IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Stone, 2009 NSPC 10

Date: March 18, 2009
Docket: Case Number(s)
1879957
1879958
1882436
1882437
1882438
Registry: Halifax

Between:

The Queen

v.

Justin David Stone

DECISION ON *VOIR DIRE*

Judge:	The Honourable Judge Marc C. Chisholm
Heard:	March 18, 2009, in Halifax, Nova Scotia
Charge:	(1) s.5(2) CDSA, possession of cannabis (marihuana) for the purpose of trafficking (2) s.5(2) CDSA, possession of cocaine for the purpose of trafficking (3) s.88(1) CC, possession of a weapon for a purpose dangerous to the public peace (4) s.90 CC, carrying a concealed weapon (5) 733.1(1)(a) CC, breach of Probation
Counsel:	Shaun O'Leary, Federal Crown Darrell Martin, Provincial Crown Nicole Campbell, for the defense

Background

[1] Mr. Stone is charged with possession of cocaine for the purpose of trafficking, possession of cannabis marihuana for the purpose of trafficking, possession of a weapon for a purpose dangerous to the public peace, carrying a concealed weapon, and breach of probation.

[2] The defense have alleged a violation of the accused's section 8 and section 9 Charter rights. The defense have also contested the voluntariness of a statement given by the accused to the police. The defense seek an order excluding admission of the accused's statement to the police and exclusion of the results of the search of the accused's person. The motion was heard on a *voir dire*.

Evidence and findings of fact

[3] There were three witnesses who gave evidence on the *voir dire*. The facts are not in dispute.

[4] On February 6, 2008, Constable Lynch and Constable Cromwell were on foot patrol on Spring Garden Road in Halifax, Nova Scotia. As they were walking west just beyond the Spring Garden Road courthouse, they passed the accused who was walking east on the sidewalk toward the courthouse.

The officers noted a strong smell of freshly burned cannabis marihuana coming from the accused. They turned and, when the accused stopped outside the courthouse, the officers approached him. There was no one else around. Constable Lynch noted he was smoking a cigarette. Constable Lynch asked his name and he promptly gave it. Constable Lynch explained that the reason they approached him was because they detected a strong smell of marihuana coming from him. She asked him if his cigarette was a marihuana cigarette. The accused responded that it was a regular cigarette but he had just smoked a marihuana cigarette. Constable Lynch asked him where. The accused answered: “In front of the Park Lane.” The Park Lane is a mall on Spring Garden Road within a five minute walk of the courthouse. Constable Lynch asked him where the roach was and he told her he dropped it at the mall. He said he did not have any other drugs on his person. Mr. Stone was described as very cooperative. The officer noted that the accused appeared tired, spoke slowly and was very quiet. Neither officer had prior contact with Mr. Stone and, thus, no knowledge of his usual demeanor and speech. Constable Lynch told the accused she was going to run a check on him by means of her police radio. While she ran the check on the defendant he talked with Constable Cromwell. He told Constable Cromwell that he was

addicted to marihuana. Constable Lynch was uncertain if she was told that information before she arrested Mr. Stone. The accused indicated to both officers more than once that he had a meeting at the court and was concerned that he was going to be late. Constable Lynch told him not to worry and that he had to deal with this matter first.

[5] The radio CPIC check revealed that the accused was on a condition to keep the peace and be of good behavior and was pending on a possession of an illegal drug charge. Following the CPIC check, Constable Lynch arrested the accused for possession of cannabis marihuana. Constable Lynch stated that, given the accused's recent use of cannabis marihuana, the time of day of such use of cannabis marihuana, the fact that he smoked the cannabis marihuana at a public mall, that he consumed cannabis marihuana before returning to a meeting at court, that she had reasonable grounds to believe he was currently in possession of more cannabis marihuana.

[6] Relevant to her grounds to arrest Mr. Stone, Constable Lynch testified that she had received training on the smell of marihuana which involved her being present for a test burn of marihuana in 2007. She stated that she grew up with a brother who was a drug addict. She testified that she had experience observing the smell of marihuana and could distinguish a strong

smell from a faint smell. The stronger the smell, the more recently the drug was smoked.

