PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Hoyes*, 2018 NSPC 26

Date: 2018-07-31
Registry: Halifax

IN THE MATTER OF an Application by Her majesty the Queen in right of Canada for an Order pursuant to subsection 490(9) of the *Criminal Code*, ordering that $107, 240.00 seized by the police on December 24, 2014 from Mark Andrew Hoyes at 86 Pondicherry Crescent in Dartmouth, Nova Scotia be forfeited to Her Majesty the Queen in right of Canada

Between:

THE ATTORNEY GENERAL OF CANADA

Applicant

v.

MARK ANDREW HOYES

Respondent

DECISION ON RESPONDENT'S APPLICATION FOR EXCLUSION OF EVIDENCE PURSUANT TO SECTIONS 8, 9 & 24(2) OF THE *CHARTER*

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	September 18, 19 2017, May 30, June 14 2018 in Halifax, Nova Scotia
Decision:	July 31, 2018
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated August 23, 2018.
Counsel:	Suhanya Edwards, for the Applicant Kevin Burke, for the Respondent

By the Court:

Introduction

[1] On December 24, 2014, police attended Mr. Hoyes' residence in response to a call to the non-emergency police line. Mr. Hoyes was outside the residence, carrying a box. He was initially detained and subsequently arrested. The box was seized and opened to find it contained $107, 240.00 in cash.

[2] A search warrant was obtained for the residence and executed. Items seized at the residence included two sealed vacuum-packed bags containing 149.20 grams and 65.60 grams of marihuana respectively, a duffel bag containing a vacuum sealer, empty packaging and a grinder and a separate smaller quantity of marihuana inside a baggy.

[3] Charges against Mr. Hoyes of possession of proceeds of crime and possession of marihuana for the purpose of trafficking were dismissed upon the Crown offering no evidence.

[4] The Crown is now seeking forfeiture, under s. 490(9) of the *Criminal Code*, of the cash seized from Mr. Hoyes. The defence originally contested the Court's jurisdiction to deal with this but withdrew that objection. The defence has filed a *Charter* application alleging breaches of ss. 8 & 9 and seeking exclusion of evidence under s. 24(2). The Crown does not dispute that the *Charter* applies in the context of a forfeiture application under s. 490(9) and that, Mr. Hoyes, as a person affected by the seizure of the money, can argue that his *Charter* rights have been infringed and seek to have that evidence excluded from this hearing if a breach is established.

[5] If I conclude that the cash was discovered as a result of a *Charter* breach, that information must be excised from the Information to obtain the Search Warrant for the residence. The search of the residence was not specifically challenged. However, the Crown has conceded that the Warrant could not have been issued without that information. The Crown also concedes that if the cash is excluded from this hearing, it cannot meet its burden for forfeiture under s. 490(9) of the *Code* and agrees that the money should be returned to Mr. Hoyes. As a result, the focus at the hearing and in my analysis is on the seizure and search of the box, not on the subsequent search of the residence.

[6] The Crown argues that the box was lawfully seized and searched because police were engaged in a legitimate investigation, Mr. Hoyes was detained for investigative purposes and the box was in plain view during that detention, then Mr. Hoyes was lawfully arrested and the box was opened (searched) pursuant to that arrest. The Crown also argues that even if there was a breach of Mr. Hoyes' *Charter* rights, the evidence should not be excluded. In doing so, the Crown submits that s. 24(2) applies with lesser force where, as in this case, the liberty of an accused is not at stake. In doing so, the Crown relies primarily on the reasoning of the Alberta Court of Appeal in *R. v. Daley*, 2001 ABCA 155 and decisions which have considered exclusion of evidence or return of funds in specific fact situations including *R. v. Hercock,* 2001 ABPC, *R. v Symbalisty*, 2004 SKPC and *A.G. (Canada) v Arana*, 2005 BCSC 579. The Crown filed a brief and Book of Authorities addressing s. 24(2). Both were very helpful and provided the court with a fair and complete picture of the specific and background considerations at play.

[7] The defence argues that there was an insufficient basis to detain Mr. Hoyes for investigative purposes, that the seizure of the box went beyond the permissible scope of a search incident to investigative detention and plain view, that the officer lacked reasonable grounds to arrest for a drug offence and the search of the box after that arrest went beyond the permissible scope of a search incident to arrest. The defence acknowledges that the context here is not a criminal trial but argues that the circumstances nonetheless justify exclusion upon proper application of the *Grant* factors.

[8] Both counsel acknowledge that *Daley,* the case relied on by the Crown to argue that the s. 24(2) factors carry less weight in this context, was decided prior to the decision in *Grant* so applied the *Collins* factors. The Crown argues under the *Grant* test, the trial context is still distinct from the forfeiture context and the *Daley* reasoning is still correct.

[9] Therefore, the issues for me to decide are:

1. Were Mr. Hoyes' rights under ss. 8 and 9 of the *Charter* breached?
    a. Did the officer have the requisite grounds to detain Mr. Hoyes for investigation?
    b. Did the seizure of the box exceed the scope of search incident to detention and plain view?
    c. Did the officer have reasonable grounds to arrest?
    d. Did the search of the box exceed the scope of search incident to arrest?
2. If Mr. Hoyes *Charter* protected rights were infringed, should the evidence be excluded under s. 24(2)?
    a. How do the s. 24(2) factors set out in *Grant* apply in this context; and,
    b. In the circumstances of this case, should the evidence be excluded?

