IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Miller, 2006 NSPC 68

Date: November 24th, 2006
Docket: 1585891, 1585892
Registry: Halifax

Between:

Her Majesty the Queen

v.

Trevor Charles Miller

DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	September 28th and November 3rd, 2006
Oral Decision:	November 24th, 2006, in Halifax, Nova Scotia
Charge:	CDSA 5(2) and CDSA 4(1)
Counsel:	James Whiting - Crown Attorney Luke Merriman - Defence Counsel.

By the Court:

[1] Mr. Miller has been charged with possession for the purpose of trafficking ecstasy (s. 5(2) CDSA) and simple possession of cocaine (s. 4(1) CDSA) His trial started on September 28, 2006 and continued on November 3 and 24, 2006. A *voir dire* was held in respect of a search conducted of Mr. Miller. This is my decision on that *voir dire*.

Introduction

[2] The fundamental issues in this trial are whether Mr. Miller's constitutional rights under section 8 of the *Charter* were violated by Cst. Shannon and if so, whether the drugs seized from him when he was searched should be excluded from evidence pursuant to section 24(2) of the *Charter*. The onus lies on Mr. Miller to prove on a balance of probabilities that he was subject to a violation of his section 8 *Charter* rights.

[3] Evidence was heard from Det/Cst Andre Thompson, to whom Cst. Shannon turned over the exhibits in the case; Cst. Shannon, Det/Cst Greg Come and Trevor Miller. The evidence of Cst. Shannon and Trevor Miller was heard on a *voir dire* concerning the legality of a search of, and seizure from, Mr. Miller. It was agreed this evidence would also be evidence on the trial.

[4] Det/Cst Thompson identified Exhibits 3 through 8 as containing ecstacy tablets and confirmed the certificate numbers for the Health Canada analysis of the sample

tablets Cst. Thompson sent from each lot of pills. Cst. Thompson's evidence established that a total of 67 ecstasy pills were seized from Mr. Miller as well as 4 "dime" bags of cocaine totalling 2.46 grams. Cst. Come, qualified as an expert, gave opinion evidence on the distribution, packaging, pricing, sale and use of ecstacy.

The Facts on the Voir Dire

[5] On August 24, 2005, Cst Shannon pulled Mr. Miller over on Hwy 102 by the Exhibition Park exit near Bayers Lake Industrial Park. Mr. Miller was outbound in a Honda Prelude. Cst. Shannon said he pulled Mr. Miller over when he was passed by him in a 70 km/hr zone. When he approached the car, he recognized Mr. Miller who was only person in the car. Cst. Shannon asked Mr. Miller for his registration and insurance. Mr. Miller said he didn't have a license or insurance. Cst. Shannon arrested him under the *Motor Vehicle Act*.

[6] Cst. Shannon arrested Mr. Miller because he was planning to have Mr. Miller's car towed as it was uninsured and did not want to leave him on a very busy highway with a speed limit of 100 km/hr where Mr. Miller was stopped. There were no side roads and no sidewalks and in Cst. Shannon's view, nowhere for Mr. Miller to go safely. He knew Mr. Miller from dealing with him in the past, including on an arrest for shoplifting when Mr. Miller became very agitated and upset and had to be physically restrained. Cst. Shannon agreed it was unusual to arrest someone for a *Motor Vehicle Act* infraction but said he did so because it was a very different setting than a traffic stop on a city street where he could have just given Mr. Miller a Summary Offence Ticket and sent him on his way without placing him at any risk. It

was, in Cst. Shannon's judgement, a very different situation on a busy highway. Cst. Shannon viewed the situation as inherently dangerous.

[7] Although Cst. Shannon said on cross-examination that it would have been an option for Mr. Miller's girlfriend to have picked him up after Cst. Shannon decided to seize the car, on re-direct, Cst. Shannon said there was nowhere for someone to stop safely for this purpose. Cst Shannon also said he arrested Mr. Miller because he thought that as soon as he told him he was going to have his car towed, he would "act up." Cst. Shannon said his option was to detain Mr. Miller and then take him somewhere. He said it never entered his head to have someone pick Mr. Miller up: Cst. Shannon said that Mr. Miller only ever suggested that his girlfriend come and get the car, not him.