[7] The search of Mr. Stone resulted in the discovery of $515 cash, a knife, a cell phone, ten one-inch baggies containing a total of 12.4 grams of cannabis marihuana, and eight tin foil pieces of crack cocaine--a total of 1.39 grams--in a Dentyne gum package. The search involved a pat down head-to-toe search by Constable Cromwell, including the officer sliding his hand around the accused's waistband. No clothing was removed. The search was conducted on the sidewalk outside of the courthouse.

[8] Constable Lynch wasn't clear in response to questions concerning what she would have done if Mr. Stone had been uncooperative. She testified that when she approached Mr. Stone she didn't want to over-react or under-react to having smelled the cannabis marihuana. At the time of this incident, Constable Lynch had been a peace officer for three and a half months.

[9] I accept the evidence as I've set it out above. I also find that Constable Lynch, as a result of her experience with her brother and her police training on the smell of marihuana, was able to identify the smell of burned marihuana and to distinguish a strong smell from a faint smell of burned

marihuana. I find that the stronger the smell of burned marihuana, the more recently it was smoked.

[10] I accept the evidence of Constable Lynch and find that there was a strong smell of recently burned marihuana coming from the person of Mr. Stone.

[11] I accept the evidence and find that Mr. Stone appeared tired, spoke slowly and was very quiet. I accept that Constable Lynch believed these observations to indicate that Mr. Stone was under the influence of marihuana.

[12] I accept the evidence of Constable Lynch and find that her grounds to arrest were:

(a) a strong smell of freshly burned marihuana coming from the accused;

(b) observations of the accused's physical condition which Constable Lynch considered to be evidence of Mr. Stone being under the influence of marihuana;

(c) that the CPIC check indicated that the accused was pending on a charge contrary to the CDSA;

(d) that it was 10:00 in the morning and the accused was outside the courthouse on a public sidewalk and planning to go into the courthouse for a meeting;

(e) that the accused admitted to recently smoking a marihuana cigarette in a public place.

[13] This rather simple fact situation gives rise to a number of legal issues.

Detention

[14] The defense submits that Mr. Stone was detained from the outset of his contact with the police as he was a suspect in relation to the offence of possession of cannabis marihuana and, therefore, should have been advised of his rights. The Crown submits that, prior to his arrest, Mr. Stone was not detained and, therefore, no police duty under the Charter was triggered prior to arrest. The leading case on the issue of detention is **R v Therens**, [1985] 1 S.C.R. 613. In **Therens**, the Supreme Court indicated that detention may involve the deprivation of liberty by physical restraint or where a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel. There must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action to constitute a detention.

[15] In my view, a detention from the point of first contact has not been proven. The smell of cannabis marihuana from Mr. Stone caused Constable Lynch to commence an investigation of a possible offense. She approached Mr. Stone. The evidence doesn't establish that she had concluded that any offence had been or was being committed. She asked him his name. She told Mr. Stone why she approached him. He gave an explanation for the smell. She made observations of his condition and then decided to arrest Mr. Stone.

[16] During this initial time, Mr. Stone was not under arrest. He was not physically restrained. He hadn't been given any order or direction not to leave. Mr. Stone elected not to testify on the *voir dire*, so there is no evidence of what he was thinking at the time other than that disclosed by his comments to the police. There is nothing in the evidence to cause me to conclude that Mr. Stone felt he was not free to leave during this time. I'm not satisfied that Mr. Stone was detained during this time.

[17] However, when Mr. Stone expressed a desire to leave for his meeting at court and was told that he had to deal with this matter first, that statement by Constable Lynch, in my view, constituted a direction to Mr. Stone restricting his liberty and, therefore, constituted a detention of him.

[18] Before dealing with the application of the law to the facts after Mr. Stone was detained, let me address the issue of voluntariness of his statement to the police. On the evidence, there was no threat, promise or inducement of any nature made to Mr. Stone to cause him to give his statement to the police. I think it likely that Mr. Stone believed that his statement to the police was entirely or largely exculpatory. Although there was no police caution, I find that his statement has been proven to be free and voluntary.