General

[10] The burden to establish breaches of the right not to be arbitrarily detained under s. 9 of the *Charter* is on Mr. Hoyes on a balance of probabilities. However, because the seizure and search of the box is a warrantless search, the burden under s. 8 of the *Charter* is on the Crown.

[11] An arrest or detention not authorized by law is arbitrary. (*R. v. Mann*, 2004 SCC 52 at para. 20 and (*Grant*, [2009] 2009 SCC 32, at para 54).

[12] A search (or seizure) will be reasonable if it is authorized by law, if the law is reasonable and the search is carried out in a reasonable manner (*R. v. Collins,* [1987], 1 S.C.R. 265, at para. 23).

> A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. In this case, the Crown argued that the search was carried out under s. 10(1) of the *Narcotic Control Act*, *supra*. As the appellant has not challenged the constitutionality of s. 10(1) of the Act, the issues that remain to be decided here are whether the search was unreasonable because the officer did not come within s. 10 of the Act, or whether, while being within s. 10, he carried out the search in a manner that made the search unreasonable.

Issue 1(a) & (b): Was the initial detention of Mr. Hoyes a valid investigative detention? Did the seizure of the box exceed the scope of search incident to detention and plain view?

[13] In *Mann,* the Supreme Court of Canada identified a common-law power of investigative detention. Police have a limited power to detain for investigation where the detention is reasonably necessary on an objective view of the totality of the circumstances. The officer must have a reasonable suspicion that the particular individual is implicated in the criminal activity that is under investigation. The question is whether the facts are objectively indicative of the

possibility of criminal behaviour. This must be examined in the context of the totality of the circumstances known to the officer at the time, including exculpatory, neutral or equivocal information. The entire circumstance is relevant to the assessment of the reasonableness of the detention, including the extent of the detention and the extent to which the interference with liberty is required for the officer to perform his/her duty.

[14] On December 24th, 2014 at approximately 4pm, police were dispatched to 86 Pondicherry Drive as a result of a call on the non-emergency line. Cst. Amit Parasram, Cst. Gibson, Cst. Divine and Cst. Greek all attended.

[15] Cst. Parasram arrived first, at approximately 4:30 p.m. He testified that, prior to arriving, he had the following information:

1. The dispatch was to an "unknown trouble call" which he believed was a 911 call. The call was not a 911 call but Cst. Parasram testified this would not have changed his response;
2. The caller reported that a male by the name of Mark Hoyes had said something like "if you touch those drugs I'll beat you to death".
3. A description of the male was given as 34, 6' tall and clean shaven.

[16] When he arrived, a person matching the description given was in the driveway walking toward a vehicle with a brown box in his hands. The person opened the car door and put the box on the passenger seat.

[17] Cst. Parasram approached, introduced himself to the person, told him the nature of the call, identified him as Mark Hoyes by reference to a driver's licence and asked if there was anyone in the residence. Mr. Hoyes said his wife, Crystal, and young son were inside. Mr. Hoyes then told Cst. Parasram that he believed the call was the result of a dispute with a neighbour or tenant (both of these terms were used during the hearing) and that a name the officer recalled as "Andersons" had threatened to make a false accusation against him. Mr. Hoyes began to scroll through messages on his phone that he thought would support his version but was scrolling too fast for Cst. Parasram to read the messages.

[18] Other officers began to arrive a few minutes after Cst. Parasram arrived. Cst. Gibson remained with him and Mr. Hoyes while Cst. Denine and Cst. Greek went to the door to speak with Crystal.

[19] At 4:40 p.m., Cst. Parasram placed Mr. Hoyes under investigative detention relating to the domestic incident and possible drugs, he advised him of his Charter rights and confirmed he understood. Cst. Gibson testified and confirmed that he observed Cst. Parasram detain Mr. Hoyes, caution him and advise him of his *Charter* rights. Cst. Denine and Greek testified that they went to the door to speak with the occupant, Crystal.

[20] At the point where Cst. Parasram initially detained Mr. Hoyes, he had a report of a threat with the potential for the presence of drugs. Mr. Hoyes was leaving the location of the alleged threat, matched the description given by the caller and was confirmed to be the person named by the caller. Cst. Parasram received information from Mr. Hoyes that the report was false. He was not entitled to disregard this information but also could not simply accept it as true. The

information Cst. Parasram had was objectively indicative of the "possibility" of criminal behaviour. The officer had a reasonable suspicion that Mr. Hoyes was implicated in the criminal activity that was under investigation. He could not simply let Mr. Hoyes go on his way and then find him later if the circumstances turned out to support that there had been a threat. The circumstances required investigation and the initial detention was reasonably necessary on an objective view of the totality of the circumstances. Some interference with Mr. Hoyes' liberty was required for the officer to do his duty, which was to investigate the threat allegation and the drug component. The investigative detention phase continued until Mr. Hoyes was arrested at 5:03 p.m., so for approximately 20 minutes. I recognize that this is longer than the very brief investigative detentions that are generally contemplated under *Mann*. However, in the circumstances, including that there was minimal interference with Mr. Hoyes' liberty and the circumstances were more complicated than some, I believe the duration of the pre-arrest detention was reasonable. Therefore, in my view, the initial detention of Mr. Hoyes was a valid investigative detention, so was lawful and not arbitrary.

