PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Smith, 2012 NSPC 95

Date: 20121009
Docket: 2430319
Registry: Pictou

Between:

Her Majesty the Queen

v.

Nicholas Cory Kevin Smith
Shawn Cassell

DECISION ON MOTION TO EXCLUDE EVIDENCE

Revised decision:	A typographical error in para. 27 is corrected, and reference in para. 40 to "sentencing" is replaced by reference to "*Charter*". This decision replaces the previously released decision.
Judge:	The Honourable Judge Del W. Atwood
Heard:	October 9, 2012, at Pictou, Nova Scotia
Charge:	Section 4(1) *Controlled Drugs and Substances Act*
Counsel:	Bronwyn Duffy for the Federal Prosecution Service Douglas Lloy for Shawn Cassell Stephen Robertson for Nicholas Cory Kevin Smith

[ORALLY]:

Synopsis

[1] The Court has for decision the case of Nicholas Cory Kevin Smith and Shawn Cassell. Mr. Smith and Mr. Cassell were charged and tried jointly in relation to an information alleging that:

> . . . on or about the 19th of November, 2011, at or near Alma, Pictou County, Nova Scotia, they did unlawfully possess a substance included in schedule II, namely cannabis (marihuana) exceeding 30 g (grams) contrary to Section 4(1) of the *Controlled Drugs and Substances Act.*

[2] This case started out as a routine checkpoint stop which evolved into a warrantless drug search incidental to arrest. Defence counsel assert that there were insufficient grounds to arrest the accused, rendering the search incidental to arrest unconstitutional. They seek exclusion of the controlled substance seized by police. To the contrary, the Crown submits that there were sufficient grounds to make the arrests; the Crown argues as well that the search conducted by police was lawfully incidental to arrest, and that the controlled substances seized ought to be admitted into evidence at trial.

[3] For the reasons that follow, I find that the arrests of Mr. Smith and Mr. Cassell were based on insufficient grounds. Accordingly, the search incidental to arrest was unconstitutional. Applying the analysis set out in *R. v. Grant*,[1] I find that the seized evidence ought to be excluded pursuant to sub-section 24(2) of the *Charter.*

Summary of the evidence

[4] On November 19th, 2011, Cst. Jason Lee Roy and Cst. John Robert Caughey were conducting an organized checkpoint on the #4 Highway in Alma, Pictou County, Nova Scotia. At some point in time between 8:15 p.m. to 8:20 p.m., Nicholas Cory Kevin Smith drove up to this checkpoint in a normal manner. The co-accused, Shawn Cassell, was seated in the passenger seat. Cst. Roy and Cst. Caughey were called as Crown witnesses on an admissibility *voir dire* that was convened at the start of the trial. As the arrests in this case and the search that led to the discovery of the challenged evidence were carried out by Cst. Roy, I will focus mainly on his evidence. I find that he had a better recollection of what happened, in any event. After Mr. Smith stopped at the checkpoint, Cst. Roy put his head near the open driver's window and spoke to Mr. Smith. He asked Mr. Smith for the usual driving documents and engaged him in casual conversation.

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[1] 2009 SCC 32.

Cst. Roy then detected what he described as a “hint of an odour of marihuana” emanating from Mr. Smith’s breath, “as if he had smoked marihuana”. As the officer continued to speak with Mr. Smith, he began to perceive a stronger odour of raw, fresh marihuana coming from within the vehicle. Cst. Roy testified that it was then that he formed the opinion that there was cannabis marihuana inside the passenger compartment; he proceeded to arrest both Mr. Smith and Mr. Cassell for possession of a controlled substance.

[5] After escorting Mr. Smith and Mr. Cassell to the rear of Mr. Smith’s vehicle and placing them under the charge of Cst. Caughey, Cst. Roy carried out a vehicle search. The constable found a number of packs of rolling paper in an unspecified location inside the vehicle. He located prescription bottles, one containing marihuana; then, under the passenger seat, he found a Sobeys shopping bag in which he located a smaller sandwich baggie; inside the baggie was a substantial amount of marihuana, exceeding 30 grams. Cst. Roy found on the back seat a first-aid kit containing a tin can which held a small number of so-called dime bags. The officer also found a grinder.

Lawful arrest?

[6] Section 9 of the *Canadian Charter of Rights and Freedoms* states:

> Everyone has the right not to be arbitrarily detained or imprisoned.

