

IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA
Cite as: R. v. S.T.P., 2008 NSPC 66

Date: October 31, 2008
Docket: 1784613
Registry: Halifax

HER MAJESTY THE QUEEN

V.

S.T.P.

BEFORE: The Honourable Jamie S. Campbell

DECISION: October 31, 2008

CASE: 5(2) CDSA

COUNSEL T. McLaughlin, for the crown
J. Arnold, for the defence

[1] On the evening of June 20, 2007 S.T.P. was found in a McDonald's parking lot in Spryfield, with twelve bags of white powder in his pockets along with \$325 in cash.

[2] He has been charged with possession of cocaine, for the purpose of trafficking, contrary to s. 5(2) of the **Controlled Drugs and Substances Act**.

[3] The issue, is whether the search and seizure, were proper. The bags and cash were found when he was searched upon arrest for possession of marijuana.

[4] Constable Jason Shannon and Constable Robbie Baird were on patrol in the Spryfield area of Halifax that evening. The patrol was part of a response to violent incidents, including fire bombings, that had taken place in the area. The constables were instructed to show a police presence in the community and generally get to know the people of the area. They indicated that this could be achieved by speaking with people and finding out as much as they could about "who was who".

[5] That evening, they were traveling north on Herring Cove Road behind a blue Pontiac Sunbird. Both constables gave evidence that they saw an individual in the back seat of the vehicle appear to take notice of them and quickly turn around. S.T.P. was the young man in the back seat. He confirmed that he did indeed see the police and believed that they saw him.

[6] The vehicle then turned off the street, at the first opportunity, into a McDonald's fast food outlet.

[7] The police checked the license plate for the vehicle and determined that on two occasions it had been associated with bail violations, once on April 3 of that year and again, only two days before, on June 18. The computer check of the license plate would not determine whether any individual in the car had been involved or connected in any way with a bail violation or even whether the owner of the vehicle had been associated with such a violation. It meant simply that the vehicle had in some way be connected to such violations.

[8] Upon receiving that information, the officers turned their police vehicle around and went into the same McDonald's parking lot. There they parked

behind the Pontiac Sunbird. They estimated that 15 to 20 seconds had passed from the time they had seen the vehicle turn into the parking lot. The occupants were still in the vehicle.

[9] The officers approached the car. Constable Shannon said that he could detect the smell of burned marijuana coming from the open window of the car. Constable Baird testified that he detected a strong smell of marijuana when the passenger door was opened.

[10] There was no other evidence of marijuana. No marijuana was found and each of the people in the car testified that none of them had been smoking marijuana that evening.

[11] Upon arrest for possession of marijuana, S.T.P. was searched. Twelve bags of a white powdered substance were found in his pockets.

Detention:

[12] The police vehicle pulled into the parking lot with its emergency lights

turned on. The police parked behind the blue Pontiac Sunbird in such a way that the vehicle could not have driven away. There was clearly an intention to detain the young men to further the investigation.

[13] Detention has been noted as covering a “broad range of encounters”. If a person is simply stopped and questioned without significant physical or psychological restraint constitutional rights under the **Charter** are not engaged. *R .v. Mann* (2004) 3 S.C.R. 59.

[14] The law with respect to such detention is a reflection of the breadth of the range of encounters with police that may qualify as a form of detention. Whether police action is appropriate will depend on all of the circumstances. The extent to which the detention in a particular case intrudes on the liberty interest of the person involved must be weighed against the seriousness of the offence, the information known to the police about the person’s involvement in that offence and the extent to which detention was properly tailored to the circumstances.

[15] The young men in the car we prevented from leaving by the position of

the police vehicle. Police emergency lights were engaged, so they would have understood that if they were to attempt to leave there would certainly be consequences. Their liberty interests, and particularly those of S.T.P. were, at that point, intruded upon.

[16] At that point however, the police had observed a young man in the vehicle, at close range, acting suspiciously. The turn into the next available place, the McDonald's, raised their level of suspicion enough to cause them to run a check of the vehicle plate. Then, after inquiring about the plate, they obtained information that the vehicle itself had been associated in some way with recent bail violations. The three sources of suspicion, could reasonably be related in a sequence that forms a coherent whole. A nervous young man, quickly turning off the street in a vehicle associated with bail violations raises a reasonable suspicion that he or someone in that vehicle was in breach of bail conditions. This is all observed by the police in the context of the broader circumstances of violent crime that had occurred in the community.

[17] The police were not at that point investigating an offence involving violence or a serious risk to the public. There is no suggestion of any kind that

the young men in the vehicle had been involved in any recent criminal activity much less any violent criminal activity.

[18] The manner in which that inquiry was undertaken is also significant. The vehicle was not stopped on the highway. It had pulled into a parking lot and the police came in behind it. No physical restraint was used. No questions were asked. No one was asked to identify himself as part of the process of detention.

[19] The situation was not one that called for, or at that point, justified, a significant intrusion on the liberty interests of any of the young men in the car. The actions of the police in pulling into the parking lot behind the vehicle in which S.T.P. was a passenger, were an intrusion on his liberty and to the extent that his liberty was intruded upon, such intrusion was justified and reasonable.

[20] The police action in detaining the vehicle was minimally intrusive, reasonably necessary and based on reasonable suspicion.

Arrest:

[21] S.T.P. was arrested for possession of marijuana.

[22] Much turns on whether the police had reasonable grounds to believe that the offence had been committed.

[23] Justice Cory in *R. v. Storrey*, [1990] 1 S.C.R. 241, noted that it is not enough for a police officer to have believed that her or she had reasonable grounds. It must be established that those grounds existed. There is therefore a subjective element and objective element to be satisfied.

