NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Hobbs***, 2010 NSCA 53

Date: 20100616
Docket: CAC 302995
Registry: Halifax

Between:

Kevin Patrick Hobbs

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bateman, Saunders and Fichaud, JJ.A.
Appeal Heard:	May 19, 2010, in Halifax, Nova Scotia
Held:	Application to adduce fresh evidence denied; appeal against conviction dismissed; leave to appeal sentence granted but appeal dismissed per reasons for judgment of Saunders, J.A.; Bateman and Fichaud, JJ.A. concurring.
Counsel:	appellant in person Ann Marie Simmons, for the respondent Michael Wood, Q.C. and Betony Rowland (student) for Brian F. Bailey

Reasons for judgment:

Introduction

[1] Mr. Hobbs is self represented. He seeks our leave to introduce fresh evidence concerning his allegation that the lawyer who represented him at trial was ineffective. He appeals his conviction and sentence claiming error by the trial judge.

[2] I would reject the appellant's attempt to introduce fresh evidence. It does not meet the requirements for admissibility. I am satisfied that Mr. Hobbs was effectively represented by his trial counsel.

[3] I see no merit to any of his submissions that the trial judge erred in either conducting the trial, or in imposing sentence.

[4] Accordingly, I would dismiss the appeal.

Overview

[5] On April 8, 2005 the appellant attended the Halifax International Airport planning to board a flight to Vancouver. The police discovered that he had checked a suitcase containing $32,000.00 in Canadian currency. The money was bundled and packaged in a heat sealed bag. On August 19, 2005, he was charged with possessing, and transporting proceeds of crime. On July 28, 2005, Mr. Hobbs was arrested in a hotel room in New York City where he and two other individuals were found with 100 pounds of marihuana and $178,000.00 in U.S. currency. Eight days after that police in Halifax discovered a commercial marihuana grow operation in a Clayton Park home rented in the name of the appellant.

[6] Mr. Hobbs had not reported any income to the Canada Revenue Agency between the years 2002 and 2004. The Crown theorized that the $32,000.00 in the appellant's suitcase was the proceeds of his illicit drug activity. Mr. Hobbs testified that the money had been earned playing poker. The appellant was convicted of possession, and transportation, of property obtained by crime. He was sentenced to nine months concurrent on each charge and probation for two years. The money was the subject of a forfeiture order.

Background

[7] The circumstances leading to the appellant's arrest and subsequent conviction are thoroughly chronicled by Nova Scotia Supreme Court Justice Felix A. Cacchione in his conviction decision now reported at 2008 NSSC 226. Further details are available in Justice Cacchione's sentencing decision, now reported at 2008 NSSC 424. For the purposes of this appeal, it will be enough for me to refer to the circumstances summarily.

[8] On April 7, 2005, the appellant purchased a return ticket to Vancouver departing Halifax the next day at 7:55 p.m., arriving in Vancouver shortly after midnight on April 9. His return flight was to leave Vancouver for Halifax that same day at 10:40 p.m.

[9] As a result of an ongoing police investigation concerning the appellant and others (details of which were not introduced at trial), the police had Mr. Hobbs under surveillance. He was observed at the Air Canada check-in counter. His suitcase was tracked and placed with eleven other suitcases randomly selected from luggage processed for the same flight. Boris, a police dog, trained in the search for narcotics, pointed — on two occasions — at the bag tagged with the appellant's name. In the opinion of the dog's handler, Boris had detected the scent of narcotics coming from the suitcase. It was seized.

[10] As the appellant was about to board his flight, police approached him, identified themselves as police officers, and asked to see his boarding pass. He was told that his suitcase had been seized on the basis that there were either narcotics in the suitcase itself or monies contaminated with narcotics. The appellant was told that the police would take steps to obtain judicial authorization to open his bag which would likely not occur until the following day. Mr. Hobbs refused permission to open his luggage without prior judicial authorization. He was then told that he was free to board the flight. He chose not to fly that day. From that day forward he never made any attempt to retrieve the suitcase or the money.

[11] A search warrant was obtained the following day authorizing a search of the appellant's suitcase. A lawyer for Mr. Hobbs (not his trial counsel) was present to

observe the search. It was found to contain men's clothing as well as a heat sealed plastic bag containing Canadian currency totalling $32,000. The suitcase also contained nine shirts, several pairs of pants, underwear and socks. There were no toiletries in the bag. The currency was divided into seven separate bundles held together with elastic bands. Six of the bundles contained $5,000 and the remaining bundle $2,000. One thousand, four hundred and sixty-three of the one thousand five hundred and eighty-two notes were $20 bills.

[12] The appellant's suitcase and contents were swabbed by a Canadian Border Services agent who, using an ion scanner, obtained readings which indicated the presence of cocaine on Mr. Hobbs' clothing and elsewhere.

[13] On August 19, 2005, Mr. Hobbs was charged:

> **THAT** on or about the 8th day of April, 2005, at or near Halifax Regional Municipality, in the Province of Nova Scotia, he did unlawfully have in his possession property or proceeds of property to wit: $32,000.00 in Canadian currency, of a value exceeding five thousand dollars knowing that all or part of the property was obtained or derived directly or indirectly from the commission in Canada of an offence punishable by indictment contrary to section 354(1) of the *Criminal Code*, thereby committing an offence under section 355(a) of the *Criminal Code*.
>
> **AND FURTHER THAT** at the aforementioned place and time, he did transport or otherwise deal with property or proceeds of property to wit: $32,000.00 in Canadian currency with intent to conceal or convert that property or those proceeds knowing or believing that all or part of the property or those proceeds was obtained or derived directly or indirectly as a result of the commission in Canada of a designated offence contrary to section 462.31(1)(a) of the *Criminal Code*, thereby committing an offence contrary to section 462.31(2) of the *Criminal Code*.