[21] After the detention, Cst. Parasram asked Mr. Hoyes what was going on and was told he was going to transport some stuff to his mothers which was down the road. Cst. Parasram could see the box which was on the floor of the vehicle on the passenger seat but was propped up by the seat. The box was suspicious because it was heavily taped up. Further, the call related to a threat concerning someone touching someone's drugs so Cst. Parasram felt it reasonable to infer that if Mr. Hoyes was concerned about someone touching his drugs, he would remove the drugs from that place and it would make sense to put them in a box.

[22] Mr. Hoyes referred to the contents of the box as "knick-knacks" or trinkets. Cst. Parasram thought this was strange because the box was very well packaged - more than what he would expect to transport knick-knacks down the street. He testified that he had received training on drug packaging so was suspicious about the package and that the circumstances when coupled with the drug reference in the call, caused him "some level of suspicion".

[23] Cst. Parasram's suspicion about the box was in part because of his training. He testified that during his cadet training members of the drug unit provided information that drugs would typically be packaged in a manner to try to control the release of scent and make sure it doesn't break open. He believed he had similar training during block training. His prior experience had included seizure of small quantities as a result of scent, incident to arrest or plain view.

[24] He told Mr. Hoyes that they could resolve the issue of the box if Mr. Hoyes would consent to have the box opened. He declined but agreed to have a canine sniff the package. Inquiries were made about the availability of a PSD but none was available.

[25] Cst. Parasram asked Mr. Hoyes for the box and Mr. Hoyes handed it to him. In his testimony, he described this request as being related to the "preservation of evidence. He said he seized the box because there "could be" evidence in it and he wanted to seize that evidence "for the purposes of investigation and to prevent the destruction of the evidence" (transcript, p. 45, lines 4 - 21). He testified that Mr. Hoyes was not handcuffed and Cst. Parasram did not have his car keys, so it was possible for Mr. Hoyes to take off.

[26] At some point, Cst. Greek and Cst. Denine, the officers who had gone to the door, completed their discussion with Crystal and at least some of that information was conveyed to Cst. Parasram. It is not clear from the evidence whether Cst. Parasram had that information before he seized the box.

[27] Cst. Parasram testified that he received the information after he detained Mr. Hoyes and before he arrested him but does not specify whether it was before or after the box was seized. Neither Cst. Greek nor Cst. Denine have clear recollections about when the information was provided. Based on my review of the evidence, particularly that of Cst. Parasram, I believe that he did not receive this information prior to the box being seized so it is not relevant to his decision to seize the box. The evidence of Cst. Denine and Cst. Parasram about how much information was conveyed to Cst. Parasram is inconsistent but I will address that issue later when I review Cst. Parasram's grounds for arrest.

[28] When asked about his authority to seize the box, the said he believed he was seizing the box under the plain view doctrine which would permit the seizure of things which you believe to be evidence of a criminal offence. (transcript, p. 47) He confirmed in cross-examination that he had no officer safety reason to seize the box so knew that he could not seize it incident to investigative detention and reiterated that he was seizing it to preserve the evidence. (transcript, p. 102)

[29] In submissions, the Crown acknowledged weaknesses in applying the plain view doctrine on these facts but did not offer any other potential legal justification for the seizure or concede that the box was taken without lawful authority. She, correctly in my view, did not argue that the

seizure could be justified as a "consent seizure" or as incident to the investigative detention. As a result, I will consider whether Cst. Parasram had authority to seize the box under the plain view doctrine.

[30] Cst. Parasram recognized that he did not have the authority to seize the box incident to investigative detention. The limited "safety search" incident to a lawful investigative detention that was recognized in *Mann* is not a power to search for evidence. Cst. Parasram candidly testified that he did not have any safety concerns related to Mr. Hoyes or the box and testified that he seized it for the purpose of preserving evidence.

[31] The common law plain view doctrine allows for a seizure without warrant where an officer is lawfully in a place, from which an item is in plain sight (discovered inadvertently) and the incriminating nature of the item is readily apparent to the officer. (see: *R. v. Squires*, 2016 NLCA 54) It has been at least partly codified in s. 489 of the Code which allows an officer who is lawfully in a place to seize an item if there are reasonable grounds to believe that the item has been obtained by crime, is offence related property or will afford evidence of a crime.

[32] The officer was lawfully present in the execution of his duties and I accept that the box was in plain sight. Therefore, the real issue for application of the plain view doctrine, is whether the box was clearly or apparently connected to criminal activity as would be required under the common law plain view doctrine, or if Cst. Parasram had reasonable grounds to believe that it was obtained by crime, offence-related property or would afford evidence of a crime as would be required by s. 489. At the point, when he seized the box, Cst. Parasram had the following information: information from a caller of unknown reliability which allowed for an inference

that there might be drugs present in the residence; his own observations of the heavy taping on the box; his belief that the explanation given by Mr. Hoyes for what was in the box was not consistent with the heavy taping; and, his belief that it was suspicious that Mr. Hoyes would not voluntarily open the box but would agree to having a dog sniff it.

[33] While I accept that the box and surrounding circumstances aroused the officer's suspicions, the box was not clearly or apparently connected to criminality and the officer's suspicion that the box contained drugs did not rise to the level of reasonable grounds to believe. Therefore, in my view, neither the common law plain view doctrine nor s. 489 authorized the seizure of the box. Therefore, its seizure was not authorized by law and was a breach of s. 8 of the *Charter*.

