EDITORIAL NOTE: NO SUPRESSION APPLIED.

IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2017-009-001480
[2017] NZDC 14823

NEW ZEALAND POLICE
Prosecutor

v

RONA RENAI FROGLEY
Defendant

Hearing: 5 July 2017

Appearances: S Burdes for the Prosecutor
K May for the Defendant

Judgment: 5 July 2017

ORAL JUDGMENT OF JUDGE T J GILBERT

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[1] Rona Frogley is charged with possession of methamphetamine, possession of a utensil, possession of a taser and possession of ammunition. The charges arise out of a search conducted of her house on 16 February 2017. Ms Frogley, when questioned, accepted possession of all of the items barring the ammunition which she denied any knowledge of.

[2] Entry into the house was purportedly made under the authority of a search warrant. It is the legitimacy of that warrant which is at issue. It is common ground that if the evidence obtained under the warrant is ruled inadmissible the charges would go no further. Conversely in relation to at least three of the charges, if the evidence is ruled admissible it seems Ms Frogley has no defence. It may be though that she chooses to proceed to trial in relation to the ammunition based on her

comments that it was not hers and she knew nothing of it. That will be for a different day if the evidence is ruled admissible.

[3] The search warrant is challenged on two grounds. First, Mrs May submits that it was not executed within 14 days of its issue and was, therefore, invalid. Second, Mrs May submits that even if it was executed within the appropriate time period the grounds for the issue of the warrant were not made out. I am going to deal with those two issues in reverse order.

Were there valid grounds for the issue of the warrant?

[4] Ms Frogley challenges the search warrant on the basis that there were insufficient grounds to justify its issue. Prior to the hearing I was provided with a copy of the unredacted version of the search warrant application. Mrs May in advancing this challenge is obviously hamstrung because she is not aware of what has been redacted.

[5] The law in relation to redaction of search warrant applications is well-settled. Whilst there is a general obligation of disclosure, s 16 Criminal Disclosure Act 2008 provides certain exceptions to that general obligation. Relevantly a prosecutor may withhold information from a defendant that the defendant would ordinarily be entitled to have if disclosure of that information would be likely to endanger the safety of any person or compromise investigative techniques.

[6] Section 16 was the subject of comment by Keane J in *Barrett v Police*[1] which is a convenient summary of the law. The key points in that case were:

(a) Section 16 protects information about informers as long as that is not at the expense of the right of a defendant to a fair trial.

(b) Disclosure should be allowed if the redacted information would help to show that an accused person is innocent of an offence.

[1] *Barrett v Police* [2013] NZHC 1416.

(c) In order to assess this, a Judge must compare the redacted and unredacted versions to decide whether or not what has been withheld goes beyond protecting informers and might legitimately assist the defence.

[7] I have approached this application with those comments in mind and have carefully considered the redacted material. Having done that, with limited exceptions I consider that the redactions have been made for legitimate purposes under s 16, namely the protection of an informer/s. In my assessment none of the redacted material provides any legitimate ground for advancing defences.

[8] However, to a limited extent the redactions go further than is needed to protect sources. Accordingly, there will be a disclosure order in relation to paragraphs 8.1 to 8.5 inclusive.

[9] I had given some thought to requiring disclosure of the material at paragraphs 15.1 to 15.15, 17.1 to 17.5 and 17.7. However, I am satisfied that when that material is viewed in combination with the other material it does have the potential to, for want of a better phrase, give up sources. That material in no way could advance the defence.

[10] With the exceptions then of paragraphs 8.1 to 8.5 inclusive, I am satisfied that the redactions were legitimately within the scope of s 16. The portions that I have ordered to be disclosed do not impact the substantive issues around whether a search warrant should have been issued.

[11] The next question is whether the search warrant application, as considered by the issuing officer, was sufficient to meet the thresholds required of s 6 Search and Surveillance Act 2012. Ms May submits that those thresholds were not met although as I have noted she is at a disadvantage because the material parts of the application are invisible to her.

[12] In broad terms, s 6 requires that the application satisfies the issuing officer:

(a) That there were reasonable grounds to suspect that the offences specified in the application had been or were being committed; and

(b) That there were reasonable grounds to believe that the search would find evidential material in respect of the asserted offences at the specified address.

[13] I will keep my comments necessarily brief on this in order to preserve the integrity of the redactions that have been made. When the application is viewed as a whole there were strong grounds for concluding that Ms Frogley lived at the address and that she was involved in drug-related offending from that address. There were multiple identified sources as well as anonymous Crimestoppers information. Some details were corroborated through NIA checks and at least one of the sources had previously provided reliable information.

