Citation: R v Desilva, 2025 MBCA 30
Date: 20250410
Docket: AR23-30-09909

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen
Mr. Justice David J. Kroft

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

	)	***H. D. P. Crawley** and*
	)	***C. P. Gray***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Appellant	)	***E. J. Roitenberg, K.C.** and*
	)	***O. G. Plotnik***
- and -	)	*for the Respondent*
	)	
AYDEN DESILVA	)	*Appeal heard:*
	)	***January 6, 2025***
(Accused) Respondent	)	
	)	*Judgment delivered:*
	)	***April 10, 2025***

SIMONSEN JA

[1] The Crown appeals the accused's acquittals on charges of possession of fentanyl for the purpose of trafficking and possession of proceeds of crime, which followed a decision by the trial judge that the police violated the accused's rights guaranteed by section 8 of the *Charter* (see *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]; *R v Desilva*, 2022 MBPC 51 [*section 8 decision*]). The Crown alleges that the trial judge erred in concluding that there had been a section 8 breach and in granting a remedy under section 24(2) of the *Charter* excluding

evidence obtained on the execution of a search warrant (the search warrant) (see *R v Desilva*, 2023 MBPC 4 [*section 24(2) decision*]).

[2] More specifically, the Crown contends that the trial judge (1) erred in her review of the information to obtain a search warrant (the ITO) by failing to apply the correct test for review and, instead, substituting her own decision for that of the authorizing justice, and by misapprehending some evidence and placing undue weight on matters of marginal relevance; and (2) erred in law in her section 24(2) analysis regarding the seriousness of the *Charter*-infringing conduct of the police.

[3] For the reasons that follow, I would conclude that the trial judge erred by failing to apply the correct test for review of the ITO and that, applying the proper test, the ITO was sufficient for the issuance of the search warrant. Therefore, there was no breach of the accused's section 8 *Charter* rights. Given this conclusion, I need not address section 24(2). I would allow the appeal, set aside the acquittals and order a new trial.

The Facts

[4] In late January 2021, the Winnipeg Police Service (the WPS) began receiving information from a confidential source (the confidential informant) that the accused had come to Winnipeg from British Columbia and was trafficking fentanyl from short-term rental properties. Based on this information, the WPS undertook an investigation, which culminated in a successful application for a warrant to search what was believed to be the accused's current residence at a specific suite (the suite) in a multi-unit building in downtown Winnipeg (the building).

[5] Upon executing the search warrant, the WPS located over half an ounce of fentanyl partially divided for resale, a small amount of cocaine, $260 in cash, indicia of trafficking and a number of documents (the evidence).

[6] The accused was charged with possession of fentanyl for the purpose of trafficking and possession of proceeds of crime. At trial, he challenged the sufficiency of the ITO on the basis of its facial validity (see *R v Garofoli*, [1990] 2 SCR 1421, 1990 CanLII 52 (SCC) [*Garofoli*]). The trial judge determined that the ITO was insufficient for the issuance of the search warrant and that the search of the suite was, therefore, unreasonable and constituted a breach of the accused's section 8 *Charter* rights. Having found this breach, she excluded the evidence under section 24(2) of the *Charter*, ending the Crown's case.

The ITO

[7] The ITO was sworn by a six-year member of the WPS (the affiant) with training specific to drug trafficking, gang dynamics and search warrant drafting. The majority of the information provided in the ITO was relayed to the affiant by an eighteen-year member of the WPS with extensive experience in investigations, who was the handler (the handler) of the confidential informant.

[8] The ITO included information about the background of the confidential informant (who was a tested, registered confidential informant known to the handler); information that the confidential informant had provided to the handler about the accused; and details of investigations undertaken by the WPS to corroborate the confidential informant's tip.

[9] Briefly, the information about the accused that the confidential informant supplied to the handler, as set out in the ITO, was:

- The accused had travelled from British Columbia and had been residing in short-term rentals in Winnipeg for the past few weeks;
- The accused had been staying at and trafficking fentanyl from a residence on Agnes Street, in Winnipeg (the residence) for a few days;
- Around February 1, 2021, the accused moved to the building and was trafficking fentanyl within the immediate vicinity; and
- The confidential informant had personal knowledge of two fentanyl transactions that the accused had conducted near the building within the prior five days. The more recent transaction had occurred within the past 48 hours.

[10] The ITO noted that the confidential informant viewed a satellite image from Google maps, identified the building and confirmed that it was where the accused was presently residing. As well, the confidential informant viewed a photograph of the accused taken by the Abbotsford British Columbia Police Department (Abbotsford PD) in 2018, which he confirmed depicted the person to whom he was referring.

