PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Dorey, 2011 NSPC 85

Date: 20111117
Docket: 617025
Registry: Kentville

Between:

Her Majesty the Queen

v.

Stephen Alan Dorey

Judge:	The Honourable Judge Alan T. Tufts
Heard:	June 16, 2011, in Kentville, Nova Scotia
Charge:	**s. 5(2) Controlled Drugs and Substances Act**
Counsel:	Bill Watts, for the Crown David Schermbruker, for the Crown Len MacKay, for the Crown Stephen A. Mattson, Q.C., for the defence

By the Court:

INTRODUCTION

[1] The accused is charged under s. 5(2) of the *Controlled Drugs and Substances Act*. It is alleged he was in possession of marihuana for the purpose of trafficking on the 11th day of August, 2010.

[2] The accused is applying to exclude as evidence in this proceeding the contents of his cellphone which the police seized upon his arrest. He argues that the search of his phone was a breach of his s. 8 *Charter* rights and accordingly any evidence from the contents of the phone should be excluded under s. 24(2) of the *Charter*. The police did not obtain a search warrant to extract the contents of the phone.

[3] The Crown acknowledges that it has the burden to establish that the police had a legal authority to seize the accused's phone and search its contents. Crown concedes that if any aspect of the police search of the phone exceeded their lawful authority then the search resulting therefrom should be excluded from the evidence.

[4] The issue in this proceeding therefore is: Did the police have authority to do a complete download of the contents of the accused's cell phone – the so-called "data dump" in excess of a month after the accused's arrest?

[5] The facts are succinctly set out in the Crown brief as follows:

> RCMP Constable Harold Prime testified that he was in his 9th year as a member of the RCMP and was attached to the Street Crime Unit at the New Minas detachment, where he had been since 2008. On August 11, 2011, a justice of the peace granted a *CDSA* search warrant in respect of Mr. Dorey's residence in Waterville, based on grounds that Dorey was believed to be in possession of marihuana for the purpose of trafficking, an indictable offence. The warrant was executed at about 2:00 p.m. on August 11, 2010, under Prime's direction. At the

time, Prime found Dorey in the front yard of the residence and arrested him for possession of marihuana for the purpose of trafficking.

Prime handcuffed Dorey, and searched him incident to arrest. Prime testified that he searched Dorey looking for items related to the offence. He located cash, a cell phone, cigarettes, a lighter, and a laser pointer on Dorey's person. He testified that he seized the cell phone as in his experience drug dealers use cell phones to conduct business; they make and receive calls and texts in relation to drug deals; they use it to photograph drugs including marihuana grows. He testified that in his experience this use of a cell phone was very common – he testified that in almost every case "they have a cell phone and they use it in the business."

Prime turned the cell phone off without looking at it or opening it, placed it in an evidence bag, and handed it to Cst. Campbell, the exhibits officer. Later, on September 21, 2010, he transported the cell phone to the RCMP Tech Crime Unit in Dartmouth so that team could conduct an analysis of the contents of the cell phone. He received a report (on a CD) from that unit on November 23, 2010. A printed version of the report was entered as Exhibit VD-2. The report reveals a large number of items on the cell phone, including text messages (some of which appear to relate to drugs), contact information, photographs of a personal nature, references to a tattoo business, information about Dorey's family members, etc..

Prime testified under cross-examination that although he seized the cell phone incident to Dorey's arrest, he believed he could also have seized it under the search warrant. He agreed under cross-examination that the warrant did not specify cell phones, however explained that it could be included in "other materials and items related to the offence" as set out in the warrant.

Prime testified that he has had no training on search and seizure respecting cell phones, just experience. He had looked at cases online and tried to stay up to date but this was very much *ad hoc* and there was no RCMP requirement for members to stay current on the law. The RCMP did not offer courses specific to cell phones, but did offer warrant drafting courses in general. The last courses Prime took were in 2007 or 2008.

Prime testified that there were no exigent circumstances which motivated him to send the cell phone for analysis without a warrant. He testified that he was not even aware he might need a warrant to do so. He was never told to get a warrant, and in his experience the Tech Crime Unit never required a search warrant in order to receive a cell phone and analyze its contents.

[6] The Crown in its submissions specifically relies on the police seizure and subsequent search of the accused's cell phone as being a lawful search and seizure under the power to search incident to arrest. The Crown is not relying on the police authority, if any, under the search warrant to seizure or search the phone.

[7] In a related proceeding *R v. Hiscoe* 2011 NSPC 84, I found that the police exceeded their authority when they did a similar full content download of the accused's cell phone and therefore violated the accused's s. 8 *Charter* rights.

[8] In my opinion there are no appreciable differences in the facts of this case from that in *Hiscoe* on this issue. Notwithstanding any differences in the cell phones characteristics in each case, in my opinion, the conclusions I reached and the reasoning used in the other proceeding are equally applicable here.

[9] Accordingly for the same reasons, I find the police violated the accused's s. 8 *Charter* rights and that the evidence obtained i.e., the contents of the accused's cell phone should be excluded from evidence under s. 24(2) of the *Charter*.

Tufts, J.P.C.