Issue 1(c): Did the officer have reasonable grounds to arrest Mr. Hoyes?

[34] An arrest will be lawful if the officer subjectively has reasonable grounds to make the arrest and the grounds are objectively reasonable. (*R. v. Storrey* (1990), 53 CCC (3d) 316 (S.C.C.)). A police officer must personally believe he has reasonable and probable grounds and "it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say, a reasonable person standing in the shoes of the police officer would have believed that reasonable and probable grounds existed to make the arrest…". *Storrey*).

[35] It is recognized that, in determining whether reasonable grounds exist, an officer is not entitled to disregard evidence that might detract from his belief. He must take into account all of the information available to him. He is entitled to disregard only what he has good reason for believing not reliable. *Chartier v. AG-Que* (1979), 48 CCC (2d) 34 (S.C.C.).

[36] When Cst. Parasram took the box, he noticed that it had the name "Peter" written on it. As he put it down, he felt the contents shift as a mass and not as individual items. He believed this to be inconsistent with the explanation offered by Mr. Hoyes that the box contained knick-knacks or trinkets. He testified that, at this time because of his training and cumulative observations, he formed the belief that the box contained drugs and at 5:03 p.m. he arrested and Chartered Mr. Hoyes for possession of drugs. Cst. Parasram testified that prior to the arrest, he had learned from Cst. Denine and Greek that there had been no domestic disturbance, so he arrested Mr. Hoyes only for a drug offence.

[37] Because the seizure of the box was a breach of Mr. Hoyes' *Charter* rights, the additional information that came as a result of that unlawful seizure cannot be used in the assessment of the reasonableness of his grounds to arrest. However, in case I am wrong in finding that seizure to be a breach, I will first assess Cst. Parasram's grounds to arrest with that information available.

[38] According to Cst. Parasram's testimony, his subjective belief that he had reasonable grounds to arrest for the drug offence was based on the following:

1. The original call which had referred to drugs together with the inference that it would be reasonable for a person who was concerned about someone touching his drugs to remove them from the residence;
2. The excessive taping of the box which was consistent with drug packaging. (Ex. 6, the cardboard box, is virtually covered in clear plastic tape or wrap);
3. The way the box was packaged was not consistent with the explanation provided by Mr. Hoyes;

4. The way the items in the box shifted was not consistent with it containing knick-knacks or trinkets; and,

5. Mr. Hoyes was willing to consent to having a dog sniff the box but would not consent to open it.

[39] There is no reason to doubt that Cst. Parasram subjective believed he had grounds to arrest Mr. Hoyes so the issue is whether those grounds are objectively reasonable.

[40] I will first say that the fact that Mr. Hoyes refused to consent to having the box opened cannot be used as part of the objective assessment of Cst. Parasram's grounds.

[41] As I said above, prior to arresting Mr. Hoyes, Cst. Parasram had some information from Cst. Denine and Cst. Greek about what Crystal had said. There is dispute about how much information was provided to him but it is clear that he was at least told that she had said there was no dispute or words to that effect.

[42] The dispute in the evidence concerns whether he was also told that Crystal had provided a similar explanation for the call as that provided by Mr. Hoyes, specifically, that the caller was a disgruntled neighbour or tenant. None of the officers had made notes of their conversation about what Crystal had said.

[43] Cst. Greek testified that he spoke briefly with the female occupant of the home. She was calm, he observed no marks on her or signs of distress and she advised that there had been no disturbance. He could not recall having been told about a disgruntled tenant. He believed he told Cst. Parasram that nothing had occurred and she had said she was fine.

[44] Cst. Denine testified that he received information from Crystal that there had been no dispute and she believed the call was a frivolous call made by a neighbour. He testified that he discussed this with Cst. Parasram. His recollection was that he told Cst. Parasram that she had said she believed the call had been made by an upset neighbour but that he didn't necessarily believe her and felt there was more to it. Cst. Denine was examined and cross-examined extensively on this recollection of giving this information. He testified that he recalled Crystal telling them about the disgruntled neighbour and it was something he would have felt it was important to tell Cst. Parasram.

[45] Cst. Parasram testified that he received some information from the officers who went to the door. In direct examination, he testified that he was only told that there was no domestic assault, meaning no physical domestic assault. (Transcript, p. 35, lines 8 - 16) Initially in cross-examination, he testified that he didn't know what explanation Crystal had given Cst. Denine and Greek and didn't think to ask. (transcript, p. 79). Later, he said recalled the officers telling him there had been no domestic dispute because this was the focus of his concern but couldn't recall whether they told him she had said it was a false allegation. (transcript, p. 81) He also said he couldn't recall if he'd asked the officers whether she'd given any explanation but acknowledged that it would have been logical or reasonable for him to do so. (transcript, p. 90, line 12 - p. 91, line 9)

[46] I believe that Crystal's explanation for the complaint was probably conveyed to Cst. Parasram, at least in summary form, by Cst. Denine and that Cst. Denine probably also told Cst. Parasram that he did not think he was getting the full story on the dispute. Cst. Parasram, while

initially certain that he had not received this information, appeared to become less certain in cross-examination and ultimately said he could not recall whether her explanation had been conveyed to him or whether he'd asked if there was an explanation. Cst. Denine, in contrast, was clear through extensive examination and cross-examination that he discussed this with Cst. Parasram. Since Cst. Denine was not part of the conversation with Mr. Hoyes, he would not have appreciated the significance of the explanation provided by Crystal, would have had no source for this explanation other than Crystal and would have had no reason to claim he'd told Cst. Parasram if he hadn't. It is possible that Cst. Parasram didn't really incorporate that information into his analysis because he didn't see it as important and so then, years later when testifying, did not recall receiving it.

