Citation:

Date:
File No: 121151-1
Registry: Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
SURREY

REGINA

v.

JAMES DOUGLAS PEARSON

AND

SHANNON LEE HURST

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE T. DENNIS DEVITT

Counsel for the Crown:	S. PRICE, N. MULHOLLAND
Counsel for the accused Pearson:	J. Conroy Q.C.
Counsel for the accused Hurst	S. Rauch
Place of Hearing:	Surrey, B.C.
Dates of Hearing:	December 5,6 2002
Date of Judgment:	January 9,2003

PROCEEDINGS

[1] The accused are charged with possession of Marihuana for the purposes of trafficking and the unlawful production of that substance. Both accused elected to have their trial in this court and the matter proceeded to trial on Dec. 5th 2002. The validity of the search warrants is at issue therefore the evidence was heard on a voir dire.

CIRCUMSTANCES

[2] The circumstances as amplified on the voir dire are that on September 24, 2001 const. Macrossan of the R.C.M.P. was travelling in a unmarked police vehicle in a westerly direction on 48th Ave in Langley . There is some conflict on the evidence as amplified on the hearing as to which windows on the officers' vehicle were open and how far they were open. Const. Macrossan said that he had his drivers' window down and as he passed the target residence he detected the smell of raw growing Marihuana. He said that he kept going and when out of sight he made a U- turn and drove past the residence again. This time he stopped in front of the target residence with his window open and he again smelled raw growing Marihuana. The smell was strongest when he was in front of the residence. He described the area as rural residential with large sized lots of approximately an acre and one half in size. The nearest residence was across the street. There was a residence to the west but quite far to the north of the roadway. There is also a residence to the east which Macrossan described as quite a bit away from the target property. The target residence was roughly a 100 feet from the street.

There was a barn behind the residence and Macrossan agreed it may have been twice the distance from the house or three hundred feet from the road.

[3] The const. said that he had been involved in over a hundred grow operations and from his experience the smell was that of raw growing vegetative Marihuana and not that of bud. He believed the smell to be coming from the target residence which property was known to him as having been the subject of a grow operation in 1999. That grow operation was in the barn. The next day const. Macrossan related his observations to const. Kalkat who made no notes but said he started the preparation of the I.T.O. immediately which effectively became his notes.

[4] In cross examination const. Macrossan admitted that he made no notes of his observations and that the I.T.O. made no mention that the total time he spent driving by and turning around and returning to the property including stopping was only 2 minutes. With respect to specific details Const Macrossan had no memory of the details he related to Kalkat other than he believed that he would have given him all his observations. Macrossan said that in his first pass by the property his driver's window was down and it was the closest to the target property and coming back the passenger window was closest. However, para. 2(a) of the I.T.O. states that the car window was open when he drove past again. There is no reference to the window being open the first time he drove past the target property. Kalkat in his evidence said that he was informed by Macrossan that his windows were half down on the first drive by. On the return after the u-turn the windows were rolled down completely. That was not disclosed in the I.T.O. In fact Kalkat thought that the justice would conclude from the I.T.O. that

the windows were rolled down on the first occasion. Kalkat had no notes as to exactly what Macrossan had told him.

[5] Const. Macrossan distinguished the smell emanating from bud as sickly- sweet whereas raw Marihuana was less sickly-sweet. He acknowledged that this was particularly when standing a short distance from the plants but not when one is a couple of hundred feet away; never the less, he was able to distinguish the smell on this occasion. Constable Macrossan acknowledged that if he told Kalkat of the distinction between the odour of vegetating and budding Marihuana that information was not in the I.T.O. However, it was his evidence that what was important was the smell of Marihuana generally.

[6] In the previous investigation of the property it was noted that the barn had a dark opaque material on the windows. Macrossan conceded that one cannot see the barn parked directly in front of the property. While driving by in order to see the barn one would have to look prior to reaching the front of the property. Macrossan couldn't say if he noted any change to the property since 1999 nor did he mention that to Kalkat. In fact Macrossan could not recollect if he saw the opaque windows on September 24th nor could he recollect if he told Kalkat that the windows were opaque in 1999. Macrossan also acknowledged that when dealing with odour it is important to pin point from where it is emanating. However he had no note or recollection of the wind direction. He also did not tell Kalkat of the distance between the target property and any other house nor if there were other houses on 48th Avenue. The officer acknowledged that there is no reference in the I.T.O. to the properties to the south, east or west of the target property.

