

SUPREME COURT OF NOVA SCOTIA

Citation: *R v. Emmerson*, 2014 NSSC 226

Date: 20140618

Docket: Halifax No. CRH 412094

Registry: Halifax

Between:

Her Majesty the Queen

v.

Steven Charles Emmerson

Judge: The Honourable Justice Allan P. Boudreau

Heard: May 26 & 27, 2014, in Halifax, Nova Scotia

Oral Decision: May 28, 2014

Counsel: Jeffrey Moors, for the Crown
Trevor McGuigan, for the Defendant

By the Court: Orally

Introduction:

[1] Steven Charles Emmerson is charged on a four count indictment dated February 14, 2013; that, on November 5, 2010 he had in his possession for the purpose of trafficking four prohibited substances under the *Controlled Drugs and Substances Act*, namely; 1. Cannabis Resin 2. Hydromorphone 3. Morphine and 4. Diazepam (Valium). Mr. Emmerson has made this Charter Application alleging that his rights pursuant to sections 8 and 10(b) of the Charter were violated and he has requested an Order pursuant to section 24(2) of the Charter excluding the evidence obtained by the police.

Background:

[2] On November 5, 2010, HRM Police were dispatched to a domestic dispute in Dartmouth, Nova Scotia. When Constable Kuhn and Constable Comer arrived, they found Mr. Emmerson and a female arguing outside of an apartment building. The argument was apparently triggered by the fact that the female had earlier cancelled or rendered as a surety for Mr. Emmerson. Upon checking, the

constables became aware that, as a result of the surety rendering, there was a Warrant for Mr. Emmerson's arrest.

[3] Mr. Emmerson was then arrested at the location and read his Charter Rights to counsel and the Police Caution regarding his right to silence. Mr. Emmerson said that he wanted to speak to a lawyer. A "pat down" search of Mr. Emmerson was conducted for safety reasons and he was placed in the back of the police car to be transported to the Halifax Police Station to be processed and booked.

[4] Constable Kuhn received a telephone call from a Sergeant Hovey that a Detective Pepler had information regarding drugs on Mr. Emmerson for possible transport to the Correctional Facility. On the way to the station, Constable Kuhn called Detective Pepler, and in a very brief conversation was advised by Detective Pepler that he had source information that Mr. Emmerson had drugs on him. Constable Kuhn said he would call Detective Pepler later when he got to the Halifax Police Station. He testified that he did not have sufficient information to arrest Mr. Emmerson for possession for the purpose of trafficking at that time.

[5] When Mr. Emmerson was talking to duty counsel at the Halifax Police Station, Constable Kuhn called Detective Pepler again and was told that Mr. Emmerson was "muling" drugs to the Burnside jail. Constable Kuhn testified that

he understood “muling” to mean that the drugs were hidden in the rectum. When Mr. Emmerson emerged from his call with counsel, Constable Kuhn arrested him again, this time for possession for the purpose of trafficking. He again read Mr. Emmerson his Rights to Counsel and the Police Caution regarding right to silence. This time Mr. Emmerson declined to contact a lawyer.

[6] Constables Kuhn and Comer decided to conduct a strip search of Mr. Emmerson. Mr. Emmerson was placed in a small interview room with Constable Kuhn. Constable Comer observed from outside through the partly open door. Mr. Emmerson removed his clothing and was asked to squat and cough a number of times; however, this produced nothing of note.

[7] Constable Kuhn then took Mr. Emmerson to Booking where Special Constable Longtin who was on duty was advised that the Constables believed Mr. Emmerson had a prison pack or packs in his rectum. Upon hearing that information Special Constable Longtin refused to book Mr. Emmerson for cells unless and until he was cleared by medical personnel as safe to do so.

[8] Constable Longtin testified that, in his experience, emergency health responders do not perform such a function and that is necessary to take an accused in such circumstances to the emergency department of a hospital to be checked and

cleared by a doctor. He testified that is the policy and that it is for medical safety purposes only, to ensure that prisoners in the custody of Halifax Regional Municipality Police are only placed in cells if it is safe to do so. He expressed concern about repercussions for the police if this procedure was not followed and a prisoner suffered injuries or even death as a result of not being cleared as medically safe to be placed in cells in the face of a belief by the police that the person had drugs in their body cavities.