[8] Cst. Shannon said Mr. Miller did not try to flee when pulled over. He said he did not observe any weapons nor did he smell alcohol or drugs when he approached the car. He said that prior to discovering the drugs during the search he had no reason to suspect Mr. Miller of any offence other than the *Motor Vehicle Act* violations. Mr. Miller was cooperative, if displeased with being detained, and went to the back of his car where the search was conducted.

[9] Upset once he knew he was being detained, Mr. Miller asked several times if his girlfriend could come and get the car. Cst. Shannon was non-committal because he thought Mr. Miller might take off if he knew Cst. Shannon intended to have his car towed. Cst. Shannon said it is normal practice to seize a vehicle with no insurance

because it could not be driven. He said he could not leave the car on the highway because it would be a hazard to traffic.

[10] Having arrested him, Cst. Shannon decided to put Mr. Miller in his patrol car but concluded that officer safety required that he search Mr. Miller first. At the start of the pat down search over Mr. Miller's clothes, he found the drugs in the right front pocket of Mr. Miller's jacket. Cst. Shannon also found a cell phone and money. He said he searched all of Mr. Miller's pockets looking for weapons. Cst. Shannon patted Mr. Miller's pockets, waistband and checked his legs. He said he was "just looking for anything [Mr. Miller] could use against me while he was in my car." Cst. Shannon testified that the brief search was incidental to the arrest. He denied a suggestion that the search was more intrusive and involved placing his thumb inside the waistband of Mr. Miller's boxers. He also denied getting Mr. Miller out of the police car after the first search and searching him again.

[11] Cst. Shannon seized from Mr. Miller bags with pills, bags of powder, $15 in cash and a cell phone. He identified the items marked as Exhibits in the trial as the items he seized from Mr. Miller.

[12] After the search, Cst. Shannon handcuffed Mr. Miller's hands behind his back. Mr. Miller testified the handcuffs were tight and he kept trying to move in the back seat of the police car "so he wouldn't be sitting on them [his hands]." Cst. Shannon gave Mr. Miller his right to counsel and secondary police caution in the patrol car. He did not read him his rights when he arrested him under the *Motor Vehicle Act*.

[13] Mr. Miller's description of the events on Hwy 102 differed somewhat from Cst. Shannon. He denied that he had been speeding in the 70 km/hr zone, saying he had seen a marked patrol car slowed down by a truck in front. Once he was pulled over, Mr. Miller said he knew the car would get towed because his license was suspended. Knowing that this was how the situation would unfold, he called his girlfriend to come and get him, giving her directions as to where he was.

[14] Mr. Miller said that Cst. Shannon, whom he knew from past encounters, approached the car and spoke to him in a friendly manner, saying he had not known it was Mr. Miller until he ran the Prelude's license plate through his computer. Mr. Miller said Cst. Shannon's attitude and demeanor toward him changed when he noticed a thick gold chain Mr. Miller was wearing around his neck. After Mr. Miller handed Cst. Shannon his suspended license, he was arrested and taken to the back of the Prelude where he was handcuffed. Mr. Miller said he was "frisked", which produced nothing, and then subjected to a more intrusive search that involved Cst. Shannon lifting Mr. Miller's shirt up, pulling his jean shorts out from his body, looking down the front of his shorts and pulling his underwear away from his body, at which time Cst. Shannon saw the bag with the pills. (Mr. Miller identified Exhibit 2 as this bag.) Cst. Shannon arrested Mr. Miller and put him in the back of the patrol car.

[15] Mr. Miller said that Cst. Shannon then went back to the Prelude where Mr. Miller's cell phone was on the front seat. He popped the trunk. Mr. Miller was fidgeting in the back seat of the patrol car because the handcuffs were tight. Cst. Shannon took him out of the patrol car and undertook a second search. Mr. Miller

says this occured because Cst. Shannon believed Mr. Miller was trying to put drugs in his underwear. “I’m guessing he thought there was something in my hands.” This time Cst. Shannon pulled the buckle of Mr. Miller’s belt and his jean shorts, which were too big for him, fell to the ground. Mr. Miller testified that he was with Cst. Shannon by the side of the road for “ a good hour...45 minutes to an hour.” Cars were “barping their horns” Mr. Miller said, during the second search.

