Citation: *R. v. Silver*, 2005 YKTC 62

Date: 20050915
Docket: 04-00398
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

R e g i n a

v.

Daniel Raymond Silver

Appearances:
Susan Bogle — Counsel for Crown
David St. Pierre — Counsel for Defence

RULING ON VOIR DIRE

[1] Daniel Raymond Silver is charged with possession of cocaine for the purpose of trafficking as well as numerous firearms offences. The charges were laid after Mr. Silver was arrested by the RCMP on October 2, 2004. A search of his person produced a .45 caliber handgun from his pants pocket and 59.3 grams of powder and crack cocaine that had been secreted in his underwear.

[2] Mr. Silver has made application under s. 24 of the *Charter* to have the evidence seized from him excluded from evidence on that the basis that it was obtained from him in violation of his rights under ss. 8 and 9 of the *Charter*. Specifically, he alleges that there were no reasonable grounds to arrest him and that the search and seizure that followed in consequence was, therefore, unreasonable.

[3] The arrest of Mr. Silver was predicated on a tip received by Constable Bell of the Whitehorse RCMP Drug Section from a confidential informant. Mr. St. Pierre, who acts for Mr. Silver, argued that the tip fell far short of providing the police with objectively reasonable grounds to arrest Mr. Silver.

[4] It is trite law that police must have reasonable grounds to effect an arrest. It is equally trite law that a search incidental to an arrest is unreasonable if the arrest was groundless. Since a warrantless search is *prima facie* unreasonable, the burden of establishing that reasonable grounds existed lies upon the Crown, notwithstanding the general rule that places the onus of establishing a *Charter* breach on the applicant.

[5] In *R. v. Debot*, [1989] 2 S.C.R. 1140, the S.C.C. dealt with the issue of weighing evidence provided by informants and relied on by police to justify an arrest or warrantless search. The oft-quoted decision of Wilson, J. sets out three factors to be considered.

> In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weakness in one area may, to some extent, be compensated by strengths in the other two.

[6] In this case, the informant telephoned Cst. Bell and told him that Daniel Silver was, at that time, in possession of in excess of one ounce of cocaine. Mr.

Silver was said to be driving a Silver Subaru automobile with a black hood and was on his way to make drug deliveries to the “Crack Shack” and some local hotels. The Crack Shack is a well known drug trafficking house located on Wheeler Street in downtown Whitehorse.

[7] Cst. Bell testified that he had been using this informant for six months. The informant had a criminal record and was paid for his information. However, Cst Bell also said that information provided by the informant had resulted in three seizures of drugs, two seizures of stolen property and a number of convictions. None of the information provided by the informant had proved to be misleading.

[8] Cst. Bell knew of the accused, Daniel Silver, and, based on other investigations he had conducted and information from other drug section officers believed Mr. Silver to be involved in drug trafficking. Mr. Silver had no criminal record and had never been arrested in the Yukon but there was an outstanding warrant from British Columbia for his arrest on a charge of marijuana cultivation. Cst. Bell also knew that Mr. Silver was operating a silver Honda automobile with a black after-market composite hood. Cst. Bell referred to it as quite unique. He believed that this vehicle was the one the informant was referring to. This vehicle was registered to another person but Mr. Silver was known to drive it and had been seen to be doing so in the days immediately prior to his arrest.

[9] Cst. Bell quickly met with other members of the drug section and they decided to fan out and see if they could locate Mr. Silver and the silver and black vehicle. As Cst. Bell drove along the Alaska Highway near the intersection of Hamilton Blvd. he saw the silver and black Honda heading down Hamilton Blvd. and Two Mile Hill toward downtown Whitehorse. He could not, at that time, identify the driver. As Cst. Bell was in plain clothes and operating an unmarked car, he radioed for assistance from uniformed police officers. Cst. Warner responded and stopped the Honda at the bottom of Two Mile Hill.

[10] After it was confirmed that Mr. Silver was the driver, he was arrested for the offence of possession for the purpose of trafficking and searched. A pat down search at the roadside revealed the 45 handgun. A short time later, at the detachment, a strip search revealed the cocaine in Mr. Silver's shorts.

