SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Reddick, 2011 NSSC 235

Date: 20110616
Docket: Cr. No. 341059
Registry: Halifax

Between:

Alexander John Reddick

Applicant

-and-

Her Majesty the Queen

Respondent

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: May 26, 2011 at Halifax, Nova Scotia

Written Decision: June 16, 2011

Counsel: Counsel for the Applicant - Bradley Sarson
Counsel for the Respondent - Angela Nimmo

Wright, J.

INTRODUCTION

[1] The accused Alexander John Reddick has been charged with a single count of unlawfully trafficking in cocaine on or about May 1, 2010, contrary to s.5(1) of the **Controlled Drugs and Substances Act**. His trial on that charge, by judge and jury, is scheduled to commence on November 21, 2011.

[2] On March 25, 2011 defence counsel gave formal notice of a Charter motion, alleging that Mr. Reddick's right to be free from unreasonable search and seizure pursuant to s. 8 of the Charter was violated at the time of his arrest. The defence accordingly seeks exclusion of certain items seized from Mr. Reddick at the time, namely, the sum of $20.25 in cash and a cell phone. The defence also seeks exclusion of evidence of a verbal utterance of an inculpatory nature allegedly made by Mr. Reddick to police shortly after his arrest.

[3] This decision rules on the admissibility of that evidence, following a voir dire held on May 26, 2011. The issues to be decided are:

(a) Was the arrest of the accused unlawful?

(b) If his arrest was unlawful and his rights under s. 8 of the Charter were thereby violated, should the two items seized from him upon his arrest and the verbal utterance allegedly made by him to the police, be excluded from evidence under a s.24(2) analysis?

VOIR DIRE EVIDENCE

[4] The only witnesses called by the Crown on this voir dire were the two arresting officers, Csts. Lee Cooke and Jason Marriott. Both are experienced police officers and at the time of the alleged offence were assigned to foot and bicycle patrol duties in the Gottingen Street area of Halifax.

[5] Constable Cooke was the first to testify. He recounted that he and his partner, Cst. Marriott, were traveling on their bicycles on Gottingen Street at approximately 11:45 p.m. on April 30, 2010 when they first observed the accused. He was walking near the intersection of Gottingen Street and Buddy Daye Street in the company of two other men who he appeared to be leading somewhere. Constable Cooke said that he had known the accused for several years (including his time as a booking officer) and knew from prior encounters and conversations with the accused that he had been a crack cocaine user in the past. Constable Cooke did not know the two other men accompanying the accused. They appeared to him to be travellers, wearing a backpack and accompanied by a dog, who were not normally in that area of town.

[6] Constable Cooke also testified that he observed the accused on a cell phone at the time and that he lead the two men with him into a walkway known as Heron Walk. Constable Cooke knew from his police experience that this neighbourhood saw a high volume of drug activity (primarily crack cocaine) and that drug transactions there were not uncommon.

[7] Constable Cooke considered this to be suspicious activity since it presented similar circumstances to the hundreds of drug transactions he had observed before in his police duties. He and Cst. Marriott therefore decided to take up an observation post nearby.

[8] From this observation post, Cst. Cooke observed the two other men sitting on a park bench, the accused no longer being in their presence. They appeared to be waiting for something and kept looking in a northerly direction through a walkway known as the “no name cut” running between Uniacke and Maitland Streets.

[9] Constable Cooke testified that the observation post they were using was in an elevated position approximately 120-130 feet distant from the two men. He was the only one of the two officers using binoculars at the time. He further testified that the area was well lit by artificial lighting.

[10] About five minutes later, Cst. Cooke saw the accused return through the no name cut, walking in a direction towards them. As the accused approached the two other men, he saw the accused’s right hand reach out to one of them (whose identity later became known as Neil Wilson). Cst. Cooke thought that when he saw the accused’s right hand extended, something appeared to be picked up from it by Mr. Wilson’s right hand. Constable Cooke then saw Wilson walk away from the accused with his right hand closed.

