Citation: R v Sys, 2024 MBCA 100
Date: 20241203
Docket: AR24-30-10044

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

BETWEEN:

HIS MAJESTY THE KING	)	***F. Aiello*** *for the Appellant*
Respondent	)	***D. Sahulka*** *for the Respondent*
- and -	)	
JOSEPH WILLIAM SYS	)	*Appeal heard and Decision pronounced:* ***November 18, 2024***
(Accused) Appellant	)	*Written reasons:* ***December 3, 2024***

LEMAISTRE JA (for the Court):

[1] The accused appealed his convictions for firearms offences. In his notice of appeal/notice of application for leave to appeal, he also sought leave to appeal his sentence. At the commencement of the appeal hearing, the accused withdrew his sentence appeal.

[2] After hearing argument on the conviction appeal, we dismissed the appeal with brief reasons to follow. These are those reasons.

[3] The police received information from a confidential source (the confidential informant) that a male known as "Joe Fish" was selling a ".22

caliber sawed off ‘cowboy style’ rifle”. After an investigation, the police determined that the accused was the male selling the firearm and that he is subject to a lifetime firearms prohibition. Pursuant to section 487(1) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*], they obtained a warrant to search his residence. During the search, police found a loaded firearm with ammunition under the basement stairs. The firearm’s serial number had been removed.

[4] At trial, the accused challenged the facial validity of the search warrant. He argued that, based on the evidence in the information to obtain (the ITO), the issuing judicial justice of the peace (the JJP) could not have granted the warrant (see *R v Garofoli*, [1990] 2 SCR 1421 at 1451-52, 1990 CanLII 52 (SCC) [*Garofoli*]), the search violated his rights under section 8 of the *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*] and the trial judge should have excluded the evidence seized pursuant to section 24(2).

[5] When determining whether to issue the warrant, the JJP reviewed the ITO and its two appendices: Appendix A, which is a seven-page document and Appendix B, which consists of five pages. However, at the request of the affiant, the JJP issued a sealing order to protect the safety of the confidential informant. Based on the sealing order, the Crown edited the ITO to delete any information that would compromise the identity of the confidential informant before disclosing it to the accused. Appendix A contains a partial redaction in paragraph 11(f) and Appendix B was completely redacted. The Crown did not ask the trial judge to rely on the information removed from the ITO pursuant

to step six of the *Garofoli* procedure (see *R v Wahabi*, 2024 MBCA 70 at paras 83-86).

[6] Relying on the law as summarized in *R v Pilbeam*, 2018 MBCA 128 [*Pilbeam*], the trial judge considered the warrant and the redacted ITO as a whole. She understood that, on a *Garofoli* review, the warrant and the ITO are presumed to be valid and the accused bears the onus of demonstrating that the ITO is insufficient to establish reasonable grounds to believe that a search would afford evidence of an offence (see the *Code*, s 487(1); *Pilbeam* at para 6). The trial judge concluded that the warrant was valid and she admitted the firearm and ammunition into evidence. She stated:

> [W]hen the test is applied objectively considering all the evidence contextually with a practical and common sense approach asking the question, has the applicant shown on a balance of probabilities that there is no basis upon which an objective determination could be made, that the pre-conditions were met.
>
> The answer I reach is the applicant has not met that onus and the application is dismissed. I find there is no breach of Section 8.

[7] Despite the trial judge's conclusion that the accused's section 8 *Charter* rights were not breached, she briefly considered whether she would have excluded the evidence under section 24(2) if she had found a breach. After weighing the three lines of inquiry from *R v Grant*, 2009 SCC 32 at para 71, she held "that inclusion of the evidence would not bring the administration of justice into disrepute."

[8] The trial judge convicted the accused of the following offences contrary to the *Code*: (1) possession of a non-restricted firearm without a licence (s 92(1)(a)), (2) possession of a firearm contrary to a prohibition order

(s 117.01(1)), (3) possession of ammunition contrary to a prohibition order (s 117.01(1)), (4) possession of a firearm knowing the serial number has been removed (s 108(1)(b)), and (5) careless storage of a firearm (s 86(1)). She sentenced him to a total sentence of three years' incarceration less pre-sentence custody of eight days credited at a rate of 1.5:1.

[9] On appeal, the accused argues that the trial judge erred by failing to find a breach of his section 8 *Charter* rights and by failing to exclude the evidence seized pursuant to the warrant under section 24(2). While the accused concedes that the trial judge applied the correct test on the *Garofoli* review, he argues that she erred in her application of the test. He contends that the trial judge misapprehended the evidence and he seeks a different application of the three factors relevant to the sufficiency of the information provided by the confidential informant. Those three factors are (1) whether the information was compelling, (2) whether the confidential informant was credible, and (3) whether the information was corroborated (see *Pilbeam* at para 14; *R v Debot*, [1989] 2 SCR 1140 at 1168, 1989 CanLII 13 (SCC)).

[10] The trial judge's decision on the *Garofoli* review is entitled to deference absent an "error in principle, a misapprehension of the evidence, or a failure to consider relevant evidence" (*Pilbeam* at para 9).

[11] We have not been persuaded that the trial judge erred. The trial judge's reasons demonstrate that she applied the correct deferential standard on her review of the sufficiency of the ITO and that she weighed the relevant factors when assessing the reliability of the information provided by the confidential informant. We see no misapprehension of the evidence.

[12] In our view, it was open to the trial judge to find, on the record, that the tip was compelling and corroborated, despite her concerns regarding the confidential informant's credibility. It is not our role to re-weigh the evidence and come to a different conclusion.

[13] The confidential informant in this case was untested. Therefore, the reliability of the tip turned on its degree of detail and the extent to which the police investigation corroborated the information.

[14] The information in the tip was current and consisted of first-hand observations. It included the accused's alias, his address, a description of the house and details about his vehicle. The tip also included specific information about the accused's prior criminal history, his appearance and tattoos, as well as the fact that he was hiding to avoid capture on an outstanding warrant. The police corroborated these details through an investigation. Although the confidential informant only knew the person selling the firearm by his alias, the confidential informant identified the accused in a police photograph. Finally, the confidential informant provided information that the accused was in possession of a firearm that he was trying to sell.

[15] The accused's reliance on cases where judges have found an ITO insufficient to establish reasonable grounds is not persuasive. Discussion of decided cases to either support or impugn an ITO under review is typically an unhelpful exercise at a *Garofoli* review. As was explained in *Pilbeam* at paras 12-13, no two ITOs are alike and judges can reasonably disagree about what amounts to reasonable grounds in close cases. Little can and should be taken from other cases decided on their unique facts. In our view, the accused's submission does not give proper effect to the deferential standard

on a *Garofoli* review or to the reality that we are conducting a second level of review (see *Pilbeam* at paras 6-9; see also *R v McLean*, 2022 MBCA 60 at para 19; *R v Kupchik*, 2020 MBCA 26 at para 5). The accused's invitation to re-weigh the facts in the ITO or second-guess the JJP must be declined given the standard of review.

[16] We see no error in the trial judge's conclusion that the JJP could have issued the warrant based on the redacted ITO.

[17] Even if we agreed with the accused that the trial judge erred in her conclusion that the warrant could have been issued based on the information in the redacted ITO, it would be open to us to consider the redacted information in Appendix B to determine whether it could support the authorization of the warrant.

[18] Having found no error in the trial judge's conclusion that there was no section 8 *Charter* breach, we need not deal with the accused's ground of appeal regarding her section 24(2) analysis.

[19] In the result, the conviction appeal was dismissed.

leMaistre JA

Rivoalen CJM

Mainella JA