[9] Constable Kuhn then called the emergency department of the Q.E. II hospital and was told the wait time would be in excess of two hours. The constable then decided to take Mr. Emmerson to the emergency department of the Dartmouth General Hospital.

[10] Between the time of the strip search and leaving for the Dartmouth General Hospital, that is between 7:24 and 8:45 p.m., at about 8:10 p.m., Mr. Emmerson told the constables that he had smoked some marijuana a short time before his first arrest. This prompted Constable Kuhn to arrest Mr. Emmerson for a third time for Breach of Recognizance. He was again, for a third time, read his Charter Right to Counsel and the Right to Silence. Mr. Emmerson again, for a second time, declined to contact counsel.

[11] It was shortly after that that Mr. Emmerson was told he would be taken to the hospital to be examined by a doctor. When Mr. Emmerson was told that he was being taken to the hospital he was not again read his Charter Rights and Police Caution. It is from this point and after that the defence alleges Mr. Emmerson's Charter Rights pursuant to section 10(b) – (Right to counsel) and pursuant to section 8 (Right to be secure against unreasonable search or seizure) were violated.

[12] Mr. Emmerson was then transported to the Dartmouth General Hospital Emergency Department without any apparent objection or hesitation by him. It should be noted that the constables had, on a number of occasions during the evening prior to going to the hospital, told Mr. Emmerson of the dangers posed if the packaging in which the drugs were housed ruptured while in the rectum.

[13] At the hospital, Mr. Emmerson was always under the watch and custody of the two constables. They attended with the Triage nurse where the officers advised of the reason Mr. Emmerson was there, as well as when he was seen by the doctor. The doctor requested an x-ray at which the constables were also present through the observation window.

[14] After the x-ray was completed, the constables and Mr. Emmerson went to another room to wait for the doctor. It was during that time, shortly after the

x-rays, that Mr. Emmerson told the constables he had drugs in his rectum. At one point he told them that he knew he was going to jail and that he might as well try to make some money. Mr. Emmerson was aware he was going to jail because his surety had rendered the day before. At some point, which is not clear, the doctor advised that Mr. Emmerson did indeed have “something in his rectum”.

[15] The constable then requested a portable toilet apparatus for Mr. Emmerson where he shortly thereafter excreted three condoms which we now know contained the drugs in question.

[16] The constables took possession of the three packages which were wrapped in condoms. The constables asked Mr. Emmerson to sign a release form so they could obtain a copy of the x-ray results, if needed. This was signed but never relied upon. Mr. Emmerson told the constables that he had not been aware of the possible dangers posed by packages of drugs carried in his rectum.

[17] Mr. Emmerson, having been medically cleared as safe for lockup, was then transported back to the Halifax Police Station where he was processed and Booked.

[18] It is common ground that Mr. Emmerson was not re-read his Charter Rights when taken to the hospital and that the constables did not obtain or consider obtaining a warrant to search Mr. Emmerson for the drugs or to seize any evidence.

Positions

[19] It is the position of the Defence that Mr. Emmerson should have been read his Charter Rights pursuant to section 10(b) when it was decided to take him to the hospital and/or when he was at the hospital waiting for x-rays. The defence also claims that the procedures which Mr. Emmerson went through at the hospital were a gross violation of his privacy rights and that they constituted a gross violation of Mr. Emmerson's bodily integrity and, as such, violated his rights under section 8 of the Charter.

[20] The defence then contends that the evidence obtained at the Hospital, namely the three drug packages, should be excluded pursuant to section 24(2) of the Charter.

[21] The position of the Crown is that Mr. Emmerson was read his Charter Rights and the Police Caution at least three times, the last one being shortly before going to the hospital that evening. That Mr. Emmerson requested and spoke to duty counsel on the first arrest, but declined to do so on the last two occasions.

[22] The Crown also contends that there was no search of Mr. Emmerson at the hospital. It says that the police never requested any particular action on the part of the examining doctor and let the doctor follow whatever procedures he decided. It

also says that the police did not obtain any bodily substances from the hospital nor did they request any. That the police simply took possession of the non-bodily substances excreted by Mr. Emmerson. That, while a consent form was obtained from Mr. Emmerson, it was never acted upon.

[23] It says that the police were basically passive custodians of Mr. Emmerson throughout the procedures at the hospital.

[24] Ultimately the Crown contends that there were no violations of Mr. Emmerson Charter Rights, but that if there were, the evidence should not be excluded pursuant to Section 24(2) of the Charter.

