IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Diep*,
2013 BCSC 2448

Date: 20131211
Docket: 35969-2
Registry: Courtenay

Regina

v.

Phuoc Huu Diep and Thi Yen Lai

Before: The Honourable Mr. Justice Halfyard

Oral Ruling on Voir Dire #1

Counsel for Crown:	J. Farenholtz
Counsel for Accused Diep:	R. Neary
Counsel for Accused Lai:	R. Miller
Place and Date of Trial/Hearing:	Courtenay, B.C. December 10, 11, 12, 2013
Place and Date of Judgment:	Courtenay, B.C. December 11, 2013

[1] **THE COURT:** Mr. Diep and Ms. Lai are charged with having possession of cocaine for the purpose of trafficking on November 2, 2012, at Courtenay. The evidence on which the charge is based was obtained by a police search of a residence at Apartment #201, 2760 Cliffe Avenue in Courtenay, which was authorized by a search warrant issued on November 2, 2012. Mr. Diep challenges the validity of the search warrant. He says that there is no evidence in the information to obtain as presented to the issuing justice which could provide objective support for the affiant's subjective belief that Mr. Diep was living at #201, 2760 Cliffe Avenue.

[2] A voir dire has been held to determine whether the issuance of the search warrant was unlawful and in violation of Mr. Diep's s. 8 *Charter* rights.

[3] The evidence on the voir dire consists solely of the search warrant and the information to obtain prepared by Corporal Paul Douglas on November 2, 2012, to support his application for the search warrant.

[4] The information to obtain was received by the judicial justice of the peace by telecommunication at 9:50 p.m. on November 2, and the warrant was issued at 10:08 p.m.

[5] The defence concedes that the evidence in the information to obtain provides objectively reasonable and probable grounds to believe that Mr. Diep was trafficking in cocaine and that he was selling cocaine out of his residence. The issue is whether the evidence provides objectively reasonable and probable grounds to believe that evidence of the offence, including cocaine, would be found at Apartment #201, 2760 Cliffe Avenue.

[6] Corporal Douglas expressly asserted his belief that cocaine would be found at #201, 2760 Cliffe Avenue: see paragraphs 5(a) and 33 of the information to obtain. The question is whether the evidence provides objective support for the officer's subjective belief.

[7] I will summarize chronologically the facts asserted in the evidence in the information to obtain that are relevant to the location of Mr. Diep's residence.

[8] On August 30, 2008, Mr. Diep told the RCMP that he lived at #201, 2760 Cliffe Avenue: see paragraph 26.

[9] On October 27, 2008, Mr. Diep told the RCMP that he lived at #210, 2760 Cliffe Avenue: see paragraph 27.

[10] On October 20, 2011, a confidential informant, "A," told Corporal Douglas that Mr. Diep lived in an apartment above the Subway restaurant on Cliffe Avenue in Courtenay: see paragraph 18(b). I think that could be a reasonable inference, although the affiant's failure to insert the last square bracket makes it somewhat ambiguous as to whether that was part of the tip information or a statement of the police officer.

[11] Next, on May 5, 2012, RCMP Constable Slofstra observed that the building in which Mr. Diep was believed to be living was an apartment building on Cliffe Avenue: see paragraph 30.

[12] In early November 2012, a confidential informant, "B," told Corporal Douglas that Mr. Diep lives at 2760 Cliffe Avenue above the Subway restaurant. Corporal Douglas went to that location and noted that the address on the building in which Mr. Diep was believed to be living was 2760 Cliffe Avenue: see paragraph 21(d).

[13] On November 2, 2012, Constable Downey did a search based on the licence plate of a car that Informant "B" reported as belonging to Mr. Diep. The search confirmed that Mr. Diep was the registered owner of the car but showed Mr. Diep's address as being #117, 2401 Cliffe Avenue. But police determined that this address was a shopping mall without any residential addresses: see paragraph 32(e).

