**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** R. v. McCarthy, 2005 NSPC 49

**Date:** 20050809
**Docket:** 1474815 & 1474816
**Registry:** Truro

**Her Majesty the Queen**

**v.**

**Thomas Joseph McCarthy**

| | |
|---|---|
| **Judge:** | The Honourable Judge John G. MacDougall |
| **Heard:** | May 13, 2005 in Truro, Nova Scotia |
| **Oral decision:** | On the *voir dire:* August 9, 2005 |
| **Written decision:** | November 24, 2005 |
| **Charge:** | Section 5(2) of the *CDSA*<br>Section 5(1) of the *CDSA* |
| **Counsel:** | Cameron McKinnon, for the Crown<br>Anne Malick, for the Defence |

A *voir dire* was held at the commencement of the trial to determine the admissibility of evidence seized by the police. Following written briefs, a decision to admit the evidence was rendered August 9, 2005. The trial continuation was adjourned to November 7, 2005. It was agreed the evidence on the *voir dire* would be applied to the trial. Counsel made summations and the accused was found guilty.

Following is the *voir dire* decision.

**By the Court**:

[1] Thomas Joseph McCarthy was arrested on October 22, 2004 in Truro, Nova Scotia and was charged with trafficking and possession for the purpose of trafficking. He was arrested at the train station and the backpack he was carrying contained a one kilogram brick of cocaine.

[2] At the commencement of his trial, counsel for Mr. McCarthy asked for a voir dire to determine if the police had breached the rights he is guaranteed by the Charter of Rights and Freedoms ("Charter"). Specifically it is asserted:

- he was arbitrarily detained (s. 9);
- the 'sniff' of his backpack by the police dog was an unreasonable and illegal search (s. 8);
- he was arrested arbitrarily (s. 9); and
- the search incident to his arrest was unreasonable and therefore illegal (s. 8).

[3] During the detention, arrest and searches the accused claims his rights under sections 10(a) and 10 (b) were breached. It is the position of the defence the appropriate remedy is exclusion of the evidence seized by the police as a

consequence of the arrest and search. For the following reasons, I am of the opinion the rights of the accused were not breached.

**Facts**

[4] The context within which this case arises is representative of the tension referred to by Justice Iacobucci in the opening paragraph of *R. v. Mann [2004] S.C.J. No. 49, para 1*:

> This appeal presents fundamental issues on the right of individuals to walk the streets free from state interference, but in recognition of the necessary role of police in criminal investigation. As such, this case offers another opportunity to consider the delicate balance that must be struck in adequately protecting individual liberties and properly recognizing legitimate police functions.

[5] Corporal Gregory Fraser, as part of the Criminal Interdiction Team out of Halifax was accompanied by three other officers and a police dog to the Via Rail station in Truro. The team had been performing the same function approximately three times a week for the past two years. The purpose of the exercise was to observe persons leaving the train from Montreal who may be involved in criminal activity and to pursue such leads as may appear. They did not have information that anyone, or anything, of interest would be on this particular train.

[6] The station in Truro was selected because it was a ‘choke point’ requiring passengers continuing east (Cape Breton and Newfoundland) to disembark and continue by bus. It was accepted that drug couriers preferred rail over air travel because there was less scrutiny by authorities. Training and experience lead the police to focus on nervous middle aged males traveling alone. To secure greater privacy these individuals frequently used berths. Prior to the train arriving Corporal Fraser stationed himself on the platform 10 feet to the right of the terminal door and Constables Ruby and Pattison were 10 -15 feet to the left of the door. Constable Guy Daigle and his police dog, Boris, a golden Labrador retriever, stood inside the terminal door. If passengers spotted Daigle and/or the dog on the train platform as the train was stopping, it may discourage suspects from leaving the train. Daigle was wearing a standard RCMP dog handlers uniform, all other police officers were in plain clothes.

[7] Mr. McCarthy disembarked from the car containing berths, lit a cigarette and walked in the direction of the terminal door. He had a backpack over his left shoulder. In Truro, the tracks run parallel to the back of a strip mall and the terminal door offers the most convenient and reasonable means of egress to the

front of the mall where the bus and other facilities are located. There was evidence the mall is approximately 500 feet in length and the space between the train and the back of the mall is estimated to be 25 feet. Should the terminal entrance not be used, a passenger could use a breezeway located in the opposite direction the accused was heading, or walk a distance around the end of the mall.