[7] There is no controversy that Cst. Roy's warrantless arrest of Mr. Smith and Mr. Cassell was a detention within the meaning of Section 9 of the *Charter.* In order for a detention to be non-arbitrary, it must be authorized by law which is itself nonarbitrary.[2]

[8] The powers of police to arrest without warrant are set out in Section 495 of the *Criminal Code.* That section states:

> 495. (1) a peace officer may arrest without warrant
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
> (b) a person whom he finds committing a criminal offence, or
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal in any form set out in Part 28 in relation to thereto is in force within the territorial jurisdiction in which the person in found.

[9] In my view, para. 495(1)(b) is the operative section here, as Cst. Roy testified that he did not know the amount of cannabis marihuana he might expect to find in Mr. Smith's car. "I did not know if it was three grams or 200 grams but

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[2] *Id.*, para. 56.

I knew that there was something inside that vehicle." In my view, the officer's belief as to quantity must be confined to the lower limit of that range. To suppose that he believed he might find a greater amount would be to support a belief unsupported by the evidence.

[10] Cst. Roy stated that he arrested Mr. Smith and Mr. Cassell for "possession of a controlled substance", which he believed to be cannabis marihuana. Possession of a quantity of cannabis marihuana not in excess of 30 grams is a straight summary-conviction offence in virtue of sub-section 4(5) of the *Controlled Drugs and Substances Act.* This is why para. 495(1)(b) is the arrest power that is in play here.

[11] The phrase "finds committing" as expressed in para. 495(1)(b) might mean different things in different circumstances. An officer who witnesses a person throwing a brick through a retail-display window and running off with a jacket or camera might be said safely to have found that person committing theft or vandalism. Sometimes, however, to conclude that one has been "found committing an offence" might well involve some degree of deductive reasoning on the part of the police observer, as when a funny odor might suggest the presence of

a contraband substance, or the inspection of a wonky looking cheque might raise concerns about fraud or forgery.

[12] Crown and defence presented to the court an array of cases dealing with the issue of whether an odour of marihuana–nuanced as burnt, fresh or raw–might support a judgment made by a peace officer that he has found a possession offence being committed. These are very fact-specific cases. Mindful of the need to confine my factual findings to evidence presented in this case, it would, in my view, stray into the reception of extrinsic evidence to draw from these cases conclusions about when the odour of cannabis might ground a reasonable and probable belief about finding an offence being committed. Crown counsel, in its argument, placed some reliance on *R. v. Janvier*[3] in support of the proposition that the detecting of an odour of raw marihuana might constitute reasonable grounds for arrest without warrant. In supposed contradistinction to *Janvier*, defence counsel referred to *STP v. Canada* [4] to advance the argument that "smell alone may not justify an arrest".

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[3]2007 SKCA 147.

[4]2009 NSCA 86 at para. 4.

[13] In my view, there is no conflict between *Janvier* and *STP* regarding the governing law. Both cases recognize that sufficiency of the grounds for arrest in cannabis-smell cases will be determined by the facts established at trial. Accordingly, in some cases, an odour of raw or fresh cannabis detected by a very experienced officer may well ground a lawful arrest without warrant. In another case, when, say, the level of experience of the officer is not as great or the odour faint, the olfactory sense alone might not be enough. There are no hard-and-fast categories of sufficiency.

[14] In this case, I find as a fact that Cst. Roy's experience in dealing with cannabis marihuana was limited. He joined the RCMP only in 2009 and his duties have been focussed since then on traffic services. He has had some exposure to cases involving controlled substances, but the details are few. Cst. Roy was asked about training that he had gotten in relation to drug-related offences; the question on this point was not limited to cases involving cannabis marihuana. He testified having experience conducting vehicle stops and seizures, but did not specify how many of these investigations involved detecting cannabis marihuana by smell. He testified being involved twice in grow-op interdiction operations when he "tagged along" with the Street Crime Unit; the exact nature of his involvement in these

operations was not made clear to me. He testified that he had participated in three or four searches involving drug warrants; however, he did not say which drugs, if any, had been found in those warranted searches. He testified to being involved in over twenty-five drug arrests at checkpoints, but did not reveal how many involved cannabis marihuana, his level of involvement in those arrests, or whether any of them actually had him sniffing out cannabis.

[15] Significantly, there is one investigative step that Cst. Roy did not take before arresting Mr. Smith and Mr. Cassell; it is the one step that would seem to have been the most advisable in the circumstances, particularly when there was nothing exigent requiring a snap judgment: Cst. Roy did not ask his partner, Cst. Caughey, a much more experienced officer, whether he could smell anything. The need to consult, collaborate, and validate, particularly when attempting to make a judgment call about the presence of contraband, site unseen, was highly compelling in this case. Given the lack of evidence about Cst. Roy's experience in detecting cannabis marihuana by smell, and given his failure to consult, I am unable to conclude factually that the constable's subjective belief that he had detected the odour of raw or fresh cannabis marihuana inside Mr. Smith's car afforded him reasonable grounds to conclude that he had found Mr. Smith and Mr.