[14] On November 2, 2012, Constable Downey searched CPIC for Mr. Diep's criminal record. During that search, he discovered that Mr. Diep was the subject of a prohibition order against possessing firearms. The date of the prohibition order is not

given. Mr. Diep's address is stated in the order to be #201, 2160 Cliffe Avenue: see paragraph 32(f).

[15] Immediately after stating that last address in paragraph 32(f), Corporal Douglas adds this statement in brackets: "This is believed to be Diep's current address."

[16] That is a summary of the evidence in the information to obtain that is relevant to the issue.

[17] On behalf of Mr. Diep, Mr. Neary argues that the evidence is not capable of objectively supporting the belief that Mr. Diep was living at #201, 2760 Cliffe Avenue. He points out that the information to obtain contains evidence of four different addresses for Mr. Diep, three of which are different from the address of the place where Corporal Douglas states he believes cocaine will be found. Counsel further says that the one address for which Corporal Douglas sought the search warrant was acquired by information that was more than four years old.

[18] Finally, defence counsel says that the judicial justice of the peace was faced with four different addresses with no way to exclude any of the other three except, perhaps, the address that was discovered by police to be a shopping mall.

[19] Mr. Neary referred me to a number of authorities to support his position that Mr. Diep's alleged criminal activity must be connected to the place sought to be searched. I accept that Judge Palmer has correctly stated the preconditions for the lawful issuance of a search warrant at paragraph 33 of his ruling in *R. v. Phan* on July 28, 2011, at Victoria.

[20] I think it is common ground that an information to obtain must contain reasonable and probable grounds to support the conclusion that evidence of the targeted offence will be found at the place sought to be searched. Counsel also agree that in this case, that precondition requires reasonable and probable grounds to believe that Mr. Diep was living at the place the police wanted to search, namely, Apartment #201, 2760 Cliffe Avenue.

[21] That is where counsel part company. Crown counsel submits that the evidence in the information to obtain does establish the necessary reasonable and probable grounds for that conclusion.

[22] Mr. Farenholtz took care in setting out the issue for a trial judge who is reviewing the sufficiency of evidence in an information to obtain. Counsel referred to several of the leading authorities and emphasized that the test is not whether the reviewing judge would have issued the warrant but whether the issuing justice could have issued it.

[23] I think I can fairly paraphrase Crown counsel's statement of the test as it applies to this case in this way. Could the evidence in the information to obtain support the conclusion that there was a credibly based probability that evidence of the targeted offence would be found at the place to be searched?

[24] I accept that as being one way the test can properly be stated. I consider that a credibly based probability is the same thing as a reasonable probability. Also, in my opinion, to say that there was a reasonable probability that a disputed fact is true is equivalent to saying that there are reasonable and probable grounds to believe that the fact is true.

[25] Reasonable probability is the standard of proof that applies, and it requires proof to a degree of certainty that is more than a mere suspicion but less than proof on the balance of probabilities: see *R. v. Jir*, 2010 BCCA 497 at paragraph 27.

[26] I do not think there is any disagreement about the test on a review. The decisive question is whether the evidence in the information to obtain is capable of supporting the conclusion that there was a reasonable probability that Mr. Diep was living at #201, 2760 Cliffe Avenue on November 2, 2012.

[27] The law presumes that a search warrant is valid. In this case, Mr. Diep bears the burden of demonstrating that the evidence in the information to obtain is insufficient: see *R. v. Campbell*, [2011] 2 S.C.R. 549 at paragraph 14.

[28] Crown counsel acknowledges the different addresses for Mr. Diep which appear in the information to obtain, but counsel says that one of those addresses was the address of the place that Corporal Douglas wanted to search, and that amounted to some evidence which could support the issuance of the warrant. Mr. Farenholtz says, in effect, that it was open to the issuing justice to conclude that Mr. Diep lived at #201, 2760 Cliffe Avenue. He argued that the justice was entitled to draw reasonable inferences from the facts stated in the information to obtain, and he implied that the inference that Mr. Diep lived at #201, 2760 Cliffe Avenue was a reasonable inference which could be drawn notwithstanding the other competing inferences.

