SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Hoyes*, 2019 NSSC 392

Date: 20191231
Docket: Hfx No. 479875
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Mark Andrew Hoyes

Respondent

Decision

Judge:	The Honourable Justice John Bodurtha
Heard:	April 15, 2019, in Halifax, Nova Scotia
Written Decision:	December 31, 2019
Counsel:	David Schermbrucker, for the Appellant Kevin A. Burke, Q.C., for the Respondent

By the Court:

BACKGROUND AND FACTS

[1] On December 24, 2014, the police attended Mr. Hoyes's residence in response to a non-emergency call. The caller alleged that Mr. Hoyes said, "if you touch those drugs, I'll beat you to death." Upon arriving at the residence, the police found Mr. Hoyes outside carrying a sealed box, which they seized. The officer who seized the box believed it contained drugs. He arrested Mr. Hoyes and subsequently opened the box to find it contained $107,240.00 in cash. The cash was used to obtain a search warrant for the residence, where the police found 214.80 grams of marijuana. Mr. Hoyes was charged with possession of proceeds of crime and possession of marijuana.

[2] The charges against Mr. Hoyes were ultimately dismissed for want of prosecution. The Crown then filed an application for forfeiture of the cash that had been seized under s. 490(9) of the *Criminal Code*.

i. The Provincial Court Decision

[3] Judge Buckle, the hearing judge in this matter, held that Mr. Hoyes's sections 8 and 9 *Charter* rights were breached by the police and that the seizure and subsequent search of Mr. Hoyes's box of cash were unconstitutional.

[4] The hearing judge then balanced the factors under s. 24(2) of the *Charter* and decided to exclude the cash evidence from the forfeiture application. The Crown appeals from her decision.

a) The Grant Factors

[5] *R. v. Grant*, 2009 SCC 32 is still the leading authority for a s. 24(2) analysis, including the s. 24(2) analysis in a forfeiture application. The Supreme Court of Canada used the *Grant* decision to revamp the s. 24(2) framework by grounding it in the following factors: the seriousness of the *Charter*-infringing state conduct, the impact upon the defendant's interests, and society's interest in an adjudication on the merits.

[6] *Grant* also clarified the policy objective behind s. 24(2) by underscoring that its focus is not to rectify police misconduct, but to preserve public confidence in the law. Where a violation is serious, the courts must dissociate themselves from the conduct by excluding the evidence. It is the long-term consequences of

admission or exclusion that must be measured, not simply the evidence at issue in a particular case. The question is whether admission would adversely affect the repute of the administration of justice in the eyes of a reasonable person; if so, the evidence should be excluded. Ultimately, a court resolving the question of exclusion must consider all the relevant circumstances, and no single factor should dominate the inquiry. In all cases, it is the task of the trial judge to weigh the various indications (see *R. v. Grant*, 2009 SCC 32 paras. 66-87).

[7] With respect to the first *Grant* factor – the seriousness of the infringing conduct – the hearing judge placed the officer's conduct in the middle of a spectrum between inadvertent or minor violations and willful or reckless disregard. As a result, she held that the first factor favoured exclusion of the evidence.

[8] With respect to the second *Grant* factor – the impact on the accused – the hearing judge viewed the consequences of the breach as compounding the seriousness of the breach itself. At paragraph 75 of the decision, she said:

> [75] The officer was told the box contained knick-knacks and it actually contained money, neither of which contain highly personal or private information… 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.

[9] This led the hearing judge to conclude that the breach had a serious impact on the accused and that the second factor also favoured exclusion of the evidence.

[10] With respect to the third *Grant* factor – society's interests – the hearing judge favoured the admission of the evidence, given that the evidence would be crucial to the Crown's application and that the societal interest in adjudicating cases involving potential proceeds of crime is high.

