“Court agrees police officer’s conduct improper – case adjourned for further argument but all charges dropped by prosecutor after hearing Judge’s comments.” [COMMENTS BY RICHARD NEARY]

R. v. M____

Between
Regina
v.
K S M____, K E B____,
H R___, J D L_____,
C B P_____, Q B T
K_____, L N B_____

[2007] B.C.J. No. 1509

2007 BCPC 217

Victoria Registry No. 129349-1

British Columbia Provincial Court
Victoria, British Columbia

Quantz Prov. Ct. J.

Heard: April 27, 2007.
Oral judgment: April 27, 2007.

(63 paras.)

Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Protection against unreasonable search and seizure — Remedies for denial of rights — Specific remedies — Exclusion of evidence — In this voir dire, the search warrant was found to be invalid, and the evidence of the discovery of the marijuana grow-op was to be excluded from the trials of the two accused who owned the residence who possessed a reasonable expectation of privacy — The court would hear submissions as to the potential breach of the third party accused's s. 7 rights under the Charter — Canadian Charter of Rights and Freedoms, s. 7, s. 8, s. 24(2).

Criminal law — Controlled drugs and substances — Cultivation or production — In this voir dire, the search warrant was found to be invalid, and the evidence of the discovery of the marijuana grow-op was to be excluded from the trials of the two accused who owned the residence who possessed a reasonable expectation of privacy — The court would hear submissions as to the potential breach of the third party accused's s. 7 rights under the Charter — Canadian Charter of Rights and Freedoms, s. 7, s. 8, s. 24(2).

Criminal law — Powers of search and seizure — Search warrants — Setting aside — In this voir dire, the search warrant was found to be invalid, and the evidence of the discovery of the marijuana grow-op was to be excluded from the trials of the two accused who owned the residence who possessed a reasonable expectation of privacy — The court would hear submissions as to the potential breach of the third party accused's s. 7 rights under the Charter —

Canadian Charter of Rights and Freedoms, s. 7, s. 8, s. 24(2).

Criminal law — Evidence — Admissibility — Voir dire — In this voir dire, the search warrant was found to be invalid, and the evidence of the discovery of the marijuana grow-op was to be excluded from the trials of the two accused who owned the residence who possessed a reasonable expectation of privacy — The court would hear submissions as to the potential breach of the third party accused's s. 7 rights under the Charter — Canadian Charter of Rights and Freedoms, s. 7, s. 8, s. 24(2).

The seven accused faced charges arising out of the discovery of a marijuana grow-op -- The issue in this voir dire was the admissibility of evidence found during the search -- The accused sought to quash the warrant on the grounds that the information to obtain was seriously misleading, lacked credibility, and upon amplification it was apparent there was no credible information in support of its issuance -- HELD: The warrant was quashed, and the search declared to be in violation of the accused Paul and R___'s rights under s. 8 of the Charter -- Paul and R___, as owners, were the only accused with a reasonable expectation of privacy -- The officer failed to state that the windows were covered by a window-blind consistent with innocent use, and compounded the omission by including the allegation that indoor marijuana grow-ops were characterized by window coverings that not only prevented people from looking in, but also prevented the light from escaping -- He also failed to disclose that the apparently independent verification of the smell of marijuana was by his common-law spouse in circumstances where she had not exited her vehicle and made no attempt to isolate the odour to the residence in question -- His evidence as to how he prepared the information to obtain and made the errors he did was entirely unsatisfactory -- The officer failed entirely in his obligation to provide the justice complete and accurate evidence as to his observations of the residence -- The evidence in the ITO and the voir dire contained such misleading and false information that all of the officer's evidence in such was unreliable -- When the evidence was expunged, the remaining grounds were insufficient and could not support the issuance of a warrant -- The court was to hear further evidence/argument as to whether based on its findings the police conduct towards the remaining accused could constitute a breach of their s. 7 rights.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, s. 8, s. 24(2)

Counsel:

Counsel for the Crown: M. Mark.

Counsel for the Accused M____: S. Kelliher.

Counsel for the Accused B____ and B_____: R. Neary.

Counsel for the Accused L_____: A. Brooks.

Counsel for the Accused P_____: D. Marshall.

Counsel for the Accused K_____: R. Neary (as agent for J. Heller).

QUANTZ PROV. CT. J. (orally):—

INTRODUCTION

1 On January 19th, 2005, members of the Victoria Police Department executed a search warrant on a private residence at # B_____ Street. In executing the search, they discovered a marihuana grow operation, and that led to the present charges. This is a voir dire to determine the admissibility of evidence found during the search.

