

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Burrell*, 2018 NSPC 9

Date: 20180409

Docket: Dartmouth No. 8110547

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Adam Leslie Burrell

LIBRARY HEADING

Judge: The Honourable Chief Judge Williams, C.J.P.C.

Heard: March 19, 2018 in Dartmouth, Nova Scotia

Written Decision: April 9, 2018

Subject: Charter Application on Section 5(2) of the **Controlled Drugs and Substances Act** Trial

Summary: The accused is detained and arrested for a property related offense. His truck is searched, and less than 30 grams of cannabis marihuana is seized. The accused is charged with possession for the purpose of trafficking, contrary to s. 5(2) of the **Controlled Drugs and Substances Act**.

Issues: Whether the detention/arrest and resulting search were lawful (ss. 8 and 9 of the **Charter**)? If not, should the evidence be excluded pursuant to s. 24(2) of the **Charter**?

Result: There is insufficient evidence to conclude there were reasonable and probable grounds to arrest for “break and enter”. Nor is the court satisfied that the accused is arrested for possession of a controlled substance prior to the

warrantless search which is unreasonable. The evidence is excluded as the state conduct is serious, the impact on the accused is significant. Despite society's interest in the adjudication of the case on its merits, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

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Heard:	March 19, 2018, in Dartmouth, Nova Scotia
Decision	April 9, 2018
Charge:	5(2) Controlled Drugs and Substances Act
Counsel:	C. Girouard, for the Crown M. Owen, for the Defence

By the Court:

Introduction:

[1] On May 29, 2017 Adam Burrell is charged with possession for the purpose of trafficking pursuant to s. 5(2) of the *Controlled Drugs and Substances Act* after cannabis marihuana is found during the search of his truck following his arrest.

Issues:

[2] Mr. Burrell argues that his detention is arbitrary (s. 9 of the *Charter*), that the search of his truck is unlawful (s. 8 of the *Charter*) and that the drugs should be excluded from evidence pursuant to s. 24(2) of the *Charter*.

[3] The Crown maintains that the detention and subsequent arrest are justified and that the search, being incident to arrest, is lawful. In the alternative, the Crown submits that even if the search is unreasonable, the evidence should nonetheless be admitted.

[4] This Court is asked to rule on the legality of the arrest and roadside warrantless search of Mr. Burrell's truck and its contents.

[5] The Crown and Defense agree that the evidence on the *voir dire* be applied to the trial proper and that the Crown will lead evidence first despite this being a Defense application.

Law:

[6] The accused asserting a *Charter* violation has the onus of proving it on a balance of probabilities: see *R. v. Kutynec (1992), 70 CCC (3d) 289 (Ont. CA)*.

[7] However, with respect to s. 8, once the applicant establishes that the search is without a warrant, the onus shifts to the Crown to show that the search is reasonable and justified in the circumstances. A search is reasonable if it is authorized by law, the law itself is reasonable, and the manner in which the search is carried out is reasonable: see *R. v. Collins, [1987] 1 SCR 265 at p. 278*. In other words, where a search is incidental to arrest, the arrest itself must be justified by law.

[8] If the arrest is lawful, the search must be subjectively and objectively “truly incidental” to the lawful arrest. There are three purposes of a search incidental to arrest: (1) officer safety; (2) the protection of evidence from destruction at the hands of a person being arrested and others; and (3) discovery of evidence that can be used at the person’s trial: *see R. v. Caslake [1998] 1 SCR 51 para. 12-19.*

[15] ... Automobiles are legitimately the objects of search incident to arrest, as they attract no heightened expectation of privacy that would justify an exemption from the usual common law principles: ... *Caslake at par. 15.*

[9] It must be remembered though that the common law power to search incident to arrest is an extraordinary power and as Cromwell, J explains in *R. v. Fearon, 2014 SCC 77:*

[16] ... The power to search incident to arrest not only permits searches without a warrant, but does so in circumstances in which the grounds to obtain a warrant do not exist. The cases teach us that the power to search incident to arrest is a focussed power given to the police so that they can pursue their investigations promptly upon making an arrest. The power must be exercised in the pursuit of a valid purpose related to the proper administration of justice. The central guiding principle is that the search must be, as the case law puts it, truly incidental to the arrest.

