CITATION: R. v. Morgan, 2012 ONCA 28
DATE: 20120116
DOCKET: C52843

COURT OF APPEAL FOR ONTARIO

Sharpe, Blair and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Calvin Morgan and Damaine Smith

Respondents

Randy Schwartz, for the appellant

Dirk Derstine and Mariya Yakusheva, for the respondent Calvin Morgan

Michael Dineen and Jeff Hershberg, for the respondent Damaine Smith

Heard: December 20, 2011

On appeal from the acquittal entered by Justice Leonard Ricchetti of the Superior Court of Justice dated September 24, 2010.

Rouleau J.A.:

[1] The Crown appeals from the acquittals entered in favour of the respondents and seeks a new trial on the basis that the trial judge erred in ruling that the respondent Morgan's s. 8 rights under the *Canadian Charter of Rights and Freedoms*, Part I of the

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 to be free from unreasonable search and seizure had been violated and that the evidence obtained pursuant to a search warrant should be excluded under s. 24(2) of the *Charter*.

FACTS

[2] On the evening of December 30, 2008, masked and armed assailants invaded an apartment at 30 Tullamore Road in Brampton. They wielded a gun (or an imitation gun) as well as machetes. The victims, Kyle Campbell, Nancy Caines and Jordan Northcott, were home that evening. A scuffle resulted in Mr. Northcott receiving several wounds. The perpetrators took cellular telephones, electronic equipment and various pieces of identification belonging to the victims. The police were called immediately after the perpetrators left the apartment. Police officers arrived shortly thereafter and conducted an investigation.

[3] As a result of their investigation, the police obtained a search warrant on January 2, 2009, authorizing them to search a residence located at 76 Abelard Avenue in Brampton. The police executed the search warrant. In the respondents' bedrooms, they found property taken from the apartment at 30 Tullamore Road during the robbery, including pieces of identification belonging to the victims. They also found clothing stained with blood containing the DNA of Mr. Northcott.

[4] At pre-trial, Mr. Morgan brought an application for an order declaring that his s. 8 *Charter* rights were breached and excluding all evidence derived from the search of 76 Abelard Avenue pursuant to s. 24(2) of the *Charter*.

DECISION OF THE TRIAL JUDGE

[5] The trial judge found that the information to obtain ("ITO"), which formed the basis for the issuance of the search warrant, contained "extensive misinformation, misleading information and incomplete evidence" which went to the "very core of the evidence necessary to the issuing judge's decision." The trial judge concluded that there had been a clear and deliberate breach or, at the very least, that the police's conduct showed a reckless disregard of their obligation to make full and frank disclosure in the ITO.

[6] In his reasons, the trial judge set out eight "of the more significant problems with the evidence in the ITO" and concluded that, once the ITO is "stripped of its erroneous and tendentious assertions," only three facts remain:

(1) Mr. Morgan telephoned Ms. Caines on one occasion prior to December 30, 2008 from a telephone number registered to 76 Abelard Avenue;

(2) there were fresh footprints found in the snow at about 10:45 p.m. on December 30, 2008 at the intersection of Pearson Road and Abelard Avenue; and

(3) Ms. Caines received a telephone call from a telephone number registered to 76 Abelard Avenue on December 31, 2008, the morning after the robbery.

[7] Later in his reasons, the trial judge added an additional uncontroversial fact: one of the stolen cellular telephones was located by Bell Canada within approximately a half hour of the robbery at the intersection of Abelard Avenue and Pearson Road.

[8] The trial judge found that "[t]hese remaining facts could not reasonably have provided the issuing judge sufficient credible and reliable evidence to find reasonable and probable grounds to believe evidence of the home invasion would be found at 76 Abelard [Avenue]." Consequently, the trial judge determined that the resulting search executed at 76 Abelard Avenue had been in breach of Mr. Morgan's s. 8 *Charter* rights.

[9] Given that the search warrant was deemed invalid, the trial judge next assessed the admissibility under s. 24(2) of the *Charter* of the evidence seized when the search warrant was executed. In applying the analytical framework for the exclusion of evidence under s. 24(2) of the *Charter*, the trial judge found that the seriousness of the police's misconduct coupled with the significant privacy interest one has in a private home outweighed the factors favouring the admission of the evidence. Considering all of the circumstances, the trial judge found that the admission of the evidence would bring the administration of justice into disrepute. As a result, the balancing of these factors led the trial judge to conclude that the evidence obtained pursuant to the search warrant would be excluded under s. 24(2) of the *Charter*.

ISSUES ON APPEAL

[10] The Crown raises three grounds of appeal:

1) the trial judge erred in his analysis of each of the eight "problems" that he identified in the ITO;

2) even after removing any misstatements in the ITO, there remains sufficient evidence supporting the issuance of the search warrant in this case; and

3) if there was nonetheless a breach of s. 8 of the *Charter*, the evidence obtained pursuant to the search warrant should not have been excluded under s. 24(2) of the *Charter*.

[11] For the reasons that follow, I have concluded that, even after removing any misstatements or incorrect information in the ITO, there remains sufficient information supporting the issuance of the search warrant. As I would allow the appeal on that ground, I need not deal with the Crown's first and third grounds of appeal.

ANALYSIS

[12] In considering the second ground of appeal, I will assume, without deciding, that the trial judge's findings that much of the information contained in the ITO was incorrect or misleading and is to be removed can be upheld.

