

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Timmons, 2009 NSSC 407

Date: 20091217

Docket: CRPH 310652

Registry: Port Hawkesbury

Between:

Her Majesty the Queen

v.

William Tracy Timmons

LIBRARY HEADING

Judge: The Honourable Justice Frank Edwards

Heard: December 15, 16 and 17, 2009, in Port Hawkesbury, Nova Scotia

Written

Decision: January 27, 2010 (delivered Orally December 17, 2009)

Subject: Charter Motion: Section 8 unreasonable search and seizure.
Warrantless search of private residence.

Facts: Police responded to “domestic call” that Accused’s girlfriend was being abused. Upon arrival at the residence, police heard scream from inside. Police knew Accused was suspected drug dealer and potentially violent. Had also been advised that Accused had Rottweiler. Police had been phoned by Complainant’s mother. Police subsequently made telephone contact with Complainant who advised that she was fine and did not require police.

Issue: Were police entitled to enter home without a warrant and conduct search to determine location of all occupants.

Result: In the particular circumstances of this case, police were entitled to

enter home without a warrant, do pat down search of Accused, and search home for other occupants. Once drugs seen in plain view, police properly proceeded to get search warrant. No breach of Accused's Section 8 rights.

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Counsel:

Wayne MacMillan, for the Crown
Ralph Ripley, for the Accused

By the Court (Orally):

[1] The Accused alleges a breach of his Section 8 right to be secure against unreasonable search and seizure. The case arose after a warrantless search of the Accused's home by RCMP officers investigating a so-called "domestic" complaint.

[2] As such, the Crown bears the burden of demonstrating on a balance of probabilities that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner (See *Mann* 2004SCC52).

[3] **Facts:** On October 10, 2008, at approximately 10:30 p.m., Nadine Shaw (then age 24 years) telephoned her mother Peggy Shaw. Nadine advised her mother that she and the Accused (with whom Nadine was living) were having a fight and "I wanted her to come pick me up."

[4] The family vehicle was not available so Peggy called the RCMP to have them go for her daughter. Ms. Shaw told the dispatcher that her daughter was being abused. She also told him that the Accused "deals in drugs and has a big Rottweiler." Peggy said she did not know whether or not there were weapons in the Accused's house.

[5] The call was relayed by RCMP telecoms Truro to the Inverness Detachment. Constables Roberts and Bojaruniec were on duty in separate vehicles. When they received the call, they teamed up in one vehicle and began to search for the Accused's home. Peggy Shaw did not know exactly where the Accused lived and had provided telecom with a very vague description. It should be kept in mind that geographical area in question is a large sparsely populated rural area. Constable Roberts using her cell phone called Peggy Shaw back to get more details. During that call, Peggy Shaw confirmed her belief that Nadine was being abused and also provided Constable Roberts with Nadine's cell phone number. Unfortunately, Peggy Shaw could not provide specific directions to the Accused's location.

[6] The RCMP then contacted Nadine who laughed and said "so my mother called." Nadine insisted that she was fine and did not need the police. Nadine stated further that a friend "Jason Timmons" was picking her up. It turns out that there is no such person as Jason Timmons and she mistakenly said Jason Timmons when she meant Jason Phillips. Nadine went on to reiterate to Constable Roberts "I'm just fine and am leaving right now." Nadine refused to tell police where she was located.

[7] Constable Roberts again called Peggy Shaw who advised that the friend is probably Jason Phillips (not Timmons) and provided police with Phillips' phone number. Constable Roberts phoned that number and spoke with Jason's mother, Irene. Irene confirmed that Nadine had called and Jason has just left. Irene provided more details about the location of the Accused's home and gave sufficient details so that police were enabled to successfully find the residence. But it did take them at least two hours to do so. They recorded their time of arrival there at approximately 12:30 a.m. and the initial call, as I have noted, was at 10:30 p.m. By the time police got to the Accused's residence, therefore, the call was 2 hours old.

[8] It should be borne in mind that Constable Roberts was aware that the Accused had outstanding charges for obstructing police and impaired driving. Police also considered Mr. Timmons to be in the violent category (Code 10:36).

[9] Constable Roberts also believed the Accused to be "major CDSA"
(Controlled Drugs and Substances Act).