[7] Const Macrosssan agreed that generally speaking given the size of the plants in this case, namely, a little larger than clones, it would be difficult to detect an odour from 300 feet away depending on such factors as wind. In this case because it was the driver's window that was open the odour, while he was parked in front which is when he said it was strongest, had to come over the car from the target property and in the driver's window.

[8] At approximately 11:00 am the next day Kalkat attended at the area of the target property to verify the information that he had been given by Macrossan. He did not detect any odour. He was at the target property for approximately two and one half minutes. He was in a vehicle parked on the road out of sight. He made a second visit to the property before 3:00 pm. to note any changes before faxing in his application for a warrant. On this occasion he just drove by the property. Kalkat said he wasn't concerned when he did not detect any smell of Marihuana. It was his view that such factors as the time of day when venting may take place and wind direction at the time of Macrossan's observations were important factors.

[9] Kalkat said that he didn't ask Macrossan the distances from the buildings on the target property to the roadway as he was familiar with the area and its rural nature and he was going to attend the area and would make his own observations. The officer went on to say distances weren't important in this case because of its rural nature. Similarly, wind was not much of a factor even though he said earlier he wasn't concerned when he did not detect any odour because there were other factors to consider such as wind direction.

[10] Constable Kalkat said that he was informed by Macrossan about the prior investigation of the target property and that he reviewed the file relating to it. However he was not aware that that the file disclosed that the windows appeared to be covered with opaque material at that time. The Report to Crown Counsel in the 1999 file which Kalkat said he reviewed stated that the windows of the barn appeared to be covered from the inside with dark opaque material. That information was not disclosed to justice in the I.T.O. in this case

[11] As a part of the investigation B.C. Hydro records were obtained and a representative, Mr. Schemenk interpreted those records as having a high consumption for the target property. Const Kalkat then observed the property for an explanation as well as checking for any business licence. He said he would expect to see equipment or a welding shop or other activity which would explain the high consumption but saw nothing.

[12] The accused Pearson gave evidence and explained how he designed the grow operation in a way in which it vented out the back of the property. He said that he monitored the system constantly and he never detected any odour. He further said that on two occasions there were strange occurrences on the property. On one occasion his wife tried to contact him and on the other he noted his dogs acted strange and barking. He investigated and discovered nothing. Both Macrossan and Kalkat denied having attended onto the property prior to the execution of the search warrant or knowing of anyone else having done so.

POSITION OF DEFENCE COUNSEL

[13] Defence counsel submit that material portions of the I.T.O. are misleading and when they are expunged from the I.T.O. there is insufficient left on which a warrant could issue.

[14] In particular para 2(a) states that Macrossan drove by the area of the 22800 block of 48th Ave. and detected a strong odour of Maruhuana coming from the area. He then drove by again with his vehicle windows open and noted the smell strongest while parked in front of the target residence. Const Kalkat said that he expected that the Justice would construe that both windows, that is, driver and passenger were open. Yet he went on to say that he understood the driver's window was partially open when Macrossan drove by the first time. This confusion arises because neither Kalkat nor Macrossan kept notes. The overall time spent by Macrossan making his observations was two minutes. He offered no information to the affiant as to the distances of the target property from the road or other residences in the area. There was no information as to wind direction although that would be germane to pin pointing the property from which the odour came. Kalkat said that wasn't important because he would make his own observations but the I.T.O. is silent on those points. Further when he did attend he drove by and made no notes of his observations. Kalkat detected no odour when he attended the target property.

[15] Paragraph 2(c) states that Macrossan noted that the windows of the white barn appeared to be covered from the inside with a dark opaque material. Macrossan said that he had no recollection of that because he kept no notes. It was his evidence that in 1999 the windows appeared to be covered with an opaque material. That information

was not disclosed in the I.T.O. The justice was left to conclude it was placed on the window for the sole purpose of the recent alleged grow operation. The justice may have come to a different conclusion had all the facts been presented.

