C.A.C. No. 129736

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Reid, 1996 NSCA 265
Chipman, Matthews and Flinn, JJ.A.

BETWEEN:

JASON WAYNE REID	)	Brian V. Vardigans
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	David M. Meadows
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	December 9, 1996
	)	
	)	Judgment Delivered:
	)	December 16, 1996
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THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Matthews and Chipman, JJ.A. concurring.

FLINN, J.A.:

Introduction

Following a trial in Provincial Court before Judge Claudine MacDonald, the appellant was convicted of trafficking in a narcotic, namely, cannabis marihuana, contrary to s. 4(1) of the **Narcotic Control Act**, R.S.C. 1985, c. N-1. Judge MacDonald also rejected the appellant's application for a stay of proceedings on the basis of entrapment.

The appellant appeals both his conviction and the rejection of his application for a stay of proceedings.

Facts

The only evidence at the appellant's trial was given by Constable David Rudderham, a 15 year member of the R.C.M.Police who had training, and considerable experience in undercover operations in the area of drug enforcement. In 1994 he was seconded to the New Minas Drug Section as an undercover operator to infiltrate the area, to meet people, and to discover what drug dealing was going on and who was involved. The area where he was instructed to work included Berwick, Kentville, New Minas and Wolfville.

Constable Rudderham acted in an undercover capacity wearing civilian clothing, no identification as a police officer, no badge or weapon. He testified that his hair, at the time, was a lot longer. He had facial hair and "somewhat of a gruffy appearance". As part of his undercover operation there was a smell of marihuana in his vehicle. This was caused by the officer having burned incense manufactured for the Drug Awareness Program which is not marihuana but smells like it. He also had open alcohol in his car.

On December 9, 1994, Constable Rudderham picked up the appellant who was hitchhiking on the Number 1 Highway just west of Wolfville. The appellant was unknown to Constable Rudderham. He was not a target of Constable Rudderham's investigation; and this particular stretch of highway was not a targeted location.

Constable Rudderham testified that sometimes he has to use more effort to gain the confidence of people that he meets but on this occasion he didn't really have to do that with the appellant. The appellant was quite up front with what he was doing and his experience with drugs.

Constable Rudderham testified that, at this first meeting, the appellant, noticing a smell of marihuana within the motor vehicle, initiated a conversation about drugs. The appellant volunteered that he had some good quality marihuana the night before "from a guy up on the mountain". The appellant told the Constable "they smoked over a gram the night before and ... him and his friends had bought all that this guy had left". He told Constable Rudderham that the price was $12.00 a gram. When Constable Rudderham asked the appellant if he had any, the appellant replied: "I wish. We smoked it all last night". During the conversation Constable Rudderham mentioned that he was from Cape Breton, after which the appellant stated "I sold more dope to people from away this summer. People coming up to me from everywhere, B.C., Ontario, lots of Newfoundlanders. They said they had talked to someone and then they came to me." After driving into the Town of Wolfville, and before parking the vehicle in front of a tavern, Constable Rudderham told the appellant that at a good price of $12.00 per gram, he would want some marihuana himself to sell. The appellant told Constable Rudderham: "No problem. I'll be in town to ten. I'm always around".

Constable Rudderham testified that what he learned from this first meeting was that the appellant "knew about drugs in the area. He had access to it and that he had previously sold."

The following day, December 10th, 1994, Constable Rudderham again picked up the appellant who was hitchhiking in Wolfville. He testified that he reiterated the general conversation of the previous day and stated to the appellant that he was interested in purchasing $200.00 worth of marihuana at $12.00 per gram if the appellant could get it. He testified that the appellant replied that there would not be any problem, he would set things up. He testified that the appellant stated "I can always get stuff." The appellant also asked Constable Rudderham if he wanted to purchase adrenalin. Constable Rudderham testified that he told the appellant he had no interest in adrenalin but asked the appellant the cost and the appellant said he would have to check. They agreed to meet the next day.

The appellant failed to attend the planned meeting for the next day. Constable Rudderham testified that he was unconcerned because in drug dealing "unreliability is the norm".

Two days later Constable Rudderham was in his vehicle. He saw the appellant walking down the street. He picked him up and they went to a Tim Horton's Donut Shop. Following a general conversation Constable Rudderham asked if the appellant had arranged for the $200.00 amount of marihuana which the Constable wanted to purchase. The appellant said he had not, yet, but he would make a phone call.

Constable Rudderham had arranged for another undercover operator to get involved in the purchase of adrenalin from the appellant. Later that day Constable Rudderham, the other undercover officer and the appellant met at Tim

Horton's. The three had a lengthy conversation. The appellant explained the affects the adrenalin would cause. He told the officers that he was waiting for a phone call about the ounce of marihuana, that the price would be $250.00 and that they would all have to go to New Minas to pick up a person and then go to Windsor to get the marihuana.

The transaction never came to fruition.

The appellant was charged with an offence under s. 4(1) of the **Narcotic Control Act** which provides as follows:

> "4 (1) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic."

The word "traffic" is defined in s. 2 of the **Narcotic Control Act** to mean:

> "(a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or
> (b) to offer to do anything referred to in paragraph (a)"

Clearly, an offer to sell a narcotic constitutes the offence of trafficking, and a conviction for trafficking, based upon an offer, may be entered even where the accused fails or refuses to carry out of the transaction (See: **R. v. Rowbothan** (1993), 76 C.C.C. (3d) 542 (Ont. C.A.)).

