

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Harvey, 2007 NSPC 16

**Date:** May 24th, 2007

**Docket:** 1715934

**Registry:** Halifax

Her Majesty the Queen

v.

Jason Harvey

**DECISION**

**Judge:** The Honourable Judge Jamie S. Campbell

**Heard:** March 19<sup>th</sup>, 2007

**Oral decision:** May 24<sup>th</sup>, 2007

**Charges:** Criminal Code Section 86 (1)

**Counsel:** Crown - Richard Hartlen  
Defence - Joel Pink

[1] In the early morning hours of October 29, 2006 two RCMP officers found a 30-06 Winchester rifle and four 30-06 cartridges in the parked unlocked vehicle owned by Jason Harvey. The rifle and cartridges were seized and Mr. Harvey has been charged careless storage of a firearm contrary to section 86(1) of the Criminal Code.

[2] Cpl. Bushell and Cst. Moreau of the Enfield detachment of the RCMP were dispatched to a residence on the Northfield Road in Noel, Hants County Nova Scotia to investigate a disturbance. They arrived at the home at 2:10am. While there, they saw a vehicle passing by the residence, driving at a slow speed with what appeared to be either a dome light or a flashlight lit in the vehicle. They were told that the person involved in the disturbance under investigation was a female who had been driving a minivan. The vehicle passing the house appeared to have been a minivan.

[3] The RCMP officers then pursued the vehicle. It's speed increased significantly from about 50 kms an hour to between 80 and 100 km an hour. The vehicle was in fact not a minivan but a Toyota 4- Runner owned and operated by Jason Harvey. Mr. Harvey, in a brief unsigned statement given to the police the next day, confirmed that he had been the driver they had been trying to catch. Mr. Harvey maintained in that statement, somewhat incongruously, that he had tried to evade them because he had an expired motor vehicle inspection sticker, yet said that he did not know that the vehicles in pursuit were the police.

[4] The police lost sight of the vehicle on the Lake Road. They had seen it turn onto that road and confirmed with bystanders near the intersection with another main highway that no minivan had passed. On closer inspection they determined that the most likely place the vehicle could have lost them was the by turning into the driveway of what they later determined to be the Harvey property.

[5] While still believing they were in pursuit of the person involved in the disturbance that was initially under investigation, they saw tire tracks leading from the Harvey driveway, down a steep embankment and onto the grass behind the house. They noted that the tracks did not appear to be of a minivan but had the more aggressive tread of a sport utility vehicle. It was at this point that the officers began to doubt that the vehicle had in fact been involved in the earlier disturbance. When they saw that the vehicle was a Toyota 4X4 they determined that it could not have been the vehicle that was involved in the disturbance.

[6] When they approached the vehicle they saw that the rear window was open. Inside the vehicle they saw a Winchester 30-06 rifle, on which there had been placed a trigger lock with the key inserted in the lock. There were also four 30-06 cartridges in the centre console of the vehicle.

[7] They seized the rifle and ammunition and left at 2:30 am.

[8] Both the vehicle and the rifle were registered to Jason Harvey and he was charged with unsafe storage of a firearm.

***Issues:***

1) Were the rifle and ammunition seized as a result of an unreasonable search and seizure and if so, does section 24(2) of the Canadian Charter of Rights and freedoms require that the evidence be excluded?

2) Was the firearm stored?

3) If the firearm was stored was it stored in a careless manner?

[9] **Seizure of rifle and ammunition:**

(a) Plain View Doctrine

[10] The search of the Toyota 4X4 was not undertaken with a warrant. It was not a search incidental arrest, an investigative detention search, or a search by consent. The circumstances were not such that the rifle could be considered to have been abandoned.

[11] The search and subsequent seizure of the rifle and ammunition could then only be justified under either the doctrine of plain view or the statutory provisions of section 117.02 of the Criminal Code.

[12] The plain view doctrine applies to justify a seizure where the initial intrusion is legal, the object is discovered inadvertently and it is immediately apparent that the object seized is evidence of an offence.

