

R. v. [REDACTED]

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

B.D. MacKenzie J.

Heard: February 29 and March 1-4, 2016.

Judgment: March 4, 2016

Docket: 163613-2

Registry: Victoria

[2016] B.C.J. No. 551 | 2016 BCSC 498

Between Regina, and [REDACTED] [REDACTED] [REDACTED]

(65 paras.)

Case Summary

Criminal law — Powers of search and seizure — Search warrants — Application by accused, charged with narcotic and firearm offences, to excise paragraphs of information to obtain allowed — Information to obtain tracking warrant for accused's vehicle did not mention accused was associated with courier business — Duty of full and frank disclosure was clearly breached by police — Appropriate to excise parts of paragraphs that contained references to surveillance of short duration stops which affiant deposed was consistent with drug trafficking.

Application by the accused, charged with narcotic and firearm offences, to excise paragraphs of the information to obtain. The police investigation of the accused focused on a suspected dial-a-dope operation. The information to obtain a tracking warrant for the accused's vehicle did not mention the accused was associated with a courier business. The lead investigator deliberately chose not to tell the affiant about the courier business as he believed it was not legitimate and was a front for the accused's drug dealing operation. The accused sought to excise references to surveillance of short duration stops which the affiant deposed was consistent with drug trafficking.

HELD: Application allowed.

The duty of full and frank disclosure was clearly breached by the police. It was appropriate to excise those parts of the paragraphs that contained references to the short duration stops of the accused's alleged employee on the basis that the information relating to the accused's courier business would have been material information the authorization judge should have had available to him.

Counsel

Counsel for the Crown: T. Corsi.

Counsel for the Accused: R. Neary.

Oral Ruling on *Voir Dire*

B.D. MacKENZIE J. (orally)

1 Mr. [REDACTED] is charged on this eight-count information with several narcotic offences, as well as firearm offences. As is often the case in matters involving drug charges, we are not in the trial proper at this stage of the proceedings, but rather at the *voir dire* stage.

2 Originally, the defence applied to set aside a tracking warrant pertaining to a vehicle driven by the defendant, Mr. [REDACTED] on the basis that the police failed to make full and frank disclosure of material facts in the ITO relied on by the judicial officer who authorized the warrant. In an alternative submission, the defence submitted that certain paragraphs in the ITO should be excised where there is reference to surveillance of short duration stops which the affiant deposed was consistent with drug trafficking.

3 The brief salient facts are that the police investigation of Mr. [REDACTED] focused on his alleged trafficking in narcotics in what is commonly referred to as a dial-a-dope operation, consisting of a drug trafficker driving to various locations and making short duration stops, as I have mentioned, where persons would enter the vehicle and then exit a moment or two later, activities which, based on their experience and knowledge of the drug trade, the police understandably believed to be consistent with such a trafficking operation.

4 As a result of the defence application and with the consent of the Crown, a *voir dire* was declared where the lead investigator in this matter, Corporal Pilot, and the affiant, Constable Robinson, both testified. In this regard, Corporal Pilot confirmed he is in charge of the West Shore RCMP Street Crime Unit and has been a police officer for about 26 years, with significant experience in drug investigations and search warrant issues.

5 During his testimony, Corporal Pilot confirmed that on March 19, 2014, he received information via an email from a fellow officer outlining that an auxiliary police officer had observed Mr. [REDACTED] driving a vehicle described as a blue Caravan. That was eventually the subject matter of the application for a trafficking warrant made a couple of days later. At the same time, this communication contained further information that Mr. [REDACTED] operated a courier business under the "front/name Deliver Me Courier."

6 By consent, the evidence of Corporal Pilot that was received during a prior *voir dire* in November of 2015 was referred to on the present application. At that time, defence counsel put the following questions to Corporal Pilot:

Q All right, so you received information that Mr. [REDACTED] potentially operated a courier business on March the 19th, 2014, correct?

A That's correct.