Analysis:

[25] While the case laws cited to me by both parties is helpful to provide general principles when analysing what constitutes a violation of a detained person's Rights under sections 10(b) and 8 of the Charter, each case is unique in the sense that it usually turns on its particular set of facts or circumstances.

[26] In the present case, the defence says that no one allegation of a violation with regard to sections 10(b) and 8 is determinative of the issue of serious violation for the purposes of the section 24(2) analysis; rather it argues that it is a

combination or the totality of what happened that evening, particularly at the hospital, but also including the fact of the strip search, squatting and coughing etc.

[27] There is common ground that Mr. Emmerson was read his Charter Rights and the Police Caution at least three times that evening.

[28] The last time was just minutes before advising Mr. Emmerson that he was being taken to the hospital to be examined by a doctor. While it is clear that Mr. Emmerson's jeopardy, i.e. the offences for which he was arrested did not change; nevertheless, the defence contends that going to the hospital was such a change in investigative procedure that he should have been re-read his Rights to counsel etc., which had been read just minutes prior. If the police had been exercising the utmost caution, this may have been desirable, but I do not find that they were legally required to do so. Mr. Emmerson had to be well aware of his right which had been read to him just minutes before. There is no evidence that Mr. Emmerson was anything but willing to go to the hospital, particularly since he had been advised of the possible dangers of his situation by the constables on several occasions.

[29] The defence has also contended that Mr. Emmerson should have been read his Charter Rights again at the hospital while he was waiting to see the doctor or

awaiting the result of the x-rays. Surely, there was no obligation on the constables to keep reading the Charter Rights to Mr. Emmerson while at the hospital. The constables simply placed him in the doctor's hands and waited. They did not request any particular procedures or examination by the doctor. They were passive observers.

[30] With regard to an unreasonable search or seizure, again the constables did not request that any bodily substances be obtained from Mr. Emmerson, nor did they obtain any. While a release for the x-ray results was obtained from Mr. Emmerson, no evidence was requested or obtained as a result of that release. The only thing that was obtained from the hospital visit were three packages which Mr. Emmerson apparently voluntarily excreted after the x-rays.

[31] Did the taking in possession of these packages by the police constitute an unreasonable seizure by the police? Surely, there can be very little expectation of privacy with regard to the three packages excreted by Mr. Emmerson.

Summary:

[32] In summary, I find that the constables acted in “good faith” throughout the evening of November 5, 2010 and the early morning of November 6. Having said that, it is apparent from their testimony that the constables were not fully aware of

the possible Charter ramifications of the situation they found themselves in that evening. It appears that the Halifax Regional Municipality Police could benefit from additional training and a clear protocol to follow in such circumstances.

[33] While there did not appear to be an immediate medical emergency at the time Mr. Emmerson was taken to hospital, I accept that the measure was taken to ensure the medical safety of Mr. Emmerson in order to place him in cells overnight. While the ultimate result was that Mr. Emmerson passed the items in his rectum, and that such a result could have been anticipated, that was not the primary purpose of taking him to hospital.

Conclusion:

[34] I find that the defence has not established a breach or violation of Mr. Emmerson's Charter Rights. The constables read him his Charter Rights as required in the circumstances.

[35] I also find that the procedures followed by the constables in taking Mr. Emmerson to the hospital to be medically cleared for cell detention was not unreasonable and that the events at the hospital did not constitute an unreasonable search or seizure. There can have been very little expectation of privacy in the packages excreted by Mr. Emmerson and seized by the constables at the hospital.

Section 24 (2):

[36] Even if I had found a breach of Mr. Emmerson's Charter Rights that evening, I would not have excluded the evidence obtained. This was real evidence which the police would have ultimately obtained by placing Mr. Emmerson in a "dry cell". The safety measures taken by the constables do not change that. We also have the statement allegedly made by Mr. Emmerson that he knew he was going to jail and that he decided to try to make some money in the process.

[37] In all the circumstances, the admission of the evidence obtained on November 5th and 6th, 2010 would not bring the administration of justice into disrepute. I find that quite the opposite would be the case. Its exclusion would bring the administration of justice into disrepute, knowing the serious problems of drugs and trafficking in prisons.

[38] The packages obtained and their content will be admitted into evidence.

[39] The Charter Application is therefore, denied and dismissed.