[11] As for the police investigation that was undertaken, the handler determined from the WPS records that the accused had been interviewed by the WPS in 2015 and provided an address of Vancouver, British Columbia. As well, the handler checked a national police database that showed the

accused had reported involvement with the Abbotsford PD about a kidnapping that occurred in 2018. The handler contacted the Abbotsford PD, which provided information that the accused and others were suspects in relation to a gang-related violent kidnapping, but that all charges were stayed because the victim was not cooperative.

[12] As set out in the ITO, the WPS, as part of its investigation to corroborate the tip, engaged in physical surveillance on February 1, 4 and 11, 2021:

- On February 1, 2021, the accused left the residence, went to a bank and then to the building with a green backpack;

- On February 4, 2021, the accused exited the suite and met with an unidentified male in a taxicab at the rear of the building for less than one minute before returning to the suite.

  The member of the WPS Guns and Gangs unit who observed this meeting believed it to be a drug transaction; and

- On February 11, 2021, the accused left the suite and attended downstairs to meet an unidentified male in the lobby. They then returned together to the suite. Thirty-seven minutes later, the unidentified male left the suite with a letter-sized envelope in his hands. Shortly afterwards, the accused also left and was followed in a ride-share to a different branch of the same bank he had attended on February 1, 2021. He returned to the suite and was later observed again in the lobby meeting the same male from earlier and the two going back to the suite with a brown

> bag. Approximately ten minutes later, the male left the suite without the paper bag and left the area.
>
> The handler believed that the two meetings on February 11 were drug transactions and that the accused's trip to the bank may have been a system to get proceeds of crime out of his possession.

[13] The affiant also stated that, in his experience as a police officer, there is a trend of drug traffickers being known to use short-term rentals for a few days to distribute illicit product onto the streets and then move to the next short-term rental before being detected. He stated that: "[the building] has been a hotspot for drug trafficking activity in the past few years. This is due to the number of short-term rentals within the building" and that "[t]hrough police investigative techniques, it was learned that [the accused] is currently residing at a short-term rental within [the building]". He concluded by saying that he believed "that [the accused] is using short-term rentals to conduct and conceal his drug trafficking activity and is currently using [the suite] to distribute illicit product."

The Law

[14] A search warrant is presumed to be valid. An accused bears the burden of demonstrating, on balance, that an ITO is insufficient to establish reasonable grounds to believe that an offence has been committed and that evidence of the offence will be found at the place to be searched (see *R v Pilbeam*, 2018 MBCA 128 at paras 6, 10 [*Pilbeam*]).

[15] In reviewing the sufficiency of an ITO, the issue is not whether, in the view of the reviewing judge, the search warrant should have issued but

whether there was reliable evidence that might reasonably be believed on the basis of which the warrant *could* have issued (see *R v Araujo*, 2000 SCC 65 at para 51 [*Araujo*]).

[16] Three factors are relevant to the sufficiency of information provided by a confidential informant (*Pilbeam* at para 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).

[17] In this case, the Crown's focus is on corroboration. In *Pilbeam* at para 20, this Court outlined what is needed:

> 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).

[18] There is not only one right answer as to whether there are reasonable grounds for the issuance of a search warrant. Instead, as I have explained, the question to be asked is whether the authorizing justice *could* have found there to be reasonable grounds. As stated in *Pilbeam*, "[j]udges can reasonably disagree as to whether a particular set of facts is sufficient to establish reasonable grounds to believe" (at para 12).

The Standard of Review on Appeal

[19] On appeal, a judge's decision reviewing the sufficiency of an ITO is entitled to deference 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 *ibid* at para 9).

[20] Because this is a Crown appeal, section 676(1)(a) of the *Criminal Code*, RSC 1985, c C-46 limits the Crown's right to appeal an acquittal to questions of law alone. Whether the trial judge applied the correct test for review of the ITO is such a question (see *Araujo* at para 20; *R v Vu*, 2011 BCCA 536 at para 35 [*Vu* CA], aff'd 2013 SCC 60 [*Vu* SCC]). In addition to establishing that there was an error in law, when seeking a new trial on the appeal of an acquittal, the Crown must show that this error "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The [Crown] is not required, however, to persuade

us that the verdict would necessarily have been different" (*R v Graveline*, 2006 SCC 16 at para 14; see also *R v Koczab (A)*, 2013 MBCA 43 at paras 19, 74, rev'd on other grounds for the dissenting reasons of Monnin JA, 2014 SCC 9).

The Positions of the Parties

[21] The thrust of the Crown's position is that the trial judge identified but failed to apply the correct test for review of an ITO in that she did not show deference to the authorizing justice in her final analysis of the totality of the circumstances but, instead, reached her own conclusion as to the sufficiency of the ITO (see *R v Sys*, 2024 MBCA 100 at paras 11, 15; *Pilbeam* at paras 6, 12; *Vu* SCC at para 9).