2 The accused Paul and R___ had a reasonable expectation of privacy in this residence. All other accused did not. These other accused seek standing, and, for the purpose of this voir dire only, admit: that they were arrested in the basement of the residence while harvesting marihuana; that the arresting officers had reasonable and probable grounds to believe they were parties to the two alleged offences before the court; and that the search was conducted reasonably.

3 All accused seek to quash the warrant, on the basis that the Information to Obtain sworn by Constable Devana was seriously misleading, lacking in credibility, and that upon amplification it is apparent there was no credible information in support of the issuance of the warrant.

4 The accused persons who do not have a reasonable expectation of privacy in this dwelling also argue they should have standing as the police were unlawfully in the dwelling, and corresponding arrests were also unlawful, and therefore any search incidental to those arrests was in breach of s. 8 and unreasonable.

5 As all of the accused seeking standing were represented by one counsel, for the purpose of the voir dire I allowed this counsel to question the affiant and to make submissions on all issues. It was on the understanding I would determine the issue of standing when dealing with the question of whether or not to quash the warrant.

6 All parties agreed that any 24(2) applications would be considered after this ruling.

THE EVIDENCE

7 I have considered and weighed all the evidence, together with the benefit of counsel's helpful submissions.

8 The affiant Constable Devana has 22 years police experience. The Information to Obtain is relatively brief, and totals 12 paragraphs in length. Eight of the paragraphs, in my view, are generic to all similar applications. Only paragraphs 5, 6, 9 and 10 relate to the purported observations in this case.

9 Paragraph 5 outlines the officer's alleged observations on the outside of the dwelling on January 13 '05. Paragraph 6 contains his stated observations on January 19 '05. Paragraph 9 refers to the results of an FOI request for the hydro records of the residence, and paragraph 10 outlines the purported observations of Constable Luchuck on January 18 of the same year.

10 I will deal with the paragraphs in numerical order, and then set out my observations generally on the quality of the preparation and the Information to Obtain. This leads to my conclusions regarding the strength of the evidence in support of the warrant, and my decision on whether or not it should be quashed.

11 Constable Devana alleged in paragraph 5 that at 3:50 a.m. on January 13 '05, while driving down Fort Street past the residence, he detected the unmistakeable odour of growing marihuana through the open window of his patrol car. The officer admitted in cross he in fact was travelling on Foul Bay Road, and the residence was on the corner of B___ and Foul Bay, not Fort Street, as alleged in the ITO.

12 He testified he first noticed this error just prior to court. He failed to adequately explain his error, especially given his own testimony as to his familiarity with the area, as he frequently passed by as a resident of that general area.

13 Given the map marked C for identification, one wonders how he could confuse Fort Street and Foul Bay Road. Foul Bay Road is a main north-south street, and Fort runs at a 45-degree angle to Foul Bay, heading to the downtown core.

14 The officer stated in evidence it was common practice for him to travel with the windows of his vehicle down, even in cold weather. He claimed the heater of his vehicle caused sinus problems unless the window or windows were open. When asked if his sinus problems affect his ability to smell, he replied, "I think it actually helps it."

15 The most significant incriminating factor relied on by the officer in paragraph 5 was the alleged strong odour of growing marihuana emanating from the residence on January 13th. To strengthen the weight of these alleged observations, he stated there were no homes "reasonably close" to the residence, and the closest structure was a home at least 20 metres to the south. The officer described an overpowering odour of marihuana while near the southeast corner of the residence, an odour he alleged dissipated as he walked north, south and east of the residence. In fact, as was brought out in cross-examination, the closest residence was to the west, the direction that in the ITO he does not mention walking in on January 13th.

16 In reality, the closest residence is approximately 4.5 metres west, and plainly visible from the front of the residence subjected to the search. This aspect of the Information to Obtain is extremely misleading, as it creates the false impression there were no other residences reasonably nearby and that he was able to isolate the odour from the nearest residence, which he said was at least 20 metres to the south.

17 The officer agreed at page 60 of the transcript that paragraph 5(g) was specifically worded in the ITO to isolate the residence from any other home or structure. The officer also agreed that this was misleading, and offered no reasonable explanation for his error.

18 In fact, portions of his attempted explanation only added to the confusion. At one point in his evidence, the officer testified he never walked west of the residence on January 13th, for fear of detection by the occupants. He later contradicted this evidence when questioned on how he could have determined the nature of the west-facing window covering, without walking on to the property, which he had denied. He then stated he was able to see the window covering on the west-facing window by walking some distance west on B___ Street. This is in direct conflict with his earlier testimony that he did not walk west on B___ for fear of detection.