[16] Mr. Miller said that when he was first pulled over, he called his girlfriend to come and get him. At that time she was about 15 minutes away but went to drop off their son and then called Mr. Miller back to find out exactly where he was.

The Lawfulness of the Arrest

[17] The first issue that has to be addressed is whether Cst. Shannon’s arrest of Mr. Miller was lawful which will determine whether the search was valid. The search that followed was, according to Cst. Shannon’s evidence, incidental to the arrest. The legality of the search is derived from the legality of the arrest and if the arrest is found to be invalid, the search will be also. *(R. v. Caslake,[1988] 1 S.C.R. 51, paragraph 13*) The Crown indicates in its Brief that the parties agree s. 261(1) of the *Motor Vehicle Act* contains discretionary authority to effect an arrest where a person is found committing a *Motor Vehicle Act* offence. The parties also agree that section 495(2) of the *Criminal Code* applies to arrests made under section 261 of the *Motor Vehicle Act*, by virtue of section 7 of the *Summary Proceedings Act*.

[18] The Crown argues that Cst. Shannon had the authority to arrest Mr. Miller under section 495(2)(d) of the *Criminal Code* in order to safeguard himself from potential harm if Mr. Miller reacted aggressively as he had done five years earlier in an encounter with Cst. Shannon and to protect Mr. Miller from the risks that such a confrontation would create, on a busy highway with fast moving traffic. The Crown's position is that Cst. Shannon was justified in exercising his discretion to arrest Mr. Miller so as to reduce the potential risk to all involved. (*Crown Brief, page 6*) The Crown also submits that Cst. Shannon arrested Mr. Miller to prevent the commission of an offence, such as assault or Mr. Miller fleeing the scene in the uninsured Prelude.

[19] The *Criminal Code* establishes in section 495(2)(d) that Cst. Shannon was not entitled to arrest Mr. Miller for the motor vehicle offences where he believed on reasonable grounds that the public interest may be satisfied without an arrest having to be effected. The *Code* obliges Cst. Shannon to have considered all the circumstances, including the need to establish Mr. Miller's identity, secure or preserve evidence or prevent the continuation or repetition of an offence or the commission of another offence. If the public interest in these law enforcement objectives can be satisfied without an arrest being made, then no arrest should occur. The Crown has argued that the *Code* should not be interpreted as narrowing the public interest to just these considerations and that Cst. Shannon was entitled to arrest Mr. Miller where he believed that the inherently dangerous highway setting and the potential for the situation to escalate made it to be necessary to do so. The Crown has also submitted that Cst. Shannon was entitled to arrest Mr. Miller to prevent him from committing additional offences, or continuing the commission of the *Motor Vehicle Act* offences. The Crown says it was reasonable for Cst. Shannon to factor in Mr.

Miller's past conduct, that is, his volatility during the shoplifting incident, when considering whether to arrest him. The arrest was valid, argues the Crown, because Cst. Shannon had clear statutory authority to make it, its execution complied with the requirements of section 495(2)(d), Cst. Shannon considered other options, and the arrest was executed prudently and with no ulterior motive.

[20] The Defence has argued that Cst. Shannon had other and more appropriate options for dealing with Mr. Miller that did not necessitate the use of arrest powers. The Defence submits that in arresting Mr. Miller, Cst. Shannon was not acting within the limitations established by section 495(2)(d) of the *Criminal Code*. Mr. Miller was cooperative throughout the entire encounter with Cst. Shannon from the time he was pulled over, and complied with his directions. The Defence points to the uncontradicted evidence that Mr. Miller continued to be compliant even once he was arrested. Mr. Miller expressed his displeasure at this development but that was it. There was no repeat of the aggression and agitation Cst. Shannon experienced in dealings with Mr. Miller at least 5 - 6 years earlier.