[11] Mr. Wilson then took off his hat and appeared to put something in it before showing it to his friend. He then jostled his cap around like a popcorn shaker. Cst. Cooke then saw Mr. Wilson take his hand out and put something in his jacket pocket before he and his friend parted from the accused.

[12] This encounter lasted only a few seconds and was observed by Cst. Cooke at a distance which he said was no more than 150 feet away.

[13] Constable Cooke readily acknowledged that he could not identify or describe what it was that he believed changed hands. He readily acknowledged that he couldn't actually see the hands of Mr. Wilson and the accused throughout the encounter because his line of vision to their hands at the critical moment was blocked by their respective standing positions. Constable Cooke was only able to directly see Mr. Wilson's back and a bit of the front of the accused's body. He therefore couldn't actually see their hands touch. He conceded that he didn't actually observe some object in the accused's hand but maintained that the activity overall suggested that it wasn't just a handshake. All of the surrounding circumstances lead him to form the belief, based on his experience, that a hand to hand drug transaction had just taken place.

[14] Constable Cooke further acknowledged that from these bare observations, he could not say positively that something had passed between the hands of the accused and Mr. Wilson. Convinced that that had happened, however, Cst. Cooke testified that his partner called in the drug transaction to other nearby police officers who promptly arrested Mr. Wilson. Based on the police officers' notes, it

is apparent that that arrest took place within the following 5-10 minutes.

[15] When Mr. Wilson was searched by the other arresting officers, they found in his pocket two tinfoil balls with crack cocaine, which information was immediately relayed to Csts. Cooke and Marriott. With this additional information, Cst. Cooke and Cst. Marriott concluded that the accused was arrestable for trafficking. As it happened, they came upon the accused moments later in an elevator in a nearby apartment building whereupon he was arrested. Constable Cooke testified that the accused was read his rights and caution verbatim from his police notebook but that the accused declined to exercise his right to counsel.

[16] Upon making a cursory search at the time of the arrest, Cst. Cooke found nothing of any significance on the accused's person and accordingly nothing was seized at that time. Constable Cooke's notebook recorded that the accused was arrested and his Charter rights and police caution read to him at 00:12 on May 1, a mere 16 minutes after the drug transaction had been called in by Cst. Marriott (hence, the estimated time of Mr. Wilson's arrest).

[17] The accused was then taken out to the street for transport to the police station for booking. Constable Cooke thought that his partner there conducted a further search of the accused's pockets which yielded the cell phone and cash consisting of two ten dollars bills and a quarter. There is conflicting evidence of the timing of that further search but in any event, those items were later turned over by the booking officer, Cst. Locke, at the police station around 1:00 a.m.

[18] When asked whether or not he had heard any statement or utterance made by the accused near the back of the police wagon at the scene of his arrest before being transported to the police station, Cst. Cooke testified that he could not recall hearing anything and was not certain he was even present when anything was said. He therefore made no record of it in his police notebook which he acknowledged he would have, had he heard any inculpatory utterance made by the accused.

[19] I now turn to a summary of the evidence given by Cst. Marriott. He made the same initial observation of the accused as did Cst. Cooke while on bicycle patrol with one exception. Constable Marriott testified that it was later, when they were positioned in their observation post, that the accused was seen making calls on his cell phone.

[20] Constable Marriott recognized the accused as someone he had known for about three years. He had been involved in several arrests of the accused for breaches of court conditions and beyond that, had seen the accused on an almost daily basis when on duty in that neighbourhood. Constable Marriott testified that on occasion, he had casual conversations with the accused about getting over his drug habit. Constable Marriott said that the accused was known to him to be involved in street level drug transactions and indeed, had been found in possession of a crack pipe on a prior arrest by Cst. Marriott back in 2007.