[29] Crown counsel cited *R. v. Nguyen*, 2011 ONCA 465, to support his position, but I do not think it assists the Crown for a number of reasons. For one thing, the error in an address in that case was said to be relatively meaningless, and also, it was said that the correct address was stated correctly in several other references. In other words, there was only one misstatement of an address, and I refer to paragraph 33 of that judgment.

[30] Crown counsel is right in saying that a justice of the peace can draw reasonable inferences: see *R. v. Vu*, 2011 BCCA 536 at paragraph 40. I think the question is whether it is a reasonable inference that Mr. Diep was living at the place sought to be searched. I do not agree with Crown counsel when he says that if there is some evidence which, if believed, could support the necessary inference, then the justice of the peace can issue the warrant even if there is other evidence which seriously conflicts with the evidence relied on.

[31] The credibility of various pieces of conflicting information given by different persons which is contained in an information to obtain usually cannot be assessed with any significant degree of confidence by simply looking at the information to obtain. The test suggested by Crown counsel is the test on a no-evidence motion at the close of the Crown's case on a trial and is also the test at a preliminary inquiry on the issue of committal.

[32] In my opinion, the issuing justice could have reasonably inferred that the shopping mall address for Mr. Diep was not his current address. But I can see no basis on which the justice could reasonably choose Apartment #201, 2760 Cliffe Avenue and exclude the other two different addresses as being incorrect. The address chosen for the search was based on Mr. Diep's statement to the police over four years previously. A few years after he made that statement, Mr. Diep told the police he lived at #210, 2760 Cliffe Avenue. At the time the warrant was applied for, the information in the information to obtain shows that an undated prohibition order gave Mr. Diep's address as being #201, 2160 Cliffe Avenue. Moreover, Corporal Douglas states his belief that he believes that last address to be Mr. Diep's current address.

[33] In my view, that statement of the officer is significant because nowhere in the information to obtain does he expressly state that he believes Mr. Diep lives at #201, 2760 Cliffe Avenue. He only says, in paragraphs 5 and 33, that he believes cocaine will be found at that address. Absent that statement of Corporal Douglas's belief, it might have been open to the justice to infer that 2160 was meant to be 2760, but that is not the situation here.

[34] In these circumstances, it is difficult to see how the judicial justice of the peace could even reasonably conclude that Corporal Douglas subjectively believed that Mr. Diep was living in Apartment #201 at 2760 Cliffe Avenue. But assuming that Corporal Douglas did believe that Mr. Diep was living in Apartment #201, there was considerable evidence to the effect that Mr. Diep lived in an apartment building at 2760 Cliffe Avenue. However, there is no evidence as to how many apartments there are, and there was no police surveillance which established that Mr. Diep was connected to that apartment building, let alone to any particular apartment in the building.

[35] Even if it was open to the justice to infer that Mr. Diep was living in an apartment in the building at 2760 Cliffe Avenue, I see no difference in value between Mr. Diep's statement to the police on August 30, 2008, that he lived in Apartment

#201 and his statement on October 27, 2008, that he lived in Apartment #210, each being different but each having equal weight. The acceptance of one over the other could not be a reasonable inference, in my opinion. Even assuming the necessary subjective belief, there are no objectively reasonable and probable grounds to support it.

[36] In my opinion, the defence has shown that the evidence in the information to obtain is not capable of supporting the conclusion that there was a reasonable probability that Mr. Diep was living at #201, 2760 Cliffe Avenue in Courtenay on November 2, 2012. That being so, the judicial justice of the peace could not have lawfully issued the search warrant which authorized a search of that residence. The warrant must be set aside. That means that the search was conducted without judicial authority and was unreasonable. It is not suggested that the search was justified by any other law.

[37] I conclude that the search was in violation of Mr. Diep's s. 8 *Charter* rights.

"Halfyard J."