[8] When the accused was about 50 feet from the terminal entrance Corporal Fraser motioned to Constable Daigle to step outside with Boris so that Fraser could observe the reaction of the accused. When he was 15 - 20 feet from the entrance the accused spotted Daigle and Boris, stopped abruptly, looked behind, looked up and began muttering to himself. He continued and passed five to seven feet in front of Daigle and Boris. Daigle heard McCarthy mutter “fuck ,fuck fuck fuck ” to himself.

[9] Instead of turning into the terminal McCarthy continued past the entrance. Because of the reaction of the accused, interest of the police increased and there was a collective determination to confront Mr. McCarthy. Fraser approached from the right and Daigle, Pattison and Ruby from behind. Fraser identified himself, showed his badge and asked McCarthy for photo identification. McCarthy

cooperated and produced his Newfoundland and Labrador driver's licence. Fraser then asked him to produce his boarding pass or ticket which he also did.

[10] On the reverse of the ticket there was a list of conditions including:

> "To ensure all passengers safety, Via Rail reserves the right to inspect all luggage. Other conditions apply to your travel."

[11] Coincidental with the approach and questioning by Fraser, Daigle took four or five steps up behind McCarthy, at which time Boris had his nose in the air and sat, indicating a positive reaction to the scent of narcotics from the backpack.

[12] During their exchange neither Fraser nor McCarthy gave indication they noticed Boris at work. Once McCarthy provided the boarding pass, Daigle communicated to Fraser there was a "positive" indication and Fraser advised McCarthy he was under arrest for possession of narcotics. Fraser asked McCarthy if he had any weapons to which McCarthy responded he did not. Fraser told McCarthy he was under arrest for possession of narcotics and he would be searched. He then directed Pattison to search the backpack. Throughout the

exchange, McCarthy indicated he had a speech impediment but said nothing else. Fraser thought McCarthy was surprised but not nervous or intimidated.

[13] Daigle stepped back 25 feet with Boris who was not trained to respond to confrontation. Pattison searched the backpack and in the bottom found a leather-like portfolio. He asked "What's this?". McCarthy responded, "I don't know, I've never seen that before". Pattison then opened the portfolio and in an envelope found a kilogram brick of cocaine.

[14] Because there were other persons in the immediate area Fraser directed McCarthy to step over to the back of the mall, arrested him for possession for the purpose of trafficking and read him the appropriate Charter rights and police caution. Mr. McCarthy was then taken to the Truro detachment of the RCMP for processing.

[15] There is no question the entire episode was very quick. Corporal Fraser noted the train arrived at 2:33 p.m.. McCarthy was arrested at 2:35p.m.. The luggage was searched by Pattison at 2:36 p.m. and McCarthy was re-arrested at 2:40 p.m.. He spoke to counsel at the police station at 3:24 p.m.

**Detention**

[16] The accused bears the burden to prove, on the balance of probabilities, that he was arbitrarily detained contrary to section 9 of the Charter. In *R. v. Therens (1985), 18 C.C.C.(3d) 481*, the issue was whether the defendant was detained when directed to attend the police detachment to comply with a breathalyzer demand. Justice LeDain set the standard for what constitutes detention in the following oft quoted paragraph, p. 19:

> Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make restraint of liberty involuntary. Detention may be effected without the application of physical restraint if the choice to do otherwise does not exist.

[17] The Ontario Court of Appeal considered a fact situation which is similar to the case of Mr. McCarthy and applied the *Therens* principle. The accused and a

friend were stopped on the sidewalk and asked to identify themselves because the police thought they were acting in a suspicious manner. Justice Krever stated the following in *R. v. Grafe, [1987] O.J. No. 796* at page 6:

> The Charter does not seek to insulate all members of society from all contact with constituted authority, no matter how trivial the contact nay be. When one considers the full range of contacts in modern society between state and citizen that which took place between the respondent and Constables Kalen and Waite on the first occasion cannot be characterized other then as innocuous. Its occurrence was not an invasion of any of the respondent's Charter rights.

[18] Further assistance in understanding detention was provided more recently by the Supreme Court of Canada in *R. v. Mann, supra*, at para. 19:

> "Detention" has been held to cover, in Canada, a broad range of encounters between police and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for the purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint. In this case the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances I would decline to do so.