[21] Constable Marriott likewise testified that the subject area was known for high level drug activity where people from outside the neighbourhood would often come to and hang around waiting to be asked by someone what they wanted or

needed. He said that in his time of assignment to that area, he had personally been involved in approximately 100 arrests for drug offences.

[22] With their suspicions raised from the surrounding circumstances, Csts. Marriott and Cooke took up their positions in an observation post. He said that he and Cst. Cooke were within 10-15 feet of each other. From there, he observed the accused and two other men near the entrance to the so-called no name cut. The two other men were sitting on a park bench while the accused was making calls on his cell phone.

[23] Within five minutes or so, Cst. Marriott saw the accused leave and enter the cut, only to return some two or three minutes later. He was then met by one of the two other men (whose identity later became known as Neil Wilson) in the middle of the street directly under a street light. He estimated that his distance from them was then between 120-150 feet.

[24] Constable Marriott then described what he saw happen. He recounted that Mr. Wilson put an arm out with the palm of his hand up as if to receive something. He said that he could clearly see that as he had a side on view of the two persons. He also saw the accused extend an arm to Mr. Wilson and place a hand over the top of Mr. Wilson's hand. Mr. Wilson then returned to the bench and sat down where he opened the palm of his hand to display to his friend whatever he had in it. Constable Marriott could not himself see any object in Mr. Wilson's hand.

[25] Constable Marriott acknowledged that he did not see what it was that was handed over by the accused to Mr. Wilson. Indeed, he acknowledged that he did not actually see anything pass from one hand to the other, nor could he say that he saw their hands actually touch. Nonetheless, he formed the belief that the accused had left the two other men waiting while he left to buy drugs nearby and returned shortly thereafter to sell them to Mr. Wilson. He recited the grounds for that belief as follows:

He knew the accused to have had a past addiction to drugs;

He was in the company of two unknown persons in an area known for its high level of drug activity;

The accused made a number of calls on his cell phone in their presence (an estimated two or three);

The accused then left the two men alone while he entered the no name cut;

The accused returned within minutes to meet the two men and handed something over to Mr. Wilson's hand;

Mr. Wilson then showed whatever that item was to his friend;

The accused then left the scene right away.

[26] Constable Marriott testified that to him, that indicated a drug transaction had taken place even though he did not see exactly what was handed over. He therefore immediately contacted other police officers nearby to have them arrest Mr. Wilson for possession.

[27] On being informed of Mr. Wilson's arrest a very few minutes later and that the arresting officers had seized two tinfoil balls with cocaine, Cst. Marriott concluded, as did Cst. Cooke, that the accused was arrestable for trafficking of that drug. As it happened, they located the accused moments later in the elevator of a nearby apartment building. He was there arrested and advised of his right to counsel which the accused declined. Constable Marriott had no recollection of searching the accused and did not seize any items from him.

[28] The accused was then taken out outside to be transported to the police station in a police vehicle. While standing near the back of the police vehicle, Cst. Marriott recounted a short conversation he had with the accused in the presence of Cst. Cooke who was said to be within earshot. Constable Marriott asked the accused what he was thinking in engaging in such activity when he knew of the police presence in that immediate area. The accused's response, according to Cst. Marriott, was an admission that he did get drugs for the two men, using their $60 to buy two stones and thereby ripping them off for $20 to get chicken wings for himself. Constable Marriott recorded that response in his police notebook upon his return to the police station shortly thereafter. He said he was one hundred percent confident in the response given by the accused as he had recorded it.

[29] The accused then took the stand briefly to refute some of the evidence given by the two police officers. The points he made in his testimony can be summarized as follows:

He knew Cst. Cooke at the time of his arrest but had met him only once before (about a year earlier);

He knows Cst. Marriott only from the night of his arrest on April 30, 2010 and did not know him before that;

He had no conversations at any time with either police officer about his prior drug use;

In respect of the statement or utterance attributed to him by Cst. Marriott, he denied ever having said any such thing at all. He said his only response was to utter the question "what did I do?" and nothing else;

He denied that Cst. Cooke had found a crack pipe on him once before on an occasion when an arrest was made;

He denied being a user of crack cocaine;

He said that he was not told the reason for his arrest nor did he have his rights read to him at all at the time of his arrest.