[22] In addressing the three factors relevant to her consideration, the trial judge found that there was sufficient information in the ITO for the authorizing justice to assess the reliability of the confidential informant's information and determine that it was credible. This determination is not contested and is supported by the record.

[23] As for the other two relevant factors, namely, whether the tip was compelling and whether the information provided by the confidential informant was sufficiently corroborated, the Crown acknowledges that the information could have been stronger but says that the trial judge erred when it came to her assessment of corroboration and the totality of the ITO.

[24] The Crown says that, given this error, it falls to this Court to consider the ITO against the correct test. According to the Crown, applying the correct test leads to the conclusion that the authorizing justice could have issued the

search warrant and that the accused's section 8 *Charter* rights were, therefore, not violated.

[25] The accused contends that the trial judge not only identified but properly applied the correct test, critically analyzed the evidence when applying that test and concluded that the ITO was insufficient for the issuance of the search warrant. Therefore, he maintains that there is no basis for appellate intervention.

Analysis and Conclusion

[26] Near the beginning of her reasons in the *section 8 decision*, the trial judge, citing *Garofoli* and *Pilbeam*, identified the correct test applicable to her review. Nonetheless, I agree with the Crown that she ultimately did not apply that deferential test, but instead reviewed and weighed the information in the ITO afresh and then decided that she would not have issued the search warrant. Adopting the submissions of the Crown, a number of reasons, in combination, lead me to this conclusion.

[27] First, the trial judge conducted a detailed assessment of the information provided by the confidential informant and the investigation done by the WPS. As argued by the Crown, her decision "oozes" first-instance analysis.

[28] Second, in the passages of her reasons regarding whether the tip was compelling and corroborated, there is no mention of whether the authorizing justice could have found it to be such. I note that, conversely, the trial judge's conclusion about the credibility of the confidential informant, where she found in favour of the Crown, was fully framed in the language of deference;

she stated "that the authorizing [justice] was in a position to assess the reliability of [the confidential informant's] information, and to find the information to be credible" (*section 8 decision* at para 33).

[29] Third, in assessing the quality of the information in the ITO, the trial judge seemed to be focused on what was missing from the tip and what more should have been done by the police, rather than on what the tip *did* contain and the police *did* do.

[30] Fourth, and importantly, I am persuaded that, in the conclusion of her reasons, the trial judge indicated that she was assessing whether, in her view, the ITO was sufficient, rather than whether the authorizing justice could have issued the search warrant based on the information in the ITO.

[31] To elaborate on the above, and to explain my reasons for concluding that the authorizing justice could have issued the search warrant, I will address some of the comments, findings, and conclusions the trial judge made about whether the tip was compelling and corroborated.

[32] In terms of her assessment of whether the tip was compelling, the trial judge found that "[t]he overall lack of detail and lack of information as to [the confidential informant's] source of knowledge, creates a weakness in the compelling nature of the assertions made by [the confidential informant]" (*ibid* at para 26). She noted that the confidential informant was unable to identify the floor at the building where the accused was staying or whether fentanyl or cash were in the suite. She further commented that there was no indication as to how the two transactions of which the confidential informant had "personal knowledge" (*ibid* at para 23) had come to be known to them, nor were there any details of those transactions.

[33] While the Crown concedes that the tip did not provide "the epitome" of information and suffers from some limitations, it is not just rumour or gossip and is still quite detailed. The confidential informant stated that they had *personal* knowledge of a very recent transaction; this was not second-hand knowledge. The confidential informant also provided details about a connection to British Columbia and two Winnipeg addresses, as well as about the timing, location and nature of the substance being sold.

[34] In assessing the quality of the information provided by the confidential informant, the trial judge stated that any concern about disclosing extra detail and thereby identifying the confidential informant could have been "addressed through a sealing order and redaction, as well as a step six application" under *Garofoli*, to review material excised from the ITO if required (*section 8 decision* at para 25). However, the ITO was in fact sealed and minorly redacted. The trial judge's comments in this regard seem to reinforce that her focus was on what she perceived as missing from, rather than on the strength of what was in, the ITO.

[35] As for corroboration, the trial judge identified that salient aspects of the confidential informant's information were corroborated: "that [the accused] was in Winnipeg, likely from British Columbia; he was seen at two addresses named by [the confidential informant]; and police observed [the accused] engaging in what appeared to be a drug transaction on February 4, 2021" (*ibid* at para 38). She determined that the surveillance on February 4, 2021 was suspicious for a drug transaction but found that "[m]uch of the information observed on [February 1 and 11, 2021] could be said to be neutral or innocent as referred to in *Debot*" (*ibid* at para 50).

