R. v. Clarke

Ontario Judgments

Ontario Superior Court of Justice

D.K. Gray J.

Heard: September 26-28, 2011.

Judgment: February 24, 2012.

Court File No. 43/11

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Between Her Majesty the Queen, and Mark Clarke

(86 paras.)

Case Summary

Criminal law — Powers of search and seizure — Warrantless searches — Search warrants — Reasonable grounds — Scope — Validity — Application by accused to quash search warrant for residence and exclude evidence derived therefrom dismissed — Justice of the peace had sufficient evidence from police, including tip from reliable informants that Mark selling drugs he stored in Milton residence from his black Infiniti, to issue search warrant for premises — Drug evidence seized from residence admissible — Search of Infiniti in adjacent driveway not authorized by warrant — Police knew gun might be present, yet did not seek warrant to search vehicle for gun — Exclusion of evidence gun discovered in vehicle would bring administration of justice into disrepute — Police acted in good faith.

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Right to protection against unreasonable search and seizure — Remedies for denial of rights — Specific remedies — Exclusion of evidence — Where administration of justice brought

into disrepute — Application by accused to quash search warrant for residence and exclude evidence derived therefrom dismissed — Justice of the peace had sufficient evidence from police, including tip from reliable informants that Mark selling drugs he stored in Milton residence from his black Infiniti, to issue search warrant for premises — Drug evidence seized from residence admissible — Search of Infiniti in adjacent driveway not authorized by warrant — Police knew gun might be present, yet did not seek warrant to search vehicle for gun — Exclusion of evidence gun discovered in vehicle would bring administration of justice into disrepute — Police acted in good faith — Canadian Charter of Rights and Freedoms, 1982, ss. 8, 24(2).

Application by Clarke for an order quashing the search warrant for his premises that resulted in charges of possession of cocaine and marijuana for the purpose of trafficking as well as weapons offences against him. Two confidential informants, both of whom had provided reliable information in the past, provided a tip that a 24-year-old black male with no record named Mark, who drove a black Infiniti, was selling drugs in Mississauga that were stored at his home in Milton. The tip provided that Mark was using the Infiniti to sell the drugs and that Mark had a handgun. The informants described Mark's roommate Dread and Dread's vehicle, as well as another partner in the drug dealing enterprise. Police kept Clarke's Milton home under surveillance for 24 hours while they awaited the issuance of a warrant to enter the residence to search for drugs. No information was provided to the justice of the peace about the weapons allegations, to protect the identities of the informants. No warrant was sought to search the Infiniti. Clarke was present when the warrant was executed. In the home, police discovered drugs, paraphernalia, cash, and debt sheets. The Infiniti was parked in an adjacent driveway. It too was searched, and a handgun and papers belonging to Clarke were discovered concealed inside.

HELD: Application dismissed.

There was sufficient evidence before the justice of the peace to justify issuing the warrant. The search of the residence was presumptively reasonable, and no items seized from therein were excluded from evidence. The description of the residence to be searched did not include the Infiniti vehicle. The police were aware of the possibility there was a gun involved and that the gun might be in the vehicle. They were not justified in searching the vehicle for the gun, having

made the conscious decision not to request a warrant to search the vehicle or to search for a gun. The warrantless search of Clarke's vehicle was presumptively unreasonable. The police acted in good faith in executing the warrant, believing they were authorized to search the Infiniti. Clarke had a strong interest in privacy in the interior of the vehicle. The offences for which Clarke had been charged were serious. The admission of the evidence obtained through the search of the vehicle would not bring the administration of justice into disrepute.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 24(2)

Controlled Drugs and Substances Act, *S.C. 1996, c. 19, s. 11*

Counsel

Catherine Hoffman and Monica MacKenzie, Counsel for the Crown.

Geary S. *Tomlinson*, Counsel for Mr. Clarke.

REASONS FOR JUDGMENT

D.K. GRAY J.

