IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. J.C.L., 2011 NSPC 91

Date: December 7, 2011
Docket: 2286297 and 2286298
Registry: Halifax

Her Majesty the Queen

v.

J.C.L. and F.R.B.

Revised decision: This decision has been revised on January 10, 2012. It replaces the previously released decision.

Judge: The Honourable Judge Jamie S. Campbell

Heard: November 16, 2011

Oral decision: December 7, 2011

Charges: CDSA 5(2)

Counsel: Jonathan Langlois-Sadubin for the Crown
Chandra Gosine – for Mr. B.
Heather McNeill and Lucy L'Hirondelle(senior law student) – for Mr. L.

By the Court:

Background on the Voir Dire

1) It may be indicative of something, of what I don't know, that so much of our constitutional law has been developed from cases involving the Byzantine complexity of impaired driving matters or the distinction between police officers' relative abilities to smell burned as opposed to fresh marijuana. This case engages those constitutional principles that have developed from the consideration of what has been referred to as the "olfactory acuity" of a police constable.

2) On February 11, 2011 Constables Brad Jardine and Maurice Carvery of the Halifax Regional Police Service Quick Response Team, were on patrol on Main Street in Dartmouth. That team deals with street level drug crime and gun violence. On that day, they were behind a black Acura, with no license plate visible from the rear. They had not followed that vehicle for any reason, they just happen to find themselves behind it in traffic. The Acura turned left and impeded oncoming traffic. Vehicles coming in the other direction had to brake quickly to avoid a collision. The officers

conducted a traffic stop. They had the authority to do that. Although, in the end, the driver was not charged with any Motor Vehicle Act offence, that does not make the traffic stop itself illegal.

3) When Constable Carvery requested documents from the driver, Mr. B., he detected a strong scent of marijuana. It was, he said, the smell of fresh marijuana and not the smell of marijuana smoke. Constable Jardine went to the passenger side of the vehicle. The window was open and he too detected a strong smell of unburned marijuana coming out of the vehicle. He said that he didn't even have to stick his head into the car to be struck by the smell. He said that he and his partner both appeared to realize pretty much simultaneously that marijuana was present.

4) The two people in the car, Mr. B. and the passenger, Mr. L. were charged with possession. They were placed in handcuffs and taken to the back of the car. There, Constable Jardine did a pat down search for officer safety. Constable Carvery searched the inside of the vehicle. In performing that search, Constable Carvery found a knapsack containing a ziplock bag in which there were 40 smaller ziplock bags containing what he believed to be marijuana, two digital scales, and another knapsack

with 2 ziplock bags also containing what he believed to be marijuana.

5) Mr. B. had $430.00 in cash. Mr. L. had a cell phone and $255.00. Another cell phone was found in the centre console of the car. Those cell phones were not analyzed. They are then, just cell phones. It would perhaps be more remarkable to find two young men in a car without cell phones.

Issue

6) Generally stated, the issue at this voir dire stage of the process is whether that seized evidence is admissible. If it is not, that is practically dispositive of the case.

Grounds for Arrest

7) The accused argue that their rights to be secure against unreasonable search and seizure have been infringed. They assert that their arrest and detention was not legal.

8) The accused say that the police had no legal authority to arrest either of them

for possession of marijuana. They may have had the legal authority to stop the car. They didn't have the legal authority to arrest them for possession based on the two police officers' senses of smell.

9) Section 495(1)(b) of the Criminal Code provides that the police officer can arrest someone whom he or she "finds committing a criminal offence". That phrase does not mean that if the person is subsequently found not guilty, the arrest was then not legal, because the person was not found committing a criminal offence. It has been interpreted to mean "apparently finds committing".

10) The Nova Scotia Court of Appeal, in R. v. P. (S.T.) 2009 NSCA 86, has provided direction on the issue of how a police officer may apparently find a person committing a criminal offence. The officer must be present when the apparent offence is taking place. In other words, he or she cannot act on a report from someone else. The officer has to actually observe or detect the offence with his or her own senses. Finally, there has to be an "objective basis for the officer's conclusion that an offence is being committed". In other words, it would have to be apparent to a reasonable person in the officer's position that an offence was being committed.

11) There is no doubt here that Constables Carvery and Jardine were present and were acting on what they observed through their own senses. The question is whether there was an objective basis for the conclusion that an offence was being committed. That conclusion in this case would have to be based on the sense of smell of the arresting officers.

A Reasonable Sense of Smell

12) It has been said that the best way to win an argument is to make sure that you get to frame the question. The defence argues that the real issue here is whether the sense of smell unaided by other evidence is sufficient. The Crown argues that the real question is whether fresh marijuana, as opposed to burnt marijuana, can be reliably identified by the sense of smell alone.