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Q All right, what steps did you take to investigate the existence of that business?

A I googled it.

Later on:

Q Do you remember what you discovered upon googling Deliver Me Courier?

A I cannot recall. He very well could run a delivery service called Deliver Me Courier. It's very possible.

...

Q It's very possible that you knew that on March of 2014?

A It's possible that he uses a name Deliver Me service, yeah.

Q And that he operated a courier --

A It's possible, possible, I couldn't confirm it, no.

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Q It's possible that you knew in March of 2014 that Mr. [REDACTED] had a business --

A Absolutely, yeah.

...

Q As lead investigator in this case did you review all of the ITOs prepared by Constable Robinson?

A Yes, we did.

Q Prior to their being submitted?

A Yes.

Q All right. Not one of those ITOs mentions anywhere that Mr. [REDACTED] was associated with a courier business of any sort, let alone one that had already been identified by the name of Deliver Me Courier, correct?

A That's correct.

Q All right. Nowhere in the report to Crown counsel is there any mention of the fact that you had

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information that Mr. [REDACTED] operated a courier company, correct?

A That's correct.

Later on:

Q Why did you withhold that seemingly highly relevant information in the context of this investigation and these proceedings?

A I didn't believe it was relevant. I believed if he did run a courier service it was courier to deliver drugs.

Q Did you come to the conclusion that since you decided that, no one else needed to think about it or worry about it?

A Yeah ...

7 During that *voir dire*, Corporal Pilot testified that he and the affiant, Constable Robinson, were understandably in constant communication with each other, given the significance of the investigation into Mr. [REDACTED] alleged drug trafficking. In this regard, Corporal Pilot testified that he shared the information about Mr. [REDACTED] operating a courier business with Constable Robinson, but was not sure when he did this. He testified Constable Robinson "would have been privy to it."

8 Corporal Pilot also confirmed he reviewed the three ITOs that were produced by Constable Robinson in order to ensure that each was correct and satisfied the police duty to provide full and frank disclosure when seeking any ex parte judicial authorization. Indeed, Corporal Pilot checked in his supervisor's check document the following box that states, "Provides full, fair, frank disclosure, including information that favours the accused."

9 Corporal Pilot, however, acknowledged that the omission of this information about Mr. [REDACTED] operating a courier company was significant and conceded in his testimony that "in hindsight, absolutely this should have been in the ITO." Corporal Pilot then testified that he had not considered that Mr. [REDACTED] was operating a legitimate business or that the information was credible, because of his belief that, pursuant to source information the police had received, Mr. [REDACTED] was involved in a dial-a-dope

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operation by supplying drugs for a person named Boddam who worked for him and who was observed to make several short duration stops in late February and early March which, according to Constable Robinson, the affiant, "In my experience, this kind of behaviour, short meetings with other vehicles, people, residences, is consistent with that of a person trafficking drugs to their clients."

10 I pause here to note that there are significant inconsistencies in the evidence of Corporal Pilot and Constable Robinson as to when, if at all, Constable Robinson was advised by Corporal Pilot about the information pertaining to Mr. [REDACTED] and the courier company. Corporal Pilot initially testified that he advised Constable Robinson of the delivery service issue, but could not recall when that occurred. During the second *voir dire*, Corporal Pilot testified he thought he advised Constable Robinson about Mr. [REDACTED] involvement with DM Courier prior to any of the ITOs being prepared by Constable Robinson.

11 During the second *voir dire*, Constable Robinson testified that, as the affiant for these ITOs, he relied on Corporal Pilot to provide him with any important information about the investigation into Mr. [REDACTED] alleged drug activities as he, like Corporal Pilot, was fully aware of his duty to provide the issuing judicial officer with all relevant information, whether or not, to use his terms, such information is inculpatory or exculpatory.