1 Mr. Clarke is charged with a number of drug offences, including possession of cocaine and marijuana for the purpose of trafficking, and a number of offences relating to the possession of an unlicenced handgun.

2 On August 27, 2009, premises occupied by Mr. Clarke were searched pursuant to a search warrant issued under s. 11 of the *Controlled Drugs and Substances Act*, and a number of pieces of evidence, including drugs, currency, and drug paraphernalia, were seized. Also seized was a loaded handgun found in the trunk of Mr. Clarke's vehicle, which was parked in the driveway adjacent to the residence.

3 In a pre-trial application, Mr. Clarke seeks an order quashing the search warrant, and an order pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*, excluding the seized items from the admission of evidence.

Background

4 Detective Constable Eric Schwab has been with the Halton Regional Police Service for nine and a half years.

5 On August 26, 2009, Officer Schwab received information from Officer Trujillo, who is with the Peel Regional Police, regarding some activities of a possible drug dealer in Milton. The activities were said to be occurring at 634 Thompson Road, Milton. Officer Schwab was given to understand that some of the information obtained by Officer Trujillo was from one or more confidential informants.

6 Late in the day on August 26, 2009, Officer Schwab drove by the property and made some observations. He observed that the building appeared to be a single family dwelling, and was attached to the adjacent building, Number 636 Thompson Road. Each building had its own garage door, and there was a shared driveway. A vehicle, licence number BBPZ 811, was parked in front of the building. Officer Schwab returned to his office, where he was provided with some additional information from Peel Regional Police, including details from the confidential informants. He made some inquiries through PARIS, CIPC, and Niche RMS. He discovered that the vehicle, having a licence number BBPZ 811, was a 2003 Infiniti, registered to one Mark Clarke, born May 27, 1951. No results were obtained from the CIPC and Niche RMS inquiries. In an agreed Statement of Facts, the parties have agreed that, while the vehicle was registered to the father of Mark Clarke, the accused, for all intents and purposes the car belonged to Mark Clarke, the accused.

7 From the information supplied by Peel Regional Police, Officer Schwab discovered that there were three individuals of interest, namely, Mark Clarke, born September 12, 1983, Michael Ross, and Kester Purcell.

8 Officer Schwab discovered that Mr. Clarke had no criminal record, but had a number of speeding tickets. He had been discovered in premises where drugs were found. He had been seen smoking a marijuana cigarette in a vehicle. Mr. Ross had been found in possession of a small quantity of cocaine, and a small quantity of marijuana. There were a number of outstanding charges against him for possession for the purpose of trafficking, possession, fail to attend, and impaired driving. Mr. Purcell had been found storing a large quantity of marijuana in the trunk of a vehicle, and had been questioned regarding a knife. He had also been observed drinking in public and was in possession of a quantity of marijuana.

9 Officer Schwab became aware of certain surveillance that was being performed by Constable Gabriel of the Halton Regional Police Service.

10 Constable Schwab prepared an Information to Obtain (ITO), in order to obtain a warrant to search the premises at 634 Thompson Road in Milton. The items to be searched for were specified to be cocaine and "debt lists", i.e. lists kept by drug dealers which are used to keep track of drugs being sold. The offence in respect of which the search was to be made was unlawful possession of a controlled substance for the purpose of trafficking, to wit, cocaine, allegedly being committed by Mark Clarke, Michael Ross and Kester Purcell.

11 The place to be searched was specifically set out, as follows:

> The place to be searched is a two storey semi-detached house located at 634 Thompson Road South, in the Town of Milton. The residence is located on the west side of Thompson Road, and faces east. The residence is constructed of beige coloured brick, and the roof is comprised of black asphalt shingles. The front door is painted beige, with the upper half of this door being comprised of a window. A single garage door, also painted beige, is located to the south of the front door. The black numerals "634" are mounted to a white placard, which is affixed to the brick immediately above the garage door.

