

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Dunbar*, 2008 NSPC 39

Date: 20080627

Docket: 1878585 and 1878586

Registry: Halifax

Her Majesty the Queen

v.

Ronald Dunbar

**DECISION ON LAWFULNESS OF
ARREST / SECTION 8 CHARTER RIGHTS**

Judge: The Honourable Judge Anne S. Derrick

Heard: May 16, 2008 - Halifax Provincial Court

Oral decision: June 27, 2008

Charges: *Criminal Code*, section 733.1(1)(a)
Controlled Drugs and Substances Act, section 5(2)

Counsel: Shaun O’Leary - Crown Attorney
Peter Mancini - Defence Counsel

By the Court:

[1] In the early morning hours of March 2, 2008 the Halifax Regional Police, acting on information from a confidential police source, arrested Ronald Dunbar for drug possession. Mr. Dunbar was subsequently charged with possession of cocaine for the purpose of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act*. He is challenging the lawfulness of that arrest, arguing that the reasonable and probable grounds necessary for arrest were not present in his case. Mr. Dunbar submits that when the police searched him incidental to the arrest, and found the drugs, they were conducting an unlawful search because the arrest itself was unlawful. As a consequence, Mr. Dunbar asserts his section 8 *Charter* rights were breached and, pursuant to section 24(2) of the *Charter*, the drugs uncovered by the search should be excluded from evidence.

Facts

[2] The pre-dawn hours of March 2, 2008 were rainy and miserable. Around 4:30 a.m., Csts. Walsh and Hussey were patrolling in the Gottingen Street area near Sunrise

Manor. They were operating the police van and on the look-out for any activity that suggested retaliation for a stabbing that had happened the day before. Cst. Walsh was unaware of any information relating to Mr. Dunbar and drugs, although his partner that night, Cst. Blair Hussey, had been told that Mr. Dunbar could be in the area in possession of drugs. As the police officers drove north on Gottingen Street, they observed a half-ton truck parked behind Sunrise Manor. The truck, with three people in it, in an area known for drug activity, parked where it was and at such an early hour, raised the officers' suspicions. They decided to investigate, especially as they were on high alert with respect to the recent stabbing. Passing the first driveway to the complex, the officers turned into the second driveway and coming upon the truck, turned on their van's "take-down" lights. They saw that three people were sitting in the truck. As Cst. Walsh got out from the passenger side of the police van and Cst. Hussey got down from the driver's seat, Mr. Dunbar "popped" out of the passenger seat of the truck and tried to walk past the side of the police van. Cst. Walsh, recognizing Mr. Dunbar, greeted him with: "What's up, Ronnie?" At this moment, Cst. Hussey snapped his head around and said to Cst. Walsh that Mr. Dunbar was supposed to be in possession of crack cocaine and to arrest him. Cst. Walsh

immediately arrested Mr. Dunbar for possession and searched him incidental to that arrest, finding crack cocaine on him.

[3] Cst. Walsh testified to his impression that Mr. Dunbar was “definitely on edge”. He said it was obvious that Mr. Dunbar wanted to get by the officers and the police van. Cst. Walsh acknowledged that he personally had no reason to arrest Mr. Dunbar and did so on the basis of Cst. Hussey’s direction.

[4] The information that Mr. Dunbar was in possession of crack cocaine had come to Cst. Hussey by way of Cst. Barna, another Halifax Regional Police Officer, who had received a call from Cst. Michael Willett of the Halifax Regional Police Drug Section during the previous evening. Cst. Willett was the sole “handler” of a coded confidential informer from whom he had received a telephone call on March 1, 2008, around 5 - 6 p.m.

[5] The confidential informer advised Cst. Willett that they had personally observed Mr. Dunbar trafficking in crack cocaine in the vicinity of Gus’ Pub several hours earlier. The informer said that Mr. Dunbar was in possession of a large quantity

of crack cocaine, Cst. Willett recalled the word “loaded” being used. Gus’ Pub is located a few blocks from the Gottingen Street area of Uniacke Square and Sunrise Manor.

