IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacIntyre, 2010 NSPC 30

Date: 2010 March 5
Docket: 1979441-7
Registry: Halifax

Between:

Her Majesty the Queen

v.

Jay Leon Scott MACINTYRE aka John Leon MACINTYRE

DECISION ON CHARTER MOTION

Judge:	The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.
Heard:	January 8, 2010
Date of Decision:	March 5, 2010
Charges:	That he, on or about the 13th day of September, 2008 at or near Cole Harbour, Nova Scotia, did unlawfully rob Cory Saunders, contrary to Section 344 of the Criminal Code. And further that he did unlawfully have in his possession property of a total value not exceeding $5,000.00, the property of Cory Saunders, knowing that it was obtained by the Commission in Canada of an indictable offence, to wit., theft, contrary to Section 355(b) of the Criminal Code.

And further that he at the same time and place aforesaid, did unlawfully have in his possession a weapon, to wit., a Lakefield .22 caliber rifle, for a purpose dangerous to the public peace, contrary to Section 88(1) of the Criminal Code.

And further that he at the same time and place aforesaid, did possess a firearm, to wit., a Lakefield .22 caliber rifle, knowing he was not the holder of a license under which he may possess it and a registration certificate for the firearm, contrary to Section 92(1) of the Criminal Code.

And further that he at the same time and place aforesaid, did without lawful excuse have possession of a firearm to wit., a Lakefield .22 caliber rifle, knowing that the serial number on it had been altered contrary to Section 108(1)(b) of the Criminal Code.

And further that he at the same time and place aforesaid, did without lawful excuse store a firearm, to wit., a Lakefield .22 caliber rifle in a careless manner, contrary to Section 86(2) of the Criminal Code.

Counsel: Perry Borden, Crown Attorney
Patricia Jones, Defence Attorney

By the Court:

[1] In proof of the charges herein against Jay Leon Scott MacIntyre, aka John Leon MacIntyre, herein called the Accused, the Crown seeks to admit into evidence: a pair of sneakers, a necklace with pendant and a Lakefield .22 calibre rifle. These items were seized by the police from the Accused's bedroom at 56 Arklow Drive, Dartmouth as a result of a search by the police therein on September 14, 2008.

[2] The search of the Accused's bedroom and the resulting seizure of the sneakers, necklace with pendant and .22 calibre rifle occurred without a search warrant authorization. As such, the Accused claims that his S.8 **Charter** rights were infringed and thereby seeks an order pursuant to S.24(2) of the **Charter** excluding the seized items as evidence in this trial. The Crown claims that consent was given to RCMP officer, Constable MacGowan by Caroline MacIntyre, grandmother of the Accused, to carry out the search of the Accused's bedroom.

[3] In the course of assessing the Accused's claim that his S.8 Charter rights were breached, the following issues required assessment and determination:

1) whether the Accused had an expectation of privacy sufficient to give him standing to assert a S.8 **Charter** breach; 2) if it is determined that the Accused had standing, was his expectation of privacy sufficient to preclude Caroline MacIntyre from having authority to give a valid consent to Constable MacGowan to search the Accused's bedroom and seize items therefrom; 3) if Caroline MacIntyre lacked authority to provide the consent relied upon by the police, should the evidence be excluded by an order issued pursuant to S.24(2) of the **Charter.**

[4] According to the decision in R. v. Edwards (1996), 104 C.C.C. (3d) 136 the Accused must show an infringement of his own reasonable expectation of privacy, which is to be determined on the basis of the totality of the circumstances and, in particular: (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access, including the right to admit or exclude others from the place; (vi) the existence of a subjective expectation of privacy; and (vii) the objective and reasonableness of that expectation.

[5] I conclude from the evidence called during the **Charter** *voir dire* that the Accused had an expectation of privacy sufficient to give him standing to raise the S.8 **Charter** issue. However, I have concluded that the Accused's expectation of privacy was insufficient to preclude Caroline MacIntyre from having authority to provide a valid consent authorizing Constable MacGowan to search the Accused's room and seize what he believed to be evidence. I have also concluded that the consent given by Caroline MacIntyre was both voluntary and given with the knowledge that Constable MacGowan had a reason to suspect that the Accused had committed a robbery and that items taken in the suspected robbery might be in the Accused's bedroom. If I am mistaken relative to the authority of Caroline MacIntyre to provide a valid consent to the police, following the analysis prescribed by the Supreme Court of Canada in the decision of R. v. Grant (2009), 245 C.C.C. (3d) 1 and its companion case of R. v. Harrison (2009), 245 C.C.C. (3d) 86 I would not have been persuaded that the evidence should be excluded pursuant to S.24(2) of the **Charter** in order to avoid bringing the administration of justice into disrepute. To have done so in this case would have had a negative effect on the repute of the administration of justice. What follows are the reasons for these conclusions.

