Citation: R v Pilbeam, 2018 MBCA 128 Date: 20181206
Docket: AR17-30-08942

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Mr. Justice Marc M. Monnin
Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella

***B E T W E E N :***

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| | ) | ***E. J. Roitenberg*** |
| ***HER MAJESTY THE QUEEN*** | ) | *for the Appellant* |
| | ) | |
| *Respondent* | ) | ***M. V. P. Cornick*** |
| | ) | *for the Respondent* |
| *- and -* | ) | |
| | ) | *Appeal heard:* |
| ***MATTHEW JOHN PILBEAM*** | ) | ***October 22, 2018*** |
| | ) | |
| *(Accused) Appellant* | ) | *Judgment delivered:* |
| | ) | ***December 6, 2018*** |

## MAINELLA JA

### Introduction

[1] This is an appeal about the review of a search warrant. It also provides an opportunity to clarify how disclosure of information from a confidential informant to the authorising judge or justice should occur.

[2] The accused appeals his conviction for possession of cocaine for the purpose of trafficking after a trial in the Provincial Court. Drugs and related drug-trafficking paraphernalia were seized from his residence pursuant to a drug search warrant. The substance of the four-page information to obtain the search warrant (the ITO) was based entirely on information provided by a

confidential informant (the CI) to a police officer with the Winnipeg Police Service (the officer).

[3] The accused alleged that the issuance of the search warrant was an unreasonable search contrary to section 8 of the *Canadian Charter of Rights and Freedoms*. The trial focussed on a facial challenge to the search warrant as to whether the record before the authorising justice was sufficient to make out the statutory pre-conditions (see *World Bank Group v Wallace*, 2016 SCC 15 at para 120). The evidence on the *voir dire* consisted of the unredacted ITO without any amplification evidence (see *R v Morelli*, 2010 SCC 8 at paras 41-43). The accused conceded that the ITO established that the officer had a subjective belief of reasonable grounds to believe that, if issued, the search warrant would afford evidence of a drug offence. In dispute was whether an objective assessment of the grounds relied on by the officer in the ITO justified the issuance of the search warrant.

[4] In his decision on the *Garofoli* review (see *R v Garofoli*, [1990] 2 SCR 1421 at 1452), the trial judge concluded that, based on his assessment of the totality of circumstances disclosed in the ITO, the authorising justice "could have found reasonable grounds" to issue the search warrant. The accused says that the trial judge erred in coming to that conclusion for essentially two reasons. First, he argues that, on its face, the ITO failed to disclose sufficient information to establish the necessary "reasonable grounds" to issue the search warrant (section 11(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19). Second, he submits that deficiencies in the officer's drafting of the ITO undermined the weight that should have been given to the CI's information.

[5] For the following reasons, I would dismiss the appeal.

Discussion and Conclusion

*Nature of a Garofoli Review and the Standard of Review on Appeal*

[6] The deferential nature of a *Garofoli* review is well known (see *R v Deol*, 2006 MBCA 39 at paras 6-8). There is a presumption of validity as to a search warrant and the sworn information supporting it (see *R v Collins* (1989), 48 CCC (3d) 343 at 356 (Ont CA)). The accused bears the burden of demonstrating, on balance, that the ITO is insufficient to establish reasonable grounds (see *R v Campbell*, 2011 SCC 32 at para 14).

[7] Warrant review "involves a contextual analysis, not a piecemeal approach to individual items of evidence shorn of their context" (*R v Beauchamp*, 2015 ONCA 260 at para 85). Like a painting or photograph, an ITO's meaning can only be properly understood if it is considered as a whole. Reviewing judges should be skeptical of attempts to deconstruct an ITO by looking at its aspects in isolation. Such an approach is an error in principle. Rather, the reviewing judge is to assess the facts and the reasonable inferences available by taking a "practical, non-technical, and common-sense" assessment of the totality of the circumstances (*R v Whitaker*, 2008 BCCA 174 at para 42, leave to appeal to SCC refused, 32657 (30 October 2008); see also *R v Evans (ED)*, 2014 MBCA 44 at para 10).