[6] Cst. Willett testified to his complete faith in the reliability of the informer, with whom he had been dealing for two years. He dealt with the informer regularly; meeting with them several times a month and receiving phone calls several times weekly or monthly. He said the informer had never provided him with information that was inaccurate or untrue. Cst. Willett testified that the informer had been paid on several occasions in the past following searches that resulted in persons being given custodial sentences for drug offences. He indicated that the informer’s tips had been corroborated by other sources, including police database information. Cst. Willett illustrated his confidence in his informer: “If I received a phone call from this source [who] said it was sunny outside, I wouldn’t look out my window.” He described his level of faith in the informer as “100 percent.”

[7] Cst. Willett himself had some direct experience dealing with Mr. Dunbar a few months earlier in relation to drugs arising out of a raid at a Kearney Lake Road

address during the winter. Cst. Willett had been part of the police team that had breached the door to the apartment where Mr. Dunbar was located. Cst. Willett said he knew, from his past experience as an officer on the beat in the Gottingen Street area, that Mr. Dunbar was a user and a possessor of drugs. Armed with the information from his source and his own direct knowledge, Cst. Willett was satisfied there were reasonable grounds to believe Mr. Dunbar was in possession of and trafficking cocaine.

[8] Cst. Willett figured that the police officers working in the Uniacke Square area that night would be familiar with Mr. Dunbar. After speaking to his source, he immediately called the Uniacke Square area patrol office and spoke with Cst. Barna for several minutes. Cst. Barna was familiar with Mr. Dunbar but was occupied with a domestic assault call. Cst. Willett was able to tell him that he had received a call from a confidential source that Mr. Dunbar was seen in possession of a large quantity of crack cocaine and trafficking in the area of Gus' Pub.

[9] Cst. Willett confirmed that there are 15 - 16 members of the Halifax Regional Police Drug Squad. He chose to call Cst. Barna rather than any of the Drug Squad

undercover officers because he knew, from the schedule, that none of them were working that night.

[10] Cst. Barna confirmed that on March 1, 2008 he was a member of the foot patrol that walked the beat in the Gottingen Street area. At 18:35 hours, he received a call on the assigned cell phone from Cst. Willett. Cst. Barna testified that in their very brief conversation Cst. Willett passed on the information from his source about Mr. Dunbar being in possession of crack cocaine and selling it “up by Gus’ Pub.” Cst. Barna was unable to act on the information as he was in the midst of an assault investigation. About an hour later, he saw Cst. Hussey in the booking area of the police station and pulled him aside to pass on the information about Mr. Dunbar that he had received from Cst. Willett. Cst. Hussey testified to having the conversation with Cst. Barna and having this information in his mind as he and Cst. Walsh later patrolled the Gottingen Street area. He recalled Cst. Barna telling him that Mr. Dunbar was supposed to have an “eight-ball” on him (3.5 grams of cocaine) and had been seen up around Gus’ Pub. Cst. Hussey was familiar with Mr. Dunbar and knew he had been the subject of a drug search earlier in the year.

[11] On March 1, Cst. Hussey had started a 12 hour shift at 1800 hours. He was working on routine patrol in the north-end of Halifax in a uniform capacity with Cst. Walsh. He and Cst. Walsh were working out of the police van doing patrols in the Gottingen, Gerrish and Creighton Street area. Earlier in the day there had been a stabbing across the street from Sunrise Manor and information was coming in that there was going to be retaliation. As a result, Cst. Hussey testified the police were “Playing that area pretty heavy.” It was a high profile area known for heavy drug activity and criminal activity generally. Driving north on Gottigen Street around 4:50 a.m., they observed the half-ton truck parked behind Sunrise Manor, in a “weird location, the way it was angled and parked”, with people in it. Cst. Hussey did not suspect the truck was involved in a drug transaction, his interest in it was due to the recent stabbing and a shooting that had occurred nearby. He felt that something didn’t seem right about the truck, so they drove in to investigate, coming around nose-to-nose with the truck to block it in. Cst. Hussey who was driving, put on the van’s “take-down” lights. Their suspicions aroused by the movements of the truck’s occupants, Csts. Hussey and Walsh got out of the police van and it was when Cst. Walsh spoke that Cst. Hussey realized the man approaching was Mr. Dunbar.