[47] In any event, Cst. Parasram testified in cross-examination that he would have continued his investigation into the drug aspect of the complaint even if he had been told by Cst. Denine that Crystal's explanation for the complaint was the same as Mr. Hoyes' explanation. While he acknowledged that if the domestic dispute part of the complaint was false, the drug component could also be false, he said that if both Mr. Hoyes and Crystal were aware of drugs, he would expect their stories to be ironed out. (transcript, p. 86)

[48] Cst. Parasram testified in cross-examination that once he received the information from the other officers, he excluded the fact that there was a domestic dispute but did not exclude whether there was value in the other part of the complaint that involved drugs so continued on with that investigation. (transcript, p. 79).

[49] In my view, even if all he heard was that there was no domestic dispute, that information was also relevant to his belief that there were drugs in the box. He had information which was apparently reliable that the caller was mistaken or not telling the truth about there having been a domestic disturbance. That should have caused him to have concerns about the reliability of the information in the call or the caller's credibility. The reference to drugs was directly impacted by any lack of credibility or reliability and was inextricably linked to the allegation of a disturbance. The caller reported that the threat was "touch my drugs and I'll kill you" or words to that effect. Crystal, who was presumably the recipient of the threat, was saying she was fine and, in effect, there had been no disturbance. The reference to drugs was part of the alleged threat. Cst. Parasram was not entitled to disregard that information in relation to his suspicion that the box might contain drugs.

[50] The concern is even greater if Cst. Parasram was told by Cst. Denine that the female occupant of the home had said that she believed the caller was a disgruntled tenant/neighbour. In that case, Cst. Parasram would have had an apparently independent and consistent explanation for the call from both Mr. Hoyes and Crystal which explanation provided a motive for the caller to make a false complaint.

[51] When I examine the information available to Cst. Parasram, including that which supported his grounds (the caller's reference to drugs, the inference that the subject of the call would want to remove his drugs from the residence, the excessive taping on the box and his view that this was inconsistent with Mr. Hoyes' explanation for the contents, and his view that the way the items shifted in the box was inconsistent with Mr. Hoyes' explanation of its contents), and

that which detracted from his grounds (that the information conveyed by the caller about the domestic dispute was not reliable or the caller was not credible and possibly had a motive to make a false complaint), I find that his grounds to arrest Mr. Hoyes for the *CDSA* offence were not reasonable. More investigation was required, at least to determine whether Mr. Hoyes did have texts in his phone that would support his contention that his neighbour or tenant had threatened to make a false complaint. As such the arrest of Mr. Hoyes was not lawful.

[52] Mr. Hoyes was initially lawfully detained for investigation. A further detention at the scene to allow for further investigation might have been lawful, however, because the arrest was not lawful, it was arbitrary and a breach of s. 9 of the *Charter.*

Issue 1(d): Did the search of the box exceed the scope of search incident to arrest?

[53] At 5:05 p.m., following the arrest of Mr. Hoyes and before transporting him to the police station, Cst. Parasram used a knife to open the box and discovered it contained Canadian currency, in 14 bundles, the approximate size and shape of a 20 lb bag of flour. At this time, Cst. Parasram re-arrested Mr. Hoyes for possession of proceeds of crime and again advised him of his *Charter* rights.

[54] The Crown argues that Cst. Parasram believed he was opening the box as a search incident to arrest. I haven't been able to see in the transcript of his evidence where he said that. He testified that he opened the box prior to transporting it to the police station because of his understanding that procedure would require this to ensure that he wasn't transporting anything that was dangerous or could contaminate the station. (transcript, p. 12)

[55] However, to the extent that the Crown is arguing that the continuing retention and opening of the box was a search incident to arrest, it cannot be justified because I have found that the arrest was not lawful. Therefore, the search of the box was not a lawful search and is a breach of s. 8 of the *Charter*.

Issue 2(a): Should the evidence be excluded under s. 24(2)? (a) How do the s. 24(2) factors set out in *Grant* apply in this context?

[56] Section 24(2) requires that evidence obtained in a manner that infringed a *Charter* right be excluded if "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

[57] The Applicant bears the burden to establish, on a balance of probabilities, that the admission of evidence would bring the administration of justice into disrepute.

[58] In 2009, in *R v. Grant*, [2009] S.C.J. No. 32, and *R v. Harrison*, 2009 S.C.J. No. 34, the Supreme Court of Canada revised the analysis for exclusion of evidence under section 24(2) of the *Charter*. In doing so, it provided an overview of the general purpose and principles of s. 24(2) as well as clarifying the criteria for exclusion of evidence under that section.