[6] Caroline MacIntyre, grandmother of the Accused, and her husband have resided at the 56 Arklow Drive property since 1991. It was not clear from the evidence whether Caroline MacIntyre and her husband jointly owned the 56 Arklow Drive property or whether title to that property was solely in the name of Caroline MacIntyre's husband at the time her consent was given. Assuming the latter situation regarding title to that property, which I conclude would be a lesser interest in that property than would be the case if Caroline MacIntyre was a joint holder of title, I am nevertheless satisfied that Caroline MacIntyre would have had at least an interest in the property by virtue of the **Matrimonial Property Act** and that such interest, together with her joint occupation of the property with her husband, would have been sufficient to establish authority to conduct a search within her home.

[7] In the course of assessing whether that authority to provide a valid consent extended to the Accused's bedroom and would therefore be sufficient to override the Accused's expectation of privacy, I have considered the following factors: 1) the Accused, who is now 22 years of age, has, according to Caroline MacIntyre's evidence, lived with his grandmother and

his grandfather at 56 Arklow Drive since he was six years of age. Also living at the 56 Arklow Drive property on September 14, 2008 were Caroline MacIntyre's daughter, Valerie MacIntyre, mother of the Accused and Caroline MacIntyre's granddaughter, Holly MacIntyre, sister of the Accused. I conclude that Caroline MacIntyre and her husband had permitted their daughter and their daughter's two children to move in and reside with them, an arrangement which carried on for a significant number of years. 2) Despite the evidence of Caroline MacIntyre that the Accused was paying rent, I conclude that there was no formal landlord tenancy relationship. The evidence was insufficient to even characterize the living arrangement between the Accused and his grandparents as a room and board relationship. Caroline MacIntyre, in describing the "rent" she claimed the Accused was paying, stated that he was paying "what he could". I characterize this loose arrangement as no more than a contribution toward household expenses for the ongoing permission given to the Accused by his grandparents to continue residing with them once he started working in 2007. The Accused's mother does not pay rent to reside at 56 Arklow Drive. 3) There was no lock on the Accused's bedroom door and, according to Caroline MacIntyre's evidence, the Accused rarely closed his door, even when he

went to work. 4) Caroline MacIntyre was able to enter the Accused's bedroom as she wished, however, generally the only time she entered the Accused's bedroom was to pick up and return his laundry. 5) There is no evidence that the Accused carried on a business from his bedroom. The evidence did indicate that the Accused had recording equipment in his bedroom which he used on occasion to allow friends to record music. The Accused had permission from his grandparents from time to time to bring friends into his bedroom. 6) The Accused was not present when the search of the bedroom took place by Constable MacGowan and when the consent to do so was given by Caroline MacIntyre. 7) There was no evidence given by the Accused as to his subjective expectation of privacy.

[8] Defence counsel has characterized the entry and taking of items from the Accused's bedroom by Constable MacGowan as a search and seizure. I therefore have employed that same language for sake of consistency. However since a valid consent was given for this impugned State activity, technically speaking there was no search or seizure. Those terms only apply to non-consensual State activity. (See R. v. Willis (1992), 70 C.C.C. (3d)

529 (Ont. C.A.). Where there is consent, it is more accurate to say that the police have merely received or gathered evidence.

[9] The police have a duty to investigate or follow up on suspected criminal activity. In this case, Constable MacGowan, despite the absence of any reported robbery by the alleged victim, had reason to at least suspect from the information provided to him by Holly MacIntyre that her brother, the Accused, had committed a robbery and that items taken in the robbery were in the Accused's bedroom. Seeking consent to enter and look for suspected evidence of a suspected robbery was in furtherance of that duty to investigate suspected criminal activity. The police therefore need not have a reasonable and probable grounds belief that an offence has occurred or that evidence of an offence exists in a certain place in order to ask for consent to enter and look in a certain place.

[10] The fact that Constable MacGowan was called to the 56 Arklow Drive property was rooted in a concern that Valerie MacIntyre had about the Accused's behaviour which resulted in a damaged door and a punched hole in the wall at the 56 Arklow Drive property. The Accused's angry and

aggressive behaviour arose during an argument between he and his sister, Holly MacIntyre, who had accused him of being involved in a robbery that she had learned about from friends. Those friends were also mutual friends of Cory Saunders, the alleged victim of the robbery, to whom Cory Saunders had reported the robbery on September 13, 2008 and provided a description of the perpetrator.

[11] It is clear from the evidence that the police acted in good faith and had a reasonable basis to believe that Caroline MacIntyre was in a position to provide them with consent to enter the accused bedroom. Once in the bedroom, the Lakefield .22 caliber rifle, which Constable MacGowan believed was a prohibited weapon, was in plain view, lying on the bedroom floor. The sneakers and necklace with pendant were retrieved from the bedroom closet by Holly MacIntyre who followed Constable MacGowan into the Accused's bedroom. She gave those items to the police.

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R. Brian Gibson, J.P.C.
Associate Chief Judge