[19] The statement of Mr. Stone to the police occurred before Mr. Stone was detained, and, therefore, before the triggering of a police duty to advise him of his rights. I find no section 10(b) violation prior to Mr. Stone's statement to the police.

[20] I have found that the direction to Mr. Stone that he had to deal with this matter before he could leave amounted to a detention of him. Was this detention lawful or arbitrary? In my view, Constable Lynch had good and valid reasons to detain Mr. Stone in order to continue her investigation. I find the investigative detention of Mr. Stone was lawful.

[21] Although the detention of Mr. Stone was not arbitrary, upon his detention he was entitled to be informed of the reason therefor and to be informed of his right to retain and instruct counsel without delay, per section 10 of the

Charter. This did not occur for a period of a couple of minutes. During this time, Constable Lynch was running a CPIC check and conferring with colleagues. No evidence was elicited from Mr. Stone during that time. After this couple of minutes Mr. Stone was arrested, searched and advised of his rights.

[22] The defense submits that the arrest was unlawful. The defense argument is that authority to arrest for a summary offense is limited to circumstances when the officer has found the accused committing the offense. In this case, the officer's stated reason for arrest was based upon reasonable grounds to believe an offense was being committed rather than her having found the accused committing the offense.

[23] Section 495(1) states:

> (1) A peace officer may arrest without warrant
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
> (b) a person whom he finds committing a criminal offence; or
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[24] Constable Lynch's evidence was that, for several reasons which she noted, she felt she had reasonable grounds to believe Mr. Stone had cannabis marihuana on his person.

[25] In the Crown brief, at paragraphs 38 and 39, the Crown submitted that Constable Lynch had reasonable and probable grounds to arrest the defendant.

[26] In **R v Stevens** (1976), 18 N.S.R. (2d) 96, the Appeal Division of the Nova Scotia Supreme Court held:

> The requirement of reasonable and probable grounds relates only to arrest without warrant in indictable offences (s.450(1)(a)) not to summary conviction offences such as creating a disturbance. In order to arrest a person without a warrant for a summary conviction offence it is not sufficient for the arresting officer to show that he had reasonable and probable grounds to believe such offence had been, or was about to be, committed; rather, he must go further and show that he found a situation in which a person was apparently committing an offence.

[27] What does "find committing" mean?

[28] In **R v Biron**, [1976] 2 S.C.R. 56 the Supreme Court of Canada, in dealing with s.495 (1) held:

> Paragraph (b) applies in relation to any criminal offence and it deals with the situation in which the peace officer himself finds an offence being committed. His power to arrest is based upon his own power of observation. Because it is based on his own discovery of an offence actually being committed there is no

> reason to refer to a belief based upon reasonable and probable grounds.
>
> ...[T]he validity of an arrest under this paragraph must be determined in relation to the circumstances which were apparent to the peace officer at the time the arrest was made.
>
> ...[T]he power to arrest without a warrant is given where the peace officer himself finds a situation in which a person is apparently committing an offence.

[29] Both counsel referred the court to the decision of the Saskatchewan Court of Appeal in **R v Janvier**, [2007] 227 C.C.C. (3d) 294. In **Janvier,** the peace officer stopped a truck operated by Mr. Janvier because it had a broken headlight. When the officer got close to the truck he detected an odor of burned marihuana. This observation led him to conclude that someone had been smoking marihuana in the truck and to suspect that more marihuana would be found in the truck. The officer arrested Mr. Janvier and searched him and the vehicle. Eight grams of marihuana were found on Mr. Janvier, and cash, and a list of contacts consistent with trafficking. He was charged with possession of cannabis marihuana for the purpose of trafficking. The arrest was found to be unlawful and the cannabis marihuana excluded. The decision was upheld on appeal.