[11] On balance, the hearing judge reasoned that the *Grant* factors favoured the exclusion of evidence and ruled accordingly.

b) Contextualization of the Grant Factors

[12] The hearing judge, at the outset of her reasons, acknowledged the difference in context between a criminal trial and a forfeiture application. She further recognized, turning to the Alberta Court of Appeal decision in *R. v. Daley*, 2001

ABCA 155 at para. 24, that "the factors involved in the s. 24(2) test do not apply with the same force when the respondent's liberty is not at risk".

[13] However, the hearing judge also qualified her reliance on *Daley*, noting the following at paragraph 63 in her decision:

> [63] …when *Daley* was decided, the analytical framework for determining whether evidence should be excluded was 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 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.

[14] In *R. v. Collins*, [1987] 1 SCR 265, (the previously determinative authority for s. 24(2)) the primary focus had been trial fairness. Under *R. v. Grant*, however, the focus is broader. Therefore, while *Daley* appropriately emphasized the importance of contextualizing the trial-focused *Collins* framework in a non-trial context, the hearing judge held that the same emphasis was not needed under the already inherently contextual *Grant* framework.

ISSUES

a) Did the Provincial Court Judge err in law in applying and balancing the factors in the test for exclusion of evidence under s. 24(2) of the Charter?

This issue can be resolved by determining the following two sub-issues:

Sub-Issues:

a) To what extent does the Charter s. 24(2) test for admission or exclusion of evidence apply differently to forfeiture proceedings as compared to a criminal trial?

b) Does the second Grant factor – the impact of the Charter breach on the interests of the accused – extend beyond the impact of the actual breach to other consequential effects?

i. Standard of Review

[15] Both the appellant and respondent agree that, as a summary conviction appeal court, this court has broad jurisdiction, including jurisdiction to review evidence raised at the hearing. However, given that the appellant has expressly characterized its appeal as an alleged error of pure law, the appellant asserts that the standard of review is correctness for both sub-issues.

[16] For the first sub-issue – which pertains to the hearing judge's weighing and contextualizing of the s. 24(2) factors – the appellant is mistaken to suggest a correctness standard. In *R. v. Cole*, 2012 SCC 53, the Supreme Court of Canada echoed several of its previous decisions, again making it clear that the standard of review for a s. 24(2) analysis is deferential where the proper factors have been considered and there have not been any unreasonable findings. The Court stated:

> [82] The standard of review is deferential: "Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review" (*R. c. Côté,* 2011 SCC 46, [2011] 3 SCR 215 (SCC), at para 44). But where the relevant factors have been overlooked or disregarded, a fresh *Grant* analysis is both necessary and appropriate.

[17] Since it is apparent that the hearing judge considered the correct *Grant* factors under s. 24(2) and structured her analysis according to them, deference should be extended when evaluating the degree to which she contextualized her analysis under the factors.

[18] I agree that the appellant's classification of the second sub-issue as a question of pure law requiring a correctness standard is appropriate. This issue pertains to the legal nature of the second *Grant* factor itself, not any analysis or weighing of considerations under the factor.

I. ANALYIS

i. To what extent does the Charter s. 24(2) test for admission or exclusion of evidence apply differently to forfeiture proceedings as compared to a criminal trial?

a) Law

[19] Before the *Grant* decision was released by the Supreme Court of Canada, *R. v. Daley*, *supra*, an Alberta Court of Appeal decision, emphasized the importance of context in a s. 24(2) analysis. That case involved a forfeiture application pursuant to s. 490 of the *Criminal Code* concerning cash seized from Mr. Daley, who was arrested for obstruction of justice and possession of proceeds of crime but was never charged. The Court of Appeal ordered the cash to be forfeited, writing the following:

> [52] Section 24(2) of the *Charter* demands that the court have "regard to all the circumstances". In this case, one circumstance includes the public policy embodied in the maxim *ex turpi causa non oritur actio*, a criminal cannot profit from his crime.

[20] However, as the hearing judge correctly noted, the underlying s. 24(2) framework has since changed from the *Collins* framework to the *Grant* framework. The *Grant* framework is inherently contextualized such that a proper application of the *Grant* factors implies an appreciation of context.