[14] The trial before Justice Cacchione lasted nine days. Evidence was introduced relating to the appellant's income tax returns. He had not filed returns in 2002, 2003 or 2004. In 2001 he reported net income of $27,000. In 2000 $28,000. And in 1999 $28,000. Gambling winnings are not subject to income tax in Canada.

[15] The appellant was represented by experienced counsel at trial, Mr. Brian Bailey. At the outset Mr. Bailey sought an early ruling from Justice Cacchione

concerning the admission of so-called “bad character” evidence. The Crown wished to introduce evidence that four months after his arrest at the Halifax Airport he was arrested in New York City and subsequently pleaded guilty there to drug related offences. Further, the Crown sought to prove that just eight days later police discovered a commercial marihuana grow operation in the basement of a house in Clayton Park which had been rented by the appellant. Cacchione, J. concluded that this evidence was directly relevant to the Crown’s theory of the case and was admissible even though it might also reflect on the bad character of the appellant. The trial judge was satisfied that the probative value of the evidence outweighed any prejudicial effect.

[16] Accordingly, the Crown tendered evidence that on July 28, 2005, Mr. Hobbs was arrested in a hotel room in New York City. The police seized 100 pounds of marihuana and $178,000 US currency and $2,305 Canadian currency. He was released but later re-arrested on a charge of witness tampering. On December 20, 2006, after serving time in an American jail while in pre-trial custody, the appellant pleaded guilty to a felony conviction of possession of marihuana. All of the property was forfeited.

[17] As well, the Crown tendered evidence that on January 13, 2005, Mr. Hobbs entered into a lease to rent 69 Shelton Woods Lane, Halifax, N.S. at the rate of $2,000 per month. On the same date he paid $1,000 in cash towards a security deposit and $1,000 in cash towards rent for the period January 15 through 31, 2005. On January 26th the appellant took out tenant’s insurance on the property paying $219 in cash for a policy spanning one calendar year. Nova Scotia Power connected service to the home starting January 18. The appellant was kept under police surveillance. He was seen driving a Cadillac Escalade which he had financed with loan payments of approximately $1,000 a month. The evidence revealed that Mr. Hobbs was unemployed and had no source of income other than what he said he won at poker.

[18] On August 5, 2005, the police executed a search warrant of the property. The home was vacant and for the most part unfurnished. Police discovered a grow op in the basement. One hundred and ninety-eight marihuana plants were found including five “mother” plants, together with lights, pumps, and other gear to operate the filtration system and remove the odour of marihuana from the air.

[19] Expert testimony at trial valued the crop at a minimum of $74,000. It was described as a semi-sophisticated commercial marihuana grow operation.

[20] Other expert testimony established that the $32,000 seized from the appellant's luggage constituted proceeds of crime; and that the other contents of the suitcase, the timing and type of ticket purchased for his flight, the price of a kilogram of cocaine in Vancouver then being $30,000, and the way in which the currency was bundled and packaged, were all consistent with a criminal operation.

[21] The appellant took the stand in his own defence. He testified that the $32,000 in his suitcase was gambling winnings and not proceeds of the drug trade. He said a few days before, a friend had called to say that River Rock, British Columbia's largest casino was hosting a significant poker tournament. Mr. Hobbs decided to fly to Vancouver, play for the day and see how it went. He said he had no need to book a hotel room or bring along any toiletries as the resort would always supply its poker players with whatever they needed. He said he had bundled the money to use in cash poker games and that he had packaged it using his kitchen heat sealer because that was convenient.

[22] Mr. Hobbs denied that he was actually guilty of possession of 100 pounds of marihuana in New York City. He said he only pleaded guilty to escape the horrible jail conditions at Rikers Island where he was being held. The appellant also denied any connection to the marihuana grow op at the house he rented in Clayton Park.

[23] The appellant was found guilty of both offences. On a subsequent date he was sentenced to nine months imprisonment on each charge to be served concurrently, and a period of probation of two years. An order of forfeiture was made with respect to the currency. A DNA order was granted. The appellant now appeals both his conviction and his sentence.

[24] On appeal, Mr. Hobbs complains that he received ineffective legal counsel from the lawyer who represented him at trial. Further, he asks our leave to advance a **Charter** argument with respect to the search of his suitcase, an issue which was not raised at trial. He appeals the trial judge's decision to admit the drug evidence from the New York City hotel room, and the marihuana grow operation in Halifax. The appellant also takes issue with the trial judge's assessment of his credibility and his conclusion that the offences were proven beyond a reasonable doubt.

[25] Mr. Hobbs asks that the convictions be set aside and an acquittal entered, for what he claims was a violation of his **Charter** rights. Alternatively, he seeks a new trial.

[26] As to sentence, the appellant says the trial judge's decision that a conditional sentence was not appropriate in these circumstances should be reversed. He asks us to vary the sentence so that he may serve it in the community.