[10] This means that the police must be able to explain why they searched. They do not need reasonable and probable grounds, but they must “have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable”.

Factual Findings:

[11] Officers Lewis and Graves, on route to a complaint of “damage to mailboxes” at 44 Brule Street, Dartmouth N.S. spot the suspect vehicle, a grey F150 truck parked at Lawton’s Drugstore at 6 Primrose Street, Dartmouth, N.S

[12] They locate Mr. Burrell, the suspect and registered owner, seated in the driver’s seat. He is arrested, searched and placed in the back of the patrol vehicle. His truck is then searched, and a quantity of cannabis marihuana is found in a duffle bag behind the driver’s seat.

[13] There are, however, several discrepancies in the evidence relating to both the arrest of Mr. Burrell and the subsequent search of his truck.

The Arrest and Search

[14] There is conflicting evidence as to the reason for Mr. Burrell's arrest.

[15] Officer Lewis testifies to having received a "mischief – property damage call in relation to mailboxes". He approaches the driver's side of the motor vehicle and Mr. Burrell identifies himself. He says that he "instantly smells the odour of marihuana exiting the vehicle". He arrests the driver for "break and enter" and possession of a controlled substance. He doesn't recall where Officer Graves is situated at this time.

[16] It is noted that Officer Lewis has considerable difficulty recalling various details of the events of May 29, 2017 and asks permission to refer to his notes on four separate occasions to refresh his memory as to: (1) date of the offence, (2) the license plate number on the truck, which is not captured in his notes, (3) where the drugs are found, and (4) whether other items are seized.

[17] The warrantless search of the truck is to locate drugs according to Officer Lewis, although he makes no reference to the smell of fresh or raw marihuana in his notes, made at the time.

[18] Officer Graves testifies they are dispatched to a "break and enter" at 44 Brule Street and that Officer Lewis arrests Mr. Burrell for "break and enter". He says that he is standing by the passenger's side door at the time. He states that it is only after Mr. Burrell is placed in the patrol car that Officer Lewis tells him he smelled fresh marihuana coming from the truck. Officer Graves says he then opens the passenger's side door and smells "a moderate smell of" fresh marihuana coming from the vehicle. Officer Graves states they search the vehicle, find marihuana and Officer Lewis goes to the patrol car and re-arrests Mr. Burrell on a charge of possession for the purpose of trafficking.

[19] Mr. Burrell recalls the day very clearly. He testifies to a "conversation" with the officers before being arrested. He is sitting in his truck at Lawton's Drugs, 6 Primrose Street waiting to pick up a prescription. He is eating pizza and his window is down. Officer Graves approaches his driver's side door and asks if he is Mr. Burrell, to which he responds yes and asks what's going on. Officer Graves replies, "You know why we are here". Mr. Burrell says he does not. Officer Graves tells Mr. Burrell he broke into a mailbox which Mr. Burrell denies.

[20] Mr. Burrell then describes an exchange, about which Officer Lewis states he has no recollection:

Constable Lewis came up beside Constable Graves and pretty much stuck his head in my window. He said, “you know, things will go a lot fucking easier for you if you start cooperating and stop fuckin’ lying to us”. I pull my hands up and said “Whoa we can be civil about this. We can talk about this. I don’t know what you’re talking about”. Constable Lewis kept badgering me and as he kept badgering me I reached for my cellphone and started to turn the camera on and as I was turning the camera on I said, you don’t mind if I start recording this and as soon as those words came out of my mouth, Constable Lewis opened my door, pulled me out of my truck, and told me I was under arrest for “break and enter”.

[21] Neither officer testifies to any exchange taking place. Although I cannot be certain as to the exact words spoken, I accept Mr. Burrell’s recollection of the events as this day remains clearly embedded in his memory. This is the first time he has ever been arrested and placed in custody.

[22] The question is whether Mr. Burrell is arrested for a “break and enter” or for both “break and enter” and possession of a controlled substance? The burden and onus of proof is on the Crown. The answer will help determine whether the search is lawful.