[21] Still, several post-*Grant* forfeiture cases echo the policy concerns about returning proceeds of crime that were raised by the Court in *Daley*. Unsurprisingly, context determines how forcefully those policy concerns should apply. For instance, the maxim *ex turpi causa non oritur actio*, quoted in *Daley*, more naturally applies to forfeiture applications governed by s. 462.37 of the *Criminal Code* because s. 462.37 requires that the accused was convicted, and therefore implies that the items in question are indeed proceeds of crime. However, the maxim is less persuasive in applications governed by s. 490(9), which applies in cases where the accused is charged but is not put to trial. In these cases, there is no implication that the items in question are proceeds of crime, and the trier of fact is required to make a separate finding in that respect on a "beyond a reasonable doubt" standard.

b) Positions of the Parties

[22] The Crown asserts that the hearing judge erred by failing to meaningfully acknowledge the context of the forfeiture application until the third step of the *Grant* test – and, even on the third step, by failing to contextualize her analysis to a sufficient degree. The Crown relies on a number of authorities with "properly contextualized" analyses in support of its position (see *Directeur des poursuites criminelles et penales c. Vanden Brande*, 2015 QCCQ 11248; *R. v. Appleby* 2009 NLCA 6; *R. v. Spindloe,* 2001 SKCA 58; *R. v. Symbalisty*, 2004 SKPC 78; *R. v.*

Hercock, 2001 ABPC 233; and *A.G. (Canada) v. Arana, 2005* BCSC 579). In each of the authorities, the policy consideration that criminals should not profit from their crimes was a substantial factor in the court's decision to allow the evidence and, ultimately, the application.

[23] The appellant Crown goes further than suggesting that the hearing judge's analysis was generally uncontextualized, however. Its factum outlines a conception of what the threshold for admission should have been at each stage of the *Grant* test. For instance, under the first branch, the Crown suggests that "it would be appropriate for the Court to be on the lookout for instances in which the police conduct deliberately flouts the rights of the person" (i.e. bad faith police conduct). Under the second branch, the Crown suggests that only conduct that impacts "privacy interests of the highest importance or dignity (for instance, cases involving an abusive strip search)" should meet the threshold. The Crown's authorities do not provide specific support for either of these suggested thresholds.

[24] The respondent concedes that the test for exclusion of evidence should be contextualized in a forfeiture dispute. However, the respondent maintains that the hearing judge did not err in this regard. The respondent submits, first, that the Crown's authorities are distinguishable and, second, that the hearing judge's failure to meet the Crown's *ad hoc* thresholds is not an error of law.

[25] The respondent attempts to distinguish the Crown's supporting authorities by characterizing them as proceeds of crime cases as opposed to the current matter which is a "return of property seized" case. The applications for forfeiture in many of the Crown's authorities were made pursuant to s. 462.37 of the *Code*, which only applies where a conviction has been obtained. In the remaining authorities, where the application was brought under s. 490(9), there was a finding beyond a reasonable doubt that the items subject to the application were proceeds of crime. The respondent submits that the application before the hearing judge fell under s. 490(9) and not s. 462.37 and, since the hearing judge did not make a finding that the items were proceeds of crime, the respondent maintains that the hearing judge rightfully considered a different set of policy considerations in her analysis.

c) Analysis

[26] The line of authorities raised by the appellant are distinguishable from the case before me. The appellant's authorities stand for the proposition that a highly rigorous, contextualized s. 24(2) analysis – one which strongly favours admission of the evidence – is required in instances where the accused has been convicted, or,

where the property has been found by the hearing judge to be tainted with illegality beyond a reasonable doubt. Neither of those conditions apply here.