[27] I prefer to restate the numerous complaints and alleged errors set forth in the appellant's notice of appeal and factum as six discrete questions:

(i) Should the appellant be granted leave to introduce fresh evidence concerning his complaint that he was inadequately represented by his lawyer at trial?

(ii) Did the appellant receive ineffective counsel?

(iii) Should the appellant be granted leave to raise a s. 8 **Charter** issue on appeal, given that the issue was not raised at trial?

(iv) Did the trial judge err in deciding to admit the bad character evidence concerning the New York arrest and the Clayton Park marihuana grow op?

(v) Did the trial judge err in his findings of fact and his assessment of credibility?

(vi) Was the sentence demonstrably unfit or did the trial judge err in concluding that a conditional sentence was inappropriate given the circumstances of the offence and the offender?

[28] Each of these questions will invoke its own standard of review.

Analysis

(i) Should the appellant be granted leave to introduce fresh evidence concerning his complaint that he was inadequately represented by his lawyer at trial?

[29] This appeal was adjourned twice to accommodate the appellant's requests. At an earlier hearing a panel of this Court determined that Mr. Hobbs had waived solicitor-client privilege to the extent necessary as would permit Mr. Bailey to respond to the appellant's complaint. That decision is reported at 2009 NSCA 90. As a result, four affidavits were sworn and placed before us: two from the appellant sworn May 12, 2009 and November 9, 2009 respectively; and two from Mr. Bailey sworn May 28, 2009 and May 29, 2009 respectively.

[30] At the appeal hearing Messrs. Hobbs and Bailey were each cross-examined on their affidavits.

[31] The essence of the appellant's allegation is that he specifically instructed Mr. Bailey to advance **Charter** arguments on his behalf and to challenge the charges against him on the basis of both delay, and illegal search and seizure. As the appellant attests in his November 9, 2009 affidavit:

> ...
>
> 7. I was very adamant about making the **Charter** arguments. If successful in the illegal search and seizure application, it would in turn, forego a trial and therefore stop any other legal expenses. ...
>
> 9. I believe that Mr. Bailey was more focussed on making as much money as he could instead of focussing on the merits of my case and giving me the best defence he could.
>
> 10. I believe that Mr. Bailey was ineffective as my lawyer. He was ineffective at trial which he did not even prepare me for. ...

[32] These complaints were expanded by the appellant during his cross-examination at the appeal hearing. He levelled additional criticisms at Mr. Bailey. He said that he had explicitly instructed his lawyer to pursue and challenge the dog sniff search well before the trial, but that Mr. Bailey told him that it had all been dealt with in Chambers, at a time when he (Hobbs) was not present. At the appeal hearing Mr. Hobbs stressed the point that in 2005 it was not unlawful for him to

take a domestic flight in Canada with any amount of undeclared currency in his luggage. Thus, in the appellant's view, any first year law student would have recognized the importance of challenging the search of his suitcase at the airport. He said this was "key" to his defence, and could have won the case. He said there were a number of Chambers appearances when he was not present. Mr. Hobbs testified that it was not until after his conviction, when he met with Mr. Bailey in jail, that Mr. Bailey first disclosed that he had not "even argued" the **Charter** challenge to the "unlawful search and seizure" at the airport. The appellant said Mr. Bailey had always led him to believe that the argument "had been made in Chambers" and that it had been unsuccessful. Mr. Hobbs said he was "shocked" and "angry" by the revelation and that he had voiced his unhappiness to Mr. Bailey.

[33] The appellant added several other accusations. He said he never wanted to testify but that Mr. Bailey had forced him to, saying he "had to" and that he never had any choice in the matter. Further, the appellant said he was shocked to discover that he could be cross-examined on the Admissions he had signed which were introduced as evidence pursuant to s. 655 of the **Criminal Code**. Mr. Hobbs testified that he was under the impression he could not be cross-examined on any of the information contained in the Admissions. He said he thought the information stipulated in the Admissions "had nothing to do this case", and that he never would have signed the documents had he known he could be subjected to cross-examination on them. He thought Mr. Bailey had assured him that he would not be questioned about any of the matters stated therein. Mr. Hobbs said he was also emphatic in his instructions to Mr. Bailey that he challenge the admissibility of the "subsequent evidence", that being his arrest in the New York City hotel room, and the police discovery of the marihuana grow op at his house in Clayton Park.

[34] These allegations were strongly denied by Mr. Bailey. He said that while he and Mr. Hobbs talked about the **Charter** challenges which might be advanced on his behalf, nonetheless Mr. Hobbs was explicit in his ultimate instructions that the challenges not be pursued. Instead Mr. Bailey was told to concentrate on the substantive merits of his defence.

[35] In his affidavit dated May 29, 2009 Mr. Bailey swears:

...

17. Mr. Hobbs stated to me several times that he was blameless and expressed had no doubt (sic) that his explanations would be believed and that the Criminal Code charges would be dismissed.

18. Mr. Hobbs and I discussed possible defences and included in those discussions, he and I canvassed the possible Charter issues with respect to search and seizure and delay.

19. I recall giving Mr. Hobbs my opinion on the evidentiary requirements, advising him on the law on the Charter issues including some of the "sniffer-dog" cases and possible remedies available under s. 24 of the Charter.

20. We discussed the potential costs that would be incurred in pursuing the various Charter issues as well as the likelihood of success.