Cassell committing the offence of possessing a controlled substance. The fact that the officer's search turned up marihuana cannot be used to bootstrap his grounds.[5]

[16] Accordingly, I find that Cst. Roy could not have concluded reasonably that he had found Mr. Smith and Mr. Cassell committing the summary conviction offence of possession of cannabis marihuana, so that his arrest in this case was not authorized by law.

[17] Indeed, with respect to Mr. Cassell, the grounds for arrest were even weaker. Cst. Roy had no evidence connecting Mr. Cassell with the ownership of the vehicle, he had no idea how long Mr. Cassell had been in the car with Mr. Smith, and there was no evidence of the officer detecting an odour of cannabis marihuana on Mr. Cassell's breath.

[18] This leads inevitably to the finding that the detention of Mr. Smith and Mr. Cassell violated Section 9 of the *Charter*.

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[5] *R. v. Morelli*, [2010] 1 S.C.R. 253 at para. 40.

Search incidental to an unconstitutional arrest

[19] Section 8 of the *Charter* provides as follows:

> Everyone has the right to be secure against unreasonable search or seizure.

[20] The search of Mr. Smith's vehicle was done without warrant, thus *prima facie* unreasonable pursuant to *Hunter v. Southam Inc.*[6] This places the burden upon the Crown to prove, on a balance of probabilities, that the search was reasonable. A reasonable search must be authorized by law. In this case, the Crown asserts that the lawful authority for Cst. Roy's search of Mr. Smith's vehicle was the arrest, which in turn gave rise to the authority to carry out a search incidental to arrest. However, as noted in *R. v. Caslake*,[7] the legality of a search incidental to arrest derives from the legality of the arrest; if the arrest is found later to have been invalid, the search will fall also. Having found that the arrests of Mr. Smith and Mr. Cassell were unconstitutional, I am compelled to find that the search, too, was unconstitutional, in violation of Section 8 of the *Charter.*

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[6][1984] 2 SC.R. 145.

[7][1998] 1 S.C.R. 51 at para. 13

Whether to exclude the seized contraband

[21] I now turn to the issue of exclusion of the evidence in accordance with the provisions of sub-section 24(2) of the *Canadian Charter of Rights and Freedoms.* Section 24(2) states:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter,* the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[22] The Supreme Court of Canada in *Grant*[8] has articulated a framework for the exclusion of evidence. The inquiry is obviously objective and invites the court to consider whether a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter,* would conclude that the admission of the evidence would bring the administration of justice into disrepute. The focus of the court should not be on the long term only, but should be prospective. Sub-section 24(2) recognizes that a *Charter* breach causes damage to the administration of justice; therefore, the remedy should ensure that evidence obtained through the breach not cause further damage to the administration of justice. The focus ought

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[8]Note 1, *supra*.

to be upon systemic concerns, not aimed at punishing police or providing compensation or material redress to the accused whose rights have been violated.

[23] The court must consider the seriousness of the *Charter*-infringing conduct. The court must evaluate also the impact of the conduct on the *Charter*- protected rights of the accused. The court must recognize society's interests in having the case adjudicated on its merits; the court's final analytical step is to balance those three criteria and determine whether the evidence should be admitted or excluded.

Seriousness of the breach

[24] First of all, with respect to the seriousness of the *Charter*-infringing conduct, I do not find that Cst. Roy's actions were blatant or flagrant. The officer did not act in bad faith. However, he ought to have self-assessed his level of experience in deciding upon his course of conduct, and he should have sought out the judgment of a more senior colleague who was right there at the scene with him. His actions resulted in the unlawful arrest of two individuals, which operated a serious restraint upon their constitutionally protected liberty interests.

[25] Further, it is significant that Cst. Roy did not appear to have considered his duty *not* to arrest the accused, as it is defined in sub-section 495(2) of the *Criminal Code.* That provision states that a peace officer shall not arrest a person without warrant for an offence punishable on summary conviction unless there exist compelling investigative reasons for doing so. Given that Mr. Smith and Mr. Cassell had identified themselves properly and were behaving very well, it would seem that the only justification for arrest, even if sufficient grounds had existed, would have been to locate and preserve evidence.