[11] Mr. St. Pierre indicated that he took no issue with the manner in which the searches were conducted. However, he argued that the tip Cst. Bell acted on fell far short of meeting the standard. It was, he said, an arrest and search on suspicion alone. The breach was serious and the evidence should be excluded. Specifically, Mr. St. Pierre argued that the tip lacked detail and amounted to little more than a conclusory statement. He said that Cst. Bell ought to have ascertained how the informant had acquired his knowledge and that Cst. Bell had failed to take any steps to investigate and confirm the information provided.

[12] *Debot, supra,* makes clear that, although there are a number of factors to be considered in assessing informer tips, it is the overall quality or sufficiency of the information that is to be considered. For example, although reliability of the informant is an important factor, it is not essential. Information as to reliability may be completely absent. Yet tips from untested or unknown informants have been found to be sufficient when the information provided and/or other investigation is sufficient to provide reasonable grounds.

[13] In this case, the police had every reason to believe the informant was reliable given his track record. Moreover, the information given went well beyond mere conclusory statements. The informant advised that the crime was then in progress. He provided specifics as to the kind and quantity of drug involved and a description of the vehicle Mr. Silver was operating as well as his intended destinations.

[14] It is true that Cst. Bell could have asked his informant how he can come into possession of this information, however, given the informant's proven high

level of reliability and the urgency of the situation, in my view this omission is not fatal. Moreover, as Ms. Bogle pointed out, there could be reluctance on the part of an informant to reveal such information since its disclosure could lead to his identification.

[15] As well, the police were able to use other information already in their possession to test the credibility of the informant's assertions. Cst. Bell had already identified Mr. Silver as a person believed involved in drug trafficking. He also knew that Mr. Silver was driving a vehicle very similar to the one described by the informant. I have not forgotten that the informant called the car a Subaru when it is, in fact, a Honda. However, given the somewhat unique description of a silver car with a black hood, Cst. Bell was justified in concluding that the vehicle described by the informant was the one he knew Mr. Silver to be operating. As an aside, it is interesting to note that Cst. Bechtel, one of the officers who stopped Mr. Silver, also described the car as a Subaru.

[16] There was also some confirmation of the informant's statement that Mr. Silver was using the silver and black car and making his deliveries at that time as Cst. Bell soon observed the vehicle heading in the general direction of the locations specified by the informant. When the vehicle was stopped, it was confirmed that Mr. Silver was, indeed, the driver.

[17] I pause to add that Mr. St. Pierre also submitted that, since Cst. Bell could not identify the driver of the vehicle he saw on Two Mile Hill, there were no grounds to stop it. There is nothing in this argument. Cst. Bell clearly had articulable cause to stop the vehicle based on the informant's tip and Mr. Silver's known use of the vehicle. Prior to the search complained of, it was confirmed that the driver was, indeed, Mr. Silver.

[18] It is also true, as Mr. St. Pierre points out, that it would have been possible for Cst. Bell to follow the suspect vehicle to see if it did, indeed, go to the locations specified. However, Cst. Bell was not asked why he did not do so and, thus, was not given an opportunity to explain this alleged failing. It may well have been inadvisable to do so as he could risk loosing sight of the vehicle. Mr. Silver could have detected the surveillance and altered his route or taken steps to secrete the drugs.

[19] This is a situation wherein the police were reacting to an event unfolding at that very moment. In such circumstances, there is a danger that post-event analysis by armchair quarterbacks in the bar and bench will apply unrealistically high standards of perfection to situations were split-second decisions have to be made.

[20] Having regard to all the circumstances, I am satisfied beyond doubt that the police had (both subjectively and objectively) reasonable and probable grounds to make the arrest and conduct the subsequent search. The details of the tip combined with the observations of the police were sufficient to remove any real possibility of innocent circumstance. The accused was not arbitrarily detained or unreasonably searched. The application to exclude the evidence thus obtained is dismissed.

[21] If I am wrong in my analysis on the issue of the reasonableness of the search, and there was a *Charter* breach, I find that I would not have exercised my discretion to exclude the evidence in question. Although an unreasonable arrest and intrusive search of the person would be a serious breach, the evidence obtained was real evidence and its admission would not affect the fairness of the trial. The police, I find, acted in good faith, and not in ignorance or

disregard of the law as in *R. v. Klimchuk*, cited by the defence. Moreover, the charges are extremely serious. In the circumstances, I find that admitting the evidence would not bring the administration of justice into disrepute.

Faulkner C.J.T.C.