19 This evidence raises other questions as to the accuracy of the officer's evidence. The fence to the west of the residence appears to be of an age that it must have been there on January 13 '05, and I find as a fact that it was. Given its height, it seems unlikely the officer could have seen the window covering from public property, even if he did walk west on B___. Finally, if he saw the covering on the west window in the manner he described, he could not possibly have failed to see the closest residence 4.5 metres to the west.

20 In paragraph 5(a), the officer deposed to the Justice that the basement windows were covered by blinds or some sort of fabric, thereby blocking the view into the basement. The officer acknowledged in evidence that both types of window covering were consistent with innocent use, and that he observed nothing to indicate the windows were covered in a manner intended to block the emission of light from the residence.

21 However, he failed to state this in the ITO, and he compounded this important omission by including in paragraph 7 the allegation that indoor marihuana grow operations are characterized by window coverings that not only prevent people from looking in, but also prevent light from escaping.

22 He agreed in cross-examination that "to some degree" he included paragraph 7 in the ITO to suggest these factors applied to this residence. Including paragraph 7 for this reason in these circumstances was misleading when he failed to point out the window coverings were consistent with innocent behaviour, and that, unlike in some other cases he has investigated, there was no evidence that the coverings were designed to prevent the emission of light. This is even more misleading, in my view, when one considers the fact that these were low basement windows, adjacent to the street, where coverings would be necessary for any degree of privacy to the residents involved in legal activity when it was dark outside.

23 Finally, with regard to paragraph 5(f), it alleged the affiant heard a fan consistent with those used in grow operations; in other words, an industrial type fan. He sought and obtained authorization to seize any fans, and yet none were seized. The evidence is unclear as to whether a fan was found in use in the grow operation.

24 In paragraph 6, the affiant alleged that three days later, on January 19th '05, he stood in broad daylight in front of the residence on B___ and detected an overpowering odour of growing marihuana. He further deposed that as he walked west, east and north, the odour dissipated. Even though he swore the ITO a few hours later, he failed to mention that the closest residence was approximately four and a half metres to the west on B___. This is a residence he must have seen hours earlier if he walked west on B___, as is claimed in paragraph 6.

25 In paragraph 9, the officer deposed that the hydro electric records of 6984 kilowatt hours for this residence for a 60-day period in the fall of '04 disclosed high consumption for a home this size, and in his opinion the amount was consistent with a marihuana grow operation.

26 However, in cross-examination he acknowledged he had no knowledge as to how the residence was heated, and that he did not compare the usage to a similar home or even with this home during similar time periods. The reading covered a time of year when heating in Victoria is required in a home. His opinion that this usage was consistent with a grow operation was potentially misleading, given the paucity of evidence in support of his conclusion.

27 Paragraph 10 alleged that Constable Luchuck travelled past the residence on January 18 '05 and that the officer detected an odour of growing marihuana. The affiant failed to disclose that this apparently independent verification of his smelling marihuana was by his common-law spouse in circumstances where the affiant knew she did not exit her vehicle, and in fact made no attempt to isolate the odour to this residence.

28 In general, the officer's evidence as to how he prepared the Information to Obtain and made the errors he did was entirely unsatisfactory. Put in the best possible light, he began producing the Information to Obtain on January 13 '07 and completed it on the 19th, without remembering what he said six days earlier, and without checking it for accuracy or considering whether any of the statements were misleading before he swore to their truth.

29 The officer acknowledged aspects of the ITO were misleading and confusing, and volunteered that he prepared it prior to the start of his shift on the 19th as "I get nothing but grief from my supervisors when I do search warrants, which is why I don't do them anymore."

30 He described his failure to eliminate the house closest to the residence as a source of odour as "a mystery."

31 How seriously he took his duties is apparently reflected in his assurance to the Crown on two occasions that he had no notes of this investigation. For the first time, he disclosed during cross-examination that he had notes of his investigation on January 13th and 19th. He stated that he looked his notes up at home the morning of his testimony. One can only assume he did not check for notes before twice replying to the Crown that he had nothing to disclose. Upon discovering these notes, he did not even advise Crown counsel of his discovery before court.

32 In considering and weighing the Information to Obtain in the context of all the other evidence on the voir dire, I find this officer failed entirely in his obligation to provide the Justice complete and accurate evidence as to his observations of the residence. The erroneous evidence regarding the closest residence could not be the product of a reasonable, innocent mistake.

33 The officer's evidence on the voir dire was equally troubling. Overall, Constable Devana demonstrated an extremely casual attitude towards his duties as a peace officer to be accurate and complete in swearing the ITO, and in giving his evidence to court.