[12] Cst. Hussey testified that everything that happened once they parked the police van in front of the truck and Mr. Dunbar got out, happened very quickly. There was no evidence that Mr. Dunbar tried to run from the police officers, although it was Cst. Hussey's testimony that he did not have time.

[13] Cst. Hussey testified that hearing Cst. Walsh speaking to Mr. Dunbar triggered his recall of what he had been told by Cst. Barna. He said that he had not had time to tell Cst. Walsh about the information he had been given by Cst. Barna. He did not engage in any other investigation of Mr. Dunbar, or the parked truck.

[14] The crack cocaine located when Mr. Dunbar was searched was found on his person and in his backpack. Cst. Hussey confirmed that these drugs could have easily been disposed of had he been able to get past the police officers. There were lots of options for where, in the surrounding streets, Mr. Dunbar could go to elude police.

[15] Although Csts. Willett and Barna made no notes of their various conversations, they had a good recall of events and were consistent in the details of the information about Mr. Dunbar that was passed along. Cst. Barna testified that March 1st was a

memorable night because it was rainy and miserable and he answered emergency calls all night. Cst. Hussey, who did make notes, also remembered the evening because of the nasty weather and how busy the shift had been. He said he remembered Cst. Barna mentioning Gus' Pub in the information he passed along even though he did not indicate this in his notes.

Issue

[16] Csts. Walsh and Hussey had the power to arrest Mr. Dunbar without a warrant for the possession of cocaine (an indictable offence) pursuant to section 495 of the *Criminal Code*. The critical issue in this case is whether the information relied on by Cst. Hussey for his direction to Cst. Walsh to arrest Mr. Dunbar, the “tip” about Mr. Dunbar possessing crack cocaine and hours before being observed selling drugs in the vicinity of Gus' Pub, was enough to ground a lawful arrest. Mr. Dunbar argues it was not, and that his section 8 *Charter* rights protect him from being searched in these circumstances, where the arrest is based on grounds that cannot be objectively justified.

Analysis

[17] The grounds for an arrest must be both subjectively and objectively reasonable. (*R. v. Storrey*, [1990] S.C.J. No. 12) I do not think an argument can be sustained in this case that the Crown, which has the burden of showing on a balance of probabilities that a warrantless search was reasonable, has failed to establish a subjective basis for Mr. Dunbar's arrest. Cst. Hussey testified that he believed Mr. Dunbar was "arrestable" based on the information he had received from Cst. Barna, information he regarded as reliable. He knew the information had come from another police officer and had his own knowledge of Mr. Dunbar's involvement in drugs. Believing that Mr. Dunbar could be arrested for drug possession, Cst. Hussey directed Cst. Walsh to effect the arrest. I am satisfied that Cst. Hussey personally believed that there were reasonable and probable grounds to arrest Mr. Dunbar and that Cst. Walsh was entitled to rely on Cst. Hussey's belief in making the arrest. (*R. v. Lal*, [1998] B.C.J. No. 2446 at paragraph 24 (B.C.C.A.))

[18] The issue in this case is whether Mr. Dunbar's arrest was justified from an objective point of view. Would a reasonable person, standing in Cst. Hussey's shoes,

have believed that reasonable and probable grounds existed to make the arrest? (*R. v. Storrey, supra, at paragraph 16*)

[19] The totality of the circumstances must be assessed in determining whether the police officer (in this case, Cst. Hussey) had an objectively reasonable belief that Mr. Dunbar was in possession of cocaine. (*R. v. Warford, [2001] N.J. No. 330 (Nfld. C.A.) at paragraph 15, referring to Wilson, J.'s judgment in R. v. Debot, [1989] S.C.J. No. 118*) There is no dispute that there was nothing about the parked truck or Mr. Dunbar's behaviour that gave police reasonable and probable grounds to arrest him. That leaves the tip received by Cst. Willett and then transmitted through Cst. Barna to Cst. Hussey. Assessed objectively, was the tipster information enough to justify Mr. Dunbar's arrest?

[20] The Supreme Court of Canada in *R. v. Garofoli, [1990] 2 S.C.R. 1421*, held that a tip could provide the requisite grounds for a search if its reliability could be satisfactorily established. A variety of factors are to be examined in making the reliability determination:

- > The degree of detail of the tip;

- > The informer's source of knowledge;
- > Indicators of the informer's reliability such as past performance or confirmation from other investigative sources.