21. After these discussions and during the course of my representation Mr. Hobbs clearly and unequivocally stated that with respect to the Criminal Code charges, he wished to focus on the substantive merits of his defence and did not wish me to advance any Charter arguments.

22. I agreed to represent Mr. Hobbs and pursue his strategy of focusing my efforts on the substantive merits of his defence and not the possible Charter arguments.

23. At no time did Mr. Hobbs ever state to me that he was unhappy with my conduct of the Criminal Code trial, and in fact he said often and in the presence of several members of my firm that he was completely satisfied and happy with my representation.

24. Also at no time did Mr. Hobbs ever say that he disagreed with my approach to focus on his substantive defence or that he wished to pursue any Charter issues.

[36] When cross-examined on his affidavits at the appeal hearing, Mr. Bailey further discredited the appellant's evidence. He said they had several meetings to prepare for trial. The first two or three meetings dealt with **Charter** issues. He provided Mr. Hobbs with his opinion concerning the lawfulness of the dog search at the airport. After considering his opinion, the appellant instructed him that he

ought not to pursue it. Rather, he instructed Mr. Bailey to oppose the Crown's attempt to introduce "subsequent evidence" involving the New York City and Clayton Park incidents, and then to mount a substantive defence to these charges. Mr. Bailey followed those instructions. He said there were never any motions made in Chambers, or otherwise, when the appellant was not present. Mr. Bailey was confident that the appellant understood him. At no time did Mr. Hobbs ever say he disagreed with Mr. Bailey's handling of the case. In fact, he complimented his lawyer many times, in the presence of others.

[37] Mr. Bailey said that they sought a preliminary ruling from Justice Cacchione hoping to bar the Crown's attempt to put in evidence concerning the arrest in New York City, and the grow op in Clayton Park. The defence and the Crown filed pre-hearing briefs. Mr. Bailey told his client that if they were to lose the motion, they should prepare Admissions and put those into evidence so as to limit the Crown's calling evidence about those incidents. They had the Admissions prepared and signed in advance, and Mr. Bailey moved to file them immediately, after they heard the judge's not unexpected adverse ruling. Mr. Bailey never told his client that if he were to testify, he could not be questioned on those Admissions. On the contrary, Mr. Bailey said he would have made it very clear to the appellant that if he were to testify, he could be asked anything relevant to the case, because his credibility was always in issue.

[38] In his testimony before this Court, Mr. Bailey well recalled objecting at a certain point during the evidence of Constable Addison. The officer had started to describe how they came to single out Mr. Hobbs at the airport. Mr. Bailey immediately objected. He explained that this was one of many tactical decisions made during the course of the trial upon which he and the appellant collaborated. They simply did not want the trial judge to know why the police had Mr. Hobbs under surveillance.

[39] Finally, Mr. Bailey denied the suggestion that he had forced Mr. Hobbs to take the stand against his will. He said electing whether to testify is always the client's decision to make. Throughout their dealings they talked about the possibility that Mr. Hobbs would take the stand. The appellant was confident the judge would believe his explanation. Mr. Bailey said he always thought his client was ready and willing to testify.

[40] Section 683(1) of the **Criminal Code** permits the court of appeal to allow the introduction of fresh evidence "where it considers it in the interest of justice". The legal principles to be followed when exercising our discretion in deciding whether to admit new evidence are well known and have been stated repeatedly by this Court. See for example **R. v. Wolkins**, 2005 NSCA 2; **R. v. Assoun**, 2006 NSCA 47, leave to appeal ref'd [2006] S.C.C.A. No. 233; and **R. v. West**, 2010 NSCA 16. These principles were most recently affirmed by the Supreme Court of Canada in **R. v. Hurley**, 2010 SCC 18.

[41] As we said in **West, supra**:

> [58] In some cases the trial record may suffice as an evidential basis for a submission of counsel's incompetence. But, in others, the allegations of incompetence may pertain to matters that occurred between client and counsel off the record. In these latter cases, fresh evidence on appeal may be necessary to enable the parties and appeal court to grapple with the issue. **R. v. G.D.B.**, 2000 SCC 22, [2000] 1 S.C.R. 520; **Wolkins**, ¶ 61; **Phillips** (Alta.C.A.), ¶ 27; **R. v. M.P.**, 2006 BCCA 236, at ¶ 9; **R. v. Smith**, 2007 SKCA 71, at ¶ 30-31.
>
> (Underlining mine)

Accordingly, and to permit our analysis of the argument, I would provisionally admit as fresh evidence under s. 683(1) the following material:

(i) Mr. Hobbs' affidavit sworn May 12, 2009;

(ii) Mr. Hobbs' affidavit sworn November 9, 2009;

(iii) Mr. Bailey's affidavit sworn May 28, 2009;

(iv) Mr. Bailey's affidavit sworn May 29, 2009;

together with their testimony when questioned at the hearing.

[42] The provisional admission of this evidence is only to enable this Court to consider Mr. Hobbs' ground of appeal alleging counsel's incompetence. I will now address the merits of that allegation.

[43] The type of fresh evidence sought to be admitted by the appellant in this case goes to his allegation that his trial counsel was incompetent, and that counsel's failure to pursue a "winning" **Charter** challenge based on a "clear" violation of his **Charter** rights should compel us to overturn his conviction, and substitute an acquittal. Because Mr. Hobbs' submissions are directed to the regularity of the trial process, as opposed to an issue decided at trial, the four factors from **R. v. Palmer**, [1980] 1 S.C.R. 759 are not applicable. Instead, the analysis in deciding whether to invoke our wide discretion to admit new evidence, will be guided by context, and a consideration of the issue to which the proffered evidence relates.