[8] The reviewing judge's important, but limited, responsibility is to decide whether the record before the authorising judge or justice, as corrected and amplified on the review, provides "any basis upon which the authorizing judge [or justice] could be satisfied that the relevant statutory preconditions existed" (*R v Pires; R v Lising*, 2005 SCC 66 at para 30; see also *Garofoli* at p 1452; *R v Araujo*, 2000 SCC 65 at para 51; *Morelli* at paras 40-43; *Campbell* at para 14; and *R v Vu*, 2013 SCC 60 at para 16).

[9] Appellate deference will be afforded to a decision made on a *Garofoli* review absent a failure to apply the correct standard or other error in principle, a misapprehension of the evidence, or a failure to consider relevant evidence (see *Evans* at para 20; *R v K (T)*, 2014 MBCA 97 at para 8; and *R v Do*, 2018 MBCA 50 at para 16).

*Sufficiency of the ITO*

[10] A search warrant is valid where the totality of the circumstances set out in the ITO discloses reasonable grounds to believe that an offence has been committed and that evidence of that offence will be found at the specified time and place (see *Whitaker* at para 41; *Morelli* at para 40; and *Campbell* at para 14).

[11] The concept of 'reasonable grounds to believe' is a compromise for accommodating the differing interests of privacy and law enforcement. This legal standard is grounded in objective facts that stand up to independent scrutiny (*R v MacKenzie*, 2013 SCC 50 at para 74). Reasonable grounds to believe is something more than mere suspicion but something less than the existence of a prima facie case, proof on a balance of probabilities or the standard required for a conviction (see *R v Debot*, [1989] 2 SCR 1140 at 1166; *R v Shinkewski*, 2012 SKCA 63 at para 13; and *R v Jacob (JA)*, 2013 MBCA 29 at para 34). As was explained in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, "reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (at para 114).

[12] A judge conducting a *Garofoli* review must be mindful that there is no clearly defined formula as to when "credibly-based probability replaces suspicion" (*Hunter v Southam Inc*, [1984] 2 SCR 145 at 167). It is a threshold

that cannot be measured in the same way as other phenomena, such as the freezing point of water or the speed of sound. Judges can reasonably disagree as to whether a particular set of facts is sufficient to establish reasonable grounds to believe (for example, compare the disagreement between the four judges in the majority (see para 49) and the three judges in the minority (see paras 82-85) in *R v MacDonald*, 2014 SCC 3, as to whether, on the facts of that case, there were reasonable grounds to believe a suspect was armed and dangerous). That is why the standard on a *Garofoli* review is deferential.

[13] The reviewing judge should also be wary of placing too much weight on prior decisions as to whether a particular set of circumstances was sufficient or insufficient to establish reasonable grounds to believe. As Cory J observed in *Canadian Broadcasting Corporation v New Brunswick (Attorney General)*, [1991] 3 SCR 459, "all factors should be evaluated in light of the particular factual situation presented. The factors which may be vital in assessing the reasonableness of one search may be irrelevant in another" (at p 478). I agree with the comment of Huband JA in *R v Blackbird* (1988), 44 CCC (3d) 95 (Man CA), that, "Each case must be decided on its own particular facts" (at p 96).

[14] Where the reasonableness of a search rests on the sufficiency of information provided by a confidential informant, the assessment of whether the totality of the circumstances provides reasonable grounds requires consideration of:

(i) whether the information predicting the commission of a criminal offence was compelling;

(ii) whether the source of that tip is credible; and

(iii) whether the information has been corroborated by police investigation prior to making the decision to conduct the search (see *Debot* at p 1168; and *R v Pilkington (C)*, 2016 MBCA 80 at para 29).

This is not a "formulaic test" (*Garofoli* at p 1457). No one factor is determinative; weakness in one of the three areas can, to some extent, be compensated for by strength in the other two (see *Debot* at p 1168; and *R v Burke*, 2011 NBCA 51 at paras 18-19).

[15] Based on my review of the trial judge's reasons, I am satisfied that he applied the correct deferential standard to review the sufficiency of the ITO. He also properly directed himself on the factors to weigh to assess the reliability of the CI's information in his assessment of the totality of the circumstances.