[30] At paragraph 48, after reviewing numerous court decisions, the Court of Appeal summarized its position, thus:

> In summary, as a matter of statutory construction, s.495(1)(b) does not permit an arrest based on the smell of burned marihuana alone. An officer smelling burned marihuana does not find the person committing the offence of possession of marihuana. If, contrary to my primary conclusion, s.495(1)(b) permits reliance upon an inference based on observation (i.e., smell) the smell of burned marihuana alone is not sufficient to support a reasonable inference that more, un-smoked marihuana will be present.

[31] In the **Janvier** case, the Court of Appeal concluded that the arresting officer did not find Mr. Janvier committing the offense (see paragraph 29) and viewed the officer's basis for arrest as nothing more than a "suspicion."

[32] The Crown argues that the **Janvier** decision can be distinguished on four bases:

(a) It relates to a situation where the smell of burned marihuana alone was relied upon and where the officer had no special knowledge or training;

(b) In **Janvier**, there were other possible explanations for the smell of cannabis marihuana in the truck, other than Mr. Janvier having been smoking cannabis marihuana whereas, in the present case, Mr. Stone was the only source of the odor of cannabis;

(c) In the present case, the officer's evidence regarding the smell of cannabis marihuana is bolstered by Mr. Stone's admission of recent possession and consumption of cannabis, supported by the officer's observation of Mr. Stone's symptoms consistent with recent consumption; and

(d) In the present case, the time and place of the accused's prior smoking of cannabis marihuana and the fact that he was pending on a drug possession charge provide additional grounds for believing that the accused was in possession of un-smoked cannabis marihuana.

[33] Does the Nova Scotia Court of Appeal decision in **Stevens,** in defining the authority of an officer to arrest without warrant for a summary offence, permit the officer to rely on an inference? I am, of course, bound by the decision of the Nova Scotia Court of Appeal and the Court's interpretation of the **Biron** decision.

[34] I repeat the words of the Nova Scotia Court of Appeal in **Stevens**:

> The requirement of reasonable and probable grounds relates only to arrest without warrant in indictable offences (s.495(1)(b)) not to summary conviction offences such as creating a disturbance. In order to arrest a person without a warrant for a summary conviction offence it is not sufficient for the arresting officer to show that he had reasonable and probable grounds to believe such offence had been, or was about to be, committed; rather, he must go further and show that he found a situation in which a person was apparently committing an offence.

[35] The Court of Appeal did not provide further clarification on the meaning of "a situation in which a person was apparently committing an offence." In **Janvier**, the primary finding of the Saskatchewan Court of Appeal was that, to find someone committing an offence, the arresting officer could not rely on an inference. The Court went on to say that, if an inference is permitted, then the issue is whether the officer's subjective belief was objectively reasonable.

[36] A number of my fellow Nova Scotia Provincial Court Judges have addressed this issue.

[37] In **R v S.T.P.**, [2008] N.S.J. No. 482, His Honour Campbell, J.P.C., dealt with this issue. S.T.P. was found one evening in the parking lot of the McDonald's restaurant in Spryfield with twelve bags of white powder and $325 cash in his pockets. The items were located by search incident to arrest. The issue was the lawfulness of the arrest.

[38] The circumstances observed by the arresting officer were: S.T.P. was seated in the back seat of a moving motor vehicle. S.T.P. appeared to take note of the police and quickly turned in his seat. The vehicle pulled off the street at the first opportunity into the McDonald's parking lot. The police checked the license plate and determined that, on two occasions, it had been involved

in bail violations, one only two days prior. The officer turned and followed the car into the parking lot. On approaching the car, he smelled what he believed to be the odor of burned marihuana coming from inside the vehicle through the open rear window. The occupants were still in the car. When the passenger door was opened, he detected a strong smell of marihuana coming from within the vehicle. S.T.P. was arrested for possession of marihuana. He was searched incident to arrest.

[39] Judge Campbell stated his conclusion, at paragraphs 53-54:

> Constable Shannon did smell a substance that he reasonably believed to be burned marihuana. While he had no special training and could not lay claim to extraordinary olfactory acuity, he was, like many people, aware of what burned marihuana smells like. That was in the context of a situation where the vehicle involved had been involved in bail violations, the back seat passenger was behaving nervously having seen the police, and the driver had apparently tried to put some distance between the car and the police as soon as possible.

