore, the decision of the authorizing justice to issue the warrant should not be disturbed.

[58] The application is dismissed.

K. Shaner
J.S.C.

Dated at Yellowknife, NT, this
20th day of May 2015

Counsel for the Applicant: Tracy N. Bock

Counsel for the Respondent: Duane Praught

S-1-CR-2014-000078

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