12 As to whether or not he was advised by Corporal Pilot about Mr. [REDACTED] involvement with DM Courier prior to applying for any of the warrants, Constable Robinson testified Corporal Pilot did not advise him of this information. Constable Robinson testified he only first learned about Mr. [REDACTED] alleged involvement with a legitimate courier company when Mr. [REDACTED] probation officer from Duncan advised him of this in September 2014.

13 While I would have thought this issue would have been clarified by some proper documentation on the part of Corporal Pilot, as emphasized by defence counsel, either by note taking or some other recordkeeping, I am not satisfied this lack of clarity on the part of Corporal Pilot is of great significance with respect to the present application, although I do agree with defence counsel that it does illustrate to a certain degree a *laissez-faire* attitude on the part of the police, which of course should be discouraged.

14 Returning to the question of why Corporal Pilot took it upon himself to determine this information that Mr. [REDACTED] was involved in a legitimate business was simply not believable, Corporal Pilot initially explained, as I have referred to in the questions and answers, that he googled this company but could not recall what the results of the Google search were. However, when he next testified some months later, Corporal Pilot testified that he recalled his Google search revealed that there was a DM Courier business listed, but not in Victoria and, as a result, because there was no listing for Victoria, this caused Corporal Pilot to conclude the information was not credible and therefore not relevant and, as a result, he determined it was not necessary to advise Constable Robinson about this information or to include it in the ITO.

15 Corporal Pilot also confirmed that he performed another Google search shortly after testifying on the first *voir dire*, but again could not recall, again because of the lack of any documentation, whether that search was the one that showed no Victoria address for DM Courier or that his first search showed no such address in Victoria.

16 What is troubling, however, is that with the consent of the Crown, the defence filed on this *voir dire* an affidavit confirming that a very recent Google search for "Deliver Me Courier Victoria" did in fact list two addresses in Victoria for that company. As a result, the defence says I should be highly suspicious of Corporal Pilot's testimony that he did not find a Victoria address and that his most recent testimony on

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this issue is merely an attempt to try and advance a plausible reason why he determined it was not necessary to advise Constable Robinson to include this material information in the ITO.

17 In my view, however, while these circumstances are a cause for concern, and again suggest a certain casualness with respect to important aspects of this significant investigation, given the fact that Corporal Pilot clearly concedes that by taking it upon himself to decide what need or need not be disclosed to an authorizing judge, he, and ultimately, although through no fault of his own in these circumstances, Constable Robinson, the duty of full and frank disclosure was clearly breached.

18 As a result, this troubling circumstance about the Google search and the issue of whether or not Constable Robinson was informed of this information takes on less significance than what otherwise might be the case or that it should colour the analysis of why there was the decision by Corporal Pilot to omit any reference whatsoever to the information that Mr. [REDACTED] was involved in a legitimate courier business.

19 I reach this conclusion because I am satisfied there has not been full and frank disclosure on the part of the police in these circumstances. While it is of course for the court to determine this issue, here a very experienced police officer has readily conceded the obligation and duty to do just that has not been met. In the words of Corporal Pilot, "I definitely should have told Constable Robinson, this information should have been in the ITO."

20 There is also no question that the evidence of Corporal Pilot clearly and frankly establishes that the omission of this information was not mere oversight or an innocent omission, in the sense that it was a deliberate decision made by Corporal Pilot not to include it, again because he was of the opinion any reference to Mr. [REDACTED] operating a courier business was merely a front for his drug dealing operation and, because of this belief, Corporal Pilot concluded it was not necessary to disclose it.

21 In these circumstances, the Crown and defence differ on what should be the end result of this failure to make full and frank disclosure on the part of Corporal Pilot and, by extension, Constable Robinson. As I mentioned at the outset, the defence had initially submitted that, given the deliberate decision to omit relevant information from the ITO and preclude the authorizing judge from having the opportunity to consider the totality of the circumstances, the tracking warrant should be quashed pursuant to the court's residual discretion to do just that.