12 Officer Schwab set out a number of grounds for his belief that evidence of the alleged offence would be found at the premises.

13 Officer Schwab deposed that he had received information that had been provided to Peel Police by two separate confidential informants. The information provided by both informants pertained to cocaine traffickers who were residing in the Town of Milton.

14 Confidential Informant Number 1 was said to have been a reliable informant, who had provided information in the past that resulted in Peel Police recovering a hidden firearm. The informant had been up front as to his or her criminal record. The informant was said to be active in a criminal lifestyle, which would be the only way that the informant would possess the knowledge and information being provided. The informant would gain nothing if arrests or seizures were not made on the details disclosed. The informant was said to be supplying information of which he or she had personal knowledge.

15 The informant advised a Peel Police officer about an active drug dealer operating in Mississauga and Milton. The information was as follows:

(a) the drug dealer is known as "Sparky" or "Mark";

(b) Mark traffics powdered cocaine and crack cocaine, and deals at the ounce level with his customers;

(c) he is described as being a male with a black complexion, thin or skinny build, and black hair pulled back in braids, and approximately 24 years of age;

(d) he is operating a black Infiniti "130" with an unknown licence plate;

(e) Mark does not have a criminal record;

(f) when dealing out drugs, Mark keeps a loaded handgun;

(g) Mark is in possession of this firearm at all times or has it in close vicinity to himself;

(h) Mark resides in Milton, but the informant is unaware where the residence is;

(i) Dread operates a Cadillac;

(j) Dread is currently on drug charges.

16 The second confidential informant was said to have provided accurate and truthful

information in the past that had led Peel Police to arrests and seizures in three incidents: information that led to the recovery of a firearm, 10 grams of heroin, and one-half ounce of crack cocaine, and that led to charges; information that led to recovery of a quantity of cocaine and marijuana, and that led to charges; and information that led to the recovery of a quantity of marijuana, that led to charges and a conviction.

17 The second confidential informant had a criminal history and was active in a criminal lifestyle and was a known drug user. It was understood that the informant would gain nothing if arrests or seizures were not made.

18 The information provided by the second confidential informant was with respect to an active drug dealer who was in possession of firearms. The information was as follows:

(a) a male by the name of Mark was selling drugs in Mississauga;

(b) Mark was described as being a male with a black complexion;

(c) Mark was selling powdered cocaine and crack cocaine;

(d) Mark was in possession of two firearms;

(e) Mark kept the firearms in his house, but on occasion drove with them;

(f) Mark resided with two males, Michael Ross, known as Dread, and Kester Purcell;

(g) Mark resided near Derry Road and Thompson Road, in Milton;

(h) Mark operated a black Infiniti "G35" with an unknown licence plate;

(i) Dread operates a Cadillac;

(j) Mark was not dealing drugs from the residence as they fear information of the address may lead to being robbed;

(k) the residence in Milton was where Mark was storing his drugs - it is described as a townhouse;

(l) Mark, Kester and Dread actively store drugs at the Milton address and try to keep the address secret from police and rival drug dealers;

(m) Mark was observed to have a large amount of both powdered cocaine and crack cocaine within the residence but unknown total amounts;

(n) Mark would supply himself with the drugs from the house and attend the Mississauga area to distribute to his drug customers;

(o) only Mark, Kester and Dread reside at the residence in Milton.

19 Officer Schwab deposed that corroboration was obtained of some of the information supplied by the confidential informants through observation by the police. Mark Clarke had been observed entering the residence at 634 Thompson Road in Milton, and he was driving a black Infiniti. The black Infiniti was seen parked in the driveway at 634 Thompson Road in Milton. Mark Clarke is approximately 24 years old. He did not possess a criminal record. He was issued tickets while he was operating an Infiniti bearing licence number BBPZ 811. Mark Clarke had been found in an apartment in Mississauga where 2.6 grams of crack cocaine were found on the kitchen table. Mark Clarke had been found smoking a marijuana cigarette in a motor vehicle in Mississauga. Michael Ross had been arrested by the police while in possession of cocaine and marijuana. The first confidential informant had told police that Mark's roommate named Dread was on drug charges. The second confidential informant told police that "Dread's" real name was Michael Ross. Persons believed to be Mark Clarke and Michael Ross were seen entering the residence at 634 Thompson Road.