[10] Shortly after Constables Roberts and Bojaruniec arrived, they heard a scream coming from inside the residence. Nadine denies there was any such noise but I do not believe her. (Nadine is still Accused's girlfriend doing her best to extricate him from situation she probably feels responsible for). (Nadine's memory vague - e.g. clearly wrong on times. Memory selective. Constable Roberts says the scream increased everyone's threat level.

[11] In fairness to her, there is another possibility which would be consistent with the evidence given by Nadine Shaw. Nadine stated that while police were still outside the residence, the dog, a Rottweiler mix, which was inside the home, was whimpering. (The dog was not barking.) It is possible that Constables Roberts and Bojaruniec honestly mistook the whimpering sounds for human sounds. Constable Roberts did described the scream as "... someone trying to scream but not able to actually get a scream out as if in a panic situation. It would be my first thought when I heard it. So it wasn't a loud scream cry for help but it was like a ... a shriek."

[12] Constable Septon arrives five minutes later, followed a few minutes after that by Constable Montreuil and Auxiliary Constable Camus.

[13] Police also saw a dog dish and chain outside indicating the possible presence of guard dog. This observation made drawing weapons prudent and absolutely justified.

[14] In those circumstances, police had a responsibility to enter the residence – whether invited or not. The perceived scream meant that either Nadine was lying about being okay, or had been subsequently threatened, or that someone else inside was in trouble. Police had to investigate and check the entire house for the presence of other persons. They commanded Nadine Shaw to open the door and to secure the dog.

[15] The Applicant has cited *R v. Godoy*, 1999 CanL11 709 (SCC). There police entered a residence in response to a 911 call. Here, although it was not a 911 call, there is no qualitative difference. Peggy Shaw had phoned police out of concern for her daughter's safety. Police responded. Police also had some knowledge of the Accused and considered him violent. Upon their arrival, they heard a scream. They were correct to ignore Nadine's advice that she was okay and did not need their assistance. As one of the officers testified, such information is not always

true. Indeed, I believe I can take judicial notice of the fact that complainants in domestic situations often recant, sometimes because of threats or coercion by their partner. In *Godoy*, Lamer stated that the police should not simply take the complainant's word.

[16] As noted in *Godoy*, whether police can enter a dwelling house depends on the circumstances of each case. Here entry by police was not only justified but entirely necessary. The police would have been irresponsible had they not done so.

[17] Once inside, police were further justified in checking the house to ensure that there were no other occupants. They were also justified in searching the Accused to ensure he had no weapon. This is entirely consistent with the quotes from *R. v. Mann*, 2004 SCC 52, cited by the Applicant at pages 13 and 14 of his brief:

“36 Any search incidental to the limited police power of investigative detention described above is necessarily a warrantless search. Such searches are presumed to be unreasonable unless they can be justified, and hence found reasonable, pursuant to the test established in *R. v. Collins*, [1987] 1 S.C.R. 265. Under *Collins*, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable (p. 278). The Crown bears the burden of demonstrating, on the balance of probabilities, that

the warrantless search was authorized by a reasonable law and carried out in a reasonable manner: *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, at para. 32.

37 This appeal marks the first opportunity for the Court to discuss whether a search incident to an investigative detention is authorized by law. Underlying this discussion is the need to balance the competing interests of an individual's reasonable expectation of privacy with the interests of police officer safety. In the context of an arrest, this Court has held that, in the absence of a warrant, police officers are empowered to search for weapons or to preserve evidence: *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 95. In the reasons following, I consider whether and to what extent a power to search incidental to investigative detention exists at common law. I note at the outset the importance of maintaining a distinction between search incidental to arrest and search incidental to an investigative detention. The latter does not give license to officers to reap the seeds of a warrantless search without the need to effect a lawful arrest based on reasonable and probable grounds, nor does it erode the obligation to obtain search warrants where possible.

40 The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances: see *S. Coughlan*, "Search Based on Articulate Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition."

[18] Also, as the Court said in *McCormick* (brief pages 15 & 16) police would do a search to ensure no “obvious risk of immediate danger” and that is exactly what they did here.