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Before: The Honourable Mr. Justice Halfyard

Oral Ruling on Voir Dire #2 and Reasons for Judgment

Counsel for Crown:	J. Farenholtz
Counsel for Accused Diep:	R. Neary
Counsel for Accused Lai:	R. Miller
Place and Date of Trial/Hearing:	Courtenay, B.C. December 10,11, 12, 2013
Place and Date of Judgment:	Courtenay, B.C. December 12, 2013

[1] **THE COURT:** In voir dire #1, I found that Mr. Diep's s. 8 *Charter* rights had been breached by the police search of his residence on the authority of a search warrant that was not lawfully issued. Voir dire #2 has been held in order to determine whether the evidence obtained by that search should be excluded from his trial. The only evidence presented is a statement of admissions of fact.

[2] The first issue is whether the evidence was obtained in manner that infringed or denied Mr. Diep's s. 8 rights. I find that it was. The second issue is whether the admission of the evidence in this trial would bring the administration of justice into disrepute. The onus of proof, of course, is on Mr. Diep.

[3] What the accused must establish is that having regard to the circumstances relevant to the three factors in *R. v. Grant*, the admission of the evidence would bring the administration of justice into disrepute.

[4] The first factor is the degree of seriousness of the police conduct in committing the s. 8 violation. The principle is that the more serious the conduct, the greater is the need for the courts to disassociate themselves from that conduct by excluding the evidence.

[5] The conduct in question is Corporal Douglas making an application for a search warrant based on an information to obtain that failed to provide sufficient grounds to support the lawful issuance of a search warrant. The evidence in the information to obtain was sufficient to show that Mr. Diep was trafficking in cocaine and that he was doing so out of his residence. But the evidence was not capable of supporting the necessary conclusion that evidence of Mr. Diep's offence would be found at the place sought to be searched.

[6] I have explained the deficiency in my ruling on voir dire #1, and I will not repeat it here. I will only add the admitted fact that there is an Apartment #210 in the building at 2760 Cliffe Avenue in Courtenay.

[7] There is no suggestion that Corporal Douglas intended to mislead the judicial justice of the peace or that he acted in bad faith, but nor is there any evidence of urgency. The defence argues that the officer acted unreasonably in preparing an information to obtain which was seriously deficient and which he ought to have known could not satisfy a precondition for the issuance of a search warrant that has been essential to support a search warrant since the Supreme Court's decision in *Hunter v. Southam Inc.* in 1984.

[8] I was referred to *R. v. Reddy*, 2010 BCCA 11 at paragraphs 92 and 97, where the principle that police should know the established law, is discussed.

[9] Mr. Neary submits that the police conduct was serious, and he relied on a statement made by the Court of Appeal in *R. v. Voong*, 2013 BCCA 527 at paragraph 92, to the effect that a s. 8 violation was serious because the police officer who applied for a search warrant provided insufficient material to support the warrant. The court there noted the police officer did not intend to mislead and did not act in bad faith but pointed out that the absence of bad faith does not equate to good faith.

[10] Crown counsel submits that the violation was nowhere near the serious end of the spectrum and was relatively minor. Mr. Farenholtz argued that since there was no cross-examination of Corporal Douglas on his information to obtain, there is no basis for concluding that he acted unreasonably or was negligent or careless in presenting a deficient information to obtain to the judicial justice of the peace.

[11] Counsel said that the police officer did nothing wrong and that if his information to obtain was deficient, it was up to the judicial justice of the peace to see that and send it back to Corporal Douglas to gather more evidence.

[12] Crown counsel referred to several cases which he said supported his position on the issue of the seriousness of the police conduct. I think the case of *R. v. Wong*, 2010 BCCA 160, is distinguishable and not of assistance for several reasons, including the fact that the police officer there acted in good faith, which was apparent from paragraphs 17 and 54. In addition, there was some urgency, and there was a meth lab being operated in the house that was searched. In addition, the Court of Appeal held that the trial judge had not committed any error in his analysis and so considerable deference was given to the trial judge's decision.