[26] I would refer specifically to the comprehensively reasoned opinion of Duncan J. in *R. v. Farmakis*[9] which drew the following important principle from the well known investigative-detention case out of the Supreme Court of Canada, *R v. Mann*:

> Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon

[9]2011 NSSC 101 at para. 61.

> them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain.[10]

[27] I would note particularly that Cst. Roy did not give consideration to the ability to conduct an informed-consent search without the necessity of arresting Mr. Smith and Mr. Cassell, as comprehended in, for example, *R. v. Wills*.[11] In my view, the serious restraint upon the constitutionally protected liberty interests of Mr. Smith and Mr. Cassell weighs in favour of exclusion of the evidence.

Impact of the breach

[28] The impact upon the *Charter*-protected rights of Mr. Smith and Mr. Cassell was great. Cst. Roy relied on the arrest to ground his search incidental to arrest. This search resulted in the discovery of the principal incriminating evidence against the accused. Admittedly, this was real evidence and not self-conscriptive, and there is a reduced level of expectation of privacy in a motor vehicle. Nevertheless, I am unable to conclude that the contraband would have been inevitably discoverable and I apply the principles set out in *Grant* at paragraphs

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[10]2004 SCC 52 at para. 35.

[11](1992), 52 O.A.C. 321 at para. 69.

122 and 137. I recognize that Cst. Caughey described seeing the cannabis marihuana in plain sight; however, the evidence of Cst. Roy was that he had found the cannabis marihuana inside a baggie, itself stored inside a larger Sobeys bag which Cst. Roy had located underneath the passenger seat. It was Cst. Caughey's evidence that he was not completely certain when in the sequence of events he had observed the cannabis marihuana in plain sight. Given Cst. Roy's evidence, I find that Cst. Caughey must have caught sight of the cannabis marihuana after it had been found by Cst. Roy, pulled out from under the seat, and removed from the Sobeys bag. Accordingly, the impact on the accused's *Charter*-protected interests were great, and led to the seizure of highly incriminating and not readily discoverable evidence. This militates in favour of exclusion.

The Interests of Society

[29] With regard to society's interests in an adjudication on the merits, I recognize that a ruling that the seized evidence be inadmissible would deprive the Crown of reliable and critical evidence. This is a factor which militates strongly against exclusion. However, I would note that this is a summary-proceeding case, and does not involve allegations of production or trafficking.

Balancing

[30] *Grant* guides trial courts on sub-section 24(2) applications in these terms:

> 85 To review, the three lines of inquiry identified above -- the seriousness of the Charter-infringing state conduct, the impact of the breach on the Charter-protected interests of the accused, and the societal interest in an adjudication on the merits -- reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by Charter breach would bring the administration of justice into disrepute.
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> 86 In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the Stillman self-incrimination test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.[12]

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[12]Note 1, supra, at paras. 85-86.

[31] In my view, the lawful exercise of police arrest power, particularly given the great frequency of roadside spot checks, must properly reflect the *Charter* value of protecting the liberty of the subject against unconstitutional arrest.

[32] Based on my balancing of these factors, I would exclude the evidence seized by Cst. Roy from Mr. Smith's vehicle, and that evidence will be ordered excluded from the trial of Mr. Smith and Mr. Cassell.

[33] **The Court**: And, Ms. Duffy?

[34] **Ms. Duffy**: Thank you, Your Honour. Crown would invite dismissal.

[35] **The Court**: Thank you very much. And Mr. Lloy and Mr. Robertson?

[36] **Mr. Robertson**: Agreed, Your Honour.

[37] **Mr. Lloy**: Yes, Your Honour.

[38] **The Court**: Accordingly, no further evidence being offered against Mr. Cassell or Mr. Smith, this charge is being dismissed out of this Court. Mr. Smith, your appearance in court has fulfilled your obligation to the court and you're free to go, and I take it, Mr. Lloy, that Mr. Cassell will be informed of the outcome.

[39] **Mr. Lloy**: Yes, Your Honour.

[40] **The Court**: Thank you very much. And I do appreciate ... I wish to say two things before closing off ... first of all, I certainly appreciated the high level of preparation that was evident in the written submissions provided to the Court by Crown and defence. I will state, as well, that the main reason for adjourning the *Charter* decision for this period of time was that I'm certain we're all aware that the Supreme Court of Canada currently has on reserve the decision out of our Court of Appeal in *R. v. Aucoin.* That matter was argued in the Supreme Court of Canada last May and I was hopeful that there might have been a decision that

would have provide additional helpful guidance to this Court; however, it wasn't forthcoming and I felt that it was more important to provide a timely adjudication than waiting and seeing what might be coming down from above.

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J.P.C.