

COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

HIS MAJESTY THE KING,)	<u>Hugh Crawley</u>
)	<u>Julian Kim</u>
)	<u>Stephen Sisson</u>
respondent,)	for the respondent
- and -)	
)	
)	
JOVAUGHN RAMOY DEVANTE THOMAS,)	<u>Matthew T. Gould</u>
)	for the accused (applicant)
accused (applicant).)	
)	
)	
)	Judgment Delivered:
)	November 03, 2023

ABEL J.

INTRODUCTION

[1] Jovaughn Thomas, the Applicant, seeks an order excluding evidence on the basis that the Part VI Authorizations granted February 10, 2021 and April 8, 2021 did not meet the threshold of investigative necessity. The Applicant

argues that the failure to meet that threshold results in any intercepted communications attributed to him being unlawful and contrary to s. 8 of the ***Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982***, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the ***Charter***). As a result, any such communications ought to be excluded pursuant to s. 24(2) of the ***Charter***.

BACKGROUND

[2] In January 2020, Brandon Police Service (BPS) began Project Brazen (the Project), the target of such investigation being RTF, the unindicted alleged leader of the drug operation. RTF was using several individuals under him as runners and couriers to conduct his drug transactions. Several judicial authorizations were granted by judges of the Provincial Court, including transmission data recorder (TDR) warrants and tracking warrants.

[3] TDR warrants and tracking order warrants were granted on March 4, 2020, June 17, 2020, August 11, 2020 and October 6, 2020 (the TDR Warrants).

[4] In addition to the TDR warrants, other investigative techniques were utilized by BPS, including speaking to informants, surveillance and undercover operations.

[5] On February 10, 2021, BPS was granted an omnibus Part VI warrant to intercept private communications along with accompanying TDR warrants, a General Video warrant, a General Warrant and Tracking Order warrants (the First

Communications Warrant). On April 8, 2021, BPS applied for and obtained a further omnibus Part VI warrant (the Second Communications Warrant).

[6] On May 18, 2021, BPS concluded the investigation and arrested the Applicant. The Applicant was charged with trafficking cocaine, conspiracy to traffic cocaine, possessing the proceeds of crime, and conspiracy to possess proceeds of crime.

[7] The Applicant argues that investigative necessity was not met so as to justify the granting of the First Communications Warrant, resulting in a breach of the Applicant's ***Charter*** rights. As a result of this breach, the Applicant argues the evidence ought to be excluded. As the Second Communications Warrant relied on and referred to the evidence gathered from the First Communications Warrant, the Applicant further argues that any evidence gathered from the Second Communications Warrant ought to also be excluded.

[8] The Crown argues that investigative necessity was met for the First Communications Warrant, there being no breach of the Applicant's ***Charter*** rights. Further, if there was such a breach, the evidence ought not to be excluded pursuant to s. 24(2) of the ***Charter***.

EVIDENCE RELIED UPON

[9] The evidence referred to on this application is the Affidavit of Cst. Calcut (Calcut) of BPS, sworn February 9, 2021 (the Affidavit), included in the Application Record.

[10] There was no cross-examination of Calcut with respect to the Affidavit.

[11] The overview of the investigation was provided at page 5 of the Affidavit, noting that the investigation related to RTF's cocaine trafficking operation in Brandon. RTF's co-conspirators were noted, and did not include the Applicant.

[12] The investigative goals were set out at page 9 of the Affidavit, and included dismantling this drug network, gathering enough evidence to arrest and bring charges of conspiracy to traffic cocaine, and to arrest and charge the individuals who are part of the drug trafficking network (collectively the investigative goals).

[13] The First Communications Warrant authorized the interception of all private oral and telecommunications, and specified the manner of interception.

[14] In the Affidavit, Calcut sets out the investigative techniques used by BPS in an effort to meet the investigative goals.

[15] Specific to this application, and in reference to investigative necessity, Calcut referenced:

- a. the use of witnesses, noting that no witnesses had come forward or have been identified in this project. Calcut further stated that based on the type of crime being committed, there is a great risk of harm to witnesses and that in his experience, witnesses that provide information experience retaliation in the form of violence;
- b. there are several informants that have provided information but that none of the informants are interested in becoming witnesses

or police agents. The details of the informants were set out in the Affidavit;

- c. surveillance of the targets had been ongoing since 2020. Calcut stated that while surveillance had been useful, it alone cannot achieve the goals of the Project;
- d. while tracking data provided information surrounding the communications, it does not reveal the content of the messages, nor does it allow members to determine when transactions may occur;
- e. undercover operators (UCOs) used in the investigation did not achieve the goal of the Project, Calcut noting that this drug cell is cautious and will only deal with people that they know.

Specifically, Calcut referred to efforts made by an UCO with respect to CN. CN was believed to be a low-level cocaine trafficker for RTF. Calcut stated that in initial interactions with CN, he was nervous to sell cocaine to the UCO. Multiple drug deals were set up between CN and the UCO.

Calcut made further references in the Affidavit to interactions with CN, including CN suggesting that the UCO could start working for CN, bringing half ounces of cocaine up north.

