R. v. Lin

Ontario Judgments

Ontario Court of Justice

Toronto, Ontario

Sparrow J.

Oral judgment: March 18, 2004.

[2004] O.J. No. 1535 | 2004 ONCJ 7 | 118 C.R.R. (2d) 60 | 61 W.C.B. (2d) 269

Between Her Majesty the Queen, and Yong Kang Lin and Thi Tuyet Lau Do

(54 paras.)

Case Summary

Civil rights — Security of the person — Unlawful search.

Motion by the accused Lin for the exclusion of evidence obtained pursuant to a search warrant. Lin had been charged with producing marijuana. The grow operation was found when a search warrant was executed. Lin stated that the warrant was invalid as it was based partly on the results of an illegal technique referred to as a FLIR, a forward-looking infrared. In addition to the results of the FLIR test, which showed heat emanating from the basement, the informant relied on an anonymous tip, surveillance, and a review of hydro consumption.

HELD: Motion allowed.

The evidence was excluded. Accordingly, the charges were dismissed. The search was illegal. The tip and hydro records were tainted by the illegal FLIR test.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 8, 24(2).

Controlled Drugs and Substances Act.

Counsel

W. Levant, for the Crown. K. Schofield, for the accused (Do). D. Stein, for the accused (Lin).

SPARROW J. (orally)

1 The accused in this matter are charged with producing marijuana by growing it in their rented house in Toronto and possession of the same quantity of marijuana for the purpose of trafficking. It is acknowledged that on January 28th, 2003, members of the Metropolitan Toronto Police Services executed a Controlled Drugs and Substances Act search warrant at the home of the accused, at 2128 Codlin Crescent, and located a marijuana grow operation in the basement, including 129 plants valued by police at $129,000 and hydroponic grow equipment.

2 The accused bring a motion pursuant to S.8 of the Charter on the grounds that the search warrant was invalid, as it was based partly on the results of an illegal technique referred to as a FLIR (forward looking infrared). They submit that the evidence should be excluded pursuant to S.24(2) of the Charter, as the breach was serious, and admission of the seized evidence would bring the administration of justice into disrepute.

3 Argument was centred on the contents of the information to obtain the warrant sworn by Officer Mark Sanders. In a nutshell, he swore that he had reasonable grounds to believe that a grow operation was being conducted at 2128 Codlin on the basis of the following information:

1) an anonymous tip from an unknown person that a grow operation was being run by Asians at 2128 Codlin;
2) surveillance between January 20th and 25th, 2002, showing an Asian male and female and various cars coming and going from the property;
3) a review of hydro consumption records from that address, which showed that in the period of July to December, 1999, they range from 22.86 kilowatt hours per day to 57.73 kilowatt hours per day, while between December, 2000 and December, 2002, they range between 137.34 kilowatt hours per day to 279.33 kilowatt hours per day. The accused Do and Lin were tenants during the latter time period, but not the former. The review also established that daily consumption at two similar Codlin homes varied from 5.57 to 20.75 kilowatt

hours per day. At 2117 Codlin, however, daily consumption was as high as 312.74 kilowatt hours per day, which was attributed to a gardening business and greenhouses on that property; and

4) the results of the FLIR test, a thermal detection device which measures patterns of heat emanating from the house from a position off the property. In short, high levels of heat were found to be emanating from the basement and certain side walls on January 22nd, 2003, a pattern which was "inconsistent with all other test dwellings and indicative of a possible marijuana grow operation."

4 Ultimately PC Sanders concludes: "When all of the foregoing grounds are considered in their totality, the informant believes that the, anonymous informant's information is confirmed as best as possible as being accurate. And coupled with other identified investigative techniques, the informant verily believes that there are reasonable grounds for a warrant to search to be issued for 2128 Codlin Crescent, Toronto."

5 In cross-examination about his conclusions at the hearing, Sanders stated that he was of the opinion that FLIRS was a valid technique at the time of the search. The Crown has acknowledged that since the ruling in Regina v. Tessling, 171 C.C.C. (3d) 361 [Ontario Court of Appeal] on January 27th 2003, however, the technique has been considered to be a breach of S.8 of the Charter and is no longer in use unless a warrant for a FLIR search is obtained. The good faith belief of the officer and the legality of the technique at the time, however, is not subject to question.