[14] These factors meant that the issuing officer could appropriately conclude that the thresholds in s 6 Search and Surveillance Act had been met. In light of this, I find that the search warrant was validly issued in the sense that it met the s 6 thresholds.

[15] I turn now to the second issue which was probably the primary point taken up by Mrs May.

WAS THE WARRANT EXECUTED WITHIN 14 DAYS OF ITS ISSUE:

[16] The police application for the search warrant was completed on 10 February 2017. The application was forwarded to the District Court where Christopher Greaney, an authorised issuing officer under the Search and Surveillance Act 2012 considered it on 13 February 2017.

[17] Unsurprisingly given what was contained in the application, Mr Greaney was satisfied that the relevant tests in s 6 Search and Surveillance Act were met and, therefore, issued the warrant. Unfortunately he misdated the warrant 13 January 2017 when the correct date should have been 13 February.

[18] Nobody realised this error until after entry had been gained into Ms Frogley's house. When an officer was explaining the warrant to her he noticed the incorrect date and spoke to his supervisor who was a sergeant. They were aware that the warrant had only been signed a few days prior and, therefore, made the decision to continue with the search, believing that the error had to be a "clerical error at the Court."

[19] As a general rule under s 103(4)(h) of the Act, search warrants are required to be executed within 14 days of their being issued unless another time period is specified. In this case 14 days was the relevant period.

[20] Ms May submits that the date of issue was 13 January 2017 and accordingly, the execution of the warrant on 16 February was well outside the 14 day period. The warrant, she submits, therefore, expired. As such the resulting evidence was improperly obtained under s 30(5)(a) Evidence Act 2006 because of a breach of the requirements of the Search and Surveillance Act and she submits any resulting evidence should, therefore, be excluded. As part of that she submits that any balancing exercise undertaken under s 30(3) Evidence Act ought fall in the defendant's favour.

[21] The police in written submissions have accepted that the warrant was improperly executed on the basis that the execution occurred more than 14 days following the issue of the warrant. However, Ms Burdes submits that the evidence should nonetheless be ruled admissible once the balancing exercise in s 30 is undertaken.

[22] As it happens I disagree with the position advanced by both counsel in written submissions. It seems to me that the warrant was clearly issued on 13 February 2017 and thus its execution on 16 February was well within the 14 day period. The evidence in relation to the date of issue and execution is both incontrovertible and unchallenged. Whilst it was issued then, it was simply misdated.

[23] The question is whether or not the inclusion of the incorrect date invalidated the warrant. Section 107(2) of the Act provides that a search warrant is invalid if "it contains a defect…that is likely to mislead anyone executing or affected by the warrant as to its purpose or scope." In my view the inclusion of the wrong date was not likely to mislead anyone as to the warrant's "purpose or scope". The warrant was perfectly clear, it just had a wrong date on it.

[24] Section 379 Criminal Procedure Act 2011 provides that:

> No warrant…may be…set aside or held invalid by any Court by reason only of any defect, irregularity, omission or want of form unless the Court is satisfied that there has been a miscarriage of justice.

[25] Section 204 Summary Proceedings Act 1957 which remains in force is to like effect. There has been no miscarriage of justice. Accordingly, I find that the search warrant was valid and that entry into Ms Frogley's property in reliance on it was lawful.

[26] If I am wrong in that conclusion and entry was unlawful by virtue only of the invalidity of the warrant due to the date-related issue I would nonetheless have admitted the evidence having regard to the balancing test in s 30(3) Evidence Act.

[27] Whilst there was an incorrect date applied to the warrant by the issuing officer, the error arose out of inadvertence. I certainly accept that there was some carelessness on the part of the police and that in an ideal world the police ought to have picked up the incorrect date prior to entry and rectified it. However, given that they knew that the warrant had only been issued three days previously, one can understand at a human level how the error went unnoticed, albeit I accept that is sloppy.

[28] There was no prejudice to the defendant in this. Had it been picked up the error would unquestionably have been rectified by the issue of a new warrant with the same end result. In my view if I were to rule the evidence inadmissible and as a result essentially put an end to the prosecution, the credibility of the justice system would be undermined. This is not a case where there was any substantive error or

where there was any actual unfairness. It was a simple typo that went unnoticed through inadvertence.

[29] Accordingly, as I have said, even if I am wrong on the substantive issues I would still have allowed the evidence to be admitted under s 30. The net result is that the evidence will be admissible at trial.

T J Gilbert
District Court Judge