34 When asked in re-examination whether he intended to mislead the Justice when he swore the paragraph dealing with the closest residence, he replied, "I could say yes or no, but my answer is obviously no." He then said, "I don't know if an elaboration to that is something required." When asked to elaborate, he again failed to provide a credible explanation.

35 I cannot explain how these errors could occur with a police officer of this experience. It is particularly so where he had the benefit of an earlier decision of Madam Justice Dorgan of the B.C. Supreme Court in 2004, some months prior to this swearing of the ITO. In R. v. Goosney and Schwind, number 123108-2, Justice Dorgan found the same Constable Devana guilty of misstatements and lack of candour. One must assume Constable Devana was aware of that decision, and yet a similar pattern appears once again some months after that decision.

36 In summary, after careful reflection, I have concluded that due to deliberate dishonesty or gross carelessness, the evidence in the ITO and the voir dire contain such misleading and false information that all of the officer's evidence in the voir dire and the ITO is unreliable. It must be given no weight unless supported by independent verifiable evidence.

ANALYSIS AND DECISION

37 As a reviewing judge, I am not to substitute my views for that of the Justice. If based on all the evidence before me, I am satisfied that the Justice could have issued the warrant, I am not to interfere.

38 In this case, the ITO identified four primary factors as providing reasonable grounds for believing there was a grow operation in the residence. They were: the odour of growing marihuana emanating from the residence; the window coverings; the level of electricity consumption; and an operating fan.

39 The evidence isolating the odour of marihuana to the residence is highly inaccurate and misleading. The evidence regarding the window coverings is incomplete and misleading. The evidence concerning electricity consumption is incomplete and potentially misleading, and the evidence concerning the fan is of little weight.

40 Given these findings, the authorities I found most helpful in deciding whether to quash the search warrant were R. v. Dellapenna, [1995] B.C.J. No. 1526 and R. v. Monroe, [1997] B.C.J. No. 1002. These are both decisions of our Court of Appeal.

41 When one expunges the misleading the deceptive facts here, the grounds remaining are insufficient and could not support the issuance of a warrant. Based on these findings and the reasoning of our Court of Appeal in the above noted cases, the warrant is quashed and I find the search to be unreasonable and in violation of the accused Paul and R___'s s. 8 rights.

42 This brings me to the question of standing for all other accused. Their counsel on the voir dire, in submitting that these accused should have standing, relied primarily on the authorities of R. v. MacIsaac, [2001] O.J. No. 2966, a decision of the Ontario Superior Court; R. v. Adams, [2001] O.J. No. 3240, a decision of the Ontario Court of Appeal; and a decision of Her Honour Judge Bruce, as she then was, in R. v. B_____, [2003] B.C.J. No. 1654, a decision of this court.

43 Based on the reasoning in these cases, the defence submitted that if the warrant was quashed, these accused persons should have standing to argue that the police were unlawfully in the dwelling, and therefore the arrest was unlawful and the search incidental to that arrest unreasonable, and for this reason in violation of these accused's s. 8 rights. On this basis, it was submitted that any evidence obtained during or subsequent to the arrest should potentially be excluded.

44 The defence also submitted that, "there might be some relief available to his clients if s. 7 came into play." Counsel acknowledged he had not provided the Crown with notice of the s. 7 argument, but then developed submissions as his argument progressed to the effect that s. 7 would apply.

45 The thrust of this argument was that the evidence should be excluded for a s. 7 breach as no one should be successfully prosecuted based on evidence obtained as a result of false and misleading statements by the affiant to the Justice, and given the officer's lack of regard for his duties to the administration of justice including his duties of disclosure.

46 The Crown's position on these issues rests on the principles established by the Supreme Court of Canada in R. v. Edwards, [1996] S.C.J. No. 11. The Crown submits that these accused have no reasonable expectation of privacy in this residence, and s. 8 is a personal right, and as a consequence they should be denied standing to argue a breach of s. 8 based upon a breach of someone else's rights. It was submitted that even if the warrant is quashed and the police are trespassers in this case, there was no breach of these accused's rights, as these accused were caught in the act of harvesting marihuana.

47 The Crown further submitted that in all the circumstances the police conduct was not a breach of s. 7, as it would not be contrary to fundamental justice to admit the evidence.

48 I am assured by counsel that the issue of standing in these circumstances has not been decided by our Court of Appeal.

49 The three cases upon which the defence placed most reliance in its argument for standing are, in my view, distinguishable. In R. v. MacIsaac, the entry to the third party dwelling pursuant to a search warrant was lawful, but it was the arrest that was contrary to s. 495.