[21] It was Mr. Miller's evidence that he knew the car would be towed but wanted his girlfriend to come and get him, and gave her directions to do so. Mr. Miller did have a cell phone and I am satisfied he spoke to his girlfriend before he was arrested and placed in the patrol car where he spoke to her again when she called back. I am not satisfied it was reasonable to believe that Mr. Miller would have fled the scene as Cst. Shannon said he feared could happen: Mr. Miller pulled over when Cst. Shannon activated his emergency equipment and did not try to take off at any time. I accept Mr. Miller's evidence that he knew the car would be towed. He knew he did

not have insurance and was a suspended driver so it is logical that he would have understood he would not be driving the Prelude anywhere once Cst. Shannon pulled him over. Cst. Shannon said he did not want Mr. Miller staying in the car because he was afraid he would take off. There was no evidence however that Mr. Miller was going to do anything rash. Although he was unhappy about the situation and used foul language when he was told he was being arrested, saying, "What the fuck are you talking about?", he did not make threatening gestures or try to assault Cst. Shannon and at no time did Cst. Shannon consider it necessary to call for back-up. Cst. Shannon could have asked Mr. Miller to surrender his car keys while they waited for Mr. Miller's girlfriend to arrive.

[22] Cst. Shannon effectively concluded that he should arrest Mr. Miller as a precautionary measure, so that Mr. Miller would not be left on the side of a busy highway, and to contain Mr. Miller who, Cst. Shannon believed, might reacte badly to the news his car was to be towed. Although Cst. Shannon stated that there was nowhere for someone to pick Mr. Miller up, this does not make sense as both he and Mr. Miller were stopped on the edge of the highway. I do not see why someone could not have pulled over further up and safely collected Mr. Miller from the side of the road. Presumably the shoulder of the highway where Mr. Miller was stopped was not so dangerous or Cst. Shannon would not have pulled him over there. Cst. Shannon was also concerned about leaving the car on the side of the road as he said it could be a hazard to traffic. Presumably therefore he could have waited with the car until the towing service came for it. Cst. Shannon could have waited with Mr. Miller until his girlfriend picked him up. It is not uncommon to see a patrol car pulled over on the shoulder of a busy highway with flashing emergency equipment alerting oncoming

traffic to its presence and the presence of police and civilians involved in a traffic stop.

[23] It does not seem to me that it was necessary for Cst. Shannon to have arrested Mr. Miller: there are limitations imposed by section 495(2) of the *Criminal Code* on the power of a police officer to arrest without a warrant. Even if the Crown is correct that the limitations are not exhaustive and that a broader public interest can be invoked to authorize an arrest, in the case of the *Motor Vehicle Act* infractions Mr. Miller was committing, driving while suspended and without insurance, all Cst. Shannon reasonably needed to do was establish Mr. Miller's identity, which he was readily able to do through his computer and based on his prior knowledge of him, and issue him with the usual Summary Offence Tickets. Cst. Shannon acknowledged that had the exact situation occurred in peninsular Halifax, Mr. Miller would have received the SOT's, had his car towed and there would have been no arrest and no search. I do not accept that conditions on Highway 102 by the Exhibition Park exit were so hazardous that it was reasonable to arrest Mr. Miller once it was determined that he was in violation of the *Motor Vehicle Act* and nothing more.

[24] I am simply not satisfied that Mr. Miller's arrest was reasonable on objective grounds. My assessment of the objective component of Cst. Shannon's decision to arrest Mr. Miller brings me to the conclusion that the arrest was invalid. *(R. v. Storrey (1990), 53 C.C.C. (3d) 316 (S.C.C.) at p. 324)* I am satisfied Mr. Miller has established that the arrest was unreasonable and therefore objectively invalid. It follows that the search of Mr. Miller, incidental to it, was also invalid.

