IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. D'Entremont, 2009 NSPC 39

Date: 2009-05-04
Docket: 1898480
Registry: Liverpool

Between:

R.

v.

Raymond L. D'Entremont

Judge:	The Honourable Judge James H. Burrill
Oral Decision:	May 4, 2009, Liverpool, Nova Scotia
Released:	August 24, 2009
Charge:	4(1) CDSA
Counsel:	Joshua Bryson, for the Crown Philip Star, Q.C., for the Defence

By the Court, orally:

[1] This was the blended Voir Dire/Trial in respect of Raymond D'Entremont on a charge that on April 18, 2008 at or near Port Mouton, Queens County, Nova Scotia he did unlawfully possess a substance included in Schedule II, to wit Cannabis marijuana, contrary to section 4(1) of the **Controlled Drugs and Substances Act.**

[2] By way of notice, the defence raised an issue and asked for a voir dire to determine the admissibility of the marijuana alleging an unlawful search and/or detention pursuant to that notice.

[3] The facts of the case are simply that Constables Smith and Nelson were conducting a checkpoint in the village of Port Mouton on the date in question when a black Volkswagen Passat motor vehicle pulled into that checkpoint. After noticing the smell of alcohol on the breath of the accused it was determined by Constable Smith that he was going to conduct an ASD test, or roadside screening device test. He had noticed that there was a Nova Scotia Liquor Commission bag in the back seat of that vehicle. While Constable Smith was dealing with the driver, he instructed, although I accept that Cst. Nelson does not remember this,

Constable Nelson to conduct a search of the vehicle as he felt there may be open liquor in the vehicle based I assume, on his noticing the smell from the driver and noticing the Nova Scotia Liquor Commission bag in the rear passenger seat.

[4] As a result of that Cst. Nelson went to the passenger side of the vehicle. There was a female passenger in the vehicle and I accept from his evidence that he spoke with her for a period of time. During that period of time he noticed a Nova Scotia Liquor Commission bag at her feet, although he was unable to tell at that point in time whether or not any of the containers/packaging contained in the bag were open at that point in time. Based on his observation of the bag, based on his knowledge that there was a strong smell of alcohol coming from the passenger, he placed her under arrest for possession of open liquor and told her that he was going to search the vehicle.

[5] He searched the vehicle and found by her feet a box of what's known as Bacardi Breezers, an alcoholic beverage. There were two full in the bag, two empty with a small amount of liquor contained in those bottles still. He searched behind the passenger seat and found a bag containing a box of four additional Bacardi Breezers and he found a bag in the back seat, a bag with wine in it. He

then continued to search the vehicle and searched a dark leather jacket containing a bag of marijuana. With relation to grounds for arrest, Cst. Nelson indicated that it was the strong odour of alcohol coupled with the bag that he believed had liquor in it at her feet that caused him to arrest Ms. Butler who was the passenger. There was some questioning on cross-examination as to whether or not Cst. Nelson had seen any open liquor or any type of breaking of the seal prior to the arrest. But I'm satisfied from reviewing my notes on the evidence and listening to Cst. Nelson's testimony carefully that he had simply seen a bag that he felt contained something and that it was indeed a Nova Scotia Liquor Store bag.

[6] With regard to the examination of the leather jacket, he indicated that he was searching the vehicle only for liquor. That in his experience he had found mickeys or cans of beer in pockets before. The lawfulness of the search is at issue here and this is a case where it is clear that the initial stopping of the vehicle was a lawful stop. It was justifiable in relation to checking vehicles for mechanical fitness and/or for the presence of alcohol consumption. In fact it is specifically, this type of stop that is approved of in the case of the <u>Queen vs. Mellenthin</u>, a decision of the Supreme Court of Canada where Justice Cory spoke for the court. However, Justice Cory makes it clear that while these types of random stops are appropriate

and checks of drivers such as was being conducted of the driver in this case are indeed appropriate and within the law. Justice Cory makes it clear in paragraph 26

> "...that any further more intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where a stop is found to be unlawful the evidence from the stop could well be excluded under section 24(2) of the Charter."

[7] Now, while the stop in this case was clearly lawful and the conduct that the officer engaged in by taking the driver who had the smell of alcohol on his breath was appropriate and that the roadside screening test was authorized. Paragraph 27, Justice Cory says this:

> " a check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over unless there are reasonable and probable grounds for conducting the search or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted."

[8] Now, in this case the defence argues that the search of the vehicle began upon Cst. Nelson's approaching the passenger side of the vehicle and making observations, plain view observations as it were initially. And the defence argues that the officer, Officer Nelson, would not have been called to that location, or directed to that location or be there or have been there unless he had received the direction he did from Cst. Smith. Now Cst. Nelson, I accept, when he approached the driver, or the passenger of the vehicle he engaged her in conversation for a couple of moments or a couple of minutes , and despite the direction that he had taken from, or received from Cst. Smith, I accept his evidence that he realized that that direction did not give him the appropriate grounds to conduct a search of the vehicle. I accept that he arrested Ms. Butler after making the observations that he did, the observations of the smell of alcohol on her breath, that he described as strong, together with the Nova Scotia Liquor Commission bag, although he was unable to see inside it at her feet. Now he arrested her to conduct the search and felt that he could not conduct the search without making an arrest and in that regard he is clearly wrong in law. He would have been, in my view, entitled to search that motor vehicle if he had reasonable grounds to believe there was unlawfully possessed liquor in that vehicle. When liquor is unlawfully possessed in the vehicle is the subject of some debate as to the legislation. Some would argue