22 However, having resiled from that submission during the course of these proceedings, the defence now relies on the submission that, at the very least, to maintain the integrity of the administration of justice, I should excise those paragraphs in the ITO that have been tainted by the non-disclosure of the information pertaining to the courier business; that is, any paragraphs that refer to short duration stops made by Mr. Boddam, believed to be employed by Mr. [REDACTED] in the drug trade, as being consistent only with drug transactions taking place.

23 On the prior point about residual discretion, the Crown submitted that that discretion should only be exercised where the totality of the circumstances would lead to a conclusion that the police conduct was so egregious that it approached something akin to an abuse of process. The defence have relied on *R. v. Ling* [2009] B.C.J. No. 267 for its primary argument, but having withdrawn that argument, it is appropriate to nevertheless note the comments of Justice Bauman, as he was, in *Ling* with respect to the duty to make full and frank disclosure. At paragraph 38 of *Ling*, Justice Bauman states:

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[38] An obligation to make full and frank disclosure of all material facts, whether pro or con the issuance of the warrant, best guards against the evil of misleading the authorizing justice by omission.

[39] In *Hunter v. Southam* [\[1984\] 2 S.C.R. 145](#) ... the Court stated at para. 32:

The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner.

24 In *Ling*, Justice Bauman also noted that in that case the evidence or the material information that was admitted was considered by the police to be very material. Similarly, in the present case, the observations of many short duration stops by Mr. Boddam, alleged to be acting on behalf of Mr. [REDACTED] were obviously very material to the application for the tracking warrant.

25 Moreover, the defence understandably in this case emphasizes the comments of Justice Fish in *Morelli* [\[2010\] 1 S.C.R. 253](#) as being applicable, where the court there made the general observation, which I agree with, that although *Morelli* did not address the question of setting aside a warrant because of material non-disclosure of relevant information, in situations where the incorporation of material information would have resulted in the affiant's narrative appearing much less sinister and much less supportive of the claim that the accused was committing a criminal offence, it illustrates how important it is to include all relevant material information in an ITO.

26 In paragraphs 58 and 59 in *Morelli*, Justice Fish made it clear that the informant's obligation is to present all material facts, favourable or not, to the authorizing judge.

27 As I have noted, even though the defence acknowledges the conduct of the police in the present case is not so egregious that the tracking warrant could have been quashed, the defence submits that all paragraphs that refer to the short duration stops should be excised, and refer me to the decision in *Suter* [\[2003\] O.J. No. 5026](#) from Ontario where the court concluded the appropriate approach in similar circumstances would be to excise the paragraph if it results in material misrepresentations by omission, irrespective of whether this is as the result of carelessness or deception.

28 In these circumstances, learned Crown counsel submit there is nothing inaccurate in the paragraphs the defence wants excised, as they simply detail the police observations which are not criticized or taken issue with, and the belief of the affiant that these activities are consistent with drug trafficking, and that this should be determinative of the issue. Conversely, the defence submits that, as in *Morelli*, if the information about the courier business was included, as the police here have conceded it should have been, Constable Robinson's narrative would have appeared less sinister and less supportive of his belief that the activities observed were related to drug trafficking.

29 As far as excising certain paragraphs in the ITO, the Crown says this relief should not be granted, because again the information was not inaccurate and it need not have been disclosed on the basis that it was not material. The Crown says I can also consider the amplification evidence of the police and conclude that not only was there insufficient evidence to establish any intent to mislead the authorizing judge, a conclusion now shared by the defence, but there is an explanation provided by Corporal Pilot as

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to why he determined it was not relevant information and did not have to be included, even though both he and Constable Robinson unequivocally testified that it should have been included.

30 Moreover, the Crown submits that even if I was to incorporate this information in the paragraphs sought to be excised, that is, the courier information *vis-à-vis* references to Mr. Boddam operating a vehicle which regularly made short duration stops, this information would not impugn or undermine Constable Robinson's belief that these activities were consistent with drug trafficking.