[44] Here, the issue concerns Mr. Hobbs' attack on the his trial lawyer's competence. He seeks an original remedy on appeal in the form of an outright acquittal. The four **Palmer** criteria are not suited to the analysis and some adjustment is required. Accordingly, I think it important to address the following factors, having regard to the totality of the circumstances:

> (1) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial,
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> (2) The evidence must be credible in the sense that it is reasonably capable of belief, and
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> (3) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[45] The Crown concedes, and I am prepared to accept, that the appellant's proposed new evidence is relevant, as it alleges conduct on the part of trial counsel which effectively compromised his defence. However, the appellant absolutely fails in establishing the second criterion.

[46] I would find that Mr. Hobbs' evidence is not believable. I would reject it. The ever increasing list of complaints levelled against Mr. Bailey, did not impress me as being credible. What started as a single sentence in the appellant's first factum filed last year, raising for the first time the complaint that "counsel did not

raise any arguments relating to s. 8 of the **Charter**" (and which revelation led to two adjournments of Mr Hobbs' appeal) expanded at the hearing into a variety of attacks upon Mr. Bailey including: advancing motions in Chambers when the appellant was not present; withholding the "truth" from the appellant until after he was convicted; filing Admissions containing information which the Crown then used in cross-examining the appellant when he was ill-prepared to face it; and being "forced" by his lawyer to take the stand in his own defence. It seemed to me that the appellant was making it up as he went along; an assessment which, incidentally, corresponds with the trial judge's view of Mr. Hobbs's credibility.

[47] On that basis alone, the appellant's motion to introduce new evidence, fails. Therefore I need not go on to cogitate whether the fresh evidence – if it were capable of belief – could have affected the result.

[48] For these reasons, I would deny the appellant's application to adduce fresh evidence.

(ii) Did the appellant receive ineffective counsel?

[49] I accept Mr. Bailey's version of events as to the instructions he received. After a thorough review of the transcript of these proceedings I am satisfied that Mr. Bailey carried out those instructions in a diligent manner, and conducted a competent, purposeful and vigorous defence on behalf of his client.

[50] Furthermore, I am satisfied that choosing not to mount a **Charter** challenge of the search at the airport was a deliberate tactical decision, made to avoid the risk that the Crown would introduce compromising evidence as to why, when and how police had Mr. Hobbs and his associates under surveillance. Mr. Bailey and his client did not want the trial judge to be exposed to such evidence, for good reason. They developed a strategy to keep it out.

[51] In the result there is no merit to Mr. Hobbs' complaint that Mr. Bailey's representation was ineffective. I would dismiss this ground of appeal.

(iii) Should the appellant be granted leave to raise a s. 8 Charter issue on appeal, given that the issue was not raised at trial?

[52] Should he be unsuccessful in his efforts to introduce fresh evidence, Mr. Hobbs asks us to allow him to challenge the lawfulness of the search, in any event.

[53] On this question, no standard of appellate review is applicable, as this is a new issue raised for the first time on appeal.

[54] The appellant seeks to challenge the lawfulness of the sniff search of his suitcase on the basis of the Supreme Court of Canada's decisions in **R. v. Kang-Brown**, 2008 SCC 18, and **R. v. A.M.**, 2008 SCC 19. The claim that his constitutional rights were violated was not advanced at trial.

[55] There is a general prohibition against considering issues on appeal which were not raised at trial. To do so is fundamentally inconsistent with an appellate court's function. **R. v. Brown**, [1993] 2 S.C.R. 918; **R. v. Rollocks** (1994), 91 C.C.C. (3d) 193 (Ont. C.A.).

[56] Our leave is required before an entirely new issue can be raised on appeal when it was not raised at trial. Whether to grant leave is a matter within our discretion. The exercise of that discretion will be guided by balancing the interests of justice as they affect the parties to the litigation. **R. v. Vidulich**, [1989] B.C.J. No. 1124 (Q.L.)(C.A.).

[57] A high threshold is demanded before permitting argument on an issue that was not raised at trial. It is only in "exceptional circumstances" that an appellate court will grant leave to do so. **R. v. Ullrich** (1991), 69 C.C.C. (3d) 473 (B.C.C.A.). Mr. Hobbs' appeal is hardly an exceptional case. It is not one, for example, where an obvious injustice has arisen.

[58] The test is particularly high where an appellant seeks to raise a **Charter** issue for the first time on appeal. **Charter** issues are too important to be dealt with in a factual void. **R. v. Shunamon** (1990), 99 N.S.R. (2d) 275 (C.A.) and **MacKay v. Manitoba**, [1989] 2 S.C.R. 357.

[59] We see no reason to permit the appellant to raise this issue for the first time on appeal. We decline to do so for three principal reasons. First, we are satisfied that the appellant *chose* not to raise this **Charter** issue at trial. We accept Mr. Bailey's evidence on this issue. As explained in para. [50], **supra**, we find that Mr.