[27] For instance, in *Spindloe, supra,* the previous finding of guilt was paramount to both the majority and concurring reasons:

> [127] Majority: … it would defeat Parliament's intention to have the exhibits **upon which Mr. Spindloe was convicted** returned to him. …
>
> …
>
> [166] Concurring: … the remedy [Mr. Spindloe] seeks is an order of the court returning to him things he acquired and used **for the purpose of committing a criminal offence**… Indeed the instruments constitute the subject matter of the offence, **and the offence stands proved beyond a reasonable doubt. So the things are tainted with crime.** This is true of all of the instruments. *All* were admitted into evidence, and *all* went to found the conviction. … [Emphasis added]

[28] *R. v. Sitthiso*, 2004 SKQB 366; affirmed in 2005 SKCA 46, underscores how the difference between an acquittal and a conviction can sway a s. 24(2) analysis. *Sitthiso* involved a forfeiture dispute where the accused had previously been acquitted. The Court did not follow *Spindloe* for that reason, writing the following:

> [7] It is my view that the facts in the case of *R. v. Spindloe* are easily distinguished from the facts that would exist in this case**, were Mr. Chandara acquitted of the charge against him**. …
>
> …
>
> [9] **Were Mr. Chandara, as well as Mr. Sitthiso, to be acquitted of the charge in the instant case, no similar argument could be made**. Use of the automobile for criminal purposes would not have been established and there is clearly nothing illegal per se in the possession or use of an automobile. **I conclude that Mr. Sitthiso's application should not be denied on this basis.** [Emphasis added]

[29] Similarly, *Appleby, supra*, does not apply in the manner suggested by the Crown. The Crown attempts to use *Appleby* to demonstrate that the legislative intent behind the *Criminal Code's* Proceeds of Crime sections is to further society's interests. This line of analysis goes to the third *Grant* inquiry. However, its reasons are predicated on s. 462.37(1) of the *Criminal Code*, which only applies where a conviction has been entered.

[30] *Symbalisty, supra*, *Hercock, supra*, and *Arana, supra*, are on-point insofar as a conviction had not been entered. However, in each of those cases, the Court was satisfied that the goods subject to the forfeiture application were "tainted with illegality" beyond a reasonable doubt. *Hercock* and *Arana* involved two cases

where cash, ostensibly obtained through crime, was not excluded under s. 24(2). The courts first found beyond a reasonable doubt that the money was obtained illegally and used that finding to guide their subsequent balancing of the *Grant* factors which led to the admission of the evidence.

[31] The fact that the finding in *Hercock* and *Arana* was on a "beyond a reasonable doubt" standard is important. In *Alberta (Minister of Justice & Attorney General) v. Squire*, 2012 ABQB 194, 537 AR 177 (ABQB), a case referred to by the hearing judge in her decision, the Court found that seized cash was obtained illegally on a balance of probabilities for the purposes of the *Victims Restitution and Compensation Act.* Nevertheless, the Court excluded the evidence after a contextualized balancing of the *Grant* factors under s. 24(2).

[32] The crux of this sub-issue, then, is this: *if* the hearing judge made a finding – as the courts did in *Hercock* and *Arana* – that the cash was tainted with illegality beyond a reasonable doubt, then the line of jurisprudence referred to by the Crown suggests that her s. 24(2) analysis was not properly contextualized. However, if the hearing judge did not make a finding – or even if she made a finding on a lesser standard – then all of the Crown's authorities are clearly distinguishable and there is no basis to argue that she erred.

[33] A balanced consideration of the hearing judge's reasons suggests that she did not make any findings on a "beyond a reasonable doubt" standard. The language used in her decision does not indicate this. In considering the third *Grant* factor, she merely commented that, "I agree that the societal interest in adjudicating cases involving the forfeiture of potential proceeds of crime is high". Referring to the cash as *potential proceeds of crime* and referring to it as *proceeds of crime beyond a reasonable doubt* is very different – and this, naturally, would affect an evaluation of the third *Grant* factor. Moreover, while the hearing judge did refer to the money as being "tainted with illegality" in concluding her analysis, this does not imply a finding on a "beyond a reasonable doubt" standard.