[19] Constables Montreuil and Septon went in the bedroom to search the Accused. Constable Septon saw a ziploc bag of marijuana on top of clothes basket in closet. I do not believe Nadine that clothes were over ziploc bag. I attach no importance to the fact that at the preliminary inquiry Constable Septon did not mention seeing the ziploc bag out of the corner of her eye during the pat down search of the Accused. The point is that she saw the bag in plain view. There was no door on the closet and the bedroom was very small - Nadine estimated 12 feet by 14 feet. Constable Septon was only 5 or 6 feet away from the open closet.

[20] I accept Constable Septon’s evidence that she did see the bag in plain view while doing the pat down – and, after the Accused was taken out of the room, would have focussed directly upon the ziploc without the necessity of looking under or around any objects.

[21] Therefore, I am satisfied that police during a lawful and reasonable warrantless search pursuant to a domestic complaint found a quantity of marijuana in plain view. In my opinion, they could have gone to the Justice of the Peace with nothing more, and obtained a warrant to search the premises for more marijuana.

[22] Once armed with the warrant they would have found and seized the other items noted in the information to obtain. There would have been no arguable breach of the Applicant's Section 8 rights, and no question about a lawful and reasonable warrantless search. As such it is not necessary for me to proceed further but I will comment on some of the other issues raised by the Accused.

[23] First, number V (Information to Obtain) - The garbage bag containing marijuana leaves and stems. Auxiliary Constable Camus tripped over a bag while checking to see if others were in the house. When he moved it, he smelled marijuana. The discovery was thus made in good faith during a lawful search for other occupants in the house.

[24] The seed tray in the basement - also in plain view - a type Auxiliary Constable Camus had seen in other drug searches. Again, seen in good faith during lawful search for other occupants.

[25] Auxiliary Constable Camus was mistaken when he says he did not mention marijuana. He is relying on memory and made no notes. Constable Montreuil did not make up information regarding these items when she conveyed information to Corporal McKay for the Information to Obtain.

[26] The finding of other items (vi) halogen lamps, timers and fans in storage room, and windows covered by bags (Corporal McKay said that was consistent with a grow-op, as a means to maintain humidity levels), all incidental, go to lawful search of premises and observed in good faith.

[27] In short, I am satisfied that the police acted in good faith, i.e. they did not use the search necessarily incidental to their response to a domestic call as a pretext for a search for drugs. As soon as they had completed what they were lawfully justified in doing without a warrant, they made immediate arrangements to obtain a warrant to search for drugs.

[28] The Accused also argues that the issuing justice of the peace was misled by police. In view of the facts as I have found them, I obviously reject this submission.

[29] There is absolutely no comparison between the situation here and that in *Innocente* (cite p. 24) where police had presented “deliberately misleading information” to a judicial official. To the extent that there may have been some inaccurate description of the observed items (e.g. the marijuana seed basket - 2nd #V) or exaggeration of significance (e.g. #iii - seeds in a plastic bottle), such errors, in the context of that residence that night, are understandable and were made in good faith.

[30] The Applicant also raised the issue of whether the warrant was defective because it failed to properly identify the residence to be searched. The warrant says the premises is “... a two story single family unit, beige plastic siding house and front porch.”

[31] Nadine Shaw testified that the house is built on a slope so that there is more exposure of the foundation on the front of the house than on the back. The front is also sided with wood while the other three sides have beige plastic siding (see Photo #4 in Exhibit 1). The front of the house may look like a two story dwelling.

[32] Also the warrant notes that the house is under construction. That is true. A porch addition was being constructed and no interior doors had yet been installed. And “there is also a shed located on the side of the house which is not attached to the house” (see photos 4 and 5 in Exhibit 1). I note also that the house is not in an urban setting, it is in a rural area with no other houses in the immediate vicinity. I am satisfied that the premises is adequately and appropriately identified in the warrant. There is no chance of confusion.

[33] Counsel also raised the issue that Corporal McKay was unsure whether she used the warrant that came off the fax machine or a photocopy of same. Absent evidence of a difference between the two, I consider this a non-issue.

[34] The Crown has proven that the police acted reasonably and lawfully in searching the Accused’s house. There was no Section 8 breach.

J.