20 It should also be noted that the following paragraph appears in the ITO:

> At the time of this application CI #1 and CI #2 have both provided information that Mark is in possession of a handgun. Due to the sensitive nature of this information and the lack of information regarding the amount of persons who are aware of this, investigators feel that an application for a Criminal Code search warrant in this regard may serve to identify CI #1 and CI #2, and potentially place them in significant danger.

21 Presumably, as a result of the concern reflected in this paragraph, a warrant was not requested for the search of a handgun.

22 Based on the information in the ITO, a telewarrant was granted to search the premises at

634 Thompson Road in the Town of Milton. Permission was granted to search the premises between 3:00 a.m. and 12:00 p.m.

23 The search warrant was executed during the early morning on August 27, 2009. It is not necessary to set out the details of the search. Mr. Clarke was in the premises when the search was conducted, and he was arrested. He was advised of his right to counsel and cautioned. Officer Schwab had a copy of the warrant with him, he explained why the police were there, and Mr. Clarke did not ask to see the warrant. Officer Schwab did not specifically give Mr. Clarke a copy of the warrant, but he left a copy of it on a table in the residence.

24 Upon a search of the premises, drugs, currency and drug paraphernalia were found.

25 A black Infiniti was in the driveway adjacent to the property during the search. At some point during the search, Officer Schwab was advised that a gun had been found in the trunk of the Infiniti. The car had been opened with a key, but no one was able to determine how the police secured the key.

26 On cross-examination, Officer Schwab confirmed that there had been surveillance of the property for less than 24 hours when the warrant was applied for. At no time did the police observe any actual criminal activity. Officer Schwab also confirmed that the police had information that Mr. Clarke had possession of a firearm, and that he sometimes kept it in his vehicle. Notwithstanding this, the police did not seek a warrant to search for a firearm, either at the residence or in the vehicle.

27 Officer Schwab also confirmed that the police had decided not to ask for a specific warrant relating to the vehicle.

28 Officer Schwab testified that when the ITO was drafted, as far as he was aware the car was still in the driveway. He knew that potentially drugs were sold from the vehicle. He testified that even though a warrant for the vehicle had not been separately applied for, he would typically search a vehicle if it was in a driveway or in a garage, but would not do so if it was on the

neighbour's side of the driveway. He testified that he would search all vehicles that were on the premises, even if they were not named in the warrant.

29 Officer Schwab confirmed that he did not give Mr. Clarke a copy of the warrant. He said Mr. Clarke did not ask to see it.

30 Officer John Carrabs of the Peel Regional Police testified. He was involved in execution of the search warrant.

31 After being inside the residence during the search, he went outside and saw the black Infiniti with its doors unlocked and open. He participated in a search of the vehicle, looking for drugs and debt lists.

32 When the trunk of the car was opened, he peeled away the fabric behind the driver's seat, and saw a compartment. In that compartment, he found a gun and some documents. The documents were in the name of Mark Clarke. He left the gun where it was. He noted that there was a space within the vehicle that was configured so that the gun could be retrieved from inside the car.

33 Officer Carrabs testified that there was another vehicle, a black Cadillac found in the garage. Nothing was found in that vehicle.

34 On cross-examination, Officer Carrabs testified that he thought a car could be searched if it was found on the property, even though no separate warrant was issued for the car.

35 Officer Craig Smith of the Halton Regional Police Service testified. He participated in the search of the residence, and seized a number of items.