THE LAW:

6 All counsel agree that the proper test to be applied by a trial judge in considering the validity of a warrant was stated in Regina v. Garofoli, 60 C.C.C. (3d) 161 [Supreme Court of Canada] as follows: "The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere."

7 In making this determination, the trial judge can not look to grounds specified in the warrant which were obtained in contravention of the Charter: see Regina v. Plant, 84 C.C.C. (3d) 203 [Supreme Court of Canada]. Therefore, in the case at bar, I must determine whether the justice of the peace could have issued the warrant for 2128 Codlin Crescent if he had not been able to rely on the results of the FLIR test, which, according to Tessling, contravenes S.8 of the Charter.

8 In this regard, defence counsel argued that the anonymous tip could not have been given

any significant weight, as the informant's reliability was basically undeterminable: see Regina v. Debot (1989) 52 C.C.C. (3d) 193. They also submit that the evidence of high hydro consumption at 2128 Codlin was not a reasonable basis for granting the warrant, given that a neighbouring home had similarly high readings, and a previous tenant at 2128 had also produced high readings.

9 They also submit that the officer could have provided a more authoritative analysis of the hydro information - for example, an examination of daily power cycles and an explanation of their meaning, and that, as described, the power levels could equally suggest lawful activity, such as legitimate plant growing or the operation of business machinery.

10 Crown counsel submits that, as found in Plant, supra, an anonymous tip and aberrant hydro records are sufficient to support a search warrant for a grow operation.

11 Ultimately, however, I need not decide whether or not the tip and hydro records constitute reasonable and probable grounds. Even if they do, they are tainted to the point that S.24(2) of the Charter is triggered, according to the authority of Plant, supra, and the companion case Regina v. Grant, 84 C.C.C. (3d) 173 [Supreme Court of Canada]. In those cases, perimeter searches of homes containing grow operations were ruled to be illegal, despite the good faith of police officers. Even though other reasonable grounds existed, they were sufficiently tainted by the perimeter searches as to render the resulting search of the home a Charter breach.

12 In Grant, the Court states at page 198, "In the case at bar there is a sufficient temporal connection between the warrantless perimeter searches and the evidence ultimately offered at trial by the Crown to require a determination as to whether the evidence should be excluded. The warrantless searches, while perhaps not causally linked to the evidence tendered, were nevertheless an integral component in a series of investigative tactics which led to the unearthing of the evidence in question. It is unrealistic to view the perimeter searches as severable from the total investigatory process which culminated in discovery of the impugned evidence. Furthermore, to find otherwise would be to ignore the possible tainting effect which a Charter violation might have on the otherwise legitimate components of searches by state authorities. The temporal and tactical connections between the warrantless perimeter searches and the evidence finally offered at trial were sufficient to warrant the conclusion that the evidence was obtained in a manner that violated the constitutional rights of the respondent so as to attract the provisions of S.24(2) of the Charter. Accordingly, I now turn to consider whether the impugned evidence ought to be excluded."

13 In this case, the tip, minimal surveillance, the hydro records, and the FLIR results were all obtained within days of each other. In my view, they are part and parcel of the same investigation and, as in Grant, when considered in total, were obtained in a manner that violated the Charter. S.24(2) is therefore engaged. With respect to exclusion, I note the following key passage in Tessling at paragraph 81: "I acknowledge that in 1993 the Supreme Court of Canada in Plant observed that preventing marijuana growing was a compelling state interest. It is impossible to ignore, however, that since that decision there has been public, judicial, and political recognition that marijuana is at the lower end of the hierarchy of harmful drugs. This means that in the speculative judicial balancing exercise inherent in determining how best to protect public confidence in the administration of justice under S.24(2) the weight of this offence is lighter on the scales than other drug related offences."