FIRST ISSUE - Whether arrest unlawful?

[30] The lawfulness of the warrantless search of the accused in this case hinges on the lawfulness of his arrest. If his arrest was unlawful, as contended by the defence, the detention of the accused violated his s.9 Charter right and the subsequent search of his person would have been unreasonable and hence a violation of his s.8 Charter right as well.

[31] If, on the other hand, the arrest of the accused was lawful, the subsequent search of his person, being incidental thereto, would have to be treated as reasonable and lawful and the items seized from the accused would be admissible in evidence. The same holds true for the alleged inculpatory utterance by the accused shortly after his arrest, provided that the arrest was lawful in the first place and that the accused was read his Charter rights and caution as required.

[32] The powers of arrest without a warrant by a peace officer are set out in s.495 of the Criminal Code. Section 495(1)(a), which is the applicable provision here, reads as follows:

> 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,

[33] The leading case on police powers of arrest under s.495(1)(a) is *R. v. Storrey* [1990] S.C.J. No. 12. Justice Cory discussed in that decision (at paras. 14-17) the need to achieve a reasonable balance between an individual's right to liberty and the need for society to be protected from crime. In striking that balance in its interpretation and application of s.495(1)(a), the court articulated the following test:

> 16. There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, 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. See R. v. Brown (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; Liversidge v. Anderson, [1942] A.C. 206 (H.L.), at p. 228.
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> 17. In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.

[34] It should be noted that some time after the *Storrey* case was decided, s. 495(1)(a) was amended to its present form by the removal of the words "and

probable" in its enunciation of the grounds necessary for an arrest. However, in the recently released decision in *R. v. Loewen*, 2011 SCC 21 the Supreme Court of Canada commented that one of the justices of the Alberta Court of Appeal, whose decision was before them, was mistaken in holding that the requirement of "reasonable grounds" in s.495(1)(a) is different from the former requirement of "reasonable and probable grounds". The substance of the test set out in *R. v. Storrey* therefore remains unaltered.

[35] In applying that test to the case at bar, I begin with the finding on the evidence that both Constable Cooke and Constable Marriott subjectively believed that they had reasonable grounds to make the arrest. Indeed, that subjective belief is not really challenged by counsel for the defence. What is challenged is whether or not that subjective belief was justifiable from an objective point of view.

[36] In his oral submissions, defence counsel pointed out certain differences in the evidence of the two police officers as to what and when they were able to see, and did see, of the encounter between the accused and the two other men. He emphasized that in any event, neither police officer was able to actually see (and much less describe) any object pass from the hand of the accused to the hand of Mr. Wilson. Indeed, neither police officer could attest that they saw the hand of the accused and the hand of Mr. Wilson actually touch. Neither did they see anything pass in exchange to the accused. The argument pressed is that if the police officers cannot say whether any item was passed by the accused to Mr. Wilson or that their hands even touched, the police had no evidence that any drugs were being passed by the accused to Mr. Wilson and hence, they lacked reasonable

grounds for making the arrest because of the absence of any objective justification.

[37] If the evidence of what the police officers saw from their observation post of this brief encounter were to be considered in isolation, I would agree that there was a lack of reasonable grounds for an arrest in the absence of objective justification. However, as the courts across this country have invariably said, judges must look to the totality of the pertinent circumstances to determine whether the arresting officer had the requisite reasonable grounds to make the warrantless arrest (see, for example, the decision of the New Brunswick Court of Appeal in *R. v. Tontarelli*, [2009] N.B.J. No. 294).

