WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
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> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
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> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
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> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Zaher, 2019 ONCA 59
DATE: 20190128
DOCKET: C62852

Doherty, Miller and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Sandra Zaher

Appellant

Erin Dann and Janani Shanmuganathan, for the appellant

Jeremy Streeter, for the respondent

Heard: January 21, 2019

On appeal from the conviction entered on July 8, 2016 and the sentence imposed on January 25, 2017 by Justice Renee M. Pomerance of the Superior Court of Justice, sitting without a jury.[1]

REASONS FOR DECISION

[1] The police received information that the appellant, a lawyer, was counseling clients to lie to immigration authorities to gain refugee status. A police

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[1] There is a non-publication order in respect of evidence referring to a prior act of violence against the appellant.

officer posing as a refugee claimant went to the appellant's office, with another officer posing as an interpreter. He sought the appellant's assistance in advancing his refugee claim. Their conversations were intercepted pursuant to a judicial authorization. The Crown maintained that in the conversations, the appellant counseled and coached the undercover officer to provide a false story to the immigration authorities in support of his refugee claim.

[2] The appellant was convicted of three charges, all of which arose out of those conversations with the undercover officer. She received a jail sentence totaling one year.

[3] The appellant appeals conviction and sentence. At the end of argument, the court indicated that the appeal would be dismissed with reasons to follow. These are those reasons.

The Conviction Appeal

[4] There is one ground of appeal. The appellant contends that the trial judge erred in upholding the authorizations to intercept the appellant's communications with an undercover police officer posing as her client. The authorizations were issued pursuant to s. 184.2 of the *Criminal Code* (interception with consent).

[5] The appellant submits that there were material omissions and misrepresentations in the affidavit sworn to obtain the warrant to intercept. She contends that if the misrepresentations are removed from the affidavit, there is no

basis upon which an issuing judge acting reasonably could have been satisfied that the proposed interceptions would provide information concerning the named offences.

[6] The appellant submitted that the errors in the affidavit undermined the credibility of the affiant and the credibility of the informant, who had advised the affiant that the appellant had counseled him to make false statements to the immigration authorities in support of his refugee claim. The primary attack was on the credibility of the informant.

[7] The appellant argues that if the warrant should not have issued because of the misstatements in the affidavit, the interceptions of the appellant's conversations with the undercover officer violated s. 8 of the *Charter*. The appellant contends that the interceptions should have been excluded from evidence.

[8] The arguments on appeal tracked those made to the trial judge. On appeal, counsel did refer to certain other omissions or misrepresentations in the affidavit which were not stressed at trial. These omissions and misrepresentations were, however, less significant than those highlighted at trial and emphasized on appeal.

[9] The trial judge's detailed and careful reasons for not excluding the interceptions from evidence are found at: *R. v. Zaher*, 2014 ONSC 7565. The trial judge found two material errors in the affidavit. In considering the effect of those

errors on the lawfulness of the authorizations, the trial judge correctly set out the applicable law and standard of review: see reasons at paras. 35-36.

[10] The first misstatement identified by the trial judge appears at para. 8 of that affidavit. The officer alleged:

> As detailed below, the RCMP received information in 2011 that Sandra Zaher, a Windsor lawyer, was actively counseling individuals to misrepresent themselves to the Immigration and Refugee Board…

[11] The remainder of the affidavit refers only to the appellant counseling a single individual with respect to refugee status. The police had no evidence she counseled anyone else.

[12] In his cross-examination, the affiant acknowledged that the use of the word "individuals" was incorrect. The trial judge described the word as misleading. She went on to hold, at para. 45:

> It is self-evident and was acknowledged by the Crown that the sentence about multiple persons is misleading and must be excised from the affidavit. I find that excising that single sentence cures the defect. There is no reason to believe that the sentence distorted the meaning of any of the other averments in the affidavit because they are all very closely concerned with only one case, that of Mr. Al-Awthan. I find that the removal of that sentence does not displace the foundation for the issuance of the order. Ultimately, the order was not predicated on any allegation of multiple offences. It was predicated on a detailed description of one case involving Mr. Al-Awthan. I am satisfied that, had the offending sentence not appeared in the affidavit, the order would nonetheless have issued.

[13] The error in para. 8 did not have any impact on the informant's credibility or reliability. It could potentially undermine the affiant's credibility. However, as explained by the trial judge, the reference to "individuals" in para. 8 had no potential to mislead the issuing justice when that word is considered in the context of the entirety of the affidavit's contents.

[14] It is also relevant in considering whether the error in para. 8 was deliberate to have regard to the nature of the information that the informant gave to the police. The misconduct described by the informant suggested a practice, and not a single isolated act. It was implicit in the nature of the information provided by the informant that the appellant routinely counseled refugee claimants to lie. That does not, of course, make the reference to "individuals" in para. 8 any less inaccurate. It does, however, offer a somewhat benign explanation for the inaccurate reference in para. 8.