[16] In terms of how compelling was the CI's tip, I see no basis to interfere with the trial judge's finding that this was not a case where "rumor or gossip from the street [was] being passed on to the police." The information could be considered compelling because it was first-hand, recent and had a degree of detail. The CI was knowledgeable about the drug sub-culture and its practices because of his or her involvement in it which is a relevant contextual fact (see *R v Caravaggio*, 2012 ONCA 248 at para 4; and *R v Rocha*, 2018 ONCA 84 at para 24). While the ITO contains the general assertion from the CI that the accused was regularly selling cocaine for the last six months, without an explanation of how the CI knew that fact, the CI provided more specific sourced information of criminality. The key paragraph of the ITO stated:

> Within the past 72 hours, [the CI] was inside of [the accused's] residence of 634 Chalmers Avenue at which time he/she observed approximately 2 ounces of cocaine within the residence. [The CI] provided me with the exact location of the cocaine, however this will not be disclosed in fear of identifying [the CI].

[17] It was also open to the trial judge to view the CI as a credible source. The CI was not anonymous or untried; he or she was a proven reliable informant. According to the ITO, there were indicia of the CI's reliability (see *Garofoli* at p 1457). Previously, the CI had "never" provided information that turned out to be "false or unreliable." In the past, the CI had provided general information about the drug trade in Winnipeg known by police to be "true and accurate" because it had been confirmed from other investigative sources. As well, the CI had given specific information that had led to "several arrests, seizures of drugs and Canadian currency." In a case where police rely on an anonymous or untried informant, the quality of the information provided and the existence of corroborative evidence will be of greater concern on the *Garofoli* review than in the case where the informant has a proven track record, as is the case here (see *Debot* at pp 1170-71; *R v Duncan (W)*, 2004 MBCA 64 at para 29; *R v Pilkington (No 1)*, 2013 MBQB 79 at paras 57-58; and *R v Zettler*, 2015 ONCA 613 at para 7).

[18] The one concern I would raise is the trial judge made the observation that it was "[i]mplicit in that relationship" between the officer and the CI that the CI would "only receive consideration for providing accurate information." That may be the case, it also may not be; the ITO is silent on this point. Reasonable inferences may be drawn when reading an ITO but an inference must have some evidentiary basis in the ITO (see *Vu* at para 16). It does not strike me as "obvious" (*ibid*) as to what the historic relationship was between the CI and the officer in the absence of more particulars. That said, my concern does not rise to the level of a palpable and overriding error by the trial

judge in misapprehending the evidence. The ITO provides ample evidence reasonably supporting his conclusion that the CI was a credible source.

[19] I am also not persuaded by the submission that the trial judge erred in determining that the steps the police took to confirm the CI's information was, in part, as he put it, "further evidence" of the reliability of the information despite that the facts in the ITO from the police about the accused were of a "non-criminal" nature.

[20] The starting point is that the police are not expected to confirm every aspect of a confidential informant's tip (see *Debot* at p 1172). Nor is it necessary that police corroborate the very criminality of the information given by the tipster (see *R v Lewis* (1998), 122 CCC (3d) 481 at para 22 (Ont CA); and *R v Dunkley*, 2017 ONCA 600 at para 15). What is relevant is whether the nature of the confirmatory evidence is such that it is reasonably open to the authorising judge or justice to infer that, because the confidential informant is proven correct on some details, it is safe in the circumstances to rely on other information provided (see *R v Caissey*, 2007 ABCA 380 at para 24, aff'd 2008 SCC 65). If evidence "build[s] trust" in the confidential informant or his or her information, it may be considered confirmative (*Pilkington (No 1*) at paras 68-74).

[21] Leaving aside the fact that the CI had recent first-hand knowledge of criminal activity in the accused's residence and had a proven track record of providing true and accurate information about drug crimes, the steps police took to confirm the CI's information reasonably allowed for further trust to be given to the CI and his or her information. Through searches of two computer databases containing police or government information, the officer confirmed that the accused's most recent address was where the CI said the accused lived. The officer drove to that address and confirmed it matched the

description the CI provided. The CI identified a known picture of the accused. While none of these confirmatory facts implicated the accused in drug trafficking, they were confirmative of the CI and his or her information, albeit to a limited degree, as opposed to discrediting the CI or his or her information.