13) Of one thing there is no real doubt. Those issues have given rise to a substantial body of case law, reflecting the combined ingenuity of lawyers and judges.

14) The Ontario Court of Appeal in R. v. Polaschek, 1999 CanLII 3714, 45 O.R. (3d) 434, took an approach that required a consideration of the broader context. Where the sense of smell is used to establish grounds for arrest, the circumstances in which that observation was made will determine the matter.

15) Those circumstances will of course include information available to the police officer through a variety of sources. They might include his or her own visual observations, what he or she hears, and information that he or she might have obtained that would allow the conclusion to be reached that the actions that he or she was observing constituted an offence.

16) That full context will of course include the officer's sense of smell. Where the sense of smell is the only factor upon which the police rely, the situation has to be subjected to considerable scrutiny. Those observations are, by their very nature, hard to verify. They can be used to justify actions after the fact.

17) Yet, it must be acknowledged that the sense of smell can be accurate. How accurate it is depends on the person who is doing the smelling and what is being

smelled. An officer's own self assessment of the accuracy and acuity of his or her sense of smell, may not be of much value at all. If the officer is someone who has had long experience working on the drug squad, or formal training in identifying drugs by the sense of smell, or has been involved in numerous arrests involving drugs, that may make that person's sense of smell more reliable.

18) What is purported to have been smelled is significant. That does not mean that if an officer says he or she smelled marijuana and that substance is found the detention is then justified. But what is actually there does matter in another way. If the officer is purporting to have detected an ecstasy pill in a plastic bag in the trunk of a car, it would be safe to say that that would not justify an arrest. If the officer, with even an ordinary sense of smell, opens the back of a van and claims to have smelled marijuana where open bales of the substance are eventually found, his or her assertion may well be a reasonable one.

19) There is a body of case law that distinguishes between the observation of fresh marijuana by smell and the observation of smell of marijuana smoke.

20) “The smell of raw marijuana is a sensory observation of the presence of raw marijuana, just as the sight of marijuana is. The smell of raw marijuana is the sensory observation of marijuana having recently been smoked. The latter, unlike the former, is not the offence that gives grounds for arrest without a warrant.” R. v. Janvier 2007 SKCA 147, para 44

21) The distinction appears to be less a legal conclusion about the relative ability of officers to distinguish marijuana smoke from other similar smells than about the reliability of smelling marijuana smoke in forming the conclusion that the substance in any form is present at that time. Where there is smoke there is, or more accurately, was, fire. But where there is marijuana smoke there is not always still marijuana. If an officer is claiming to have detected marijuana by the smell of smoke, it would seem that more circumstantial indicia of the presence of the actual substance would be required.

22) Here, Constables Carvery and Jardine were acting within their legal authority in conducting the traffic stop. Nothing that gave rise to that traffic stop would tend to support even a suspicion that the people in the car might have marijuana in their

possession. The lack of a license plate visible to the police is not significant. There was, in any event, a proper temporary sticker on the car. The abrupt turn was not, in this situation, indicative of anything.

23) The constables both smelled what they believed to be a strong smell of marijuana. The smell of fresh marijuana was evidence that marijuana is present in the vehicle. It was the only evidence that the substance might be present.

24) The circumstances surrounding that observation must be considered. Constable Carvery does not have extensive experience specific to the identification of marijuana. He has not spent time working on the drug squad. He has had brief training in identifying drugs by smell but that was 7 years before when he was in the police academy. While the controlled burn of marijuana in that environment may indeed be memorable, and while smell memory may be among the most persistent, it must be acknowledged that it was some time ago.

25) Constable Jardine said that he had been exposed to the smell of marijuana for many years. While he had no training prior to the arrest of these two young men, he

had been involved with numerous cases involving the seizure of marijuana and knew full well what it smelled like.

26) Both officers are possessed of a sense of smell. They, like most other people, can distinguish the smell of some things from the smell of other things. They also know generally what marijuana smells like. They are not people who have never smelled marijuana before. So, while not experts in the field of drug detection by smell alone, they can smell marijuana.

27) In this situation they were not purporting to sniff out a gram of marijuana in the trunk, nor were they purporting to smell a couple of grams stored in a bag in the glove box. The fact that something was found, of course, cannot be used to justify the reasonableness of the search. A search is certainly not made reasonable by the fact that something was found.

28) The issue is the reasonableness of the conclusion, based on the information that the constables had at the time. They both said that they smelled marijuana. This was not a conclusion of one officer acting alone. The information on which they said they

acted was a smell emanating from more than 40 small bags and two larger bags of marijuana inside a car. The fact that a larger quantity was detected adds to the reasonableness of the assertion that the marijuana could, in this situation, have been detected by its scent alone.