36 Officer Smith testified that Officer Carrabs pointed out the pistol that had been found in the trunk of the car. Officer Smith testified that he seized the gun and made it safe. At the time it was first found, it was loaded and ready to fire. Officer Smith wore gloves, removed the gun from

where it was found, removed the magazine and ejected a round that was in the chamber ready to be fired. He also observed the identification that had been found in the trunk.

37 On cross-examination, Officer Smith confirmed that the vehicle had not been listed as a place to be searched in the search warrant.

38 Officer Trujillo of the Peel Regional Police testified. He testified that he had been the one who contacted Halton Police regarding the three potential targets, Mr. Clarke, Mr. Ross and Mr. Purcell. He advised Officer Schwab about the information received from the confidential informants. He testified that the information from the confidential informants had proven to be reliable in the past. That information had led to successful investigations.

39 Officer Trujillo participated in the search.

40 On cross-examination, Officer Trujillo confirmed that the police had information regarding illegal drugs and an unregistered firearm. He also confirmed that the information was that the firearm was often kept in the vehicle. During a briefing held before the search was conducted, there was discussion of the possibility that there might be a gun, either in the residence or in the vehicle. Nothing was said during the briefing about the possibility of searching the vehicle. Officer Trujillo testified that he knew that the car might be searched for drugs. He thought it would be permissible.

41 Officer Barrett Gabriel of the Halton Regional Police testified. He participated in the search, and ultimately recorded and listed the items that were found during the search. He prepared what ultimately became an exhibit in which all of the seized items were listed.

42 On cross-examination, Officer Gabriel confirmed that the description of the property in the search warrant did not mention a vehicle, nor did it even mention the driveway. Notwithstanding, Officer Gabriel considered that a vehicle in the driveway would be included in the search of the property.

43 Officer Gabriel also agreed that there was no mention in his list of items of a key to the vehicle.

Submissions

44 Mr. *Tomlinson*, counsel for Mr. Clarke, submits that the search warrant should be quashed, and the items seized from both the residence and the vehicle should be excluded from evidence.

45 Mr. *Tomlinson* submits that all references to Mr. Purcell that were contained in the ITO should be excised. References to Mr. Purcell's conduct and convictions are prejudicial, and there has been shown no nexus between Mr. Purcell and Mr. Clarke.

46 With respect to the warrant itself, Mr. *Tomlinson* submits that there was insufficient evidence before the Justice of the Peace that would justify the issuance of the warrant. This is particularly so, Mr. *Tomlinson* submits, because much of the evidence that was relied on was information obtained from confidential informants. In order to rely on such information, it must be shown that the information is reliable and that it has been corroborated.

47 In this case, it cannot be concluded that the informants are reliable. They both have criminal records. They both had an incentive to provide false information. They were in a position to secure benefits as long as charges were laid. There was little downside risk to providing false information. Very little in the way of specifics were provided.

48 As far as corroboration is concerned, Mr. *Tomlinson* notes that no illegality of any kind was observed through the police surveillance. Any activity that was observed was neutral, or could be explained innocently. There was no corroboration whatsoever of any criminal activity before the warrant was applied for.

49 As far as the gun is concerned, Mr. *Tomlinson* submits that the warrant itself did not authorize a search of the vehicle in which it was found, nor did it authorize a search for a gun.

Even though the vehicle was found in the driveway adjacent to the residence, the warrant itself was very specific in authorizing only a search of the residence. A separate warrant could have been sought for the vehicle, but was not.

50 Mr. ***Tomlinson*** acknowledges that some *obiter* comments by the Court of Appeal in *R. v. Benz*, *[1986] O.J. No. 227* (C.A.), appear to suggest that a warrant authorizing a search of a residence also, by implication, authorizes a search of a vehicle in a garage or driveway. However, Mr. ***Tomlinson*** submits that those comments were clearly *obiter*, as recognized in *R. v. Brennen*, *[2000] O.J. No. 3257* (S.C.J.), and they were not followed by the British Columbia Court of Appeal in *R. v. Vu*, *[2004] B.C.J. No. 824* (C.A.).