[13] The case of *R. v. Nguyen*, 2011 ONCA 465, was cited by Crown counsel, but I find that that case is not of much assistance because the Court of Appeal held the trial judge erred in setting aside the search warrant. Moreover, in its unnecessary s. 24(2) analysis, the Court of Appeal noted that the accused persons did not own or live in the home and considered that any hypothetical s. 8 violation was relatively minor.

[14] Crown counsel next submitted that the decision of the Ontario Court of Appeal in *R. v. Blake*, 2010 ONCA 1, supported his argument that Corporal Douglas's *Charter*-infringing conduct was of minor seriousness. In that case, the trial judge held that the information to obtain was insufficient to sustain the issuance of the search warrant but nevertheless admitted

the evidence obtained by the search, which included cocaine, and the accused was convicted. On the accused's appeal against the trial judge's decision to admit the evidence, it was apparent that at trial, the information to obtain that had been presented to the issuing justice had been extensively edited to protect the identity of confidential informants. The trial judge ruled that the edited information to obtain was insufficient, and the Crown did not appeal that ruling. The Court of Appeal noted that the trial judge had found that the police had acted in good faith and accepted that finding.

[15] At paragraph 24, Mr. Justice Doherty stated:

> They [meaning the police] cannot be said to have acted negligently or in ignorance of any of the applicable *Charter* requirements.

[16] In paragraph 25, Mr. Justice Doherty expanded on that statement, and then he stated:

> The police conduct in this case does not fit anywhere on the misconduct continuum described in *Grant*, at para. 74.

[17] Then, at paragraph 32, the court noted that "the propriety of the police conduct stands unchallenged" and, in paragraph 33, stated, among other things, that there was not even any suggestion of "inattention to constitutional standards."

[18] The Court of Appeal in *Blake* found that the seriousness of the s. 8 violation was minor and that although the impact of the violation on the accused was serious, the first and third *Grant* factors outweighed the second and admitted the evidence.

[19] In my view, the facts relating to the seriousness of the police conduct in *Blake* are very different than in this case.

[20] Mr. Farenholtz seemed to suggest that the conduct of Corporal Douglas was unchallenged in the same sense as the police conduct in the *Blake* case. I do not agree. The defence challenges his conduct by alleging Corporal Douglas was negligent and careless and by attempting to demonstrate that negligence by reference to the information to obtain.

[21] I find that Corporal Douglas acted unreasonably in preparing a seriously deficient information to obtain and applying for a search warrant on the strength of it.

[22] Crown counsel implied that the erroneous issuance of the search warrant by the judicial justice of the peace mitigates the seriousness of the violation. I do not agree. A police officer who makes an ex parte application for a warrant to search a place, particularly when that place is a residence, has a duty to exercise reasonable care in attempting to present evidence in an

information to obtain which is sufficient to meet the established constitutional standards. Corporal Douglas's conduct, in my view, fell below the required standard of care. There was nothing intentional about the conduct of Corporal Douglas, nor would I characterize his conduct as being grossly negligent. Nevertheless, I find the *Charter*-infringing police conduct to be serious and of a kind from which the court should dissociate itself.

[23] In addition to paragraphs 92 and 98 of *R. v. Voong*, I find support for this conclusion in *R. v. Dhillon*, 2010 ONCA 582 at paragraph 61.

[24] I conclude that the first *Grant* factor weighs strongly in favour of exclusion.

[25] As to the second factor, it is plain that the impact of the violation on Mr. Diep's *Charter*-protected right of privacy was serious. That point is not in contest. The accused persons were found in their residence and arrested, and their home was searched.

[26] The second factor weighs heavily in favour of exclusion.