[13] The RCMP were legally on Mr. Harvey's property. The driver of the vehicle had, for whatever reason, been trying to evade the police. Mr. Harvey's statement confirms that he was indeed trying to get away from them. At the time, the police assumed that it was because he was involved in the incident under investigation but in any event, Mr. Harvey had for whatever reason tried to get away from the police, and they were justified in coming on to his property.

[14] When the officers arrived it appeared as though the driver had left the vehicle. The back window appeared to have been left open. The officers had found the vehicle, the driver of which had been trying to evade them moments earlier.

[15] It was reasonable in the circumstances for the officers to approach the vehicle to make at least a cursory inspection of it. In making that cursory inspection they noticed the rifle. At that point the complexion of the situation changed. The police had found the unlocked vehicle that had been involved in a chase, with a rifle in it, in the middle of the night, in a rural area. To make

matters worse, the vehicle itself was at the bottom of a hill close to a wooded area. They had no way to know why the driver of vehicle had fled and no way to know whether he or she was alone, had more weapons or was in the immediate area. From a tactical point of view it would have to be considered a potentially high risk situation.

[16] The police were acting properly within their scope of authority in coming onto the Harvey property and making a visual inspection of the inside of the vehicle. The first aspect of the plain view doctrine was clearly met.

[17] The police were not looking for a weapon. The rifle itself was not hidden from view. The discovery of the rifle was inadvertent. Spotting the rifle did not require any level of attention greater than a mere casual view of the interior of the vehicle, aided only by a flashlight. The second aspect of the doctrine was also met.

[18] The third aspect of the test requires that it be apparent that the item seized be evidence of an offence. Clearly the test does not require that the police be able to determine from immediate observation at the scene that an offence has been committed. The seizure of drugs under the plain view doctrine would in that case be impossible because the substance observed had, at the time of its seizure not been analyzed. While finding a rifle in the back seat of an unlocked vehicle that had

been evading police moments before does not establish all of the elements of an offence, it was certainly not unreasonable on the part of the officers to have concluded that the unsecured rifle was at least evidence of the offence of unsafe storage or transportation of a firearm. The seizure was justified under the plain view doctrine.

(b) Criminal Code Section 171.02(1)

[19] Section 171.02(1) of the Criminal Code provides the police with power, without a warrant, to search for and to seize a firearm that on reasonable grounds is believed to have used in the commission of an offence. The power may only be exercised where the conditions for obtaining a warrant exist but by reason of exigent circumstances, it would be impractical to obtain a warrant.

[20] Exigent circumstances means that there was no time to obtain a warrant because of danger to any persons or that the loss or destruction of the evidence was imminent. A warrant can be obtained by telephone within about an hour. The police have the ability in their vehicle to check on the vehicle and property involved and to determine whether there are any firearms registered to the person shown as the owner of the vehicle and the home. The question is then whether the police should have taken other steps rather than immediately seizing the rifle.

[21] There were two officers involved. If they were to obtain a warrant they would have to

have remained at the scene to guard the evidence to make sure that it was not somehow removed

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or destroyed. While they could have checked to see what if any weapons were registered to the owner of the home, that is cold comfort if an illegal firearm is involved. They had no way of knowing, at that point why the person driving the vehicle was trying to evade them. They had no way of knowing whether the person was alone, was watching them from the woods or the nearby house or was at that time under the influence of drugs or alcohol. The vehicle was parked in a dark area so that maintaining a watch over it would in itself have been potentially dangerous.

[22] The work of the police is inherently dangerous. The fundamental rights of citizens must be respected and that sometimes may involve exposing the police to a higher level of risk. The police however should not be required to take risks with their personal safety that are unreasonable. The level of risk to which the police may have to be exposed may be increased as the as the potential intrusiveness of their actions in securing the evidence increases. Here the potential danger to the police officers far outweighed the intrusiveness of their actions in seizing the rifle.

[23] They had three options at the time. They could have seized the rifle, as they did. They could have left the scene and obtained a warrant or they could have secured the scene and obtained a warrant. Leaving a loaded rifle in an unsecured vehicle that had just sought to evade them could have been seen as irresponsible. Had something happened with that rifle during the



time it took to obtain the warrant the officers would have been exposed to considerable criticism.