[13] The Supreme Court of Canada has held that even where the ITO contains misleading or false allegations, the reviewing judge is to determine whether, after disregarding the misleading or false allegations, there remains sufficient evidence to justify issuing the search warrant: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 57. I have concluded that, in the present case, there remains substantially more

relevant information in the ITO than the three (or four) remaining facts listed by the trial judge in his reasons. As I will explain, when the additional information (described below) coupled with the three (or four) facts listed by the trial judge are considered in the context of this case, there is reliable evidence that might reasonably be believed to show:

1) a connection between 76 Abelard Avenue and the robbery;
2) a connection between Mr. Morgan and the searched premises at 76 Abelard Avenue; and
3) a connection between Mr. Morgan and the robbery.

[14] Once these connections are made, they are reasonably capable of supporting the issuing judge's decision that there were reasonable grounds to issue the search warrant.

THE CONNECTIONS

1) <u>Connection between 76 Abelard Avenue and the robbery</u>

[15] Approximately 30 minutes following the robbery, Bell Canada was able to place one of the stolen cellular telephones equipped with GPS capabilities at the intersection of Pearson Road and Abelard Avenue. That location, as determined by Bell Canada, is accurate to within 100 meters. Shortly after receiving the information that the cellular telephone was located at the intersection of Pearson Road and Abelard Avenue, the police attended at that location. It was snowing heavily when they arrived and they observed fresh footprints in the snow on the street located directly in front of 76 Abelard Avenue which is at the intersection of Pearson Road and Abelard Avenue.

[16] The stolen cellular telephone's location and the fresh footprints provide a basis for inferring a connection between 76 Abelard Avenue and the robbery.

2) <u>Connection between Mr. Morgan and the robbery</u>

[17] Two of the victims identified the perpetrators of the robbery as being three black males, approximately 20 years old with medium builds and measuring between 5 feet 10 inches and 6 feet tall. The third victim could only say that one perpetrator was black and was unable to describe the others. Mr. Morgan matched the general description given by the victims.

[18] The victims knew Mr. Morgan as he was one of only two black men who had been to their apartment to buy a small amount of marihuana. The second black man who had attended at their apartment was a relative and did not match the general description of the perpetrators. He was therefore not a suspect.

[19] Ms. Caines told police that she had seen a photo image of Mr. Morgan wearing a red bandana in the same fashion as one of the perpetrators during the robbery. There was, however, some inconsistency in the description given by the victims of the face coverings worn by the perpetrators. Mr. Northcott described the face covering as being a tie-dyed bandana and Mr. Campbell thought that all of the face coverings were black.

[20] These facts provide a basis for inferring a connection between Mr. Morgan and the robbery.

3) Connection between Mr. Morgan and 76 Abelard Avenue

[21] Further to the interview with Ms. Caines, the police were informed that sometime prior to the robbery, Mr. Morgan had placed a telephone call to her from a telephone number registered to 76 Abelard Avenue. On the morning following the robbery, Ms. Caines received a telephone call from that same number but she was not home at the time. The telephone caller's number was, however, recorded in her telephone. She considered this telephone call to be suspicious because Mr. Morgan, who was the person known to her at that telephone number, would have known that she was at work at that time. She therefore reported this event to police.

[22] Further to Ms. Caines report, the police followed up on the telephone number she provided. The police confirmed that the telephone calls were made from the landline telephone number registered to 76 Abelard Avenue. The owner of 76 Abelard Avenue was found to be someone with the surname Morgan. Although the police had a different address for Mr. Morgan, further investigation revealed that Mr. Morgan was no longer residing at that last known address. The police therefore concluded that he was residing at 76 Abelard Avenue with relatives.

[23] Consequently, there is a basis for inferring a connection between Mr. Morgan and the residence located at 76 Abelard Avenue.

THE ITO VIEWED AS A WHOLE

[24] As outlined above, there was considerably more evidence supporting the issuance of the search warrant than the three (or four) remaining facts listed by the trial judge. That information provided the basis for making the three critical connections noted above.

[25] Further, the information must be viewed in the context of this case. The search warrant was sought less than three days after the robbery and as part of an ongoing investigation. At this stage, the burden on the police is not to prove, beyond a reasonable doubt, that evidence of the robbery would be recovered at 76 Abelard Avenue. Rather, the test to be applied by a reviewing judge was set out in *Araujo*, at paras. 51 and 54, as follows:

> In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was *at least some evidence that might reasonably be believed on the basis of which the authorization could have issued*.
>
> …
>
> An approach based on looking for sufficient reliable information in the totality of the circumstances appropriately balances the need for judicial finality and the need to protect prior authorization systems. Again, the test is whether there was reliable *evidence that might reasonably be believed on the basis of which the authorization could have issued*, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge. [Emphasis in original.]

[26] When the three connections and other remaining facts are viewed in the totality of the circumstances, the trial judge ought to have concluded that, stripped of the materially inaccurate and incomplete information, the ITO provided reliable evidence on which the issuing judge or justice could have issued the search warrant. Further, the respondent Morgan did not meet his burden to show that, on a balance of probabilities, the warrant could not have been issued.

[27] For these reasons, in applying the test described in *Araujo*, the search warrant could have issued given that it was based on sufficient reliable information in the totality of the circumstances.

[28] Before concluding, let me add one further comment. As explained, it was not necessary to address the appellant's first ground of appeal. Accordingly, I should not be taken as either accepting or rejecting the appellant's submissions that the trial judge erred in his finding that there were many instances of inaccurate and incomplete information and erred in concluding that the police had deliberately and recklessly misled the issuing judge.

CONCLUSION

[29] In conclusion, therefore, I would allow the appeal and order a new trial.

"Paul Rouleau J.A."
"I agree Robert J. Sharpe J.A."
"I agree R.A. Blair J.A."

RELEASED: January 16, 2012