[23] It may well be that Officer Lewis smells raw marihuana coming from the vehicle, but aside from this simple assertion, there is little evidence to support it. He doesn’t say whether the smell is mild, moderate or strong. Officer Graves speaks to a “moderate smell” once he opens the passenger side door. Mr. Burrell says he doesn’t smell anything at all. We do know that the marihuana located is of a relatively small quantity and it is in Ziploc bags, inside a small grey bag in a larger duffle bag behind the driver’s seat.

[24] Mr. Burrell observes the search while seated in the back of the patrol cruiser. He says Officer Lewis finds a pill bottle containing roaches in the driver’s door console and tosses it in the vehicle. The search continues and results in the discovery of the duffle bag containing a smaller bag which contains bags of cannabis marihuana.

[25] Neither officer mentions the pill bottle of roaches that is not seized, but I accept Mr. Burrell’s evidence on this point. I also believe Mr. Burrell when he says that a copy of his prescription for medical marihuana is found by the officers, but not seized.

[26] Officer Lewis says he arrests Mr. Burrell for both “break and enter” and possession of a controlled substance while Officer Graves and Mr. Burrell indicate he is arrested for only the “break and enter”. I am not able to reconcile these versions of events and as such am not able to conclude that Mr. Burrell is arrested for possession of a controlled substance prior to the vehicle search.

[27] The lawfulness of the arrest for “break and enter” is difficult to assess, given the lack of information provided. Officer Lewis says the complaint is in relation to “mischief and damage to mailboxes” at 44 Brule Street. Was there a break-in at 44 Brule Street as defined by s. 348 of the *Criminal Code of Canada*? On what basis is the complaint made and by whom? Officer Graves says the complaint is in relation to a “break and enter”, but no further details are provided. Perhaps the officers have no further information. The officers detain Mr. Burrell based on a third party complaint without any details. They do not attend the scene, observe any damage, or speak to any witnesses. And in the end, the Court is told that Mr. Burrell is not prosecuted for this offence. There may well be enough for an investigative detention, but is there enough for a lawful arrest for “break and enter”?

[28] Harkening back to the law, where a search is incidental to arrest, the arrest itself must be justified by law. The police powers of arrest without a warrant are set out in s. 495 of the *Criminal Code* which states:

Arrest without warrant by peace officer

495 (1) 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;
- (b) a person whom he finds committing a criminal offence; or
- (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found

[29] The officer must have reasonable grounds to believe that an indictable offence has been committed. There is insufficient evidence before the Court to conclude there were reasonable grounds to arrest for a “break and enter”.

[30] And as indicated above, the Court is not satisfied that Mr. Burrell is arrested for possession of a controlled substance prior to the search, which, according to

Officer Lewis, is for the express purpose of locating drugs. Furthermore, Mr. Burrell did not consent to the search of his truck.

[31] On the balance of probabilities, for the reasons noted above, I find that the arrest was not justified and that the search was unlawful.

Admissibility of the Controlled Substance – s. 24(2) Analysis

[32] Once a breach of ss. 8 or 9 of the *Charter* is established, the Applicant has the burden of proving that allowing the evidence tainted by the breach will bring the administration of justice into disrepute.

[33] *R. v. Grant, 2009 SCC 32* sets out a three-prong test rooted in public interest which takes a long-term, forward-looking and societal perspective.

[71] ... a Court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
- (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little) and
- (3) society's interest in the adjudication of the case on its merits.

The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

...

(1) The seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct)

[34] Although there is a reduced expectation of privacy in one's motor vehicle, there is nonetheless an expectation of privacy. And returning to Cromwell's comments in *Fearon, supra*:

[16] ... The power to search incident to arrest not only permits searches without a warrant, but does so in circumstances in which the grounds to obtain a warrant do not exist. The cases teach us that the power to search incident to arrest is a focussed power given to the police so that they can pursue their investigations promptly upon making an arrest. The power must be exercised in the pursuit of a valid purpose related to the proper administration of justice.

[35] I accept Mr. Burrell's testimony, which is not challenged on cross-examination, that the arrest only takes place after an unpleasant exchange between Officer Lewis and Mr. Burrell wherein Mr. Burrell is about to use his camera to capture the event. The evidence tends to support the premise that the arrest itself is for "break and enter". There is no mention of the smell of raw marihuana.