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[24] Had they remained, watching the vehicle, while the warrant was obtained, they would have exposed themselves and potentially others to a significant risk. The circumstances, which have already been outlined, would have made that an unnecessary and unreasonable risk.

[25] The reasonable option was to seize the weapon. The exigent circumstances as contemplated by section 171.02(1) were present.

(c) Section 24(2)

[26] If however the rifle was obtained in as manner that infringed Mr. Harvey's rights the issue then is whether that evidence should be excluded on the basis that its inclusion would bring the administration of justice into disrepute.

[27] Determining whether the admission of the evidence would bring the administration of justice into disrepute must be done having regard to the view of a reasonable person, who is not involved in the case and who is fully apprised of the circumstances of the case. That involves a consideration of the nature of the evidence seized, the way it was obtained and a more general consideration of the affect the exclusion of the evidence would have on the administration of

justice.

[28] If it is decided that the admission of the evidence would render the trial unfair, the evidence must be excluded. In this case, clearly the evidence obtained by the police was not conscriptive. Mr. Harvey was not compelled to make a statement or to provide a bodily substance. The rifle was found without any involvement by Mr. Harvey. When evidence is non-conscriptive in nature, it's exclusion or admission will depend on the remaining two factors.

[29] The seriousness of the breach is a second factor to be considered. The focus at this stage is on the nature of the alleged breach itself. If there were a breach in this case, it was not deliberate, flagrant or committed in bad faith. While police bad faith will strengthen the case for exclusion to remedy the breach, police good faith does not strengthen the case for admission.

[30] This was not a case where there would be no grounds for a warrant. The police were not acting on that basis. The reasons for not obtaining a warrant were practical considerations of safety.

[31] The police were confronted with a situation that required them to balance legal and practical considerations. They had just pursued a vehicle driven by a person who was trying to

evade them. When the vehicle was found it appeared at least to have been parked in a place that was intended to keep it hidden from their view. It was 2am on a rainy night in a rural area. By simply looking in the open window of the unlocked vehicle they could see a high powered hunting rifle. Where they stood they were potential targets of someone intent on doing them harm.

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[32] At this point, they could either seize the rifle or do something else. They could not have simply left. Their only other option was to call for a warrant while remaining at the scene. They could have obtained information on Mr. Harvey while they waited. Even if that information had disclosed that Mr. Harvey was a peaceful law abiding citizen, that would not confirm that he had been driving the vehicle, nor would it explain why the driver had been trying to evade them. Given a choice between remaining at a potentially dangerous scene and seizing the rifle the decision made by the officers in this case was a reasonable one. In any event, it was not a flagrant breach of Mr. Harvey's rights.

[33] The third aspect of the inquiry under section 24(2) is the affect exclusion of the evidence would have on the administration of justice. That involves a balancing of the interests of truth with the integrity of the justice system. The onus is on the applicant to show that the admission of the evidence would bring the administration of justice into disrepute. The issue is whether any violation of Mr. Harvey's rights was sufficiently serious that it outweighs the interests of the Crown in admitting the evidence.

[34] The value of fundamental constitutional rights can risk being trivialized in assessing the impact in individual cases. Some breaches may be seen to be almost insignificant but if they are routinely allowed to be trumped by the interests of the Crown in the prosecution of cases the rights they represent are undermined. The impact of the admission of evidence obtained in breach of a person's constitutional rights must be considered in light of its broader implications.

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[35] In this case however, both broader implications, as well as those specific to the situation, favour the admission of the evidence. Police officers should not be required to seriously compromise their safety and the safety of others in preserving evidence which is in itself potentially dangerous. Any alleged infringement of Mr. Harvey's rights was minimal. The exclusion of the evidence in these circumstances would place disproportionate emphasis on that breach and place insufficient importance on the interests of society in having a trial that is fundamentally fair.

***Storage:***

[36] Mr. Harvey is charged careless storage of a firearm contrary to section 86(1) of the Criminal Code. Mr. Pink argued that the rifle in this case was not stored.