[21] It is well-established that the results of the search cannot be relied upon, *ex post facto*, to establish the reliability of the tipster information. Rigorous scrutiny of the source information and the reliability of the source is essential to ensure that the requirements for lawful arrest are met for all citizens, including those with a reputation for illicit drug activity.

Degree of Detail of the Tip

[22] Mr. Dunbar has argued that the tipster information is sparse. Although Mr. Dunbar says that it did not include any details concerning when the trafficking was done or if it was ongoing, Cst. Willett's evidence indicated that his source had said Mr. Dunbar's trafficking activities had occurred "several hours earlier." Although there is no evidence that this specific detail was passed along to Cst. Barna or if it was then relayed to Cst. Hussey, I am satisfied that it would have been reasonable for these police officers to believe that the tip was fresh.

[23] Mr. Dunbar asks me to contrast the tipster information that resulted in his arrest with that in *R. v. Goodine*, a decision of the New Brunswick Court of Appeal. ([2006] N.B.J. No. 496) Without question, the *Goodine* tip information was much more detailed than the information that prompted the arrest of Mr. Dunbar. However, it appears that the target in *Goodine*, Michael Goodine, was not known to the police, therefore the information provided enabled the police to identify where Mr. Goodine was living and the vehicles in which he was said to be transporting the contraband cigarettes. There did not need to be such detail in the tip that led to Mr. Dunbar being arrested. It is difficult to think of what additional information would have been relevant or necessary in this case.

[24] On the facts of this case, I am satisfied that the limited detail of the tip does not undermine its reliability. It is not as though there was a lot of detail that could have been offered: Mr. Dunbar was known by the police to have been involved in the drug trade which is relevant to the reasonableness of their reliance on the tip. On this particular occasion there was no collateral information to supply, for example, the description and address of a residence, an associate (such as the girlfriend in *Goodine*) or a vehicle. The tip contained little detail because the circumstances offered little

detail: Mr. Dunbar was seen in the vicinity of Gus' Pub with a significant amount of cocaine in his possession. The essential details were present: the identity of the target, the general area he was seen frequenting and the presence and sale of drugs, specifically, cocaine.

The Informer's Source of Knowledge

[25] As I have mentioned earlier in these reasons, Cst. Willett's source was passing along information they had obtained from direct observation. It had not been filtered through a chain of other people, a process that can distort information as it is repeated from one person to the next.

The Informer's Reliability

[26] I am satisfied, based on Cst. Willett's evidence, that the confidential informer in this case has been a very reliable source. Cst. Willett's confirmation of his source's reliability was both compelling and convincing; notably he testified that the source, with whom he had been dealing for two years, had never provided information that was inaccurate or untrue.

[27] It is fundamental to the assessment of the lawfulness of an arrest based on a tip that the court be in a position to make an independent assessment of the facts that ground the belief that the individual is involved in the alleged criminal activity, in this case, drug trafficking. (*R. v. Lal, supra, at paragraph 23*) The court must examine the totality of the circumstances to assess the reasonableness of the police officer's belief that there were grounds for the arrest. (*R.v. Debot, supra, at paragraph 53*) In weighing the totality of the circumstances, it is not essential, in my opinion, that there have been independent corroboration of the tip information where the information is compelling, as it was here, and originated from a credible source. Corroboration functions to verify the reliability of the tip and that reliability was established here through the source's past performance. *Garofoli* emphasizes past performance of the source as the standard to be applied. Although the presence of a distinctive vehicle, as in *R. v. Silver, [2007] Y.J. No. 34*, was not a feature here, the factors that were, as described in *Silver* at paragraph 13, "what the police knew about [the accused], the substance of the information given by the informer, as well as that person's proven reliability..." are sufficient in my opinion to assure the tip's reliability and justify the reasonableness of its use to ground the arrest of Mr. Dunbar.

[28] Consequently I am satisfied that the Crown has established the lawfulness of Mr. Dunbar's arrest by Cst. Walsh on March 2, 2008 and no violation of his *Charter*-protected rights under section 8 as the police were entitled to search him incidental to a lawful arrest.

Anne S. Derrick

Judge of the Provincial Court of Nova Scotia