Hobbs had ample opportunity to challenge the dog sniff and search of his bag, but made a strategic decision not to do so, prompted we believe, by a fear that any challenge of the search and seizure would cause the Crown to call evidence offering details as to why, when and how the police had Mr. Hobbs under surveillance.

[60] Second, this is not a case where the law has radically changed since the appellant's trial. In fact, **R. v. Kang-Brown** was decided by the Supreme Court of Canada on April 25, 2008. The decision had been on reserve since May 27, 2007. The appellant's trial commenced May 5, 2008, and the appellant was represented by senior, experienced counsel.

[61] Third, the evidentiary record at trial is incomplete and does not allow a proper basis for us to determine the search issue. There is a paucity of evidence on the issue of whether the police had a reasonable suspicion (sufficient under **Kang-Brown** and **A.M.**) to authorize the dog's sniff. Crown counsel properly avoided adducing evidence as to the reasonable suspicion held by the officers involved in the search, as that issue was not before the court.

[62] In conclusion, it seems obvious to me that the appellant made a strategic decision to avoid having the trial judge hear the evidence with respect to the probe conducted by the intelligence unit. In the words of Mr. Bailey when he rose immediately to object to the Crown's attempt to lead such evidence from the police officer:

> My Lord, I'm simply going to interject. ... I think it's more important that we confine ourselves to why he did what he did and so on and that we not get into embellishment of facts. ...

In final argument Mr. Bailey went further, reminding the trial judge:

> "There could have been all kinds of different things that would cause him to be the subject of a probe ...".

The appellant should not be entitled to re-try the issue simply because he doesn't like the result. The evidence is incomplete, making it impossible for this Court to adjudicate upon this new **Charter** issue. See for example, **R. v. Fertal** (1993), 85

C.C.C. (3d) 411 (Alta. C.A.); and **R. v. Trabulsey** (1995), 97 C.C.C. (3d) 147 (Ont. C.A.).

[63] Accordingly, I would refuse leave to raise for the first time on appeal what Mr. Hobbs now alleges to have been a violation of his s. 8 **Charter** rights.

(iv) Did the trial judge err in deciding to admit the bad character evidence concerning the New York arrest and the Clayton Park marihuana grow op?

[64] This ground raises a question of law. The standard of review is correctness.

[65] It will be recalled that at the request of defence counsel the trial judge gave an advance ruling which permitted the Crown to introduce evidence relating to the appellant's conduct several months after the seizure of the $32,000 from his luggage. First, the Crown was permitted to introduce evidence describing Mr. Hobbs' arrest on July 28, 2005, in a New York City hotel room which ultimately led to his plea of guilty to a felony conviction for possession of 100 pounds of marihuana and forfeiture of $178,000 US currency. Second, the Crown was allowed to introduce evidence that on August 5, 2005, Halifax police discovered a fully operational marihuana grow op in the basement of a house rented to the appellant. The appellant complains that the admission of this evidence and the use to which it was put by Cacchione J. constitutes reversible error.

[66] I see no merit to this ground of appeal.

[67] The evidence in question is directly relevant to the Crown's theory with respect to the source of the funds, and directly linked to proof of the fact that the currency in question was derived from the illicit drug trade. A reading of Justice Cacchione's comprehensive decision makes it clear that he properly instructed himself on the law. He understood that the evidence in question could not be used to determine guilt simply on the basis that the appellant might be the type of person to commit such an offence. **R. v. Arp**, [1998] 3 S.C.R. 339. He was alive to the fact that this evidence could only be used for a limited purpose. The evidence was relevant to the issue of Mr. Hobbs' knowledge of the source of the funds found in his suitcase. It was also relevant to establish the criminal origin of the property

found. The trial judge satisfied himself that the probative value of the evidence outweighed its prejudicial effect. He was correct in his application of the law.

[68] Mr. Hobbs also complains that the impugned "subsequent" evidence was inadmissible in that it related to events which occurred *after* the search of his luggage at the Halifax Airport in April, 2005. Thus – in Mr. Hobbs' submission – he ought not to have been prosecuted on charges relating to "proceeds of crime" since, at the time of the search, he had never been convicted of a "crime".

[69] The appellant's submission is flawed. A conviction for possession of the proceeds of crime, or for transporting the proceeds of crime, pursuant to ss. 354(1) and 462.31(1) respectively, does not oblige the Crown to prove that the proceeds originated from a crime *committed by* the person who transports, or who is found in possession. On the contrary, each of the operative sections states:

> ... any property or any proceeds of any property ... obtained by or derived directly or indirectly ... (from/as a result of) "... the commission in Canada of ... an offence."

[70] It was not a prerequisite that Mr. Hobbs be proved to have committed the initial crime which then led to his being found in possession, or transporting the proceeds thereof. On the contrary, it was open to the Crown to lead evidence from which the trial judge might then reasonably conclude that Mr. Hobbs had the necessary knowledge (in the case of possession) or knowledge or belief (in the case of transporting) of the spurious character of the proceeds. The essential question for Justice Cacchione to answer was whether the money found in Mr. Hobbs' suitcase constituted proceeds of crime? The Crown's theory was that the appellant was involved in the drug trade. They led considerable evidence to establish that he was a "player". Police officers testified that Mr. Hobbs had been under surveillance in Canada and the United States for some time. When he was arrested at the hotel in New York City, Mr. Hobbs was in possession of close to $200,000 and 100 pounds of marihuana. Evidence at his trial confirmed that such a quantity of drugs would fill four or five hockey bags or six large suitcases. Photographs taken at the time of his arrest showed Mr. Hobbs and his associates with their suitcases stacked high in a corner of the hotel room. Such a quantity of cash and drugs suggested a network of international trafficking connections.

