“Client acquitted of involvement at MJ grow operation after Court accepted argument there had been serious violations of client’s rights and excluded all evidence.” [COMMENTS BY RICHARD NEARY]

R. v. A B_____

Between
Regina, and
C G A B_____ and O R____

[2005] B.C.J. No. 583

2005 BCPC 87

129 C.R.R. (2d) 238

68 W.C.B. (2d) 519

Duncan Registry No. 26503-1

British Columbia Provincial Court
Duncan, British Columbia

Higinbotham Prov. Ct. J.

Oral judgment: February 17, 2005.

(42 paras.)

Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Protection against unreasonable search and seizure — Remedies for denial or rights — Specific remedies — Exclusion of evidence — Criminal law — Powers of search and seizure — Search warrants — Validity.

Motion by the accused, A B_____ and R____, to exclude evidence from an apartment search on the basis that their rights under s. 8 of the Canadian Charter of Rights and Freedoms were violated. The police suspected a marijuana grow operation in the basement of the building, but sought to include A B_____'s residential apartment at the top of the building in the warrant. The search was conducted with a telewarrant obtained from a judicial justice of the peace. The constable seeking the warrant testified that he contacted the judicial case manager in Duncan to find a judge but none was available, and made no further inquiries about getting a warrant in-person. Prior to obtaining the warrant, the senior RCMP officer telephoned the head of security at BC Hydro, allegedly to fulfill the duty to advise of possible safety concerns. The head of security personally conducted a resistance test on the line and estimated recent consumption. The estimate was included in the information to obtain the warrant. The senior officer and head of security had a continuing relationship about grow operation investigations. During the search, marijuana plants were found in the apartment area. The head of security attended the scene after the initial warrant execution and read the meter.

HELD: Motion allowed. The evidence was excluded. The charges against the accused were dismissed. The accused's rights under s. 8 of the Charter were violated. The constable's failure to inquire whether the application could reasonably be heard on an in-person basis rendered the warrant invalid. A judicial justice of the peace, acting judiciously could not have issued the warrant for the apartment area on the evidence contained in the information. The power consumption information in the information was impossible to interpret without expert testimony. The manner in which the search was conducted was unreasonable. Discovery of marijuana plants made it unnecessary to have power consumption information. The head of security was acting hand-in-hand prior to the application for the warrant and none of the underlying facts were disclosed to the judicial justice of the peace. There were glaring inaccuracies in the information to obtain. The constable should have told the judicial justice of the peace that A B_____ had no criminal record, unlike the owner and renter of the building. Based on the information to obtain, the constable had no belief that either of the accused were involved in a grow operation. The search was a fishing expedition. The breaches were serious and close to the line of bad faith.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 8.

Counsel:

Counsel for the Crown: M. Coleman

Counsel for the Accused A B_____: R. Neary

Counsel for the Accused R____: D. McKay

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1 HIGINBOTHAM PROV. CT. J. (orally):— This is a voir dire to determine whether the defendants have established a violation of their rights under s. 8 of the Charter to be secure against unreasonable search and seizure.

2 It is common ground that if the evidence obtained as a result of a search of the building, and more specifically, the separate apartment on the third floor, is ruled inadmissible, there is nothing left to sustain either of the two charges.

3 The search was conducted with a telewarrant obtained from a judicial justice of the peace.

4 Although the executing officer testified that he entered the premises at 9:50 a.m., a time which is prior to issuance of the warrant and not within the time specified in the warrant, I am satisfied from other evidence that he was mistaken, and that, in fact, entry was made after the warrant was issued and within the time specified.

5 Most of the submissions for the defence were advanced by Mr. Neary, counsel for Mr. A B_____, because of the evidence that the apartment premises were under the control of his client.

6 The first argument of Mr. Neary is that contrary to legal authority, the affiant seeking the search warrant failed to make an inquiry as to whether a judicial justice of the peace was present at the Duncan courthouse and available to consider the application.

7 The affiant did contact the judicial case manager in Duncan, but only inquired with respect to the presence of a judge. He was told no judge was available and therefore proceeded by way of a telewarrant application.

8 In fact, the policy in force at that time was that judges would not do warrants, but that as a first option, judicial justices of the peace, in person, would do them.

9 The constable applying for the warrant then failed to advise the judicial justice of the peace in the information to obtain that was sent by fax, that he had made any inquiry whatsoever.

10 In my view, his failure to inquire as to whether the application could reasonably be heard on an in-person basis, in and of itself renders the warrant invalid. It should not have been issued.

11 Even if the police officer swearing the affidavit was unsure of his duty, the judicial justice of the peace ought to have been alive to the issue, particularly when no mention of an inquiry is seen in the information to obtain.

12 The search is therefore, effectively, warrantless.

13 I now turn to the issue of whether a judicial justice of the peace, acting judiciously, could have issued the warrant on the evidence contained in the Information to Obtain, as amplified during testimony.