50 Similarly, in R. v. B_____ there were a number of breaches of the Charter, including, it appears, a finding by the judge that the police did not have reasonable and probable grounds to arrest (see paragraph 72).

51 In R. v. Adams, it was conceded the police had reasonable and probable grounds to arrest. However, this case is also different on its facts. This was a case were in non-exigent circumstances the police entered a dwelling house without a warrant. The court found there was nothing in s. 529 or in R. v. Feeney (1996), 7 C.R. (5th) 101, Supreme Court of Canada, that suggested "a warrant is not required for an arrest in the dwelling house of a third party."

52 R. v. Edwards makes it clear that s. 8 rights are personal, protect people and not places, and the right to challenge a search warrant with a view to excluding the evidence found applies only to those persons who have a reasonable expectation of privacy. Here, no reasonable expectation of privacy existed for these accused, and as a consequence it was agreed they could not challenge the warrant for the purpose of excluding all the evidence found in the residence.

53 The more narrow question is whether these accused can use the unlawful entry into other person's residence as a foundation for arguing their arrests were unlawful.

54 I agree that simply because accused persons were in a private dwelling, for which they had no reasonable expectation of privacy, does not deprive them of their right to challenge the lawfulness of a search incidental to arrest. In that limited sense, I find they have standing here to seek to exclude the evidence obtained against them as a result of their arrest and subsequent to their arrest. In other words, they have standing to challenge the identification evidence obtained due to their arrest.

55 I have found the police entry into the property was unlawful. However, it was also admitted for the purpose of the voir dire that each of these accused was caught in the act of harvesting marihuana, and consequently, once in the residence the police had reasonable and probable grounds to arrest them as parties to these two offences. The manner of the search

was also admitted as reasonable. Based on these admissions, there is no question the arrest of these accused was in compliance with s. 495 of the Code.

56 The authorities referred to by the accused suggest that the lawfulness of the entry may make any subsequent arrest in a private dwelling unreasonable, however I am not persuaded that this is the law given the different facts in those cases, and given the decision of the Supreme Court of Canada in R. v. Edwards. In my view, this case is best viewed as another example of where the police, by trespassing on a third person's private property, obtained the evidence necessary to provide them with reasonable and probable grounds to arrest these accused.

57 In that regard, in my view the more appropriate authorities are those provided by the Crown, including R. v. Spinelli 101 C.C.C. (3d) 385, a decision of our Court of Appeal, and R. v. Vereczki, [1998] B.C.J. No. 3188, a decision of the B.C. Supreme Court. Applying the reasoning of these cases to the facts at bar, I find that these accused persons have only satisfied me that the co-accused's s. 8 constitutional rights have been violated, and not the s. 8 rights of these accused. I am not satisfied that in these circumstances there was a breach of the s. 8 rights of these accused in the dwelling, who had no reasonable expectation of privacy. However, that does not end the matter.

58 This leaves the matter of s. 7. This argument was not fully presented by the defence and I understand why. It evolved during submissions, as a result of very recently received evidence. As a consequence, the Crown received no notice of this aspect of the defence submission either, and I am not critical of either counsel in that regard.

59 As Madam Justice Southin emphasized in R. v. Spinelli, the mere fact evidence was obtained illegally does not mean a person's right to a fair trial and fundamental justice have been denied (see page 8). However, it is recognized in these and other authorities that misconduct to third parties may affect the accused's rights under s. 7.

60 In R. v. Spinelli, Madam Justice Southin refers to possible criminal conduct or other conduct directed towards third parties to obtain physical evidence against the accused as a possible breach of the section 7 right of the accused. She was equally clear that such a breach of s. 7 could not be founded on an officer's breach of third party rights based on the minutiae of criminal law involved in that case. In her view, this would "diminish the concept of fundamental justice."

61 In R. v. Vereczki, the court stated at paragraph 12, and I quote:

> . . . unless police misconduct to third parties leading to evidence incriminating the accused is demonstrated to be so oppressive, vexatious or unfair so as to amount to an abuse of the court's process, a doctrine independent of the rights guaranteed by s. 7 of the Charter, similar issues of the accused's rights under s. 7 and s. 11(d) of the Charter are not triggered.

62 Given my findings of fact, and as this aspect of the defence argument was understandably not fully developed but evolved while submissions were ongoing, given the recently presented evidence in the voir dire, I will consider further argument from all counsel representing these accused, including any other authorities they may have on the issue. That is whether based on my findings of fact the police conduct here towards third parties could constitute a breach of these accused persons' s. 7 rights.

63 I will also hear any evidence and submissions on 24(2) for all accused on the next date.

(RULING CONCLUDED)