[25] I want to note that Mr. Miller's evidence implied that Cst. Shannon's treatment of him, notably the decision to arrest, was influenced by something other than the reasons given by Cst. Shannon in his testimony. Mr. Miller said Cst. Shannon's treatment of him, initially casual and familiar, changed when he caught sight of Mr. Miller's thick gold chain. Interpreting what Mr. Miller was implying about Cst. Shannon's motivation for arresting him would involve pure speculation on my part as I have no evidence that Cst. Shannon's rationale for the arrest was anything other than what he said it was. Mr. Miller evidently thought and thinks that Cst. Shannon had reasons, other than those stated, for arresting him but he has not established what those reasons would have been. My conclusion that the arrest of Mr. Miller was invalid is not based on Mr. Miller's suggestion that there was some ulterior motive governing Cst. Shannon's decision. I have not heard any persuasive evidence that supports that allegation.

[26] I also want to note that I do not find in Cst. Shannon's testimony an acknowledgment that the arrest was effected to enable a search to be conducted. Cst. Shannon's evidence indicated that the search was conducted incidental to the arrest and that the decision to arrest was not influenced by an ulterior plan to conduct a search.

[27] I have found the arrest to be invalid and that is fatal to the legality of the search. The search derived its legality from the arrest only and therefore it too was invalid. Cst. Shannon had no lawful authority to search Mr. Miller without having effected a valid arrest. A search pursuant to an invalid arrest is an unreasonable search and therefore a violation of Mr. Miller's *Charter* protected rights.

[28] I now must consider what follows from my determination that Mr. Miller's rights under section 8 were violated as a result of being subjected to an unreasonable search.

Should the Evidence Be Excluded Under section 24(2) of the Charter?

[29] The burden rests on Mr. Miller to establish, on a balance of probabilities, that the admission of the evidence would bring the administration of justice into disrepute. *(R. v. Collins, [1987] 1 S.C.R. 265 at paragraph 30)* In *Collins*, the majority of the SCOC concluded that section 24(2) should be read as providing that "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings *could* bring the administration of justice into disrepute. *(Collins, supra at paragraph 43) (emphasis added)*

[30] There are three categories of factors that are relevant to determining whether the admission of evidence will bring the administration of justice into disrepute under section 24(2) of the *Charter:*

(i) factors relating to the fairness of the trial;

(ii) factors relating to the seriousness of the *Charter* breach;

(iii) factors relating to the effect of excluding the evidence.

(R. v. Collins, supra at paragraphs 35 - 39; R. v. Fliss, [2002] 1 S.C.R. 535 at paragraph 75)

[31] The evidence in this case which Mr. Miller is seeking to exclude is the 67 ecstacy tablets and the 2.46 grams of powder cocaine. This evidence is classified as non-conscriptive evidence as Mr. Miller was "not compelled to participate in its creation or discovery*."* In other words, the evidence "existed independently of the *Charter* breach in a form useable by the state." *(R. v. Stillman, [1997] 1 S.C.R. 607 at paragraph 75 - 77; R. v. Mann, supra at paragraph 52)* The admission of non-conscriptive evidence will rarely operate to make a trial unfair as it existed irrespective of the *Charter* violation and its use will not deprive the accused of a fair hearing. *(R. v. Collins, supra at paragraph 37 : R. v. Stillman, supra at paragraph 75)*

[32] While I do not find that the admission of the evidence unlawfully seized from Mr. Miller would affect adjudicative fairness, as discussed in such authorities as *R. v. Buhay, [2003],1 S.C.R. 631* at paragraph 49, I must move on to ask myself in my analysis of the section 24(2) issue: how serious was this breach of Mr. Miller's section 8 rights?

[33] The starting point for my consideration of this issue is the differing descriptions by Mr. Miller and Cst. Shannon of the search.

[34] Cst. Shannon described a pat search on the outside of Mr. Miller's clothing and the discovery of the drugs in the right front pocket of Mr. Miller's jacket. Cst. Shannon testified that he searched Mr. Miller once after arresting him for "officer

safety issues" because he was placing Mr. Miller in his patrol car. It was Cst. Shannon's evidence that he was searching Mr. Miller for weapons. The search took about a minute. He searched all of Mr. Miller's pockets in the course of the search.