that it is unlawful to possess any liquor in a vehicle whether open or closed, whether or not, if it is within the reach of the driver. While others would argue that it is unlawful to carry liquor in a vehicle only if it unopened and not in reach of the driver. It is clear in law that an individual is entitled to transport liquor in a vehicle as long as that liquor is not consumed and not within the reach of the driver. However, given the way the **Liquor Control Act** reads there is some debate as to whether or not even unopened liquor within the reach of the driver contravenes the **Liquor Control Act**. I say that as somewhat of an aside, it's not important to the decision that I will be making in this case. But I will say this, that Section 113 of the **Liquor Control Act** does specifically permit a police officer, if he believes or suspects that liquor is unlawfully kept, to search without warrant a vehicle, and I paraphrase that. However, the test in that section is "if he believes or suspects" and in my view that test, and I believe it's been held in other cases, offends the **Charter**. And in my view, and as was argued by the Crown, the authority to search is only authorized if reasonable grounds to conduct the search are established and the officer believes on reasonable grounds that an offence has been committed.

[9] In this case, the question becomes is whether or not Cst. Nelson at the time he conducted the search of the motor vehicle for liquor had reasonable grounds to believe that there was liquor unlawfully kept in that vehicle. In my view, he did. In my view, the presence of the strong smell of liquor together with a liquor commission bag at the feet of the passenger coupled with the fact that he could tell there was something in it, opened or unopened, gave him, in my view, in the totality of the circumstances, reasonable grounds to believe that the passenger illegally possessed liquor in that vehicle at that time and the search of the vehicle was lawful for liquor.

[10] However, that finding does not end the matter in my view because it is a search of a leather jacket pocket that is in question here because it's in that location that the marijuana was discovered. The defence argues that the jacket could easily have been patted, as it were, in the pocket area, patted to determine whether or not there was a liquor container in that pocket. While the Crown argues that the officer was not restricted to a pat search of the pocket. If he was authorized to search for liquor he was authorized to search for liquor and if he chose to put his hand in the pocket to conduct that search then it's authorized by law, they argue.

[11] In my view, the law makes it very clear that if the scope of the search is not exceeded, then as long as the search is conducted in a reasonable manner it will not offend section 8 of the **Charter** for the purposes of this case. However there are times that a search will exceed it's lawful purpose and when it does it may offend the **Charter**. The defence provided to me the case of R v. Mpamugo, 2009 CanLii 9741 (ON S.C.) which dealt with the admissibility of cocaine and a loaded handgun when a search of a vehicle was conducted. It's not disputed in this case that in this particular circumstance that because it is an unwarranted search, a search not authorized by warrant, that the Crown bears the burden of showing that it was search authorized by law.

[12] In that case, the court found that the search exceeded it's scope when the officer searched under the floor mat and found cocaine knowing very well, and I paraphrase, knowing very well that there would have been no liquor under the floor mat of the vehicle without their being an obvious bulge.

[13] Also there was the case cited therein of the Queen vs. Dreyer, a 2008 decision of the BC Court of Appeal found at 229 CCC (3d)281, where the police searched a paper bag located in the space between the drivers seat and the centre

console. And when the officer went to move the bag to look for liquor, he felt objects inside which he suspected were drugs, he knew they were not, he knew from the feel of the bag that the container did not contain liquor and he opened the bag and found four packets of cocaine. And the court held in that case that the search was not authorized or that the officer was not authorized to expand the search authorized for a limited purpose to a blanket search for contraband based on a hunch.

[14] And in this case what I have to decide is whether or not the scope of the search was expanded in this case or whether or not the search was a search that continued to be a search only for liquor. I've kept all of the facts in mind, I've listened carefully to the evidence of Cst. Nelson and in my view at the time that Cst. Nelson conducted the search of the jacket, I am satisfied on the balance of probabilities that he did in fact expand the scope of the search at that particular time to a general search for contraband in the vehicle. I don't say that to say that an officer may never reach his hand in a jacket pocket in a vehicle to determine whether or not there is liquor present, but given the totality of the evidence that I've heard, in connection with this voir dire I am satisfied that while the search for liquor was lawful, and while the officer had found a number of bottles of alcoholic

beverage in various locations in the vehicle I am persuaded that when he put his hand in the jacket pocket that he was searching for something other than liquor at that particular time and that the search had become, at that particular point in time, a general search for contraband. A general search for contraband exceeded the authority that he had under the Liquor Control Act in those circumstances and as a result I do find that there was a breach of Section 8 of the Charter, the search of the pocket not having been shown to be justified on balance by the Crown. I then move to section 24(2) to determine whether or not the evidence should be excluded from this trial and based on the concession contained in the brief of the Crown, I am satisfied that the concession is appropriate under the three parts of the test set out in Collins and I do exclude the evidence of the marijuana from evidence at the trial.

[15] Given the fact that this was a blended trial/voir dire, having excluded the substance from the evidence there is no evidence that the accused possessed marijuana at the time and place alleged in the information and the accused is found not guilty of that offence.