[37] As noted by the Supreme Court of Canada in *R. v Carlos* (2002) 163 C.C.C. (3d) 449, there are no temporal requirements for storage. There is no requirement that the accused plan a

long term permanent storage of the firearm. In that case, the accused placed a hand gun in what was described as an “ill-planned, temporary hiding spot”. A number of guns were put aside when the police attended the accused person’s house to execute a search warrant. The evidence of the accused was that he had been cleaning the guns and intended to properly store them before going to a scheduled meeting with the police. He panicked when the police arrived to execute the warrant.

[38] The Supreme Court held that there are circumstances in which a short interruption in the use or handling of the firearm will constitute use or handling and not storage. In that case, the accused had taken some steps to put away and hide the weapons so that his actions could properly be characterized as constituting storage of the weapons.

[39] The term “store” as used in section 86(1) requires an intentional placement of the object along with an intention that the object remain there, out of the person’s immediate control yet retrievable by him. If the object is within the person’s immediate control he is using or handling the object.

[40] In this case, Mr. Harvey left his rifle in the vehicle. There is no evidence to suggest that it had remained in his immediate control. To the contrary, the evidence of Mr. Harvey’s friend, Mr. Leander Paul, was that the rifle had been kept in the vehicle so that he could come by to pick it up between 4:30 am and 5:00am the next morning. Mr. Paul’s evidence as that he was borrowing

Mr. Harvey's rifle to go hunting because he could not afford ammunition for his own hunting rifle.

[41] While this does appear to be a rather unusual arrangement, it does confirm that Mr. Harvey had left the rifle in the vehicle intentionally, with the further intention of having it remain out of his immediate control for at least a period of some two hours or more. In those circumstances the rifle was stored as that term is used in section 86(1).

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***Carelessness:***

[42] It is significant that the charge against Mr. Harvey is made under section 86(1) and not section 86(2). The latter section makes it an offence to fail to comply with regulations made pursuant to the Firearms Act. Section 86(1) creates the offence of careless storage. Failure to comply with the provisions of the *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations* (SOR/98-209) (the "Regulations") does not necessarily mean that an offence has been committed under section 86(1). There must be a marked departure from the standard of care of a reasonably prudent person. If there is a reasonable doubt as to whether there has been such a marked departure or if reasonable precautions were taken to discharge the duty of care, the accused person should be acquitted. *R. v. Gosset* 23 C.R. (4<sup>th</sup>) 280, 157 N.R. 195, 83 C.C.C. (3) 494, 105 D.L.R.(4<sup>th</sup>) 681, [1993] 3 S.C.R. 76, 17 C.R.R. (2d) 77.

[43] The Regulations, prescribe requirements for the storage of firearms. Storage of a firearm in a manner that does not comply with the Regulations constitutes an offence under s. 86(2). The Regulations are also relevant in setting the standard for storage of firearms. The issue for an offence under section 86(1) is whether there has been a marked departure from that standard.

“ It is possible to imagine a situation where none of the requirements of the regulation were met - say a loaded firearm kept in a hermit’s remote cabin- where no danger was created by the manner of storage. Conversely, it is possible to imagine compliance with all

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of the requirements of the regulation while still being careless within the meaning of subsection 1- say by doing what the regulation requires but leaving the required keys with a 10 year old boy.” *R. v. Lulic* 2003 WL22883132 (Ont. C.J.), 2003 CarswellOnt 4963, 58 W.C.B. (2d) 96, [2003] O.J. No. 5961, para.9

[44] The Regulation is relevant in determining the appropriate standard but the breach of the Regulations does not constitute an offense under section 86(2).

[45] A breach of the Regulation is not enough. Negligence is not enough. There must be a marked departure from the standard of reasonable care . While civil negligence deals with the apportionment of loss, negligence in the context of criminal law deals with the punishment of moral blameworthiness. ( *R. v. Gosset supra. para. 37*)

[46] In dealing with the issue of a marked departure from the standard of care of a reasonable person, the Supreme Court of Canada in *R. v. Gosset*, supra., held that it was appropriate for the criminal law to punish those who failed to act reasonably.

[47] Once a determination is made that the conduct of the accused was a marked departure from the standard of care, the second question is whether he simply did not turn his mind to the issue or lacked the mental capacity to turn his mind to the duty of care.

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[48] If the accused lacked that mental capacity, the issue is whether a reasonable person with the capacity of the accused would have made himself aware of the standard of care.

