PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Borden, 2010 NSPC 36

Date: 20100219
Docket: 1975562-64
Registry: Kentville

Between:

Her Majesty the Queen

v.

Reginald Donald Borden

Judge:	The Honourable Judge Alan T. Tufts
Heard:	September 29, 2009 at Windsor, Nova Scotia
Oral decision:	February 19, 2010
Written decision:	May 7, 2010
Charge:	4(1); 5(2); 5(1) Controlled Drugs and Substances Act
Counsel:	R. Michael MacKenzie, for the Crown Karen Armour, for the defence

By the Court:(orally)

[1] The accused in this proceeding is charged under s. 4(1), s. 5(1) and s. 5(2) of the *Controlled Drugs and Substances Act*. All of the alleged drugs are cannabis (marihuana). The accused applies pursuant to s. 24(2) of the *Charter* to have certain drugs discovered during the search of his automobile excluded as evidence from the trial of this proceeding.

[2] The search was conducted "incident to arrest". The Crown has now conceded the arrest was contrary to s. 495 of the *Criminal Code*. The Crown acknowledges that the officer purported to arrest the accused for possession of marihuana of less than 30 grams, which is a straight summary offence. It concedes that the officer did not "find" the accused committing the offence.[1]

[3] The Crown accordingly concedes that the accused's s. 9 and s. 8 *Charter* rights were breached. This proceeding therefore considers only s. 24(2) of the Charter. This involves the application of the principles set out in *R. v. Grant, infra* and *R. v. Harrison, infra*.

The Facts

[4] The investigating officer was on foot patrol near the Windsor Community Centre, Windsor, NS, where a gazebo was located which was often frequented by young people. It was the evening of September 18, 2008. As the officer approached the gazebo he noticed the accused, among other young people. The young people left.

[5] As he was returning from that location he noticed the accused's car parked near the community centre in a public parking lot. He was familiar with the accused and his vehicle. He was also aware from other officers that the accused was suspected of selling drugs. The officer looked into the accused's vehicle with his flashlight and noticed two small plastic bags containing a substance the officer suspected was cannabis marihuana. As a result he left by car with another officer to

[1] This concession was made after the crown was referred to and considered *S.T.P. v. Canada (Director of Public Prosecutions Service)* 2009 NSCA 378

look for the accused who he was not able to locate at that time. When he returned to the community centre the accused's vehicle was gone.

[6] Subsequently the officer made a patrol to the high school where he was aware a dance was to take place. When he arrived the officer saw the accused sitting in his vehicle with two others. He approached the accused, asked him to exit the vehicle and arrested him. Before arresting him and searching the vehicle, it is conceded, the officer was aware that the two bags he had seen earlier were no longer present.

[7] During the course of the search drugs were found in the front console of the accused's vehicle. The Crown concedes that the officer did not have reasonable and probable grounds to believe that the accused had committed an indictable offence. It is also conceded the officer did not "find" the accused committing a criminal offence. Therefore it is conceded the officer had no legal authority to arrest the accused nor consequently to search him incident to arrest. His s. 8 and s. 9 *Charter* rights were violated.

Section 24(2) - the Principles of *R. v. Grant*

[8] In *R. v. Grant* 2009 SCC 32 and *R. v. Harrison* 2009 SCC 34 the Supreme Court of Canada revisited the appropriate analysis for s. 24(2) applications and revised the previous *Collins/Stillman* approach. It is important, I believe, to describe the overview of this revised approach before considering the lines of inquiry which *Grant* directs.

[9] Chief Justice McLachlin and Justice Charron remind us that the purpose of s. 24 is to maintain the good repute of the administration of justice. The administration of justice is more than investigating, charging and trying those accused of crimes. It is about maintaining the rule of law and upholding *Charter* values. It requires that the court examine the issue at hand from a long-term societal perspective in the sense of maintaining the integrity of and public confidence in the justice system. The inquiry is objective. The focus is societal. It is not about punishing the police or providing compensation to the accused. The remedy, if any, belongs to society, not the accused. In my opinion it is in part a normative analysis–examining the issue in the context of the underlying values and principles of a free and democratic society.

[10] It is also recognized that the violation of the *Charter* provisions has already done damage to the administration of justice. Section 24(2) endeavours to ensure that the admission of the evidence obtained does not further damage the repute of the justice system. In *R. v. Grant, supra* the Supreme Court of Canada endorses three lines of inquiry. At ¶ 71 the court says,

> ...When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. ...