[22] In summary, it was reasonably open to the trial judge to find that the ITO, when read as a whole, disclosed a compelling tip of criminal activity at the accused's residence from a credible source despite there being minimal police corroboration of the tip.

*Alleged Deficiencies in the Drafting of the ITO*

[23] I have also not been convinced by the argument that the officer's drafting of the ITO was contrary to his duty of full, fair and frank disclosure of the material facts in support of the *ex parte* application (see *Araujo* at para 46; *Morelli* at para 58; and *Evans* at para 18). The accused points to several missing facts from the ITO that he says are material and should have caused the trial judge to have concern about the strength of the CI's information.

[24] First, in terms of the compelling nature of the tip, the accused says, instead of refusing to disclose in the ITO where in the accused's residence the CI saw the cocaine due to a fear of compromising the identity of the CI, the officer could have put the information in the ITO and then moved to seal it pursuant to section 487.3 of the *Criminal Code* (the *Code*).

[25] Second, in terms of the reliability of the source, while the officer mentioned in the ITO that the CI's prior information had led to "several arrests," the accused argues that he failed to mention if that prior information had led to the issuance of search warrants or convictions. He also criticises

the refusal of the officer to disclose whether the CI had a criminal record. The officer stated in the ITO, "I cannot confirm if [the CI] does or does not have a criminal record as this may identify and endanger [the CI]." Again, the accused submits that a sealing order could have addressed any concern about compromising the CI's identity. Notwithstanding the comments of the Ontario Court of Appeal in *R v Medina-Mena*, 2007 ONCA 377 at para 1, the accused asserts in his factum, "whether a person has or does not have a criminal record will rarely be an identifying feature." Finally, he says the officer deposed that the CI was "requesting consideration" for the information provided but the officer did not specify the nature of that consideration in the ITO.

[26] In my view, it is unnecessary to address each of the alleged shortcomings of the ITO. As is not uncommon, with the benefit of hindsight and the insight of an experienced legal mind, it can be confidently stated that the officer could have provided more information in the ITO, been more precise and improved the ITO's overall drafting (see James A Fontana & David Keeshan, *The Law of Search and Seizure in Canada*, 10th ed (Toronto: LexisNexis, 2017) at 119).

[27] I agree with counsel for the accused that the officer could have taken a different approach to protect the CI's identity by disclosing more information about the CI and his or her information in the ITO and moving to seal it pursuant to section 487.3 of the *Code*. The reticence of a police officer in sharing information about a confidential informant with the authorising judge or justice for reasons of an informer's safety can lead to "serious problems" in the review of the warrant where the credibility of the police officer will likely be impugned because of the non-disclosure (Robert W Hubbard, Peter M Brauti & Scott K Fenton, *Wiretapping and*

*Other Electronic Surveillance: Law and Procedure* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2018, release 61), ch 4 at 4-73 to 4-75; and *R v Lucas*, 2009 CarswellOnt 3082 at para 23 (Sup Ct J), aff'd 2014 ONCA 561).

[28] The state of the law after many years of litigation about the treatment of informant information in a *Garofoli* review boils down to the simple reality that the state cannot have its cake and eat it too in matters such as this. The authorising judge or justice is part of the "circle" of informant privilege (*R v Brassington*, 2018 SCC 37 at para 41; see also *R v Barros*, 2011 SCC 51 at para 37). They are entitled to access the information and are legally obligated to safeguard it (see *R v Y (X)*, 2011 ONCA 259 at para 1).

[29] If the police make the choice to pursue prior judicial authorisation to conduct an investigative search based on information from a confidential informant, the consequence is that the material information about or from the confidential informant must be disclosed to the authorising judge or justice. The obligation of making full, fast and frank disclosure requires that the authorising judge or justice knows the "true state of affairs" (*R v Thomson (K), Thomson (R), Hately (S), Farrington, Guilbride, Hately (J) and Goyer*, 2006 BCCA 392 at para 50). There is no good reason that that should not occur because the procedure described in *Garofoli* (see p 1461) is designed to reconcile the interests of law enforcement, the protection of informers and the accused's right to make full answer and defence (see *R v Crevier*, 2015 ONCA 619 at paras 41-90).