[15] The second error in the affidavit identified by the trial judge in the affidavit appears at para. 24. In that paragraph, the affiant sets out his reasons for believing the informant's allegation that the appellant counseled him to lie to the immigration authorities. The affiant refers to the informant as having "nothing to gain by coming forward and, in fact, everything to lose".

[16] Paragraph 24 does not contain any material misrepresentations. The trial judge did, however, conclude that the affiant failed to disclose certain facts that

were relevant to an assessment of the informant's credibility and, in particular, his motives for implicating the appellant.

[17] During cross-examination of the affiant, it became clear that the informant had suggested to the affiant on more than one occasion that he had been told by the person who encouraged him to report the appellant to the authorities that if he assisted the authorities they would, in turn, help him stay in Canada.

[18] The trial judge concluded that the affiant should have disclosed this information in the affidavit when addressing the informant's possible motives: see reasons at para. 55.

[19] The trial judge ultimately concluded, however, that the rest of the information in the affidavit considered along with the evidence about the informant's possible motive that had not been included in the affidavit, still provided a basis upon which the information would provide reasonable grounds upon which to grant the authorization. She said, at para. 59:

> I am satisfied that had the motive been disclosed, it would not have affected the issuance of the order. I have spoken in detail about this motive as opposed to others because I find this motive to be the most compelling. Suffice it to say, however, I find that the order could and would still have issued if any or all of the alleged motives had been disclosed.

[20] In addition to the two errors examined at length by the trial judge, counsel on appeal made reference to other minor shortcomings in the affidavit. Some were

addressed by the trial judge: reasons at paras. 61-63. In our view, none of these alleged shortcomings could have had any impact on the decision to grant the authorization. We do not propose to examine each individually.

[21] Before moving to the sentence appeal, we wish to emphasize one additional finding made by the trial judge. In the context of considering admissibility under s. 24(2) of the *Charter*, the trial judge had this to say about Detective Richardson, the affiant:

> Sergeant Richardson was acting in good faith and he was genuinely trying to test the credibility of the affiant [informant] and was genuinely trying to put forward an accurate picture of the case. While he failed to do so in two respects, those examples were not born of any deliberate intention to mislead.

[22] We defer to this credibility assessment. The absence of any attempt by the affiant to mislead the judge on the application for the authorization is a significant consideration in determining whether the authorization would have been granted but for the errors in the affidavit.

[23] In summary, the appellant invites this court to redo the trial judge's analysis and to treat the errors in the affidavit, especially the failure to refer to the informant's motive, as having a much greater impact on the viability of the authorization than did the trial judge. This court cannot go down that road. The trial judge's findings of fact, and her credibility assessments, are entitled to deference. The trial judge clearly articulated her credibility findings and factual findings. She

also identified and applied the correct legal principles in assessing the validity of the authorization.

[24] We see no reason to interfere with the trial judge's ruling. The conviction appeal is dismissed.

The Sentence Appeal

[25] The trial judge was faced with a very difficult problem on sentence. The offences are serious. They are made much more serious by the fact that the appellant is a lawyer who used her professional standing to commit crimes against the administration of justice.

[26] The appellant is a 54 year old first offender. She has a long marriage and two grown children. The appellant is respected in the legal community. Several letters filed on sentencing attested to her integrity, professionalism and commitment to her clients.

[27] The appellant has had more than her share of personal problems. Most recently, her mother has become seriously ill and the appellant has assumed responsibility for her day-to-day care.

[28] The trial judge was sensitive to the competing considerations presented on sentencing. She concluded that while the appellant's mental and physical health concerns entitle her to some mitigation of sentence, there was nothing in the trial record or the evidence on sentencing to suggest that those health-related issues

had any connection to the commission of the offences or the level of her moral culpability: *R. v. Zaher*, 2017 ONSC 582, at para. 25. We would defer to that assessment.

[29] There was also no basis upon which we could interfere with the trial judge's conclusion that a conditional sentence was inappropriate having regard to the paramount importance of general deterrence and denunciation: see reasons at paras. 56-57.

[30] We would not interfere with the length of the sentence. The circumstances required a significant jail term. Hopefully, the appellant can get something positive out of this experience. Like the trial judge, we recommend that she be placed in a facility where she has access to meaningful psychological counseling and support. We trust the correctional authorities to take appropriate steps to facilitate that access.

[31] Leave to appeal sentence is granted, but the appeal is dismissed.

"Doherty J.A."
"B.W. Miller J.A."
"G.T. Trotter J.A."