[59] A number of general principles can be taken from *Grant*:

1. The purpose of s. 24(2) is to maintain the good repute of the administration of justice;
2. "Administration of justice" includes the rule of law and upholding *Charter* rights in the system as a whole;
3. Admission or exclusion must be considered with a view to the long-term, prospective, and societal consequences on the integrity of, and public confidence in, the justice system;

> 4.The distinction between conscriptive and non-conscriptive evidence is much less relevant; and,
>
> 5.Trial fairness is to be viewed as an "overarching systemic goal" rather than as a distinct stage of the 24(2) analysis.
>
> (*Grant*, para. 65 - 70)

[60] Against the backdrop of these general principles, the Court set out the three criteria for consideration in determining whether the admission of evidence would bring the administration of justice into disrepute:

> 1.the seriousness of the *Charter*-infringing state conduct;
>
> 2.the impact of the breach on the *Charter*-protected interests of the accused; and,
>
> 3.society's interest in the adjudication of the case on its merits.
>
> (*Grant*, para. 71)

[61] These criteria must then be balanced to arrive at an answer to the ultimate question suggested in *Grant* and *Harrison:* what is the broad impact of the admission of the evidence on the long-term repute of the justice system? (*Grant*, para 70, *Harrison*, para. 36) As was stated in *Harrison* (at para. 36):

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[62] That is the test to be applied in this case to determine whether Mr. Hoyes has met his burden to have the evidence excluded. This is not a trial and Mr. Hoyes' liberty interests are not

at stake. The leading case on the application of s. 24(2) in this context is *R. v. Daley*, 2001 ABCA 155. The Court in *Daley* said that the test to be applied under s. 24(2) remains the same but the different context means that the factors apply differently. I agree with that.

[63] However, when *Daley* was decided, the analytical framework for determining whether evidence should be excluded was the one set out by the Supreme Court of Canada in *Collins/Stillman.* That framework has been modified by the Supreme Court of Canada in *Grant.* Some of the statements of principle and analysis from *Daley* would still apply under the new framework. However, because the focus of the analysis under s. 24(2) has changed, caution must be used in applying *Daley* in a post-*Grant* case.

[64] In my view, application of s. 24(2) has always required a highly contextual and fact-specific analysis. When that is done in a non-trial context, the test remains the same and the general principles and criteria identified in *Grant/Harrison* remain the same. The difference is simply that the court has to apply the test and criteria to the specific facts in an individualized way that takes into account the unique context of the proceeding.

[65] One of the only post-*Grant* cases to apply s. 24(2) in a context similar to the one before me is *Alberta (Minister of Justice and A.G.) v. Squire*, 2012 ABQB 194. It involved an application under the *Victims Restitution and Compensation Payment Act* for the forfeiture of cash alleged to be the proceeds of crime. *Charter* breaches were found, and the court excluded evidence which resulted in the return of the seized property to Mr. Squires. In doing so, the court concluded that *Daley* was distinguishable because of the revision of the *Collins/Stillman* test by *Grant*. Justice Sullivan pointed out an important difference between the two tests.

Specifically, that the focus under *Collins/Stillman* had been on whether the evidence was conscripted or non-conscripted whereas the *Grant* analysis offered a more balanced consideration of the factors to arrive at an answer to the broader question of whether admitting the evidence would bring the administration of justice into disrepute. In considering the *Grant* criteria, Justice Sullivan concluded that the first and second of the *Grant* factors, the seriousness of the breach and the impact on the individual's *Charter* protected right, would apply in the same way regardless of the type of legal proceeding or whether or not the accused's liberty interest was at stake. The reasoning in *Squire* was approved of in *Alberta (Minister of Justice and A.G.) v. Wong*, 2012 ABQB 498.

[66] I agree with Justice Sullivan that there are aspects of *Daley* that no longer apply with the same force. Under the *Collins* test, courts were instructed to weigh three categories of factors: fairness of the trial; seriousness of the Charter breach; and, effect of exclusion on the administration of justice. Fairness of the trial was identified as a key part of the administration of justice such that if admission of the evidence would affect the fairness of the trial, its admission would tend to bring the administration of justice into disrepute. Where admission would render the trial unfair, particularly in cases of conscripted evidence, exclusion would often result without consideration of the second and third branches. Conversely, non-conscripted or real evidence would rarely render a trial unfair so was routinely admitted. This emphasis on conscriptive versus non-conscriptive evidence and the impact of the distinction on the fairness of the trial featured prominently in the court's reasoning in *Daley* and the ultimate conclusion that the s. 24(2) factors applied with less force in the non-trial context. The court noted that concepts of fair trial and conscriptive evidence make little sense in a proceeding where there are no

charges, no accused and no risk of conviction. As a result, the Court of Appeal concluded that in the context of forfeiture, the first branch of *Collins* would not be determinative of whether admission of the evidence would bring the administration of justice into disrepute.

[67] The second branch of *Collins*, the seriousness of the breach, continues to be a factor under *Grant*. The court's analysis of this factor in *Daley* was a traditional s. 24(2) analysis which examined the circumstances of the breach and did not identify any distinctions due to the type of proceeding.