[19] In *R. v. H.(C.H.), [2003] M.J. No. 90*, the Manitoba Court of Appeal reviewed the development of the law. The police had asked three youths to identify themselves in the early hours of the morning for no reason but to

determine why they were in that particular neighbourhood. A query resulted in the defendant being identified as breaching his curfew. He was arrested and charged. The police admitted they had no grounds to detain the youths. If the youths had decided to leave without answering questions they could. If they had asked why they were being questioned they would have been told.

[20] Justice Steele, speaking for an unanimous court, stated at paragraph 18:

> The use of the word "detention" necessarily connotes some form of compulsory restraint. It involves the act of holding or keeping someone against his will for a period of indeterminate length. Conversation does not necessarily result in detention within the meaning of the Charter. There must be something more. There must be a deprivation of liberty.

[21] And further at paragraph 21:

> The elements of a police demand or direction, coupled with a voluntary compliance that results in a deprivation of liberty, are essential to the existence of a psychological detention. These elements assure that a common thread - control over the movements of the individual - runs through all three types of detention identified in the Therens test. Without some control over the individual's movements, there is no detention - not even psychological detention. The only distinction is one of degree. In the third category of detention, the control emanates from the accused, who submits to a police demand or direction by restraining their own freedom of movement in the reasonable belief that they have no other choice.

[22] The requests for identification and boarding pass were neutral and of themselves did not suggest a deprivation of liberty. Although the police were suspicions drugs were being transported, a specific crime had not been determined. Seeing the police dog may have alerted Mr. McCarthy to the reason for the presence of Corporal Fraser but the questions were not directed at the commission of a particular crime. There were no probing questions as to why he was on the train, whether he was carrying contraband or if he would consent to a search of his backpack.

[23] On the witness stand Corporal Fraser appeared to be direct and to the point. There is no reason for me to believe he was different in his approach to Mr. McCarthy. There is no doubt in my mind Corporal Fraser was professional in his approach when he states his tone of voice was “very low-keyed and relaxed”. Had he massaged the encounter with banter about sports, the weather or children it may or may not have assisted him in establishing an atmosphere of cordiality and general conversation. Corporal Fraser ought not to be penalized for being direct and professional as long as he does not create an environment in which he is taking advantage of a power imbalance and compelling co-operation. Although it may appear superficial, or even deceptive, sugar does win over vinegar in determining

the issue of detention. The distinction between “request” and “demand or direction”as noted by Justice Tarnopolsky in *R. v. Bazinet (1986), 25 C.C.C. (3d) 273 at pp 283-84* may be the interpretation of whether one is seeking or requiring co-operation.

[24] The purpose and motive of the Interdiction Team was to intercept persons who fit a profile. This initiative is ‘results orientated’ and predictably leads to a more aggressive investigation if initial overtures do not produce desired results. The process may lead to either physical restraint or a demand/direction in circumstances that are clearly oppressive and in which the accused thinks he is compelled to co-operate. The pattern that so often leads to a determination of “significant physical or psychological restraint” has been set. Corporal Fraser quite candidly admitted that if the dog sniff had been negative he would have pursued the matter with Mr. McCarthy in hopes of obtaining what he considered to be a consensual search. However, there is no reason to disbelieve Fraser, when he states that despite his interest in McCarthy, McCarthy was free to ignore him and his questions. Should McCarthy have chosen to continue to walk, Fraser could not have legally stopped him.

[25] There are numerous cases which permit the police to ask an individual to provide identification (*R.v. Grafe, supra and R. v. H. (C.H.) supra*). Asking for a copy of the boarding pass does not unduly stretch the intrusion or convert a request into a demand or direction. Mr. McCarthy provided Corporal Fraser with the information requested within 30 - 60 seconds and within that time frame Boris had already indicated a positive reaction for narcotics. Every delay does not constitute a detention. The purpose and motive of the police is only one of the factors to be considered.

[26] Another significant, although not determinative factor of whether there was a detention is the subjective belief of the accused as to whether or not there was compulsion such that he was given no choice but to co-operate with the police. The accused did not give evidence on the voir dire. There is no evidence the accused was subject to a disability other than a possible speech impediment. He was traveling independently and, whether he was aware of it or not, had a kilogram of cocaine over his shoulder. The name and phone number of a lawyer was also uncovered in his pack. His reaction to seeing the police dog caused obvious anxiety and the utterance overheard by Constable Daigle suggests a modicum of distress. I accept the observation of Corporal Fraser that a reasonable

interpretation of the accused psychological state was one of surprise. There is no evidence the accused had been deprived of freedom of choice or the ability to think for himself. The failure to advise the accused he need not respond to the requests for information is significant but not fatal in the circumstances.