[11] This however, in my opinion, is not a checklist. It is not a formula or an equation. Yet there is no overriding rule. It is not an analysis with mathematical precision. The task is to consider the issue by examining these lines of inquiry to assess and balance the effect of admitting the evidence on society's confidence in the administration of justice.

[12] However, it is important to understand these inquiries and how different aspects will influence the effect on the administration of justice. I will view this in the context of the analysis of this case.

<u>The seriousness of the *Charter*-infringing state conduct</u>

[13] In *Grant* the Supreme Court of Canada recognizes that police conduct sits on a continuum from minor or inadvertent violations which would only minimally undermine public confidence to more willful or reckless disregard for *Charter* rights which would inevitably negatively affect public confidence in the rule of law. Obviously, exigencies may lessen the seriousness of the police conduct and good faith would reduce the need for the court to disassociate itself from the police conduct. Clearly, ignorance of *Charter* standards is not good faith.

[14] Deliberate, willful and flagrant police conduct which is not respectful of individual rights will undoubtedly lean toward or favour exclusion of evidence. On the other hand good faith efforts by the police to comply with *Charter* values or if the conduct is inadvertent or if extenuating circumstances are present this would have an opposite influence. However, in my opinion, it is not enough for the police to have innocent or honest intentions if their actions are deliberate and intentional. In my view the police should be expected to turn their mind, if the circumstances allow, to their legal authority to interfere with an individual's liberty and be cognizant and aware of an individual's rights under the *Charter*.

[15] In the vast majority of cases police, of course, are well-intentioned. They are doing or intending to do their duty. They are making their best efforts to enforce the law and to bring those suspected of committing crimes to justice. However, in my opinion, in doing so they must turn their minds to the *Charter* rights of the individuals they are investigating. In other words, police obviously must obey the law and respect the *Charter* rights of individuals they encounter. Failing to avert to the scope of their legal authority may not be bad faith, but it would not be, in my opinion, necessarily good faith.

[16] In this case the investigating officer initially had cause to suspect the accused, at the very least, because of what he had seen in the accused's car earlier. As a footnote, the accused challenged the "looking into the car" by the police as a search. I have concluded without deciding that this does not constitute a search. The officer therefore was entitled to confront and speak to the defendant. However, beyond this brief encounter the Crown concedes his authority was limited. He could not arrest the accused. In my opinion it is clear he did not direct his mind to that at all. While in one sense he acted in good faith in the sense that he did not set out deliberately to violate the accused's rights, he was simply unaware, or more importantly, he never turned his mind to his authority.

[17] This is not, in my opinion, what the Supreme Court of Canada considered to be good faith. It is certainly, in my opinion, conduct which favours exclusion of evidence. In my opinion having the police act without legal authority and without any conscious effort to determine their authority would in the long term do harm to the administration of justice, the public confidence in it and the integrity of same. It

undermines the rule of law. After all, we expect the police to know what their authority is and act within its scope.

[18] In *Harrison, supra* the court said that where the police knew (or should have known) that their conduct was not *Charter*-compliant, it favours disassociation with such conduct and hence exclusion of evidence.

Impact on the *Charter*-protected interests

[19] This inquiry focuses on the accused's protected interests. Here the right to privacy and liberty were impacted. Impacts of rights can range from fleeting and technical to profoundly intrusive. Clearly the range of impact influences whether the admission of the evidence would undermine public confidence in the administration of justice. It is a claimant-centred perspective which is the focus of the analysis. It is a fact-specific determination. It is, though, impact on the protected rights, not just impact on the person which is important.

[20] Here the accused's vehicle was searched and he was unlawfully arrested. His expectation of privacy in his vehicle is somewhat reduced yet there is an impact on his privacy rights. As was said in *Harrison* the impact is more than trivial. However his liberty was completely compromised. He was arrested and subjected to further detention. A search followed from the arrest. He was arrested in the presence of others–a point that he argued–although whether this occurred in private would not, in my opinion, reduce the impact on this protected right.

[21] There is a difference, in my opinion, between a short encounter with police or even a brief investigative detention and circumstances of arrest. Arrests trigger more intrusive restrictions on a person's liberty. This is why the law requires adherence to statutory authority. Arresting someone in my opinion is a serious matter because it has a serious impact on individual 's liberty. In this case, in my view, the Charter violations have serious impact on the accused's protected rights.