[16] As I understand the submission of the defence the evidence relating to the strong odour detected by Macrossan is misleading because there was not a frank and full disclosure as to all the circumstances present. Accordingly, para 2(a) and (b) ought to be expunged. With respect to para 2(c) the reference to the windows being covered with a dark opaque material is misleading as there was no reference to the fact that condition existed in 1999 and whether or not the condition remained the same. Accordingly that sentence ought to be expunged from the paragraph.

[17] Similarly with respect to para. 4(c) defence counsel the reference to opaque material ought to be expunged

[18] In dealing with the smell detected by Const Macrossan Defence counsel urges me to reject Macrossan's evidence on the ground that it is not credible given the time frames involved and the size of the plants and the distance from the road. I am asked to prefer the evidence of Mr. Pearson as to the manner of venting and the lack of any smell.

POSITION OF THE CROWN

[19] The Crown says that Macrossan's evidence ought to be accepted and not discounted. It is not a requirement that the police eliminate every possibility. Macrossan gave his observations to Kalkat and his belief as to the address from which the smell

originated. Kalkat knew Macrossan as a drug investigator and the two sat in close proximity in the office therefore Kalkat knew that he was reliable and was entitled to accept Macrossan's observations. The degree of verification required was not the same as if the information came from an anonymous informant. However Kalkat took steps to verify the information by among other things attending the property and making his own observations. Part of those observations included the opaque material on the window in the barn. The crown says Kalkat was merely stating a fact when referring to the state of those windows. Taking the evidence as a whole the Crown says that the smell, the opaque covering on the window, the high electrical consumption with no observable explanation and the fact that the property was used before for a grow operation disclose more than sufficient reasonable and probable grounds for the issuance of the warrant.

THE LAW

[20] I do not intend to recite the number of cases placed before me dealing with search warrants except to state the almost trite duties on those involved in the process. Firstly, it is not the function of the reviewing judge to substitute his or her view of the evidence. The role of the reviewing judge is to determine whether there are reasonable and probable grounds to issue the warrant as amplified on review and after deleting any offending or misleading information in the I.T.O. If there are grounds that support the warrant that ends the matter. On the other hand, if there are insufficient grounds the evidence resulting from the search may be excluded after a consideration of s.24(2) of the Charter.

[21] The standard of proof required for the granting of a search warrant is that of a reasonable probability. There must be more than mere suspicion. See R.v.Debot [1989] 2 S.C.R. 1140 @ 1166.

[22] The nature of the application is that it is held in camera and is made ex parte. In the circumstances there is a high responsibility placed upon those applying for warrants to handle the truth with impeccable care. As was said in R. v. Monroe [1997] B.C.J. No. 1002 @ p9, presumably , every fact placed before the Justice is designed to assist in securing the warrant and so errors, ambiguities or mis-statements as to any fact are cause for concern. I would add to that list any material omissions because they may create ambiguities or may mislead. Those applying for a warrant must not intentionally mislead or putting the matter or as Southin J.A. said in R. v. Dellapenna (1995) 31 C.R.R. (2d) 1 the affiant must say to himself "Have I got this right?" Have I correctly set out what I've seen, what I've been told, in a manner that does not give a false impression?"

ANALYSIS

[23] It is my view that paragraph 2 (a) is misleading. It refers to constable Macrossan as driving an unmarked police vehicle in the 22800 block of 48th AVE. and detecting a strong odour of Marihuana. It then goes on to state that he drove past again this time with his windows open and noted the smell strongest in front of the target residence. Const Kalkat acknowledged that he thought that the justice would conclude that the windows were open on both occasions. However, on amplification he said he was told by Macrossan that the windows were partly open on the first drive by. This is particularly

troublesome when no distances were provided by the affiant in the I.T.O. as to the barn to the road or other houses in the vicinity. In the circumstances para 2(a) of the I.T.O. must be expunged. Similarly, the reference in para 2 (b) to the odour of Marihuana coming the target residence must be expunged.