Calcut stated in the Affidavit that CN continued to talk as though he would not refer the UCO to anyone else and that he would

just continue to have them work for him and not refer him to his supplier;

- f. BPS chose not to obtain a general warrant to covertly enter premises of a possible stash location;
- g. no evidence was gathered from garbage dumpster dives; and
- h. as BPS was unable to determine a drug reload pattern, no search warrant was sought.

[16] In addition, Calcut references efforts made by BPS to contact RTF directly to purchase cocaine, including the UCO making contact with RTF by text message, RTF questioning who the UCO was, the UCO attempting to explain who they were and how they got the number, and RTF declining to continue the conversation.

[17] Further efforts were made to contact RTF, including the UCO acting as a different person, with either RTF challenging who the UCO was, or providing no response.

[18] Calcut refers to efforts made by BPS to contact GO and JAS, who were known to BPS to work within RTF's organization at a higher level. Attempts were made to establish a buyer so that the UCO could prove themselves as a trustworthy customer in the network and eventually purchase through RTF. No response was received from the attempts to contact GO and JAS.

[19] Calcut refers to information received from an informant who advised that RTF does not sell to people he does not know.

[20] BPS then attempted to make buys off a lower-level target, being CN, and attempted to work up the network to RTF.

[21] Calcut makes reference to those efforts to buy from CN, as previously referred to, CN stating that he would not refer the UCO to anyone else.

[22] It is for those reasons that the Crown argues that investigative necessity was established for the issuance of the First Communications Warrant.

ANALYSIS AND DECISION

The Law

Investigative necessity

[23] As set out in s. 186(1)(b) of the ***Criminal Code***, R.S.C., 1985, c. C-46 (the ***Code***), and as defined in ***R. v. Araujo***, 2000 SCC 65 (***Araujo***) at para. 29, investigative necessity means that there must be, practically speaking, no other reasonable alternative of investigation in the circumstances of the case (see ***R. v. Baldovi et al.***, 2016 MBQB 220 (***Baldovi***) at para. 141).

[24] Investigative necessity sufficient for a Part VI authorization does not require a recourse of last resort; it can include gathering independent confirmatory evidence that is not reasonably available by other (see ***R. v. Ledesma***, 2017 ABCA 131 at para. 67).

Legal burden on applicant

[25] The applicants bear the burden, on the balance of probabilities, that their ***Charter*** rights have been infringed (***Baldovi*** at para. 145).

Test to be applied by reviewing judge

[26] As a reviewing court, the test is whether there was some reliable information on the basis of which the issuing judge could have been satisfied as to the statutory requirements for issuance of the authorization (see **Baldovi** at para. 146).

[27] This hearing is not a rehearing of the issuance, nor an appeal. The reviewing judge does not stand in the place of the issuing judge, nor should the reviewing judge substitute their view for that of the issuing judge. The question is not whether the reviewing judge would have granted the authorization, but whether there was any basis on which the issuing judge could have done so. The reviewing judge should only set aside the authorization if satisfied on the whole of the material presented that there was no basis on which the authorization could be sustained (see **Baldovi** at para. 147).

[28] A reviewing judge must consider that the issuing judge based their decision on the entirety of the ITO as a whole, and that the issuing judge may draw reasonable inferences from the content of the ITO in a practical, common sense and non-technical manner (see **R. v. Boussoulas**, 2014 ONSC 5542 at para. 7 and **R. v. Vu**, 2013 SCC 60 at para. 16).

Was there sufficient evidence to provide a basis upon which the issuing judge could have concluded that the investigative necessity requirement had been made out?

[29] The argument of the Applicant falls primarily into two categories - tried and failed, or unlikely to succeed. The Crown need not establish both for the

purpose of investigative necessity. The Applicant argues that neither were established for the purpose of investigative necessity.

[30] As a starting point to my analysis, it is necessary to recall the investigative goals of the Project, those goals including the dismantling of the drug network and preventing distribution of cocaine from being sold, to identify the key players, and to gather enough evidence to arrest and bring charges against the drug network of RTF.

[31] As noted in ***Araujo*** at para. 43, the objectives of the investigation rightly informs the investigative necessity analysis. In ***Araujo***, the police had more need for wiretapping given that they were trying to move up the chain and catch those higher up in the operation, reinforcing the investigative necessity (at para. 43). The Crown in this case argues similar investigative goals to reinforce the investigative necessity of the wiretaps.

[32] Further, individual techniques of investigation ought not to be looked at in isolation. As noted in ***Baldovi***, at para. 212, in quoting ***R. v. Mac***, 2016 ONCA 379 at para. 55, “the investigative necessity inquiry is contextual and must focus on the investigation as a whole, not examine each individual technique under a microscope.”

[33] As noted in ***Baldovi*** at para. 213, one of the goals of that investigation was to obtain evidence against the suppliers and organizers of the drug operation. In ***Baldovi***, the Court noted that techniques other than wiretaps may have been effective in detecting couriers and low-level targets but that they

would not have been effective in obtaining evidence of the higher-level dealers who actively avoid contact with the drugs and money. Again, the investigative goals in *Baldovi* informed the investigative necessity. The Crown again arguing the similar requirement in this case.