14 In paragraph 82, the Court continues: "The breach of an individual's right to privacy in his or her home, on the other hand, can only be characterized as serious. As between the right of an individual to be assured of protection from the state's unwarranted invasion of privacy in the home and the state's right to intrude on that privacy to catch marijuana growers, I see public confidence being enhanced more by excluding rather than admitting the marijuana evidence in issue."

15 Despite the Court of Appeal's reference to marijuana being at the lower end of the harm hierarchy, I note that counsel have referred to other problems caused by grow operations for example, growers' attempts to bypass hydro meters, and ungrounded wires, which threaten residents, even children.

16 I also note that in Tessling, the officers did not have high hydro readings to rely on in addition to the FLIRS results. Nevertheless, according to my understanding, the Court of Appeal has clearly ruled that in marijuana grow cases, evidence obtained by intrusion into homes under a warrant which flows from a contravention of S.8 of the Charter will not be admitted.

17 In my view, the fact that grounds for the warrant were perhaps a bit stronger in this case than in Tessling is an insufficient distinction to support a different finding under S.24 (2) of the Charter. There was a breach because of tainting or potential tainting; it must be considered serious, and it outweighs society's interest in preventing marijuana growing. Although under appeal, Tessling, in this regard is, in my view, binding and the evidence flowing from the search in question in this case will therefore be excluded.

18 All right. So Madam Crown, that evidence having been excluded, do you have any other evidence to call?

19 MS. LEVANT: No.

20 THE COURT: All right. The charge is therefore dismissed. Everyone is free to go.

21 MR. STEIN: Thanks very much, Your Honour.

22 THE COURT: You are welcome.

RECESS
ON RESUMING

23 MS. LEVANT: Yes, good-morning again, Your Honour.

24 THE COURT: Good morning.

25 MS. LEVANT: For the record, it's Wendy Levant appearing on behalf of the Department of Justice. Just in follow up on the Lin and Do matter, I'm going to ask Your Honour to sign these forfeiture orders, so they can be included with the Information.

26 THE COURT: Why are there two of them?

27 OFFICER SANDERS: It's just a copy...

28 MS. LEVANT: One is a copy for the officer in charge.

29 THE COURT: And counsel on the other side are consenting?

30 OFFICER SANDERS: They did.

31 MS. LEVANT: Yes, they - Ms. Schofield consented to that.

32 THE COURT: It says "upon reading the consents filed." Is there a consent filed?

33 OFFICER SANDERS: She didn't write a consent. She just told us to do it. She suggested it ...

34 MS. LEVANT: It was actually Ms. Schofield that had suggested that we do this. Unfortunately, she's not here to consent.

35 THE COURT: Well it says "consents filed" right on the form.

36 OFFICER SANDERS: Well they can be crossed out too.

37 MS. LEVANT: I believe that can be crossed out.

38 THE COURT: Well I am not happy about this, Ms. Levant. You know, somebody should think these things through.

39 MS. LEVANT: All right ....

40 OFFICER SANDERS: I think they don't want the equipment back, so I have to destroy it somehow.

41 MS. LEVANT: The issue is destroying the grow equipment.

42 THE COURT: Yes, I understand.

43 MS. LEVANT: Well if Your Honour isn't satisfied with those documents then we can find another way.

44 THE COURT: Well it says on the face of it - I am not going to sign something that says "reading the consents filed" when there is no consent filed.

45 MS. LEVANT: I understand that.

46 THE COURT: I do not sign things like that, Ms. Levant.

47 MS. LEVANT: I understand.

48 THE COURT: All right.

49 MS. LEVANT: It's just - it was an issue that ...

50 THE COURT: So you should have either read it in advance and redesigned it for me, or you should have gotten the consents - one or the other. So...

51 MS. LEVANT: Okay. I understand the officer will deal with it. Thank you, Your Honour.

(Court Monitor's note Other matter spoken to at this time)

52 THE COURT: I am not saying I will not sign that, but it might be better to get a consent. I am not exactly sure how everything is proceeds of crime. It probably is, but I do not know exactly what the theory is and I prefer to have a consent on it. Maybe you can call her and get her to come up and sign a consent.

53 MS. LEVANT: Okay.

54 THE COURT: All right?

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