[27] Clearly, the third *Grant* factor, society's interest in the adjudication of the charge on the merits, weighs heavily in favour of admission. The offence is serious. Some 247 grams of crack cocaine, apparently packaged for sale, were found in Mr. Diep's possession, and he admits the intent to traffic. A large amount of cash, more than $27,000, was found in the master bedroom of the residence. Mr. Diep had a further $1,500 in cash on his person. The evidence recovered in the search is highly reliable, and it is essential to the Crown's case. If that evidence is excluded, an obviously guilty person will go free.

[28] The Court of Appeal in *R. v. Voong* at paragraph 105 said that society "also has a vital interest in having a justice system that is above reproach" and that this interest should also be considered when assessing the third factor. But even taking that interest into account, the third factor remains heavily weighted in favour of admission.

[29] The last step in the *Grant* analysis is to weigh the factor or factors which favour exclusion against the weight of the factor or factors which favour admission. Here, the first and second factors favour exclusion while the third factor favours admission.

[30] Bearing in mind the long-term adverse effect that I think admission of this evidence would have on the reputation of the justice system, I am satisfied that the first two *Grant* factors outweigh the third. The evidence will be excluded.

[31] MR. FARENHOLTZ: Thank you, My Lord. Just to make it clear on the record, the

ruling should apply to both Mr. Diep and Ms. Lai.

[32] MR. NEARY: Yes, My Lord, certainly. And I would assume my friend is calling no more evidence?

[33] MR. FARENHOLTZ: That being the case, the Crown has no evidence to call.

[34] MR. NEARY: And I would ask Your Lordship direct acquittals.

[35] THE COURT: All right.

[36] MR. MILLER: As would I, My Lord.

[37] THE COURT: There being no further evidence against the accused persons, I find them both not guilty, and they are free to go.

[38] MR. FARENHOLTZ: Thank you, My Lord.

[39] MR. NEARY: Thank you very much, My Lord.

"Halfyard J."

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[2] The first issue is whether the evidence was obtained in manner that infringed or denied Mr. Diep's s. 8 rights. I find that it was. The second issue is whether the admission of the evidence in this trial would bring the administration of justice into disrepute. The onus of proof, of course, is on Mr. Diep.

[3] What the accused must establish is that having regard to the circumstances relevant to the three factors in *R. v. Grant*, the admission of the evidence would bring the administration of justice into disrepute.

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urgency. The defence argues that the officer acted unreasonably in preparing an information to obtain which was seriously deficient and which he ought to have known could not satisfy a precondition for the issuance of a search warrant that has been essential to support a search warrant since the Supreme Court's decision in *Hunter v. Southam Inc.* in 1984.

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[21] I find that Corporal Douglas acted unreasonably in preparing a seriously deficient information to obtain and applying for a search warrant on the strength of it.

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[28] The Court of Appeal in *R. v. Voong* at paragraph 105 said that society "also has a vital interest in having a justice system that is above reproach" and that this interest should also be considered when assessing the third factor. But even taking that interest into account, the third factor remains heavily weighted in favour of admission.

[29] The last step in the *Grant* analysis is to weigh the factor or factors which favour exclusion against the weight of the factor or factors which favour admission. Here, the first and second factors favour exclusion while the third factor favours admission.

[30] Bearing in mind the long-term adverse effect that I think admission of this evidence would have on the reputation of the justice system, I am satisfied that the first two *Grant* factors outweigh the third. The evidence will be excluded.

[31] MR. FARENHOLTZ: Thank you, My Lord. Just to make it clear on the record, the ruling should apply to both Mr. Diep and Ms. Lai.

[32] MR. NEARY: Yes, My Lord, certainly. And I would assume my friend is calling no more evidence?

[33] MR. FARENHOLTZ: That being the case, the Crown has no evidence to call.

[34] MR. NEARY: And I would ask Your Lordship direct acquittals.

[35] THE COURT: All right.

[36] MR. MILLER: As would I, My Lord.

[37] THE COURT: There being no further evidence against the accused persons, I find them both not guilty, and they are free to go.

[38] MR. FARENHOLTZ: Thank you, My Lord.

[39] MR. NEARY: Thank you very much, My Lord.

"Halfyard J."