[34] The realities of investigations of drug operations in considering investigative necessity, was also considered in *Baldovi* at para. 143. The Court referenced *R. v. Wasfi*, 2006 BCCA 55, at para. 49 where the Court notes that:

...The reviewing judge must look at the particular evidence in each case, but he or she should not do so without understanding the realities and risks associated with other means of investigation. Drug traffickers, particularly those at higher levels of the distribution ladder, can be expected to employ methods designed to counter police inquiry into their activities and to be willing to resort to violence to avoid detection. It does not follow that every drug investigation will automatically entail sustainable judicial authorization of intercepted private communications, but the realities of this type of investigation must be recognized on review.

[35] Lastly, the Crown notes the specific wording of s. 186(1)(b) of the *Code*, in that it would be impractical to carry out the investigation of the offence using other investigative procedures. In other words, practically speaking, there is no alternative to a wiretap. This does not mean that other investigative techniques are not available, but rather, looking at the investigation, its goals, and the techniques previously used, the use of other investigative procedures would be impractical.

[36] With that legal framework in mind, and in considering the assertions of Calcut in the Affidavit, the Affidavit establishes that although other investigative and surveillance efforts and techniques were used, due to the manner in which

the organization was structured, and the investigative goal of gathering evidence regarding the drug network of RTF, especially the key players, other methods had little chance of success in meeting those objectives.

[37] The Applicant argues that minimal efforts were undertaken by BPS in dealing with RTF or others higher in the organization, and that the statements in the Affidavit that support the investigative necessity are not borne out by the information.

[38] Further, with respect to the efforts with CN, the Applicant argues that minimal time was spent with that member of the organization, before concluding that no further efforts would be fruitful.

[39] As noted in ***R. v. Riley***, 2008 CanLII 63219 (ONSC) at para. 40, the officer asserted that “the informants are not in a position to testify or to act in an agent capacity.” The Court concluding that asking confidential informants to act as agents for the police or to testify against their friends is not a prerequisite to a finding of investigative necessity.

[40] In ***Baldovi***, the Court addressed the unwillingness of informants in that case to introduce an undercover to the targets at para. 207. The affidavit in support of the wiretap noted that the use of an undercover and the close connections between the targets made the efficacy and success of that technique doubtful.

[41] In further discussing the unlikelihood of success in ***Baldovi***, the Court at para. 144 referred to ***R. v. Starr***, 2001 MBQB 107, where at para. 21, the Court

noted that given the apparent fear of certain of the witnesses, the close family ties, the gang associations and the other methods that had been tried, it was the Court's conclusion that the authorizing judge could have found that other investigative procedures were unlikely to succeed.

[42] In the Project, no witnesses were identified, nor had any come forward, and the informants were unwilling to become witnesses. This is not a surprising reality in a drug investigation, those realities to be considered in assessing investigative necessity.

[43] The techniques referenced by Calcut were effective in detecting low-level targets of the Project. Surveillance and TDR data had made some inroads with lower level members of the organization. Attempts to contact RTF were unsuccessful as were efforts to contact other members who were higher in the organization.

[44] Inroads were made with CN, but CN advised that he would not introduce the UCO to others in the organization.

[45] As noted by the Crown, and with which I agree, this does not mean that other investigative techniques are not available, but rather, looking at the investigation, its goals, and the techniques previously used, the use of other investigative procedures would be impractical.

[46] The Applicant also argues that the timelines between any information establishing investigative necessity and the date when the Affidavit was sworn ought to also give the Court concern.

[47] The Applicant argues that much of the specific efforts made by BPS in contacting RTF, GO, JAS, and CN took place in the summer of 2020, the Affidavit having been sworn in February 2021. The Applicant argues that the Affidavit does not make specific reference to further investigative efforts in the five to six months between those specific efforts and the application in February 2021.

[48] The Affidavit does make reference to ongoing efforts. More specifically, there is nothing to suggest that RTF changed the manner in which he conducted his operation, or that a witness was willing to testify, or that an informant became willing to become a witness. In other words, despite the lapse of time, the information provided in the Affidavit suggested that the use of other investigative techniques would continue to be impractical. This consideration is to be made in light of the investigation, its goals, and the techniques previously used.

[49] A goal of the investigation was to obtain evidence of the higher-level ring leaders and dismantle the drug operation. When RTF is actively avoiding contact with the drugs and money, those investigative goals, practically speaking, can only be met through the authorizations permitted by Part VI.

[50] The Affidavit established investigative necessity. In considering the parameters on which a reviewing judge is to operate, there is no basis to interfere with the decision of the issuing justice.

[51] In considering the investigative techniques used at the time of the Affidavit, their limitations and the reasons why other techniques would not be

sufficient to accomplish the goals of the Project, the information contained in the Affidavit demonstrates that investigative necessity was made out.

[52] As the authorization was in compliance with s. 186(1)(b) of the **Code**, there has been no breach of s. 8 of the **Charter**. Both authorizations were valid, there being no breach of the Applicant's **Charter** rights.

[53] Accordingly, the application is dismissed.

_____J.