[35] Mr. Miller described a much more intrusive search, involving lifting up his shirt, pulling clothing away from his body, looking down the front of his jean shorts, and locating the drugs in the front of Mr. Miller's underwear. Mr. Miller also testified that Cst. Shannon conducted a second search after Mr. Miller was placed in the patrol car and then removed. During the second search, Mr. Miller said Cst. Shannon undid Mr. Miller's belt buckle causing his shorts to fall down in full view of passing motorists. Mr. Miller said he was with Cst. Shannon by the side of the road for 45 minutes to an hour altogether. This suggests that the search took some time, although I do not take Mr. Miller to be saying that the 45 minutes to an hour was all taken up with searching. Mr. Miller's description of the searches contains features similar to those found by the Supreme Court of Canada in *R. v. Golden, [2001] S.C.J. No. 81* to have constituted a strip search. The Crown conceded that Mr. Miller's description of a second search, if accepted as true, with his belt being loosened so that his shorts fell down, constituted a strip search. The Crown asserted that such a search did not occur.

[36] Mr. Miller and Cst. Shannon also described different points when the handcuffs were put on: Mr. Miller said this occurred before he was searched, Cst. Shannon said it was after the search.

[37] The Defence urged me to discount Cst. Shannon's evidence about the search because of discrepancies between his testimony and his police notes describing the packaging of the pills he seized. I have considered that but have not found it to be significant: Cst. Shannon was very consistent about the manner in which the search was conducted and was not shaken in his evidence about it.

[38] It is for Mr. Miller to satisfy me on a balance of probabilities that he was subjected to the intrusive search he described. I do not find that he has done so. I do not accept that following an arrest for *Motor Vehicle Act* violations Mr. Miller was subjected to what amounted to a strip search on a public highway or that his shorts fell down, and that motorists passing at 100 km/hr reacted to this occurring. The search described by Cst. Shannon is more plausible. The patrol car had a security shield or divider between the front seat and the back: this was made clear through Mr. Miller's evidence that Cst. Shannon handed the cell phone through "a slot" so he could speak with his girlfriend. Mr. Miller was also handcuffed in the back of the patrol car, with his hands behind his back. There has been no persuasive evidence that Cst. Shannon was doing anything other than a search incidental to arrest for the purposes of officer safety. It would not have been logical or necessary for Cst. Shannon to do more than a basic pat down search with the security shield and the handcuffs providing additional security against Mr. Miller being able to do or use anything to attack Cst. Shannon in the car. I also accept Cst. Shannon's evidence that he handcuffed Mr. Miller once the search was completed, not beforehand, as Mr. Miller recalled. There was no evidence of any reason for handcuffing Mr. Miller before he was searched following his arrest.

[39] I find that the search by Cst. Shannon of Mr. Miller was brief and involved a pat-down over clothing and a checking of pockets. Had the arrest been valid, it would have constituted a minimally intrusive search incidental to arrest compatible with conventional police practices for ensuring that the person in custody does not have any readily accessible weapons.

[40] I have found that the arrest was invalid and the search incidental to it was a brief pat-down search that included reaching into pockets. How serious a breach of Mr. Miller's rights was that?

[41] The Defence has argued that this was a very serious breach of Mr. Miller's rights as it involved an intrusion into areas - pockets - in which Mr. Miller had a high expectation of privacy. I agree with this. The Supreme Court of Canada in *R. v. Mann, [2004] S.C.J. No. 49* recognized that individuals, not subject to arrest, have a reasonable expectation of privacy in their pockets. The search of Mr. Mann, a pat-down search that included reaching into Mr. Mann's pocket, was found to have gone beyond what was required to mitigate concerns about officer safety and to reflect a serious breach of Mr. Mann's protection against unreasonable search and seizure. (paragraph 56) In my view, the *Mann* principles are relevant to my assessment of the seriousness of the breach of Mr. Miller's rights: a search that unreasonably intrudes upon an individual's pockets is a serious breach of rights. The search of Mr. Miller was an unlawful and hence, an unreasonable search. Cst. Shannon, acting under his arrest powers, subjected Mr. Miller to a search of his pockets. This was a serious breach of Mr. Miller's right to be free from unreasonable search or seizure.