14 I will deal with the issues raised by the defence, or some of them.

15 First, that W P_____ was acting as an agent of the police and his involvement in the matter taints the search.

16 On this point, I am prepared to find that Mr. P, who I believe is head of security for B.C. Hydro and in charge of investigations for theft of service, has a long-standing relationship with Corporal Wilton, who, while not the lead investigator, was the senior RCMP officer involved, and who, in fact, reviewed the Information to Obtain and approved it. Mr. P and Corporal Wilton have a continuing relationship as regards these types of investigations.

17 In this case Corporal Wilton called P some days or weeks before the search, and told him he suspected a grow op at the premises which became subject to search eventually. He said this was not to ask for help, but to fulfil his duty to advise of any possible safety issues and for purposes of any investigation Mr. P may have commenced.

18 I find this a bit disingenuous. I find it impossible to accept that Corporal Wilton was not expecting some power consumption information from Mr. P, so as to bolster a potential application for a warrant.

19 Indeed, Mr. P later reported that they did not know what power consumption was taking place recently, because they could not get in to read the meter.

20 Mr. P took it upon himself to conduct a resistance test on the line and to, effectively, guesstimate what the recent consumption had been.

21 Those figures are included in the Information to Obtain but in my opinion are impossible to interpret without expert testimony, and are therefore useless as a ground with which to obtain a warrant.

22 Mr. P was also invited by Corporal Wilton to attend at the scene with a lineman after the initial execution of the warrant, ostensibly for the purpose of ensuring officer safety.

23 However, according to Constable Minkley, the lead investigator, these gentlemen were allowed in to read the meter, presumably on an investigation designed to ultimately determine whether a theft of services had occurred. I cannot see why they would dismantle and remove the meter otherwise, despite the testimony from Constable Wilson on that point.

24 I agree with the submission that the discovery of an extensive array of marihuana plants rendered it unnecessary to obtain consumption evidence in order to advance the charges of cultivation and possession for the purpose of trafficking.

25 I hasten to add that there was no evidence placed before the judicial justice of the peace suggesting a theft of services, and the application was made only in respect of drug offences.

26 I find, therefore, that the manner in which the search was conducted was unreasonable, and further, that Mr. P was acting hand-in-hand with the police prior to the application for a warrant being made, and that none of these important underlying facts were disclosed to the judicial justice of the peace.

27 Since I have already ruled the search warrantless, these findings more properly go to the issue of whether the search was reasonable.

28 Secondly, I will deal with the sufficiency of the Information to Obtain the search warrant. There are glaring inaccuracies in the Information to Obtain, as regards the observations of Constable Minkley on the layout and description of the building. For this reason, I look at other matters referred to in the Information to Obtain with some degree of scepticism.

29 Further, I am of the view that, as per my comments in R. v. Rugg, [2003] B.C.J. No. 2965, in the circumstance of this case it was important to share with the judicial justice of the peace the police information that Mr. A B_____ had no criminal record, unlike the owner of the building and the renter of the property. Again, this goes to reasonableness.

30 My most significant finding, perhaps, is that based upon the information to obtain, the applicant had no belief that either of the accused were involved in a grow operation. In fact, the information to obtain only states a belief that a third party is involved in the grow op in the basement of the building.

31 The applicant further stated to the effect that he expected a search would determine whether or not Mr. A B_____ was involved. This was nothing but a fishing expedition as regards Mr. A B_____.

32 The only reason for widening the scope of the application to the apartment on the third floor was in the hope something might turn up.

33 The applicant had no basis for advancing the proposition, either implicitly or explicitly, that the residential area at the top of the building was accessible or had anything to do with the basement where they believed the cultivation was taking place.

34 I do not believe that it is necessary to deal with any remaining points. I find that there was no reasonable basis upon which a judicial officer, if properly informed, could have issued a warrant that covered the apartment area. The items found there are the only items that connect either accused to the basement cultivation.

35 I further find that the search itself, even had it been lawful, was conducted in an unreasonable manner, having regard to the involvement of Mr. P and the over-wide scope of the search under the circumstances.

36 Although the evidence obtained was not conscripted, the breaches were serious.

37 I am not prepared to find bad faith, but this case is close to the line.

38 The right of privacy and to be secure against unreasonable search and seizure is one of our most cherished and important rights, and it is up to the courts to do what they can to ensure that the right is respected. The only way this can be accomplished in this case is to exclude the evidence obtained as a result of the search.

39 I therefore exclude the evidence.

40 Is there any other evidence you wish to call?

41 MR. COLEMAN: No, nothing from the Crown, your Honour.

42 THE COURT: All right. Mr. A B_____ and Mr. Rogers, will you stand, please. I am dismissing both charges against you.

(EXCERPT CONCLUDED)