[71] Constable Slaunwhite testified that in his expert opinion the value of the plants in the grow op at Clayton Park was $74,000, at a minimum. Considering the size of the grow op, and the chemicals, wash tank and other assorted equipment in place to grow it, the people involved in the operation were hardly babes in the woods. As the officer put it, those responsible "had a place to go with this product". In addition, Constable Duggan was able to place Mr. Hobbs at the house in Clayton Park on July 19, a point when – according to the expertise of Constable Slaunwhite – the marihuana grow was well under way.

[72] In response to Mr. Hobbs' other arguments, the fact that his bag containing money seized at the Halifax Airport was thought to contain traces of cocaine, whereas the drugs found in New York City and Clayton Park were marihuana, is of little importance to the Crown's case. Neither is the fact that the subsequent incidents happened in July and August, some months after his luggage was seized in April. These are simply features of the case which would have to be considered by the judge in his overall assessment of the circumstantial evidence presented by the Crown. Cacchione, J. carefully sifted through all of the evidence before satisfying himself that the Crown had proved Mr. Hobbs' guilt beyond a reasonable doubt. He made no error in doing so.

[73] For all of these reasons I would dismiss this ground of appeal.

(v) Did the trial judge err in his findings of fact and his assessment of credibility?

[74] Finding facts and assessing credibility are clearly within the jurisdiction of the trial judge who has the distinct advantage of hearing and assessing the reliability of testimony, first hand. We will not intervene in such matters unless we are persuaded that the judge's conclusions are the result of palpable and overriding error.

[75] The appellant's complaint that the trial judge erred in assessing credibility is not supported by the record. After a careful and painstaking analysis of the evidence, Justice Cacchione provided comprehensive reasons detailing the strong findings which anchor his assessment of credibility. His decision provides a clear indication of the reasoning path which led to Mr. Hobbs' conviction.

[76] The trial judge accepted the evidence of all of the Crown witnesses. That included the expert evidence given by RCMP Constable Slaunwhite, and RCMP Corporal Rodonets. After a *voir dire* the judge qualified Constable Slaunwhite as an expert:

> ... entitled to give opinion evidence with respect to drug networks, hierarchy of drug organizations, packaging, pricing, drug paraphernalia, distribution methods and production of narcotics.

[77] Constable Slaunwhite described the results of the search conducted at the Clayton Park residence on August 5, 2005. He described the grow op as an enterprise involving more than one individual, given its level of sophistication and organization. Considering the maturity of the marihuana plants, he opined that they had been started "at least two and a half months" prior to the search. That would take it back to mid-May, 2005. He calculated the yield, conservatively, to be 37 pounds with a street value ranging from $74,000 to $92,500. The officer testified:

> ... if you're growing 37 pounds of marihuana and you have 198 plants you have to have a pre-established clientele or market to move that product to. ... so anybody that's dealing or distributing 37 pounds would be -- that would be common to a top-level dealer because those people are dealing in distributing multiple kilograms and pounds of marihuana. ... somebody would have had to have been involved in drugs and drug trafficking for a number of years to establish a clientele and be secure in the clientele that they're going to move that kind of product.

[78] RCMP Corporal Rodonets' qualifications were admitted by the defence. Justice Cacchione ruled that Corporal Rodonets was:

> ... entitled as an expert to give opinion evidence in the areas of proceeds of crime, money laundering, identification and tracing of proceeds of crime, common money laundering techniques including techniques for storing, packaging, processing, converting proceeds of crime, nature of business transactions and criminal activities in particular the illicit drug trade, the denominations, packaging and transporting of cash generated from and used in drug trafficking, reporting requirements for financial institutions with respect to the receipt of cash, the use of cash and the legitimate personal or business dealings in cash packaging methods used by financial institutions.

[79] By consent Corporal Rodonets was not part of an exclusion of witnesses order and therefore he was present in court during the entire proceedings. Based on all of the evidence and testimony he heard, Corporal Rodonets expressed the opinion that:

> ...the $32,000 currency seized at the Halifax International Airport, near Halifax, Nova Scotia on April the 8th was derived directly or indirectly from trafficking controlled substances and therefore proceeds, it's therefore proceeds of crime.

[80] Both RCMP officers were extensively examined and cross-examined. Justice Cacchione accepted their evidence, without qualification.

[81] Mr. Hobbs' principal complaint lies with the judge's assessment of the appellant's own testimony. His explanation for having the shrink-wrapped bundles of cash in his suitcase did not stand up to a withering cross-examination. The rebuttal evidence called by the Crown was devastating. The judge's reasons leave no doubt as to why he thought the appellant attempted to mislead the court, and why he came to reject the appellant's evidence as incredible.

[82] Simply to illustrate by way of example, in attempting to explain why he had $32,000 cash bundled and shrink-wrapped in his suitcase for a one-day return flight to Vancouver, Mr. Hobbs boasted of his prowess at poker. He said he had been alerted by a friend to a high stakes competition at the River Rock Casino. He said he didn't need to pack toiletries because such things were always provided to tournament players.