51 Mr. ***Tomlinson*** submits that, in the result, the items were seized from the residence and the vehicle pursuant to a warrantless search, which was presumptively unreasonable. Mr. ***Tomlinson*** submits that, on an analysis of the factors set out by the Supreme Court of Canada in *R. v. Grant*, *[2009] S.C.J. No. 32*, it would bring the administration of justice into disrepute to admit the evidence. Thus, he submits, the evidence should be excluded.

52 Counsel for the Crown submit that the evidence should be admitted.

53 Counsel submit that the search warrant was properly issued. The issue is not whether the reviewing judge would have issued the warrant in the first place, but rather, whether there was sufficient evidence before the justice of the peace that could have justified issuing the warrant. Counsel submit that there was ample evidence before the justice of the peace to justify the warrant.

54 Counsel acknowledge that the ITO was based, in large part, on information supplied by confidential informants. However, counsel submit that the totality of the information canvassed in the ITO was sufficient.

55 Counsel point out that the information supplied by the confidential informants was specific in some respects. The drug dealer was identified as someone named "Mark", who was described as being a black male, approximately 24 years of age, who operated a black Infiniti. He was

described as someone who did not have a criminal record, who lived with two males, Michael Ross, known as Dread, and Kester Purcell, near Derry Road and Thompson Road in Milton.

56 The police were able to corroborate that Mark Clarke was approximately 24 years old, does not have a criminal record, lives near the intersection of Derry Road and Thompson Road, and drives a black Infiniti. It was corroborated that Mark Clarke, Michael Ross and Kester Purcell had been previously arrested by the police while in possession of illegal drugs.

57 It was also shown that information supplied by the confidential informants had been reliable in the past. Information provided had led to arrests, and, in one case, a conviction.

58 As far as the gun is concerned, counsel submit that the search of the car, in which the gun was found, was authorized by the warrant for the property itself. The vehicle was found in the driveway directly adjacent to the property, and, according to the reasoning of the Court of Appeal in *Benz*, a search of the vehicle could be effected pursuant to the warrant. Counsel acknowledge that the observations of the Court of Appeal were *obiter*, but nevertheless, coming as they do from the province's highest Court, they must be considered binding. The fact that the British Columbia Court of Appeal has disagreed with the Court of Appeal's observations is of no moment. The British Columbia Court of Appeal's decision is not binding on a judge of the Superior Court in Ontario, but a judgment of the Ontario Court of Appeal, even in *obiter*, is binding.

59 Counsel submit that even if the warrant is quashed, and/or it is determined that the search of the vehicle was not authorized by the warrant, the evidence should nevertheless be admitted pursuant to s. 24(2) of the *Charter*. Counsel submit that based on an analysis as required in *R. v. Grant*, *supra,* Mr. Clarke has not satisfied his onus to show that the administration of justice would be brought into disrepute if the evidence were to be admitted.

Analysis

60 The first issue is as to the validity of the warrant. The appropriate test is set out by Fish J. for the majority of the Supreme Court of Canada in *R. v. Morelli*, *[2010] 1 S.C.R. 253*, at para. 40:

> The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.

61 Where, as here, most, if not all, of the information on which the ITO is based was supplied by a confidential informant, there must be some checks and balances in place. As discussed by Wilson J. in *R. v. Debot*, *[1989] S.C.J. No. 118*, at para. 53, it is necessary to determine whether the tip is credible, and whether the information has been corroborated by a police investigation. However, she stated, "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 mean the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two." In *R. v. Nguyen*, *[2004] O.J. No. 1055* (S.C.J.), Hill J. noted, at para. 52, that "There need not be corroboration of the very criminal act in issue for confirmative detail to have probative value respecting the accuracy of an informant's information."