31 As a result, the Crown says, for all those reasons the paragraphs should not be excised.

32 Given the totality of the evidence on the voir dire, I am satisfied that the information pertaining to Mr. [REDACTED] involvement with a legitimate courier business was material information and, as the affiant acknowledged, if he had known about this information, he would have included it or, as Corporal Pilot testified, "absolutely this should have been in the ITO."

33 In these circumstances, I am satisfied that there has been a lack of full and frank disclosure when Corporal Pilot took it upon himself to conclude this information was irrelevant and need not be put before the authorizing judicial officer. As a result, I am persuaded it is appropriate to excise those parts of the paragraphs that contain references to the short duration stops of Mr. [REDACTED] alleged employee, Mr. Boddam, on the basis that the information relating to Mr. [REDACTED] courier business would have been material information the authorizing judge should have had available to him in order to take it into consideration in determining whether the warrant should have been issued.

34 As a result, the following information will be excised from the ITO, and gentlemen, if you can follow along with me, it is not exactly as suggested by Mr. Neary, but close.

35 Paragraph 17(b), the first full sentence ending with the words "seven minutes" will be excised. The third full sentence, beginning with, "West Shore RCMP" and ending with "six minutes or less meets" will be excised.

36 Paragraph 19(c) (ii), referring to February 26 at the outset, is excised.

37 Paragraph 20(b), the information that starts at (b) and includes (i), (ii), (iii), and (iv), is excised.

38 Paragraph 21(e), the information commencing at (e) and including the information in (ii)(1), (2), is excised. The information in (iii) is excised, (v), (vii), (x)(1), (2), and (3).

39 Then paragraph 33(d)(i), "In my experience", et cetera, et cetera.

40 That is the information in the ITO that will be excised.

41 Is that clear, Mr. Corsi, or do you want me to go through it again?

42 MR. CORSI: If you could repeat, My Lord, I missed it, for paragraph 17.

43 THE COURT: Seventeen?

44 MR. CORSI: I was still searching for that paragraph as you were going through.

45 THE COURT: I will ask you the same in a minute, Mr. Nearing.

46 MR. NEARING: Thank you very much, My Lord.

47 THE COURT: Paragraph 17, I am sorry, I should have said page 5, (b) as in Bob, at the top, the first sentence starts with "On February 26", ends with "seven minutes", and then the third sentence that begins with "West Shore RCMP then observed" and ends with the words "six minutes or less meets." That is all in paragraph 17, that comes out.

48 MR. CORSI: Thank you, My Lord.

49 THE COURT: Okay. Mr. Neary, was there anything that you were unclear of?

50 MR. NEARING: Yes, My Lord, just two things, points of clarification. I think I know the answer, I just want to make sure that I'm right and there's not any confusion later. Paragraph 20(b), given that Your Lordship said Roman numerals (i), (ii), (iii), and (iv) --

51 THE COURT: Hang on.

52 MR. NEARING: -- all go. Sorry, it's on page 7, My Lord.

53 THE COURT: Yes, 20(b)(i), (ii), (iii), and (iv), yes.

54 MR. NEARING: So that is all of 20(b) then?

55 THE COURT: That is all of 20(b).

56 MR. NEARING: Okay, thank you very much, My Lord.

57 THE COURT: Okay.

58 MR. NEARING: And then there's one other, just bear with me for one moment, please.

59 THE COURT: Sure.

60 MR. NEARING: 33(d) is gone in its entirety also, if I understand you correctly. You had said 33(d)(i), that is the only Roman numeral in there, so am I right that all of 33(d)?

61 THE COURT: That is correct.

62 MR. NEARING: Okay, just double checking. I did want to make sure that the first two lines weren't there. I just want to be clear that I understood as I was trying to follow along.

63 THE COURT: No problem.

64 MR. NEARING: Then in that case, My Lord, I understand, and I have no further questions, thank you very much.

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65 THE COURT: Okay, thank you.

B.D. MacKENZIE J.

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