[40] That context supports the reasonableness of the conclusion of one who, although without special olfactory gifts or training, has a normal sense of smell and not the altogether unusual ability to at least recognize the smell of burned marihuana. Had the smell of marihuana been the sole foundation of the grounds for arrest, the officer would have to show something beyond those rather unremarkable abilities. Whereas, here, the smell is part of a

larger supporting context and, with that context, forms a practically coherent and logically consistent basis for a reasonable conclusion that marihuana may be present, there is no requirement for special training or ability.

[41] At paragraph 35, Judge Campbell said this:

> Unfounded suspicions or those that cannot be reasonably articulated cannot be raised to the level of reasonable grounds by the unaided sense of smell. In situations where the police have shown objective evidence to support the acuity of the olfactory observations, the sense of smell may be used to establish reasonable grounds. In other situations, the smell of marihuana must be considered in the context, not of any extraordinary sensory abilities, but of surrounding circumstances that logically support the reasonableness of the assertion marihuana is probably present.

[42] In my view, Judge Campbell's decision clearly accepts the argument that, in appropriate circumstances, the Court may accept as reasonable an inference that the accused is presently in possession of marihuana. Having said that, I noted that Judge Campbell, setting out a test in paragraph 54, used the phrase "marihuana may be present," and in paragraph 35 that "marihuana is probably present." Is this the same standard? How does this compare with "apparently finds committing"?

[43] In **R v Blois**, [1998] N.S.J. No. 238 (Associate Chief Judge J. Gibson), the arresting officer observed a car traveling slowly. A traffic stop was executed. Blois was the front-seat passenger. When the officer approached

the car, he noted a smell of burned marihuana coming from the inside of the vehicle. The driver was asked to exit the vehicle. She did so. The officer did not detect the smell of marihuana from her person. The officer then asked Mr. Blois to exit the vehicle. He did so. The officer detected the smell of marihuana on him. The officer had considerable experience investigating drug cases and had been present for a prepared marihuana burn to become familiar with the smell of burned marihuana. The officer arrested and searched Mr. Blois.

[44] Associate Chief Judge Gibson found that when the officer directed Mr. Blois to step out of the car for the purpose of investigating the offence of possession of marihuana he was detaining him. The search of Mr. Blois without his informed consent was unlawful. Based on that Charter violation, Associate Chief Judge Gibson excluded the one gram of marihuana found on Mr. Blois. The decision was not dependant on the issue of whether the officer had a sufficient basis for arrest.

[45] In **R v Lee**, [2000] N.S.J. No. 40 (Williams, J.P.C.), a traffic stop was executed on the car being driven by Mr. Lee because the car did not have a license plate. Mr. Lee could not produce a license. He was detained on that basis and returned to the police station. At the station, the officer noted a

smell of fresh marihuana emanating from Mr. Lee. He arrested Mr. Lee and conducted a strip search, locating 30 grams of marihuana. The officer stated that during his ten years of police experience he was familiar with the smell of marihuana and had been present for a prepared burn of marihuana.

[46] Judge Williams found that the Crown had not proven that the officer had any special training in drug smell identification nor any special ability in that regard. He found that the Crown had not established reasonable and probable grounds for the arrest. He found the officer relied on his sense of smell alone and a hunch. Given the violation of the accused's rights and the invasive nature of the search, he excluded the marihuana.

[47] In **R v Curren** (2003), NSPC 33 (Beach, J.P.C.), a traffic stop was conducted. The accused was one of two back-seat passengers. The officer stated that the driver appeared nervous. There was a smell of marihuana in the vehicle. The driver and passengers were searched. Judge Beach found that the Crown had not proven that the officer had reasonable grounds for the search of Mr. Curren.

[48] In all of these cases, the offence being investigated was simple possession of marihuana and the argument regarding the legality of the arresting officer's action was in terms of reasonable grounds. There was no discussion of the

meaning of “find committing.” These cases do not discuss the Supreme Court of Canada decision in **Biron** or the Nova Scotia Court of Appeal decision in **Stevens**. This approach is consistent with that of many other trials. (See a review of such cases in **R v Huebschwerien**, [1997] Y.J. No 24, Lilles, Terr.Ct.J.)