[68] In assessing the third branch of the *Collins* test, the effect of exclusion and whether exclusion of evidence would bring the administration of justice into greater disrepute than its admission, the court in *Daley* identified policy considerations that in my view continue to apply under *Grant* and would be distinct to the type of proceeding. The Court accepted the finding of the lower court that there was an overwhelming case that Daley's possession of the $16,600 was unlawful. The Alberta Court of Appeal said that, the requirement in s. 24(2) of the Charter that the court have "regard to all the circumstances", included the public policy embodied in the maxim *ex turpi causa non oritur actio*, a criminal cannot profit from his crime. It referred to a number of earlier cases (*Buxton* (1981), 62 C.C.C. (2d) 278 (Alta. Q.B.), *Re Regina and Largie* (1981), 63 C.C.C. (2d) 508, *Re Collins and The Queen*, (1983), 7 C.C.C. (3d) 377, and *R. v. Spindloe*, [2001] S.J. No. 266,), all of which had said in various ways that it would be contrary to public policy or the public interest to return proceeds of crime or items intended for illegal drug use to the person who had committed the crime. The reputation of the administration of justice would suffer if the items were returned.

[69] These same considerations have figured prominently in a number of decisions referred to in the Crown's brief where courts have refused to return offence related property or proceeds of crime or exclude evidence from forfeiture proceedings where the result would be the return of the proceeds. (see for example: *R. v. Hercok*, 2001 ABPC 23; *R. v. Symbalisty*, 2004 SKPC 78; *R v Spindloe*, 2001 SKCA 58)

[70] Further, the court noted that the fact that no one's liberty interest was at risk in the proceedings was relevant to consideration of the harm in admitting the evidence. The harm, if the evidence is admitted, would not be the potential loss of his liberty, but the failure to receive monies which the evidence shows have accrued as the result of criminal activity.

Issue 2(b): In the circumstances of this case, should the evidence be excluded?

Application of Specific Criteria from *Grant*

1. Seriousness of the Conduct

[71] When considering this first criterion, the Court must consider whether admitting the evidence would send the message that the Court condones the state misconduct by allowing it to benefit from the fruit of the misconduct. The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes (*Grant*, para. 72).

[72] The Courts have recognized a spectrum of misconduct including inadvertent or minor violations at one end and willful or reckless disregard on the other. The more deliberate or

serious the conduct, the greater the risk that the public's confidence would be undermined and the greater need for the Court to dissociate itself from that conduct. The Court in *Grant* noted that extenuating circumstances or good faith could attenuate the seriousness of the misconduct or reduce the need for the Court to dissociate itself (*Grant*, paras. 74, 75).

[73] In this case I have found breaches of Mr. Hoyes' s. 8 and s. 9 rights, including the initial seizure of the box following a lawful detention, an unlawful arrest and the opening of the box following that arrest. That is the Charter-infringing conduct at issue.

[74] I do not view this as a situation where the officer's actions demonstrate bad faith. However, has actions do demonstrate an unacceptable lack of understanding of some fundamental police powers and an element of single-minded focus that may have caused him to ignore or discount information that did not conform with his perception of the situation.

[75] The officer believed he was operating within the law and in conformity with the *Charter* and did some things that show a respect for *Charter* protected rights. For example, immediately following the initial detention, he advised Mr. Hoyes of his *Charter* rights and again provided him with that information when his jeopardy changed after arrest and re-arrest on a different charge. He was respectful to Mr. Hoyes and the situation he was in. He did not restrain or handcuff Mr. Hoyes during either the initial detention or after arrest. This was because the officer was aware that Mr. Hoyes' son may have been watching. However, he also seemed to think that the fact that Mr. Hoyes exercised his constitutional right to refuse to open the box was strange and a factor he could consider in forming grounds to arrest him.

[76] The Crown has pointed out that while the officer was experienced in patrol work which would include grounds for detention and arrest and had some training in drug packaging, he was not an experience drug investigator. I accept that. However, I would expect an officer of his experience and training to understand the limits of the plain view doctrine and grounds for arrest, to recognize when a situation is out of the normal and seek advice if necessary. Here, the officer should have recognized that seizing a box where the contents were not visible was different than seizing drugs or a gun. I was troubled by the fact that he did not consider that issues with the reliability of the caller's information concerning the domestic disturbance would impact the reliability of the information relating to drugs. Further, his responses to questions in cross-examination suggesting that he would have continued on the same path even if he had heard that Crystal was providing the same explanation for the complaint as Mr. Hoyes. In my view, this information, should cause an officer to consider whether the caller might well have a motive to make a false complaint and pause to consider the impact of that on his grounds.

[77] The fact that the police obtained a warrant to search the residence is a factor that I can consider in assessing good faith but has to be balanced against the fact that no warrant was sought to seize or open the box and the evidence resulting from that search formed a necessary part of the grounds for the warrant to search the residence.

[78] I would place the *Charter*-infringing conduct above the middle of the spectrum of conduct and conclude that this factor favours exclusion of the evidence.

2. Impact on the Accused

[79] Analysis of the impact of the breach on the Accused must evaluate the interests engaged by the infringed right and the degree to which that right has been violated (*Grant*, at para. 77).

[80] The Court in *Grant* identified a spectrum of intrusiveness. The offending conduct here did not directly involve the search of a residence, the seizure of a bodily substance or the search of Mr. Hoyes' person. The search involved the seizure and search of a box in the driveway of a private residence. The officer was lawfully entitled to be in the driveway and the box was in public view. The officer was told the box contained knick-knacks and it actually contained money, neither of which contain highly personal or private information.

[81] However, the information obtained from this search was used to support a warrant to search a residence and there is no doubt that search of a residence falls at the most intrusive end of the spectrum, very close to the forcible taking of bodily substances. There is a high reasonable expectation of privacy in your own home (For example, see: *R. v. Silveria*, [1995] 2 S.C.R. 297).