[83] In rebuttal the Crown called Howard Blank, Senior Vice-President of the Great Canadian Gaming Corporation, which owns the River Rock Casino. Justice Cacchione accepted Mr. Blank's testimony as being truthful and credible. Mr. Blank testified that the River Rock Casino did not have any big poker tournaments in April, 2005. He said they never provided complimentary services to poker players unless they were celebrated "stars" on the circuit, which evidently, Mr. Hobbs was not. He said the hotel at the resort did not open until August 2005, three months after the appellant claimed that he planned to stay there. In the words of the trial judge:

> [80] Hobbs' evidence given in direct examination did not withstand the scrutiny of cross-examination. To borrow from the poker parlance used so freely

> by Hobbs in his direct testimony, his evidence was a flop. According to Hobbs it was simply a confluence of different circumstances, not under his control, that led him to be charged with the present offences and other offences both here and in New York State.
>
> ...
>
> [103] Mr. Blank's evidence concerning the casino's policy regarding complimentary rooms for tournament players at their hotel, which had not yet opened in April 2005, or at any other hotels confirmed that Hobbs was untruthful in his evidence and that he attempted to deceive the Court.

[84] Neither is there any merit to the appellant's complaint that the judge engaged in speculation in his assessment of the evidence. I am satisfied Cacchione, J. properly instructed himself in this regard. After a careful review of the evidence he was entitled to conclude, as he did, that the appellant's involvement in the drug trade in July and August supported a reasonable inference that the $32,000 cash in his possession in April constituted the proceeds of his drug activity.

[85] Solid and dogged police work produced a web of direct and circumstantial evidence that ensnared Mr. Hobbs. Slips of paper, labels on prescription pill bottles, phone records, a lease, insurance policy, photographs, banking transactions, covert surveillance, cable service, power bills and receipts for such things as hotel rooms, doggie treats and women's panties were all part of the net which tied Mr. Hobbs to crimes in New York City and Clayton Park.

[86] The evidence of Mr. Hobbs' activities in New York City and in Clayton Park was directly linked to proof of the fact that the currency in his suitcase was derived from the illicit drug trade. It was open to the trial judge to draw such an inference.

[87] The testimony at trial, including the expert opinion evidence of Constable Slaunwhite and Corporal Rodonets, along with the appellant's own admissions, and the proven facts, added further support to the conclusion that Mr. Hobbs was involved in the drug trade for some time prior to the events of July and August, 2005.

[88] In summary, the trial judge's analysis and reasons in convicting the appellant were commendable. There is no reason for us to intervene.

(vi) Was the sentence demonstrably unfit or did the trial judge err in concluding that a conditional sentence was inappropriate given the circumstances of the offence and the offender?

[89] The appellant's seeking leave to appeal his sentence appears to be nothing more than an attempt to re-argue the sentence imposed. He has not otherwise articulated any basis for overturning the decision of the trial judge.

[90] Having presided over this nine day trial, Justice Cacchione was in a unique and favoured position, able to impose a fit sentence in the context of the relevant factors and sentencing principles. His sentence is entitled to deference. We may only intervene in cases where the judge has erred in principle, or the sentence is manifestly unfit. **R. v .C.A.M.**, [1996] 1 S.C.R. 500; and **R. v. L.M.**, 2008 SCC 31.

[91] Here, Mr. Hobbs' principal submission seems to be that Justice Cacchione erred by refusing to permit him to serve his sentence in the community in accordance with the provisions of s. 742.1 of the **Criminal Code**.

[92] I would reject that submission. Cacchione, J. correctly concluded that offences involving money laundering and possession of the proceeds and profits of the drug trade required a special emphasis upon deterrence. He was not satisfied that a conditional sentence would properly address the principles of specific deterrence, general deterrence and denunciation. As s. 742.1 prohibits the imposition of a sentence which is inconsistent with the fundamental purposes and principles of sentencing, Cacchione, J. correctly concluded that a conditional sentence was inappropriate.

[93] The judge was also satisfied that the appellant posed a risk of re-offending. Based upon his observations over the course of a 9-day trial as well as the documentation before him, the judge formed the conclusion that Mr. Hobbs would breach a conditional sentence. I am not prepared to second guess his decision on that point. While persuaded that the appellant was no stranger to the world of drugs and drug trafficking, Cacchione, J. properly directed himself that Mr. Hobbs'

involvement in the drug trade subsequent to the offences before the court, was not to be treated as a prior conviction.

[94] Justice Cacchione felt that a "short, sharp sentence would be appropriate". He sentenced the appellant to a period of nine months' incarceration, to be followed by two years' probation. It seems clear from the judge's sentencing remarks that the relatively low sentence he imposed was motivated by the fact that the appellant had already completed a tough stretch of jail time in New York City. I would also observe that the jail sentence of nine months is less than the community-based sentence urged by Mr. Bailey as "something in the range of 12 to 18 months". Justice Cacchione's belief that a "short, sharp sentence would be appropriate", seems ironic in retrospect ,when one recalls that he made those comments at a sentencing almost two years ago, for crimes committed in 2005.

[95] In summary, there is nothing on the record in this case which would persuade me to disturb the sentence imposed.

Conclusion

[96] For all of these reasons I would dismiss the appeal against conviction. While I would grant leave to appeal sentence, I would dismiss the appeal.

Saunders, J.A.

Concurred in:

Bateman, J.A.

Fichaud, J.A.