[36] Regarding the accused's ties to British Columbia, the trial judge recognized that a computer check and a discussion with a member of Abbotsford PD regarding the November 2018 incident confirmed a connection to British Columbia in the relatively recent past. That being said, in her *section 24(2) decision*, the trial judge found that it was misleading for the ITO to have stated that the accused was "under the scrutiny" (at para 19) of both the Abbotsford PD and the local police in Langley, British Columbia (Langley PD), and that that reference appeared to have been "included solely to impugn [the accused's] character" (*ibid*). However, that information was properly used to corroborate the accused's ties to British Columbia. As well, the Supreme Court of Canada has held that the inclusion of information about stayed charges is permissible in an ITO (see *R v James*, 2019 ONCA 288 at paras 57-60 [*James*], rev'd for the dissenting reasons of Nordheimer JA, 2019 SCC 52). Although the reference to Langley PD should have been expanded upon in the ITO, given its lack of detail, it could not reasonably have had any impact on the decision of the authorizing justice.

[37] Furthermore, I am satisfied that the trial judge gave undue weight to the fact that no checks were made to confirm that the residence and the suite were short-term rentals and that no searches were done to determine the registered owners of those properties. There is no obligation to corroborate every aspect of a confidential informant's information. The personal information provided by the confidential informant about the accused trafficking fentanyl in close physical and temporal proximity to the building was combined with police surveillance that tied him to the suite—supporting an inference that the accused would be storing drugs or proceeds of crime in the suite.

[38] In the context of corroboration, the trial judge again seemed focused on what more the police could have done. This is reflected in her comments on urgency, which the parties agree is legally irrelevant. She said that "[t]his was not an urgent situation" and that "[t]here was both time and opportunity for police to undertake further computer checks to corroborate [the confidential informant's] information or to more fully set out the basis for their statements in the ITO" (*section 8 decision* at para 51).

[39] In my view, there was considerable corroboration in this case which, together with the information provided in the tip from the confidential informant, should have been assessed against the governing test, that is, whether the authorizing justice could have issued the search warrant.

[40] Returning to the conclusion of the trial judge's *section 8 decision*, I am satisfied that it supports my conclusion that she erred in law by exceeding the permitted scope of her review. After she had conducted her detailed analysis of whether the tip was compelling and the extent to which it was corroborated by police investigation, she stated (*ibid* at paras 52-53):

> Based on the totality of the circumstances as set out in the ITO, I am not satisfied that the credibility, compellability and corroboration of the information contained in the ITO was sufficient to ground a reasonable belief.
>
> While the threshold of suspicion was reached, the [justice] who authorized the issuance of the warrant did not have evidence in the ITO to constitute reasonable grounds to believe that [the accused] was in possession of fentanyl and proceeds of crime, and that such evidence would be found at [the suite]. [The accused] has met his burden of proving that the search warrant and supporting ITO was insufficient.

[41] It is apparent from the trial judge's choice of words in the first paragraph above that she was conducting her own analysis as to the quality of the information in the ITO. And the second paragraph must be considered in light of the previous paragraph and the preceding detailed analysis.

[42] Therefore, I conclude that the trial judge erred in principle by failing to apply the correct test for review of the sufficiency of the ITO. (Other cases where the Crown was successful in establishing that the test was not properly applied are *Vu* CA at paras 33-35; *R v Sadikov*, 2014 ONCA 72 at para 95; *James* at para 22; *R v Shiers*, 2003 NSCA 138; *R v Saunders*, 2003 NLCA 63, aff'd 2004 SCC 70).

[43] For the reasons outlined above, applying the correct deferential test, the authorizing justice could have issued the search warrant. I agree with the following summary of this case provided by the Crown:

> A reliable informant provided timely first-hand information of the [accused's] drug trafficking as well as additional details that, although being unsourced, were sufficiently specific to have some value. The police independently confirmed much of [the confidential informant's] information and through their own investigation tied the [accused] to a particular suite as well as to at least one suspected drug transaction that corroborated the [confidential informant's] descriptions of his living arrangements and trafficking activity.

[44] Therefore, there was no breach of the accused's section 8 *Charter* rights. The trial judge's error in concluding otherwise led to exclusion of the evidence, which clearly had a material effect on the acquittals.

[45] For the foregoing reasons, I would allow the appeal, set aside the acquittals and order a new trial. However, the facial validity of the ITO is

determined by this decision such that a further challenge on that basis shall not be available to the accused at the new trial.

Simonsen JA

I agree: leMaistre JA

I agree: Kroft JA