62 In this case, it is clear that there was no corroboration of the specific criminal activity targeted in the search warrant. However, the police were able to corroborate some information provided by the informants, sufficient to provide a degree of faith in the accuracy of the information. The perpetrator was said to be Mark, who was 24 years of age, who lived near Derry Road and Thompson Road in Milton, who had no criminal record, and who drove a black Infiniti. The accused, Mark Clarke, was approximately 24 or 25 years of age at the time, lived near the corner of Derry Road and Thompson Road in Milton, had no criminal record, and drove a black Infiniti. He had been arrested in the past at a time and in premises where drugs were found.

63 It is not without significance that information provided by the confidential informants had proven to be reliable in the past.

64 On balance, I am satisfied that there was sufficient evidence before the justice of the peace to justify issuing the warrant. Thus, the application to quash the warrant is dismissed.

65 Since the search of the premises was authorized by a valid search warrant, the search was presumptively reasonable, and there was no violation of s. 8 of the *Charter*. Thus, the items seized from the residence will be admitted into evidence.

66 Before leaving this issue, I should note that I do not accept Mr. ***Tomlinson***'s submission that merely because Officer Schwab did not furnish a copy of the warrant to Mr. Clarke, that is sufficient to justify quashing the warrant. Officer Schwab had explained to Mr. Clarke what was happening, and Mr. Clarke did not ask to see the warrant. Officer Schwab left a copy of the warrant on the table in the premises. At best, this argument is a technical one.

67 I also do not accept Mr. ***Tomlinson***'s submission that references to Mr. Purcell in the ITO need to be excised or that they otherwise affect the matter. The fact that Mr. Purcell was not found on the premises is of no moment. Any reference to him in the ITO is mere surplusage. It does not affect Mr. Clarke.

68 The more difficult issue is whether the warrant authorized the search of the motor vehicle.

69 In *R. v. Benz, supra*, police were engaged in the search of some premises in Hamilton. During the search, the officers seized some keys. They were advised that the keys were for two vehicles belonging to the accused and that the vehicles were parked outside. One of the officers proceeded to the vehicles, unlocked the door of the second one, and seized a lease from the glove compartment.

70 MacKinnon A.C.J.O. stated as follows:

> Apparently at trial, Crown counsel "conceded" that the motor vehicle was "improperly searched" although the trial judge found that the police acted without malice and with an honest but mistaken belief as to their right to search the car. The concession having been made, the Crown felt bound by that concession on the appeal. Although the concession cannot be directly disturbed now, I would not want to be taken as accepting it as necessarily legally correct. There was a valid warrant to search the premises at 8 East 35th Street. The car belonging to the respondent containing the lease was out on the

> street in front of the house (within 100 feet). The keys to that car were in the respondent's residence which was being legally searched. Certainly if the car had been in the garage of the premises or even on the driveway there would be little doubt but that the search warrant would cover a search of the car. We do not have a description of the premises, so we do not know whether there was either a garage or a driveway attached to the premises. One might conclude there was neither, as neither car was on a driveway or in a garage, the un-licenced car being in an adjacent parking lot.
>
> [emphasis added]

71 The remarks relied on by the Crown were clearly *obiter*, as discussed by Kozak J. in *R. v. Brennen*, *supra*, at paras. 68 and 69. He concluded, at para. 69, that the judgment of the Court of Appeal in *Benz* does not bind an inferior court to adopt as a principle of law that any vehicle in the garage or driveway of a dwelling that is being subjected to a search, pursuant to a valid search warrant, would be included in the warrant as a place to be searched.

72 The Court of Appeal's *obiter* remarks in *Benz* were expressly disapproved, and not followed, by the British Columbia Court of Appeal in *R. v. Vu, supra*. Donald J.A., for the majority of the Court, at para. 20, said:

> On the face of the warrant I do not, with respect, see how it is possible to find that it authorized the search of a motor vehicle. The warrant recites that there are reasonable grounds to believe that evidence of an offence under the *Controlled Drugs and Substances Act* are "in a place, namely the dwelling house...". The authority is "to enter the said place...". The antecedent of place is clearly the dwelling house. That language cannot be stretched to include a vehicle.