[34] The hearing judge made findings based on the unique factual matrix presented to her and used her discretion to balance those findings, distilled through the appropriate s. 24(2) factors. The Crown proposes an arbitrarily defined, rigorous threshold for each stage of the s. 24(2) *Grant* test – a threshold that is untethered to any applicable authority.

ii. Does the second Grant factor – the impact of the *Charter* breach on the accused – extend beyond the impact of the actual breach to consequential effects?

Positions of the Parties

[35] The Crown submits the hearing judge erred by considering the consequential effects of the breach under the second *Grant* factor. The Crown explains that the hearing judge was understandably mistaken because, until last year, there was a line of s. 24(2) jurisprudence that allowed for the effects of a breach to exacerbate its seriousness. However, the Crown contends that that line of jurisprudence was corrected by the Ontario Court of Appeal in *R. v. Jennings*, 2018 ONCA 260. According to the Crown, had the hearing judge accounted for the *Jennings* decision, the second factor would have favoured admission rather than exclusion and her s. 24(2) analysis would have led her to a different conclusion.

[36] The respondent maintains that it was correct for the hearing judge to consider the effects of the breach under the second *Grant* factor, arguing that the Crown misunderstood the import of Jennings.

[37] The respondent interprets *Jennings* as a statement on the intrusiveness of breathalyzers specifically, not the *Grant* framework generally. The respondent maintains that *Jennings* is a statement that the consequential effects of a breach in a breathalyzer case are minimal, not that consequential effects in general are irrelevant. The Ontario Court of Appeal's decision in *R. v. Szilagyi*, 2018 ONCA 695 – which was issued after *Jennings* – suggests that that Court made the same interpretation as the respondent. In *Szilagyi*, the Court of Appeal expressly considered the entire impact of a breach that led to a warrant; it considered all of the impacts of the breach, and did not limit its consideration to some of the impacts of the breach, as the appellant suggests the hearing judge should have in her analysis.

a) Analysis

[38] The Crown's submissions on this sub-issue rely entirely on a broad interpretation of *Jennings*. The Crown asserts that *Jennings* stands for the proposition that, under the second branch of the s. 24(2) *Grant* analysis, the consequences of the *Charter* breach should not affect how a Court evaluates the impact of the breach on the accused. I do not find that interpretation persuasive and it is at odds with how other courts have treated *Jennings*. The current body of

jurisprudence around *Jennings* strongly suggests that it is instructive in breathalyzer cases, but to date it has not been relied on in a non-breathalyzer-related s. 24(2) dispute.

[39] In reviewing *Jennings*, nothing in the language of the decision suggests that it should have broad application. Each time the court discusses the principle that courts should disregard the *consequences* of a breach and focus on the breach itself, it explicitly confines the principle to breathalyzer cases. Consider the following excerpts:

> [24] The conclusion on the s. 8 issue is sufficient to dispose of the appeal. However, a divergence in the lower courts on how to approach s. 24(2) analysis in **breath sample cases** makes it necessary for this court to address the reasons of the trial judge and the SCAJ on this issue.
>
> …
>
> [27] … The trial judge discerned two competing lines of authority setting out the methodology for assessing the seriousness of the impact of the accused in **breath sample cases.** …
>
> …
>
> [29] …these two lines of cases focuses on the significance of statements in *Grant,* in which the Supreme Court identifies **breath samples** as a central or paradigmatic example of a minimally intrusive search: … [Emphasis added]

[40] Ultimately, the appellant's argument is not in accord with the *Jennings* decision in principle or the effect of the decision on the s. 24(2) jurisprudence. I conclude that there is no merit to the appellant's submissions on this sub-issue.

II. CONCLUSION

[41] The appellant's position on each sub-issue is largely unsupported. A generous interpretation of the appellant's authorities would be required to find support for its legal arguments, such an interpretation would fall outside of this court's standard of review on a summary conviction appeal. Therefore, I find the hearing judge did not err in her balancing of the factors under s. 24(2) of the *Charter* resulting in her decision to exclude the cash evidence from the forfeiture application. The appeal is dismissed.

Bodurtha, J.