[38] The surrounding circumstances in the case before me present a much fuller context to the brief encounter between the accused and the two other men he was with. As backdrop, the encounter took place in a neighbourhood well-known to the police to experience a high volume of drug transactions. The accused was frequently seen in that neighbourhood by the police and was known to them as having been involved in the drug scene at the street level.

[39] On the night in question, the accused was first observed by Csts. Cooke and Marriott in the company of two other men who were apparent strangers in the neighbourhood and who he appeared to be leading somewhere. Whether on the street or moments later from their observation post, police observed the accused making a number of calls on his cell phone before leaving the other two men alone in the area of a walkway which he disappeared into. The two men kept looking in that direction, apparently waiting for something. Moments later, the accused returned to meet the two men and they extended their hands toward each other.

The other man, Mr. Wilson as it were, then showed something in his hand or his hat to his friend, with the accused then departing the scene right away.

[40] In the eyes of the police officers, all this activity collectively had many of the hallmarks of a street level drug transaction which in their experience they had similarly seen hundreds of times before. The inescapable conclusion, both subjectively and objectively, was that an item or object of some sort had been passed by the accused to Mr. Wilson. The officers suspected, of course, that the item passed was drugs upon which they acted by alerting other police officers nearby to apprehend Mr. Wilson. When Mr. Wilson was arrested within 5 to 10 minutes later, the arresting officers confirmed the suspicions of Csts. Cooke and Marriott when they were advised that a search of Mr. Wilson yielded two tinfoil balls with cocaine. It was only at that point that Csts. Cooke and Marriott formed the belief that they had the requisite reasonable grounds to arrest the accused for trafficking in cocaine.

[41] As the *Storrey* case tells us, that subjective belief is not sufficient to constitute reasonable grounds for an arrest. Such grounds must, in addition, be justifiable from an objective point of view.

[42] I have reached the conclusion, based on the totality of the evidence, that a reasonable person placed in the position of Csts. Cooke and Marriott would have believed that reasonable grounds existed to make the arrest. There was nothing

about this activity taken as a whole, that would suggest to a reasonable person, standing in the shoes of a police officer, that there was an innocuous explanation for it. Once Csts. Cooke and Marriott were informed a very few minutes later of Mr. Wilson's arrest and advised of the two tinfoil balls of cocaine that were found on his person, they attained the requisite reasonable grounds to make the arrest of the accused.

[43] With that finding that the arrest of the accused was lawfully made, it follows that the search of his person incidental to that arrest was a lawful search. Accordingly, the cash and cell phone seized from the accused as a result of that search are admissible in evidence at trial.

[44] I now turn briefly to the inculpatory utterance allegedly made by the accused to police shortly after his arrest. No Charter breach is alleged with respect to any such utterance. Rather, the position of the defence is that such an utterance was never made by Mr. Reddick, as he attested to in his evidence on the voir dire.

[45] Because of my finding that the arrest was lawfully made, and because I am further satisfied on the evidence that the accused was read his Charter rights and caution by Cst. Cooke at the time of his arrest, the evidence of Cst. Marriott attributing the inculpatory utterance above described to the accused will also be admissible at trial. It will then be for the trier of fact, namely the jury, to decide whether or not any such inculpatory utterance was actually made.

SECOND ISSUE - Exclusion of Evidence

[46] Because of my disposition of the first issue in this decision, it is unnecessary

for me to engage in a s.24(2) Charter analysis on the exclusion of evidence. While courts sometimes do so on a provisional basis, I do not see the need for it in the present case and decline to do so.

CONCLUSION

[47] Based on the totality of the circumstances surrounding the encounter between the accused and the two other men he was with, I conclude that the arresting officers had the requisite reasonable grounds to make the arrest as they did. Since the arrest was lawful, it follows that the search of the accused incidental to that arrest was a lawful search, and the items seized are admissible in evidence at trial. Similarly admissible at trial is the evidence of Cst. Marriott attributing to the accused an inculpatory utterance made shortly after his arrest.

J.