[82] Further, the breaches also involved the arrest of Mr. Hoyes and everything that goes with that, including transport to the police station.

[83] In my view, this factor would tend to support the exclusion of the evidence.

3. Society's Interests

[84] Society's interests in a traditional trial context include determining the truth, bringing offenders to justice, and maintaining the long-term integrity of the justice system. The Court in

Grant instructs that the issue to be determined under this criterion is "whether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence, or by its exclusion?" (para. 79).

[85] Under this criterion, factors including the reliability of the evidence at issue, the importance of the evidence to the prosecution's case and the seriousness of the offence are all relevant.

[86] Some of these are trial considerations and don't lend themselves easily to the forfeiture context. The comments of the court in *Daley* about the importance of not returning proceeds of crime are still apt.

[87] The evidence seized in this case – money - would be considered reliable evidence. In discussing this factor, the Court in *Grant* specifically noted that it is not determinative, should not be given disproportionate significance and must be considered in the context of the case as a whole. In *Grant* and *Harrison*, the Court confirmed that automatic admission of reliable evidence regardless of how it is obtained is inconsistent with the *Charter*, and specifically inconsistent with the wording of s. 24(2) (*Grant*, paras. 81-84).

[88] While it is clear that the Supreme Court did not intend to provide a framework where all reliable evidence would be admitted, this aspect weighs in favour of admitting the evidence.

[89] The evidence in this case would be crucial to the Crown's application and, as I have said, I agree that the societal interest in adjudicating cases involving the forfeiture of potential proceeds of crime is high. As such, this factor supports admission of the evidence.

Balancing

[90] The final task is to balance the factors to determine what is the broad impact of the admission of the evidence on the long-term repute of the justice system? (*Grant*, para 70, *Harrison*, para. 36)

[91] I remind myself of the context of this hearing. It is not a trial. The ultimate result of inclusion of the evidence would not be that Mr. Hoyes is convicted of a criminal offence and liable to loss of liberty, but rather the forfeiture of money. The ultimate result of exclusion is not that someone who should be convicted is acquitted, but rather that money that is tainted by criminality is returned to Mr. Hoyes. However, I also remind myself that the hearing involves police power and state action against an individual. I also come back to some of the general principles arising out of that decision: the purpose of s. 24(2) is to maintain the good repute of the administration of justice; "administration of justice" includes the rule of law and upholding *Charter* rights in the system as a whole; and admission or exclusion must be considered with a view to the long-term, prospective, and societal consequences on the integrity of, and public confidence in, the justice system. These principles apply in the forfeiture context. Trial fairness, which under *Grant* is identified as the "overarching systemic goal" does not apply in the same way.

[92] In balancing the factors under *Grant*, I have to keep in mind that is important for courts to dissociate themselves from police misconduct. Of course, that goal does not always trump other legitimate interests of the criminal justice system. In this case, the goal of dissociating the court from police misconduct and the associated risk that the conduct will continue has to be balanced against the potential negative impact on the public perception of the criminal justice system if an individual is seen to be benefitting financially from illegal activity.

Conclusion

[93] To summarize my conclusions on the three criterion. The first criterion, the seriousness of the breach marginally favours exclusion. The police conduct did not demonstrate a willful or negligent disregard for *Charter* Rights or reflect a systemic or institutional abuse of *Charter* rights but did demonstrate what I would describe as "blinded" or single-minded focus that resulted in the breach *Charter* rights. The second criterion, the impact of the breach on Mr. Hoyes' *Charter* protected right, favours exclusion. While the breaches in and of themselves might have been in the lower half of the spectrum of intrusiveness, the fact that the evidence seized resulted in a search of a residence moved it into the higher range. The third criterion, society's interest, marginally favours admission. The reliability of the evidence, importance of the seized items to the proceeding and public interest in forfeiture of potential proceeds of crime is high.

[94] When I balance all of these factors and consider the importance of distancing the court from the police misconduct, having regard to all the circumstances, I conclude that admission of the evidence in these circumstances would have a negative impact on the long-term repute of the

administration of justice. As such the application to exclude evidence pursuant to s. 24(2) of the *Charter* is granted.

Elizabeth Buckle, JPC.

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Hoyes* 2018 NSPC 26

Date: 2018-07-31
Registry: Halifax

IN THE MATTER OF an Application by Her majesty the Queen in right of Canada for an Order pursuant to subsection 490(9) of the *Criminal Code*, ordering that $107, 240.00 seized by the police on December 24, 2014 from Mark Andrew Hoyes at 86 Pondicherry Crescent in Dartmouth, Nova Scotia be forfeited to Her Majesty the Queen in right of Canada

Between:

THE ATTORNEY GENERAL OF CANADA

Applicant

v.

MARK ANDREW HOYES

Respondent

ERRATUM

Judge: The Honourable Judge Elizabeth Buckle

Heard: September 18, 19, 2017, May 30, June 14, 2018 in Halifax, Nova Scotia

Decision: July 31, 2018

Erratum date: August 23, 2018

Counsel: Suhanya Edwards, for the Applicant
Kevin Burke, for the Respondent

Erratum: [1] Heard has been corrected from March 13, September 18, 19, October 23, December 8, 2018, January 17, May 30 June 31, 2018 to September 18, 19, 2017, May 30, June 14 2018 in Halifax, Nova Scotia