[49] There is no evidence in this case that Mr. Harvey lacked the capacity to turn his mind to the standard of care. The question is whether his conduct was a marked departure from that standard.

[50] In this case the firearm was found in a vehicle. The Regulation provides that a firearm may be transported in an unattended vehicle only if it is in a locked trunk or compartment, or if there is no such trunk or compartment, it is not visible from outside the vehicle and the vehicle or part containing the firearm is securely locked. The charge in this case is careless storage not careless transportation but it is significant that the rifle was found in a vehicle.



[51] Mr. Harvey contends that he had left the rifle in his vehicle, with a trigger lock in place with the intention that it be picked up only a few hours later by Mr. Paul. The vehicle was parked behind his home, some number of yards from the nearest home, in a rural area, late at night. He argued that this was not a marked departure from the standard of care of a reasonable person.

[52] The Regulations contemplate circumstances where firearms are transported in remote wilderness areas. In such areas, where firearms are in a vehicle than cannot be locked and have no lockable compartment, they must be not visible and must be rendered inoperable by a secure locking device.

[53] The area of Hants County is rural but it is hardly remote wilderness. The circumstances may however be analogous. In remote areas, the chances of passers by picking up the firearm are very limited. Even so, the standard requires that some effort be made to secure the firearm. The obligation on the owner of the firearm is not onerous.

[54] Under s. 86(1) the circumstances and the efforts made to insure safety must be considered. Firearms are inherently dangerous. When being used or handled great care must be taken. In their storage, efforts must be made to secure them against theft or misuse. Because they are inherently dangerous objects the law imposes special obligations that recognize the public interest in keeping them out of the hands of those who could potentially endanger the safety of others.

[55] There are any number of inherently dangerous objects that can be found a home, garage or farm building. People with even the most basic level of prudence and common sense would not allow a toddler to have access to a box cutter knife. Drain cleaner is kept out of reach of children. Chainsaws and blowtorches are normally not given to children. Yet, despite the dangerous nature of each of these items, government has not regulated the ownership, possession, transportation and storage of box cutters, drain cleaner, chainsaws or blowtorches.

[56] The care to be taken on dealing with firearms is well beyond that required of those dealing with other inherently dangerous objects. Firearms are a target for theft. Stolen firearms that make their way into the hands of those willing to use them in the commission of violent crimes present a danger to society that all gun owners share a level of responsibility to prevent.

[57] The reasonable precautions to be taken in storing a firearm exceed the precautions that one would take in storing unregulated dangerous items or one's own valuable possessions. While a person may choose to take the risk of theft of his own property he does not have the right to expose others to the risks of allowing firearms to get into the wrong hands.

[58] In this case, Mr. Harvey did not even make inadequate efforts to secure the rifle. The only

precaution taken, if in these circumstances it could even to be considered as such, was the placing of a trigger lock on the rifle. Even that most minimal precaution was defeated by his leaving the key in the lock. The rifle was kept in full view and ammunition was kept readily available in the unlocked vehicle.

[59] The facts that it was late at night, in a rural area and that Mr. Harvey intended to have Mr. Paul pick up the rifle a few hours would not justify his actions under the Regulations. They are relevant however, in determining whether his behaviour constituted a marked departure from the standard of a reasonable person. A reasonable person would have kept the rifle in a locked compartment or out of sight with a trigger lock in place. Failing to do keep the rifle out of sight or

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failing to have a trigger lock in place might be merely negligent in light of the location and the short period of time that the rifle was to be kept there. That might have been an understandable though negligent failure to exercise sound judgment. That is a situation where one has considered safety precautions and made a decision that was not a reasonable one.

[60] Having the rifle in plain sight, in an unlocked vehicle, with the rear window either lowered or removed, with a trigger lock on the rifle that would not present any kind of hurdle to anyone intent on using the rifle, with ammunition within easy reach is evidence of a failure on Mr. Harvey's part to turn his mind in even the most passing way to safety. That is a marked departure from the standard of a reasonable person.

[61] I find Mr. Harvey guilty of the offence as charged.

Jamie S. Campbell

Provincial Court Judge