[42] Cst. Shannon's good faith does not save the illegal search and secure the admission of the evidence. The Supreme Court of Canada has held in *R. v. Buhay, supra* at paragraph 59 that " good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority." Here Cst. Shannon effected an unreasonable arrest of Mr. Miller; the fact that he did it in apparent good faith does not dilute the seriousness of the breach of Mr. Miller's section 8 rights. In its submissions on the seriousness of the breach issue, the Crown argued that Cst. Shannon believed he had lawful authority to arrest and search and acted on "reasonable beliefs." I accept Cst. Shannon believed he had lawful authority but I do not accept that his decision to arrest, which gave him the power to search, was based on objectively reasonable grounds.

[43] In my view, this was a serious breach. Mr. Miller was committing MVA infractions, yet he ended up arrested, searched and handcuffed. The search included areas (pockets) in which he had an acknowledged reasonable expectation of privacy. That reasonable expectation of privacy was violated by the exercise of police powers to search derived from an arrest that was objectively unreasonable. This is what the *Charter* aims to protect individuals from: the arbitrary exercise of state power.

[44] The final consideration in the section 24(2) analysis is whether the exclusion of the evidence could adversely affect the administration of justice. The purpose of section 24(2) is to prevent the administration of justice from being brought into "further disrepute" by the admission of evidence in the proceedings. In *Collins, supra* at page 281, Lamer J. explained that: "This further disrepute will result from the

admission of evidence that would deprive the accused of a fair hearing or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies." *Collins* established that it is not only the instant prosecution but also "the long term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered." *(Collins, supra at paragraph 31)*

[45] Mr. Miller is charged with a serious offence, possession for the purpose of trafficking and simple possession of a small amount of powder cocaine. The seized evidence is required for a conviction and the Crown has led evidence to support that the purpose of the possession was trafficking. As found in *R. v. Kokesh, [1990] 3 S.C.R. 3* at paragraph 57, it cannot be denied that the administration of justice could suffer some degree of disrepute from the exclusion of this evidence.

[46] However in the recent case of *Mann*, where the charge was also one of possession for the purpose of trafficking, the Supreme Court of Canada upheld the trial judge's decision to exclude the drug evidence notwithstanding that it represented the Crown's case against Mr. Mann. Citing *Buhay, supra* at paragraph 71, the Court held: "...evidence which is non-conscriptive and essential to the Crown's case need not necessarily be admitted. Just as there is no automatic exclusionary rule, there can be no automatic inclusion of evidence either. The focus of the inquiry under this head of analysis is to balance the interests of truth with the integrity of the justice system. The nature of the fundamental rights at issue, and the lack of reasonable foundation for the search suggest that the inclusion of the evidence would adversely affect the administration of justice." The Court went on to note that: "The vibrancy of a

democracy is apparent by how wisely it navigates through these critical junctures where state action intersects with, and threatens to impinge upon, individual liberties." (paragraph 15)

[47] The seriousness of the breach mandates against the inclusion of the evidence notwithstanding the seriousness of the charges. I find that the admission of evidence obtained by way of an intrusive and invalid search of Mr. Miller's pockets could adversely affect the administration of justice. This was not a trivial or technical breach of rights *(Buhay, supra at paragraphs 52 - 53)*. I find that the exclusion of the evidence obtained from Mr. Miller unlawfully through a serious breach of his constitutionally protected rights is appropriate in this case to protect the integrity of the administration of justice. The unlawful arrest of a person committing *Motor Vehicle Act* violations led to the search of his pockets. This was a serious intrusion upon Mr. Miller's constitutionally protected right to privacy. I find that the disrepute to the justice system that would necessarily result from the admission of the drugs as evidence "cannot be counterbalanced by speculation about the disrepute that might flow from its exclusion." *(R. v. Kokesh, supra at paragraph 58)* I find that Mr. Miller has satisfied me that his *Charter* rights were violated and that the drugs seized from him in the course of the unlawful search should not be admitted into evidence.

Judge Anne S. Derrick