29) The fact that fresh marijuana was found in sealed bags inside a knapsack is also a consideration. While the quantity is not small, it was not unsealed in the open. Here, the smaller quantities were in bags, in a bag, in another bag. There was no loose marijuana found.

30) The use of the sense of smell alone raises a level of concern. The potential for unjustified detention is real. There was no other evidence of any kind to support the assertion of reasonable grounds. There is no evidence to substantiate either officer's ability, beyond that of a normal sense of smell and usual police training, to detect marijuana by smell alone. That is particularly significant where, as here, the substance was found in sealed bags, inside a knapsack in a quantity that, while not minute, was not substantial either. Forty grams is about the size of ½ of a bowl of cereal for example.

31) Neither officer was able to detect a smell of marijuana emanating from the exhibits on the table a few feet from them in the courtroom. The substance was of course older than it was when the car was stopped, it was held in virtually vacuum sealed bags and was in a courtroom rather than in a smaller car. At the same time however, it was not secured in a knapsack as it was when located in the Acura.

32) The balance is tipped toward a conclusion that reasonable grounds did not exist for the arrest. The manner in which the marijuana was stored in the vehicle, the absence of loose marijuana, the total amount of the substance in the car, the lack of recent specialized training of the officers involved and the lack of any evidence other than odor as detected by the two officers, support that conclusion. The resulting search was then not an untaken incident to a legal arrest and therefore the evidence was obtained in contravention of the rights of the accused under Section 8 of the Charter.

Admissibility of the Evidence

33) The conclusion that there has been a breach of the section 8 Charter rights of the accused does not necessarily mean that the evidence must be excluded. According to s. 24(2) of the Charter, it must be shown that the admission of the evidence would bring the administration of justice into disrepute.

34) The test to be used in making that determination is set out in the Supreme Court of Canada decision in R. v. Grant, 2009 SCC 32. There are three "avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective." para 71

35) The court has to balance the effect of admitting the evidence on society's confidence in the justice system. That has to be done first with regard to the seriousness of the Charter breach, and the concern that admission of evidence obtained in breach of Charter rights may send the message that the "justice system condones serious state misconduct". Second, the balancing should consider the impact of the admission on the rights of the accused person and the concern that the admission of the evidence might send the message that "individual rights count for little". Third, the court should also consider society's interest in the adjudication of the case on its

merits.

36) The Supreme Court of Canada, in Grant, noted that state conduct that results in Charter violations varies in seriousness. That is significant. All Charter violations are not of the same significance or consequence. There are breaches that are the result of inadvertence or minor violations and there are those that are the result of flagrant, willful or reckless disregard for the Charter rights of the accused. In any case where Charter rights are involved, of course, principles are at stake. In whatever circumstances, the principles at stake in upholding Charter rights remain powerful considerations. Those principles do not elevate minor or technical breaches to another level however. There is a difference between intentional or reckless disregard for Charter rights and technical breaches.

37) It should be noted as well, that the accused are young persons. While they are subject to the same considerations as adults, the courts must be particularly vigilant in making sure that their constitutional rights are protected.

38) The breach here was “a near run thing”. As all counsel have noted, there is no

shortage of case law dealing with the issue of whether a police officer can have the reasonable grounds required to legally arrest a person based only on his sense of smell. Cases have dealt with the distinction between fresh marijuana and burnt marijuana smells. A complex body of case law is still in the process of being developed about the extent to which the sense of smell in conjunction with other factors might form sufficient grounds for an arrest.

39) Ignorance of Charter standards cannot be rewarded. The police cannot act in contravention of the Charter and plead ignorance. That is not what is happening here. There is a difference between pleading ignorance of the law and failing to apply the nuances or perhaps more accurately, appreciating those legal nuances in a different way.

40) A police officer who walks up to the driver's door of a car has no idea what is about to confront him or her. One part of the officer's attention must be firmly focused on safety and assessing the risk. In the midst of that, the officer has to make a judgment call, in seconds, without the benefit of quiet reflection and a bit more than 1100 pages of briefs and case law. Here, the officers had to assess, on the spot,

whether that smell constituted grounds for an arrest. While there may be entirely legitimate disagreement with the decision they reached at the time, it would not be right to characterize their actions as flagrant, willful, or reckless.

41) The police in this case acted in good faith. There is absolutely no evidence to suggest otherwise. There is no evidence to suggest that this car was targeted for any reason. There is nothing to suggest for example, that it was in a neighborhood in which the police were being particularly vigilant about potential drug dealers. There is nothing to suggest that these two people were targeted for a search based on some inappropriate considerations, such as age, race or gender. The two young men involved were not known to police before this incident. This is not a situation in which an arrest for marijuana possession was being used to “shake down” some people about whom the police already had their suspicions just because of who they were. There is nothing to suggest that either young man was the victim of any kind of “profiling” by the officers.