73 Donald J.A. noted that the remarks of the Ontario Court of Appeal, which I quoted earlier,

were *obiter*, and he clearly did not follow or apply them. At para. 29, he quoted with approval the remarks of Kozak J. in *R. v. Brennen*, which I discussed earlier.

74 In the case before me, I have concluded that the search of the motor vehicle was not authorized by the warrant. This is so primarily for two reasons.

75 First of all, the description of the property to be searched, as set out in the warrant, is very specific. A detailed description of the premises is set out, which I reproduced in its entirety earlier. Included is a statement that the building is a two storey semi-detached house, constructed of beige coloured brick, and having a roof comprised of black asphalt shingles. It is noted that the front door is painted beige, and that the black numerals "634" are mounted to a white placard, which is affixed to the brick immediately above the garage door.

76 By no stretch of the imagination, in my view, can this description of the premises be construed to include a vehicle. I am not aware of how the premises were described in *Benz*, but the description in the case before me, as detailed as it is, must be limited to the building and the building alone.

77 The second reason is that the police, at all times, knew that there was potentially a gun, and that it was often in Mr. Clarke's motor vehicle. The police made a conscious decision to not apply for a warrant to search for a gun, and made a conscious decision to not apply for a warrant to search the motor vehicle. Having made that conscious decision, it is not now open to the police to argue that the warrant, that was very carefully restricted to the building, nevertheless is sufficient to justify searching the motor vehicle.

78 Thus, in my view, the search of the motor vehicle was a warrantless search, and was presumptively unreasonable. The search of the vehicle and the seizure of the gun and documents were contrary to s. 8 of the *Charter*.

79 Having come to this conclusion, I must now consider whether the gun and documents should be admitted into evidence pursuant to s. 24(2) of the *Charter*. This requires an analysis of the tests set out in *R. v. Grant, supra*.

80 The Supreme Court of Canada in *Grant* held that the Court must examine three factors: the seriousness of the *Charter*- infringing state conduct; the impact of the *Charter* violation on the *Charter*-protected interests of the accused; and society's interest in an adjudication of the case on its merits.

81 Starting with the first factor, in my view the *Charter*-infringing state conduct is at the less serious end of the scale. Every police officer who testified was of the view that the search warrant authorized a search of the vehicle. They had good reason to think that it did. While *obiter*, the remarks of the Court of Appeal in *Benz* pointed strongly towards the validity of that view. Clearly, in my view, the police acted in good faith in relying on what appeared to be authority from the Court of Appeal to justify their actions. This factor points towards admission of the evidence.

82 As to the second factor, Mr. Clarke had a strong interest in privacy in the interior of his motor vehicle, although not to the same extent as a privacy interest in his own residence: see *R. v. Dhillon*, *2010 ONCA 582*, at para. 56. This factor points towards exclusion.

83 As to the third factor, society has a strong interest in an adjudication of the case on its merits. Any offence involving guns is a very serious matter. This is particularly so where both guns and drugs are involved. In combination, drugs and guns can be particularly lethal. The seriousness of the offence cannot be understated. The evidence is highly probative, if not critical.

84 I recognize, as noted in *Grant*, at para. 85, and in *R. v. Côté*, *2011 SCC 46*, at para. 53, that the seriousness of the offence has the potential to cut both ways. However, no matter which way it cuts here, in my view the evidence should be admitted.

85 The balancing of the *Grant* factors is not simply an arithmetical exercise. In the final analysis, a determination must be made as to whether Mr. Clarke has established that the admission of the gun and documents into evidence would bring the administration of justice into

disrepute. In my view, he has not done so. The police acted in good faith and the evidence is highly probative, if not critical. The evidence will be admitted.

86 For all of the foregoing reasons, the application to exclude the seized evidence is dismissed.

D.K. GRAY J.