Decision of the Trial Judge

Judge MacDonald decided that, considering the words spoken by the appellant in the total context, and in their entirety:

> "I am satisfied beyond a reasonable doubt that there was an offer or offers to traffic in a narcotic between the dates set out in the Information."

With respect to entrapment Judge MacDonald said:

> "I am satisfied that what the officer did here was part of a bona fide investigation... one could describe it as a situation where the officer presented the accused with an opportunity but he did not induce the commission of the offence... I am not satisfied that entrapment has been made out and, therefore, I am not granting a stay as a remedy."

Grounds of Appeal

The appellant's grounds of appeal are as follows:

1. That the trial judge erred at law in finding on the evidence, that the appellant had offered to traffic in a narcotic;
2. That the trial judge erred in finding that the police officer was engaged in a bona fide investigation;

First Ground of Appeal

In order to succeed on the first ground of appeal the appellant has to show that the verdict of the trial judge is unreasonable and cannot be supported by the evidence. Counsel for the appellant did not press this ground of appeal during the hearing of the appeal.

The finding by the trial judge that there was an "offer to traffic" is a finding of fact. There is evidence upon which the trial judge could make that finding. Therefore, it cannot be said that the finding is unreasonable, or cannot be supported by the evidence.

I would dismiss this ground of appeal.

Second Ground of Appeal

In **R. v. Barnes**, [1991] 1 S.C.R. 449 (S.C.C.) Lamer C.J. said the following about entrapment at p. 463:

> "The basic rule articulated in *Mack* [**R. v. Mack**, [1988] 2 S.C.R. 903] is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry." {emphasis added}

As Lamer J. (as he then was) said in **Mack** at p. 965 [S.C.R.]:

> "The absence of a reasonable suspicion or a *bona fide* inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis."

In my opinion Judge MacDonald made no error in concluding that what Constable Rudderham did was part of a *bona fide* investigation. However, in my view, she did not even have to make an inquiry as to the *bona fides* of the investigation. Constable Rudderham did not pick up the accused, initially, with any intention of purchasing marihuana from him. It was only after the appellant revealed his involvement with drug use and drug trafficking that Constable Rudderham presented him with an opportunity to commit a similar crime. In other words, by the time Constable Rudderham provided the appellant with the opportunity to commit the offence, the appellant, himself, had provided to the officer the required

reasonable suspicion.

This is not a case of "random virtue testing", so called. Constable Rudderham was permitted to present the opportunity, to the appellant, to commit the offence of trafficking in a narcotic, because Constable Rudderham had a reasonable suspicion that the appellant had already engaged in that particular criminal activity.

There is still, however, the question as to whether the conduct of Constable Rudderham went beyond providing an opportunity to commit an offence, and amounted to an inducement to commit that offence.

As Lamer J. said in **Mack** at p. 959-960 [S.C.R.]:

> "In other words, it may be inevitable that, when apprised of the factual context of an entrapment case, members of the community will put themselves in the position of the accused; if a common response would be that anyone could have been induced by such conduct, this is a valuable sign that the police have exceeded the bounds of propriety. The reasoning does not go so far as to imply that the accused is therefore less blameworthy; rather, it suggests that the state is involved in the manufacture as opposed to the detection of crime."

Judge MacDonald, in her decision following the trial, said:

> "..... basically one could describe it as a situation where the officer presented the accused with an opportunity, but he did not induce the commission of an offence."

I agree.

The appellant did not testify at the trial nor did he call any other evidence. There was no basis upon which the trial judge could find the appellant was exploited, vulnerable, weak, threatened or felt pressured in any way by the police activity.

Just because Constable Rudderham took on the persona of a person involved in the drug trade, including the smell of marihuana in his car, does not mean that a person not already involved in the drug trade would suddenly be induced to become involved.

As Lamer J. said in **Mack** at pp. 975-76 [S.C.R.]"

> "More fundamentally, the claim of entrapment is a very serious allegation against the state. The state must be given substantial room to develop techniques which assist it in its fight against crime in society. It is only when the police and their agents engaged in a conduct which offends basic values of the community that the doctrine of entrapment can apply. To place a lighter onus on the accused would have the result of unnecessarily hampering state action against crime. In my opinion the best way to achieve a balance between the interests of the court as guardian of the administration of justice, and the interests of society in the prevention and detection of crime, is to require an accused to demonstrate by a preponderance of evidence that the prosecution is an abuse of process because of entrapment.
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> In conclusion, the onus lies on the accused to demonstrate that the police conduct has gone beyond permissible limits to the extent that allowing the prosecution or the entry of a conviction would amount to an abuse of the judicial process by the state. The question is one of mixed law and fact and should be resolved by the trial judge. A stay should be entered in the "clearest of cases" only."

The appellant, quite simply, did not make out a case for entrapment, and Judge MacDonald was correct in so finding.

The appeal should be dismissed.

Flinn J.A.

Concurred in:

Matthews J.A.

Chipman, J.A.

C.A.C. No. 129736

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JASON WAYNE REID

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.