[27] Any suggestion of the deprivation of freedom of choice must be reasonable, supported by objective evidence. This is of particular importance in a case such as this in which the accused is not physically restrained. Corporal Fraser approached the accused from the side. Mr. McCarthy was not physically impeded from continuing in the direction he was walking. There is no evidence McCarthy was aware of the presence of the other officers who had approached from behind. Many cases impute the absence of choice because of the physical restraints within which the accused is questioned. Sitting in a motor vehicle after being stopped by the police, confronted in one's place of abode or backed into a set of lockers reduces the impression one is free to leave and increases the perception of restraint and control. Those fact situations are distinguishable.

[28] The burden to satisfy me there was detention is on the accused. The accused stopped and acquiesced to the request to provide identification and his boarding pass. The police have the authority to be proactive and seek out information. Citizens have the choice as to whether or not they wish to co-operate. The use of Boris to sniff the backpack is a legitimate police investigative tool. The delay of Mr. McCarthy to gather information through the dog sniff is not more or less improper than asking for identification. I agree most Canadians are inherently co-operative with police and this is good. With respect to Mr. McCarthy, there is no evidence he was under significant psychological restraint. It would appear he was taken off guard by the presence of the police and he did what was natural for him, he co-operated. There was not sufficient evidence to satisfy me the police deprived Mr. McCarthy of his choice.

**Dog Sniff**

[29] Section 8 of the Charter protects persons from unreasonable search and seizure. The section is to be interpreted purposefully and is to protect the privacy expectations of people not places. Justice Sopinka in *R. v. Evans, [1996] 1 S.C.R. 8 at para. 11* gave the following guidance with respect to what is protected:

> ... Clearly it is only where a person's reasonable expectations of privacy are somehow diminished by an investigatory technique that s.8 of the Charter comes into play. As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning if s. 8.

[30] Justice Binnie in *R. v. Tessling, [2004] S.C.J. No. 63* endorsed taking a contextual approach to achieving a balance between individual privacy interests and the interests of law enforcement. At paragraph 25 he referred to the statement of Justice Sopinka in *R.v. Plant, [1993] 3 S.C.R. 281 at p. 293* which gave direction as to where the reasonableness line should be drawn:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

[31] At paragraph 19 Binnie J. accepted the principled approach in determining what was protected by s. 8 focusing upon " (1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation."

[32] It would be easy to say Mr. McCarthy had a subjective expectation or hope of privacy in the contents of his backpack. In the case of *R. v. Buhay [2003] 1S.C.R. 631, para. 24*, Justice Arbour made it clear that on a contextual analysis a reasonable expectation of privacy need not be a high one to be protected by s. 8. However, it was not detection of the contents of the backpack that gave Mr. McCarthy away but the scent of narcotics which lingered on the exterior of the bag.

[33] Mr. McCarthy did not give evidence on the voir dire. In analyzing whether there was a reasonable expectation of privacy I must balance what is subjective with what is reasonable. Following are the considerations I think are relevant:

- what was detected: Boris is trained to detect and respond to various narcotics. As with the Forward Looking Infra-Red ("Flir") camera referred to in *Tessling, supra,* the information gathered exists on the outside of the container. Neither investigative tool looks into the container. However, there is a 92% chance one would find illegally possessed narcotics in the backpack based on the success rate of Boris.. The significant difference between the Flir and Boris is the quality of the information. What Boris detected was not meaningless information.

Absolutely nothing was learned about the pack other than it likely contained narcotics. Unless illegal possession of narcotics is to be considered a legitimate privacy interest, there was no information gathered that would fall into the category of protected information as set out by Sopinks J. in *R.v.Plant, supra.*

- degree of de facto control: The backpack was on the person of the accused at all relevant times. It appears to be his only luggage and would not be easily misplaced, confused or lost track of. There was nothing unique about the backpack which would attract particular attention. In the ordinary course he would anticipate that he could keep the bag at his side without inspection or seizure. The contents of the backpack were securely stowed inside.

[34] However, McCarthy was well aware the scent that accompanied the backpack was not protected or within his control. There was no evidence the scent was detectable by the human nose and therefore it could not be said to be revealed to the general public. However, McCarthy's reaction to seeing Boris confirmed that he was aware a trained dog would detect the scent. In spite of this he chose to travel as he did. In *Tessling, supra,* Justice Binnie stated as follows at para. 40, "It is true that a person can have no reasonable expectation of privacy in what he or

she knowingly exposes to the public, or to a section of the public, or abandons in a public place".