[30] I share the view articulated by both counsel on this appeal that an ITO drafted as it was in this case should not be commonplace. In coming to that conclusion, I am sensitive to the fact that it is not for this Court to play armchair detective from the tranquility of the courthouse and dictate

requirements as to how a clear and concise ITO is to be drafted that fulfills a police officer's duty of full, fair and frank disclosure because the drafting of an ITO requires the exercise of significant judgement, often in circumstances of some urgency (see *R v Ebanks*, 2009 ONCA 851 at paras 43, 54).

[31] However, what the Courts expect is that any information that may tend to identify a confidential informer be protected in an ITO in such a way that maximises "accountability and accessibility" (*R v McKay*, 2016 BCCA 391 at para 150). This means that all of the material information about or from the confidential informant relevant to the statutory pre-conditions to issue a search warrant needs to be disclosed, unedited, to the authorising judge or justice and, later, after input is sought from the police by the Crown, a redacted version of the ITO will be disclosed to the defence upon request. The failure of the police to follow such an approach is not grounds by itself for a successful challenge to a search warrant, but likely will invite such a challenge given what is typically expected of the police.

[32] However, in this case, none of the suggested flaws raised by the accused with the ITO means that, as it was drafted, it failed to provide sufficient reasonable grounds to issue the search warrant when it is read as whole in a practical, non-technical and common-sense manner (see *Pires* at para 30; and *R v Green*, 2015 ONCA 579 at para 18). There was no subfacial challenge to the search warrant that the record before the authorising justice "did not accurately reflect what the [officer] knew or ought to have known, and that if it had, the [search warrant] could not have issued" (*World Bank Group* at para 120). The fatal flaw with the accused's submission is that there is a complete absence of any evidence in the record establishing that any of the omitted information complained of was consequential to the statutory preconditions to issue the search warrant such that the officer was not "honest

and diligent" in the drafting of the ITO (*Evans* at para 18; see also *R v Hebert*, 2002 CarswellOnt 2786 at para 5 (CA)).

[33] I also disagree with the submission that the trial judge abdicated his responsibility to undertake a meaningful review of the ITO by accepting the officer's claim of informant privilege over some of the information provided by the CI and his or her criminal background (if any). It is well accepted that a valid concern about revealing the identity of a confidential informant can arise from even the "smallest details" (*R v Leipert*, [1997] 1 SCR 281 at para 18).

[34] In my view, the trial judge did not err in accepting that the officer's sworn assertion of informer privilege in the ITO was anything but valid and done in good faith. There was no evidence to the contrary. The printed word of the ITO does not reasonably support a conclusion that the officer was deliberately artful in his description of the CI's background or information so as to deprive the authorising justice of "the ability to independently assess the sufficiency of the ITO" (*R v Rocha*, 2012 ONCA 707 at para 35). He explained the nature of the information that was not being disclosed and the lawful reason for non-disclosure. Ultimately, he ran the risk that over-editing the information about or from the CI, before the search warrant was issued, could have caused the authorising justice to refuse the application because of insufficiency.

[35] There is also no evidentiary basis to conclude that facts that bore on the substance of the application for the search warrant were withheld from the authorising justice such that it could be said that there was a material non-disclosure (see *Pilkington (C)* at para 25). In the absence of cogent supporting evidence that a material non-disclosure did occur, to make such an assumption

would be entirely speculative and contrary to the presumption of validity of a search warrant.

[36] Ultimately, I have come to the conclusion that the accused's appeal must fail because of the appellate standard of review. The comments of Watt JA in *R v Nero*, 2016 ONCA 160, leave to appeal to SCC refused, 36984 (14 July 2016), apply equally here (at para 84):

> Finally, the standard of review applied on appeal from findings made on a *Garofoli* application does not permit a microscopic re-examination of individual components of the ITO as the appellant urges. The motion judge was required to consider the ITO as a whole and to determine whether the ITO contained sufficient reliable evidence that might reasonably be believed on the basis of which the production order could have issued. An appeal from that finding is not *Garofoli nouveau* or *Garofoli redux*. Absent an error in the statement of the test, a misapprehension of relevant evidence or a misapplication of principle, an appellate court is disentitled to intervene. That is this case.

[37] In the result, I would dismiss the appeal.

Mainella JA

I agree: Monnin JA

I agree: Burnett JA