42) The second “avenue of inquiry” focuses on the seriousness of the impact of the breach on the protected interests of the accused. Being arrested and searched is always

a serious deprivation of liberty. Once again, there is a principle at stake. When young people are involved, the extent of the impact of the breach may be heightened. A young person may feel the intrusion on his liberty and security interests more acutely than an adult. Standing at the back of one's car in handcuffs is undoubtedly a very unpleasant experience.

43) In this case however, the detention was in the context of a vehicle stop. The search was of a vehicle. It was brief. It was not especially intrusive. There is no evidence that this search was conducted on a busy street in the presence of a crowd of curious onlookers. It was cold. One of the young men complained and became vocal about what was happening. Constable Jardine said that he educated Mr. L. about the police powers of arrest. It would be naïve to assume that this pedagogic function was undertaken at the side of the street with the quiet patience for which first year criminal law professors are known. None of the actions of the officers however could be interpreted as being particularly or intentionally demeaning toward the young men. They were not treated rudely or aggressively. While there was an intrusion on the privacy rights of the two young men, that intrusion was not a particularly serious one. Their bodily integrity and human dignity were not infringed upon in any substantial

way either.

44) The third aspect to be considered is perhaps more general in nature. As explained in Grant, there is an interest in bringing matters to trial to have them dealt with according to law. A judge must consider the negative impact of the admission of evidence that was obtained in breach of Charter rights, but must also consider the impact of failing to admit the evidence. This aspect considers the reliability of the evidence that is sought to be excluded.

45) If a breach is one that compels a suspect to talk, the reliability of the evidence itself is undermined. In that case, the admission of the evidence really doesn't serve anyone's interest. On the other hand, the exclusion of reliable evidence may undermine the "truth-seeking function" of the process. The evidence here is highly reliable. That is, with respect, not a return to the considerations of conscriptive and non-conscriptive evidence. It places the focus on the reliability of the evidence.

46) Another consideration is the seriousness of the offence involved. The charges here are not simple possession but possession for the purpose of trafficking of

marijuana. The exclusion of the evidence would be determinative of the matter. The charge is serious but it must be acknowledged that it does not involve trafficking at the most serious end of the scale.

47) The direction to consider three avenues of inquiry does not mean that the matter should not be considered as a whole. There is a balancing of interests that must take place. That cannot be done by following a checklist. That balancing of interests must be done with a view to the integrity of the system of the administration of justice. That does not mean and has never meant that the issue is somehow resolved with a view to public opinion. “Public opinion”, as it may be purported to be expressed by angry anonymous posters to internet news sites, might suggest that people are not in the slightest concerned about other people’s children being stopped and searched for drugs, pretty much anytime. The consideration of public interest does not mean playing to the gallery of immediate public reaction.

48) A judge has to consider the broader context and the long term effects of allowing s. 24(2) to become a trump card to some to be played in response to breaches of Charter rights. If the right to be protected against unreasonable search and seizure

can be ignored because drugs are found and that evidence is reliable, the values expressed in the Charter will have been watered down to the point of being meaningless platitudes. On the other hand, if some technical breaches of the Charter are used as tools to undermine the truth-seeking function of the process, the Charter may be perceived as a less than meaningful reflection of the values of Canadian justice.

49) Here, police officers acting in apparent good faith stopped a vehicle. There was nothing wrong with that. They believed they smelled unburned marijuana. There is nothing to suggest that the police were targeting the individuals involved. The arrest was undertaken in a way that was unremarkable. The vehicle was searched. The search itself was unremarkable, except that marijuana and scales were found. In my view, the officers did not have grounds based on the unaided sense of smell, with nothing further. At the same time, they were not acting in a way that indicates any improper motive or in a way that suggests either an ignorance or lack of concern for the Charter rights of the people involved. The actions of the officers in effecting the arrest and subsequent search were not aggressive or demeaning.

50) Excluding the highly reliable evidence here would uphold one principle at the cost of another. That other principle arises from the concern that the breach here was not made in bad faith and did not arise out of ignorance of Charter principles, feigned or real. The constables' decision was not technically correct, in my opinion, but was not the kind of breach that demands a response that would have the very real effect of allowing someone to avoid prosecution for a serious offence. Prosecution must sometimes give way to principle even when based on a technical point. The termination of the prosecution in this case would have an effect well beyond being commensurate with the seriousness of the breach.

51) The evidence obtained from the search in this matter is admissible.

Jamie S. Campbell
Judge of the Provincial Court of Nova Scotia