- location: The search was not in or about a dwelling, in which there is the highest expectation of privacy (*R.v. Evans, supra, para. 21*). It was not in an area where there would be an element of control or limited access to the public, such as an office, a friend's house, a hotel room, motor vehicle or locker. The accused chose to use public transit and therefore would be prepared to pass in close proximity to members of the public from every walk of life. He cannot control the space between himself and other members of the public and would expect to be literally rubbing elbows.

[35] He accepted as a term of his carriage a condition that Via Rail reserved the right to inspect his luggage for reasons of safety. This condition on his ticket does not authorize a drug search by the police but does impact on the accused's belief he has absolute control over the contents of his baggage. There is no evidence as to the likelihood of a Via Rail safety search and I accept that it would be uncommon.

- nature of the search (technology): Justice Binnie in *Tessling*, *supra*, agreed the use of technology by the state to look into homes and invade privacy interests of individuals is a concern and the fear of same may cause undue anxiety. I agree with the analysis of Judge Daniel in *R.v. Mercer [2004] A.J No 634* that the technology of the dog's nose is not so complex and mysterious as to alarm the public. "A dog's nose has long been a device often in public use for hunting and for search and rescue operations. Unlike the ionic wand, the Flir, binoculars or a flashlight, no technology is involved when a dog sniffs. People know and understand exactly how a dog's nose works. It works exactly like theirs, only is much more sensitive"( para 45). The use of the dog to detect contraband is reasonable. The surgical precision of the process to provide information on the presence of contraband with such a high degree of accuracy without intruding into any other aspect of the targets life is remarkable.

[36] In conclusion, I am of the opinion the accused did not have a subjective expectation of privacy that could reasonably be supported. I do not think there is a difference in McCarthy passing Constable Daigle and Boris standing inside the terminal door and Daigle taking five or six steps behind McCarthy to accommodate a sniff. McCarthy chose to travel by public transport which would provide no

control or protection from others entering his immediate space. The use of dogs by police was known and he was aware of the effect of passing in close proximity of such a dog. The use of trained police dogs to detect the scent of contraband in public areas such as train, bus and airplane depots is a legitimate police investigatory tool and does not infringe on any legitimate privacy interest protected by section 8 of the Charter.

[37] For clarification, although the common law discretion to exclude evidence because "it would result in unfairness if it was admitted at trial, or if the prejudicial effect of admitting the evidence outweighs its probative value" *( R. v. Buhay, supra, para. 40 )* was not argued I do not think my decision would be different.

[38] I have had the benefit of reading the decision of Judge Daniel in *R. v. Mercer, supra* and her summary of the conflicting and unsettled state of Canadian law with respect to the issues which arise in the context of this case. Although I came to the conclusion Mr. McCarthy did not have a reasonable expectation of privacy which would be protected by s. 8, if others were to disagree with me I would adopt the reasoning (mutatis mutandis) and the conclusions reached by

Judge Daniel with respect to the application of s. 24 (2) and in particular the following:

- the cocaine is real evidence and the accused was not conscripted against himself and its inclusion would not effect the fairness of the trial;

- the breach, in the context of these facts, was not serious enough to warrant exclusion of the evidence;

- should the evidence be excluded the administration of justice would be brought into disrepute.

**Arrest and Search**

[39] Based on the indication from Constable Daigle that Boris had indicated a positive scent of narcotics and that the scent came from the backpack I agree with Corporal Fraser that he had reasonable and probable grounds to arrest the accused as he did. The 92% success rating of Boris together with the behaviour of Mr.

McCarthy provided the necessary foundation for a lawful arrest. The interest in continuing the investigation to confirm and recover the narcotics does not detract from the lawfulness of the arrest *(R. v. Storrey, [1990] 1 S.C.R. 241)*.

[40] The search of the backpack by Constable Pattison was directed by Corporal Fraser and was incidental to the arrest. Although a warrantless search it was reasonable on the same grounds as the arrest. The search at the site was justified both for safety reasons and to recover evidence *( R. v. Caslake, [1998] 1 S.C.R 51).*

**Conclusion**

[41] The application of the accused to exclude evidence based on a breach of his Charter rights is denied.

J.