

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Lively, 2007 NSSC 301

Date: 20071022
Docket: CR. No. 274575
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Gordon Allison Lively

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Judge: The Honourable Justice Robert W. Wright

Heard: October 9 and 10, 2007 in Halifax, Nova Scotia

Oral

Decision: October 22, 2007

Written

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Subject: Charter of rights - whether evidence seized from the pockets of the accused was obtained by an infringement of the accused's section 8 or 9 Charter rights and if so, whether such evidence should be excluded under s. 24(2) of the Charter.

Summary: Two plainclothes officers observed the accused near a downtown bar late at night, one of whom believed that the accused struck a resemblance to a picture of someone he had just seen on the outstanding arrest warrant list. When the officers approached the accused, identified themselves and said they would like to talk for a moment, the accused suddenly bolted across the street. The officers quickly caught up to him and when he resisted the officer's grip, they took him to the ground, informing him that he was being arrested as a suspect under an outstanding warrant. Instead of complying with the officers' demands to stop resisting and to give them his hands, the accused continued to vigorously resist and kept reaching towards his pockets. The officers eventually got the accused under control and handcuffed his

hands behind his back. While still on the ground, the officers first carried out a pat-down search to check for weapons and ultimately emptied his pockets, finding several individual packets of cocaine and ecstasy pills. They thereupon arrested him for possession of controlled substances for the purpose of trafficking under the **Controlled Drugs and Substances Act**.

In a voir dire at the outset of the trial, the accused sought to exclude the physical evidence thus obtained, alleging that his s. 8 and 9 Charter rights had been infringed.

Issues:

- Was there a lawful arrest or detention of the accused?
- Was there a lawful search and seizure of the accused?
- If the Charter rights of the accused were violated, should the subject evidence be excluded under the s.24(2) remedy analysis?

Held: In the circumstances, the police had reasonable and probable grounds to arrest the accused (even though it was later determined that he was not actually subject to an outstanding arrest warrant). Furthermore, given the accused's physical resistance to the arrest and his persistent reaching for his pockets, the police did not exceed the permissible limits of the common law power of search incident to arrest by emptying his pockets to make sure he was not carrying a weapon. Since neither the arrest nor the search and seizure of the drugs was unlawful, there was no breach of the accused's Charter rights and the physical evidence thus obtained was admitted in evidence at trial.

Even if that finding was wrong, and a violation of the accused's Charter rights did occur, the court would nonetheless have refused to exclude the subject evidence at trial under a s. 24(2) remedy analysis.

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