Society's interest in the adjudication of the case on its merits

[22] Obviously society has an interest in seeing cases tried on their merits. This is particularly so where the evidence is reliable and where the alleged offence is serious, although this latter factor has the potential to cut both ways. Seriousness of the offence cannot trump or dominate the whole analysis. As was said in *Harrison*, we expect police to adhere to higher standards than those of alleged criminals. While clearly the seriousness of the offence is important there are no *Charter*-free zones. Even those accused of the most heinous crimes are entitled to the full protection of the *Charter*. Breaching those rights not only affects the accused but also affects the entire reputation of the criminal justice system. See *R. v. Burlingham,* [1995] 2 S.C.R. 206 ¶50.

[23] Further, the public has an interest in a justice system that is beyond reproach. See *R. v. Harrison*, *supra*. Here the impugned evidence is reliable and the offence alleged is relatively serious, although not to the extent it would have been if more concentrated or so-called "hard drugs" were involved. Also, this event occurred in the parking lot of a high school during an after-hours event, which increases its seriousness.

Balancing of factors

[24] The balancing of the findings after analyzing each of the lines of inquiry is qualitative and is not capable of mathematical precision, see *R. v. Harrison*, *supra*. The findings must be weighed in the balance. The seriousness of the police conduct is not determinative nor is the truth-seeking interest of the criminal justice system determinative. In my opinion the police conduct here is serious because the officer simply was unaware of his legal authority–something he ought to have known or at least turned his mind to. He did not. This was not unlike the circumstances in *R. v. Reddy* 2010 BCCA 11 where handguns were excluded. There the British Columbia Court of Appeal found that the police officer ought to have known that he did not have the power to detain someone or conduct a search.

[25] In *R. v. Nguyen*, [2009] O.J. No. 4564 (ON S.C.) the court pointed to the police not being knowledgeable about the scope of their authority in the improper search of the trunk of the accused's car as a contributing factor in excluding the

evidence. The same was considered in *R. v. Sergalis*, [2009] O.J. No. 4823 (ON S.C.).

[26] This is not a case where any deference was shown to the accused's privacy or liberty interests, as was the case in *R. v. Crocker* 2009 BCCA 388.

[27] I recognize that the investigating officer had reasons for what he was doing. He was acting in furtherance of his earlier observations of the two very small bags which he thought contained marihuana. The simple fact is that he had no legal authority to arrest the accused and consequently to search the vehicle incident to arrest either, for that matter. This conduct is a serious breach of the accused's Charter rights. The impact of both the accused's liberty and privacy are significant. In the case of his privacy interest in the interior compartment of his motor vehicle more than trivial and in the case of his liberty very significantly, in my opinion.

[28] While society's interest in adjudicating this case on its merits is important and the truth-seeking function are important it does not outweigh, in my opinion, the long-term interest in upholding the public confidence in the criminal justice system. Sometimes, where justified, exclusion of evidence is necessary and warranted by overriding considerations of justice. Justice Fish in *R. v. Bjelland* 2009 SCC 38 at ¶65 quoted from Chief Justice Samuel Freeman of the Manitoba Court of Appeal, when he said:

> The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. . . . [T]he law makes its choice between competing values and declares that it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at an unlimited cost. "Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much."

[29] The same sentiments were expressed in the recent case of *R. v. Lauriente*, 2010 BCCA 72, released February 12, 2010. In upholding the trial judge's exclusion of evidence under s. 24(2) by applying the revised *Grant* analysis. The

appeal court referred to Justice Doherty's comments in *R. v. Golub*, (1997) 117 C.C.C. (3d) 193 (ON C.A.) where he said, AT ¶61:

> ...Respect for the rule of law and the long term viability of the justice system suffers where the police engage in "short cuts" or fail to respect the constitutional rights of those they encounter in the course of the exercise of their duties. The long term harm to the justice system is not worth the short term gain made by the admission of evidence which was obtained in a manner that ignores the rule of law.

[30] In my opinion the long-term repute of the administration of justice is better maintained by the exclusion of this evidence. I am satisfied of that on the balance of probabilities. The accused's application is granted. The drugs located in the accused's car console are excluded from evidence.

A. Tufts, J.P.C.