[49] Based upon my review of the jurisprudence, I would summarize the law in relation to arrest without warrant for a summary offense thus: The Crown must prove that the arresting officer subjectively believed that she had found an offense apparently being committed and that her belief was objectively reasonable. The officer may rely on an inference in forming her belief. The assessment of objective reasonableness of the officer’s belief necessitates a consideration of all of the facts or circumstances known to the officer at the time.

[50] In these types of cases, the key inference is that marihuana smokers, like tobacco smokers, carry a supply with them. Such an inference will not always be objectively reasonable. (See **Janvier**.)

[51] In the present case, there were the following relevant facts or circumstances:

(a) Constable Lynch, although very new to the police force, had some special training and personal experience with a family member who was a drug addict to enhance her ability to identify the smell of burned marihuana;

(b) Constable Lynch believed she smelled a strong, fresh odor of very recently burned marihuana;

(c) the accused, Mr. Stone, was the only source of the odor of marihuana;

(d) Mr. Stone, to explain the smell of marihuana on his person, volunteered that he recently smoked marihuana;

(e) the officer observed that Mr. Stone showed symptoms of being under the influence of marihuana;

(f) Mr. Stone admitted smoking the marihuana in front of a public mall before returning to the courthouse for a meeting;

(g) Mr. Stone was pending on a drug possession charge;

(h) the CPIC check indicated Mr. Stone was bound by a condition to keep the peace and be of good behaviour (a condition he would appear to have admitted violating by smoking a marihuana cigarette); and

(i) while not articulated as a reason by Constable Lynch, the accused was anxious to leave to go into the courthouse. (Constable Lynch did state that

she didn't know whether the accused's claim that he had a meeting was truthful.)

[52] On the other hand:

(a) Mr. Stone was cooperative;

(b) he denied being in possession of drugs; and

(c) the public sidewalk in front of the Provincial Court building is not a place one would expect persons to be under the influence of, or in possession of, an illicit drug.

[53] In my view, the facts or circumstances known to the arresting officer at the time of arrest provide a sufficient basis to conclude, and I do conclude, that the officer's subjective belief that Mr. Stone was in possession of marihuana was objectively reasonable. Therefore, I find that Constable Lynch had the authority to arrest for present possession of marihuana pursuant to section 495(1)(b) of the Criminal Code. Further, I find that Constable Lynch had reasonable grounds to believe that the public interest could not be satisfied without arresting Mr. Stone in order to secure evidence relating to the offence, pursuant to section 495(2)(d)(iii). I accept the evidence of Constable Lynch and find that the search of Mr. Stone was incident to his

arrest and for the lawful purpose of securing evidence. In my view, the manner of search, given the nature of the alleged offence was reasonable.

[54] I am not satisfied that the accused's section 8 or section 9 rights under the Charter were violated.

[55] The violation of the accused's section 10(b) right upon detention was brief and no evidence was obtained as a result of the breach; therefore, no exclusion of evidence will result.

[56] If I am in error in concluding that the law permits an arresting officer to rely on an inference to "find a person committing an offence," let me say that, without the inference in this case, the arresting officer had insufficient cause to arrest Mr. Stone. In that case, there would have been a violation of Mr. Stone's section 8 and section 9 Charter right. However, without going into great detail, let me say that, if I had found a breach of the accused's section 8 and/or section 9 rights, a section 24 analysis would have resulted in a decision not to exclude the evidence given due to:

(a) the seriousness of the charges facing the accused;

(b) there being no bad faith on the part of the police;

(c) the evidence not being conscriptive; and

(d) the fact that the accused could have been lawfully arrested for admittedly having violating the condition to keep the peace and be of good behaviour.

[57] The motion to exclude the accused's statement to the police is denied.

[58] The motion to exclude the results of the search of the accused's person is denied.

Dated at Halifax, Nova Scotia, this ____ day of _____ 2009.

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Judge Marc C. Chisholm