[24] The reference in para. 2(c) to the covering on the barn windows with a dark opaque material is also misleading. Although it is a statement of fact it is incomplete. There is no disclosure that the situation was the same in 1999 when there was an investigation. Para 2(d) refers to that prior investigation but does not state that the windows were at that time covered with a dark opaque material. However, the report to crown counsel in 1999 did mention that fact. The logical inference to be drawn by the justice on this application is that the material was placed there to protect this grow operation whereas it may have been there since 1999. The full facts should have been placed before the justice to be weighed when considering the application. Accordingly, the reference to opaque material in paras 2(c) and 4(c) is misleading and must be expunged.

[25] The question then is whether what is left in the I.T.O. as amplified can support the warrant. The only cogent evidence left that could lead to an inference that there was a grow operation at the target property is the high hydro consumption. While that consumption is consistent with a grow operation it alone is not sufficient to provide a reasonably based probability that there was a grow operation on the property. In the circumstances the search was a warrantless search and violated s.8 of the Charter. Accordingly it is not necessary for me to deal with the evidence of Mr. Pearson as to the likelihood that Macrossan smelled Marihuana coming from his property. I accept the

evidence of Macrossan that he never went onto the accused property or knew of anyone that did.

[26] Weighing the harm done to the administration of justice if the evidence is excluded against the harm done upon admitting the evidence I think that properly informed right thinking members of the community would appreciate despite the resulting accuracy of the police suspicion the law requires that the police state the facts fully and frankly to the justice when seeking a warrant to search a residential property: see R.v. Krammer 2001 V.C.J. No. 2689. The confusion that arose in the material in this case could have been avoided by the officers taking proper notes and then stating everything that was relevant in the I.T.O. If Macrossan did not provide enough detailed information including distances between the properties or to the road as well as wind direction a factor Kalkat considered relevant Kalkat should have conducted further surveillance of the property rather than proceed by stating part of the circumstances which may result in the justice arriving at an erroneous conclusion. As was stated by Sopinka J. In R. v. Kokesh 61 C.C.C. (3d) 207

> "Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the charter violation is plainly more serious than it would be otherwise, not less. Any other conclusion leads to an indirect but substantial erosion of the Hunter standards: the Crown would happily concede s.8 violations if they could routinely achieve admission under s.24(2) with the claim that they did not obtain a warrant because they did not have reasonable and probable grounds. ...It should not be forgotten that ex post facto justification of searches by their results is precisely what the Hunter standards were designed to prevent..."

[27] While the facts in that case are quite different from this case in my view those words equally apply to a situation were the police proceed to obtain a warrant and misstate the facts or omit material information which may mislead the justice.

[28] In this case without information of the distances between the buildings and the road as well as the distances of other residences to the target property and the wind direction the police could not reasonably pin- point where the smell was coming from. Another relevant factor according to kalkat was the time of venting, however, neither Kalkat nor Macrossan provide a precise time when Macrossan noted the odour. Kalkat drove by the property in the morning and in the afternoon and experienced no odour, however, if venting was occurring when Macrossan passed by in order to verify the odour presumably it was important to attend at the same time the next day. Had Macrossan taken notes then perhaps Kalkat would have been able to verify Macrossan's observations. Furthermore Kalkat didn't ask Macrossan the appropriate questions. Instead Kalkat proceeded with only partial information without exercising care as to whether or not he was misleading the justice. All the police had without the relevant information was a suspicion not reasonable and probable grounds.

[29] A search warrant is an important investigatory tool but the police must follow the principles set forth in cases such as, R. v. Monroe [1997] B.C.J. No.1002 p.9 and R. v.Dellapenna (1995) 31 C.R. (2d) 1. In this case Kalkat did not stop and ask himself; have I got this right? Have I correctly set out what I've seen, what I've been told in a manner that does not give a false impression?

[30] These violations of the Charter are serious. In the circumstances the evidence gathered pursuant to the search warrant is inadmissible under s.24 (2) of the Charter as to admit the evidence would bring the administration of justice into disrepute.

T. Dennis Devitt, Judge
Provincial Court of British Columbia