[36] The discrepancy over the number of bags seized is problematic. Officer Graves testifies to two bags being seized and placed by him in the exhibit locker. Officer Lewis provides an explanation for the third bag tendered into evidence. He suggests the third bag contains "shake", but denies having put loose marihuana in an exhibit bag. There is no other evidence of "shake" being present. Perhaps there is a plausible explanation for the unexplained third bag, but it is not before the Court.

[37] On cross-examination, Mr. Burrell identifies Exhibits 2 (4 grams) and 3 (18.5 grams) as cannabis marihuana belonging to him. He says that Exhibit 4 containing 9.4 grams is not his. On re-examination, he confirms that the bags he purchased from his dealer have green edges along the Ziploc portion of the bags, as is the case with Exhibits 2 and 3 only.

[38] The Court notes that the Officers make no mention of Mr. Burrell's prescription for medical marihuana until it is raised by the defense. It is only on cross-examination that Officer Lewis recalls "there was some kind of document for a prescription for medical marihuana but can not recall where it was in the vehicle". He adds that he recalled Mr. Burrell telling his partner, Officer Graves that he had such a prescription.

[39] Mr. Burrell testifies to two conversations with Officer Lewis regarding his prescription, after the marihuana is found. The first is while seated in the patrol vehicle. Mr. Burrell says he tells Officer Lewis there is a copy in both the duffle bag and on the visor of his truck. According to Mr. Burrell, Officer Lewis looks it over and shows it to Officer Graves. And according to Mr. Burrell, Officer Lewis' response is that he is going to tell Mr. Burrell's doctor that Burrell is trafficking.

[40] The second conversation takes place at the police station when Mr. Burrell asks Officer Graves to take note that he has a prescription for medical marihuana. According to Mr. Burrell, Officer Lewis hesitates to make the note and consults with another officer before doing so.

[41] The prescription is an important piece of evidence which, if made known to Officer O'Neill, a qualified expert called to give opinion evidence on the recreational use of cannabis marihuana, could affect his opinion on trafficking. Moreover, Officer O'Neill indicates that his opinion might be affected by whether there were two or three bags of cannabis marihuana seized. In the end, the expert is not asked by the Crown to provide an opinion.

[42] The investigation and evidence (both seized and not seized) generate more questions than answers and call into question state actions.

(2) The impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little)

[43] Mr. Burrell, a resident of Yarmouth, is a carpenter by trade and his work takes him across the province. He has degenerative disc disease, osteoarthritis and irritable bowel syndrome. He manages his pain with cannabis marihuana, having received a prescription on April 14, 2017.

[44] Mr. Burrell is held in custody, overnight and is taken to court before being released (a total of 17.5 hours later). To this point he has never been charged with a criminal offence.

[45] Once released, Mr. Burrell returns to his truck to find his wallet out on the dash and items scattered all over the interior of his vehicle.

[46] This Court finds that the Officers were aware of the prescription for medical marihuana, but did not factor it into their decision to arrest Mr. Burrell, lay charges, seize evidence or seek an expert opinion. This could send a message that medical marihuana prescriptions are ignored in such circumstances.

(3) Society's interest in the adjudication of the case on its merits.

[47] It is always in society's interest to see cases decided on their merits. Having said that, some cases are stronger than others – some charges raise more serious public safety concerns than others.

[48] Mr. Burrell is in possession of approximately 23 grams of a drug that is soon to become legal. He has a medical prescription which allows him to possess 150 grams at any given time. Mr. Burrell admits that he purchased the drug illegally as he had not gotten around to finding a licensed dispensary. He has since done that.

[49] The Crown's expert witness, Officer O'Neill, indicates that as a matter of policy, the police are not currently prosecuting unlicensed marihuana dispensaries.

[50] The foregoing mitigates against the public interest in prosecuting under the circumstances.

[51] Taking all things into consideration, this Court is of the view that to admit the evidence would bring the administration of justice into disrepute. The evidence having been excluded, the Court finds that the Crown has not proven its case beyond a reasonable doubt and Mr. Burrell is found not guilty.

Pamela Williams, C.J.P.C.