[24] The objective assessment of reasonable grounds is not an artificial parsing of each factor or observation. It is a practical review of the information upon which the police acted, how those pieces of information relate to each other logically and chronologically, their cumulative affect and the context in which they were observed.

[25] Where the smell of marijuana is the sole factor upon which the police

rely, that observation must be subjected to scrutiny. Such observations are by their very nature unverifiable. They can be used to justify actions after the fact. The smell of marijuana has the potential to be used as a way in which reasonable suspicion can be pushed toward reasonable grounds.

[26] Where the smell of marijuana itself is intended to establish grounds for an arrest a further inquiry into the factors that may support the reliability of that evidence is required. As noted by the Ontario Court of Appeal in **R v. Polaschek** 1999 Can LII 3714, 45 O.R.(3d) 343, the circumstances under which the observation was made will determine the matter. It may be that some officers have sufficient training or expertise such that their opinion as to the source of the smell and its relation to present possession can be relied upon.

[27] Those circumstances may include special training that the officer may have had and any formal experience such as working on a drug squad. It is difficult to accept that an officer's own estimation or his or her olfactory acuity, or the officer's personal assessment of the power of his or her own "smell memory" will be of great value in that regard.

[28] It is important however to distinguish those situations in which smell is the only factor from those where smell is part of a larger context of reasonable suspicion as it approaches reasonable grounds. In the former case the assessment is on the basis of the objective evidence of the officer's particular ability. In the latter case, while the issue of the officer's ability may be relevant, it is part of a broader field of considerations.

[29] In *R. v. Blois* [1998] N.S.J. No.238, Associate Chief Judge Gibson allowed an application for the exclusion of evidence obtained from a search incident to an arrest based on the smell of marijuana. In that case the police observed a car driving slowly. When they approached the car they smelled what they believed to be burned marijuana. Upon arrest and search the police found marijuana.

[30] The only factor in addition to the smell was evidence from one of the officers of his considerable experience investigating marijuana trafficking cases and his familiarity with the smell arising from burning tests done by the police.

[31] In *R. v. Lee* [2000] N.S.J. No. 40, (NS Prov. Ct.) the accused was stopped by a police officer who had noticed that his vehicle bore no licence plates. Lee had no identification. He was taken to the police station for identification having told the police that he had a previous conviction and his photograph would be on file. During that process of identification, some 35 minutes after making initial contact, one of the officers noticed the smell of fresh marijuana. He was arrested and searched on that basis and marijuana was found.

[32] The Crown adduced no evidence to establish that the police officers involved could accurately detect the odour of marijuana other than the assertion by one of the officers that he had taken drug courses and seen marijuana in his ten years of experience. Judge Castor Williams held that the officer did not have any special ability in that regard, nor any training in drug identification. Judge Williams held that the officer was relying on his own sensory faculty of smell to formulate the reasonable grounds. He concluded that the officer was acting on a “hunch”. That did not establish reasonable and probable grounds for an arrest.

[33] In *R. v. Curren* 2003 NSPC 33 (Can LII), 216 N.S.R.(2d) 238, the accused was in a vehicle that had been stopped on a traffic stop. The police identified the smell of marijuana and searched the driver and passengers. Judge Beach found that the police officer had no particular expertise in drug investigations, “but it was the smell that caused him to enter the vehicle to confirm his hunch.”

[34] The officer’s evidence was that the only reason he detained the vehicle involved was because of the smell. The police stated however that the driver of the vehicle appeared nervous and the driver’s hands and one leg were shaking. The officer confirmed however that this was not uncommon when vehicles are stopped by the police. Judge Beach found that the police in that case had not established reasonable grounds.

[35] Unfounded suspicions or those that cannot be reasonably articulated cannot be raised to the level of reasonable grounds by the unaided sense of smell. In situations where the police have shown objective evidence to support the acuity of the olfactory observations, the sense of smell may be used to establish reasonable grounds. In other situations the smell of

marijuana must be considered in the context, not of any extraordinary sensory abilities, but of surrounding circumstances that logically support the reasonableness of the assertion marijuana is probably present.

[36] The officers in this situation can claim no special abilities or training in the identification of drugs through the sense of smell. Like many people, no doubt, they can identify a smell but like many people, they can mistake a smell for something else. They are neither experienced drug enforcement officers nor are they people who have never in their lives smelled marijuana. If the officer's were relying entirely on their sense of smell there would not have been reasonable and probable grounds for an arrest. Yet, the fact that they are possessed of a sense of smell and are not unfamiliar with the smell of marijuana must form part of the context.

[37] Their observations regarding the smell cannot be dismissed as irrelevant but must be considered in their context to determine what extent, if any, they should be relied upon.

[38] The basic facts bear repeating. The police were behind three young

men in a car. When the young man in the back seat saw them he turned around quickly. The police at this point were very close to that car. That behaviour would not provide reasonable and probable grounds in itself. It did raise suspicion.

[39] The police checked the licence plate of the vehicle and found that it had been “involved” in bail violations. That could mean that a person had been found in the vehicle who was suspected of being in violation of release conditions. That would also raise suspicion. It is significant for these purposes that it would not only add cumulatively to the degree or level of suspicion. These are not two reasons for suspicion that are logically unrelated. A person involved with a bail violation would have reason to appear nervous.

[40] The car turned left off the street at the first opportunity. Again, that behaviour is consistent with a person involved in a bail violation seeking to avoid detection by the police.

[41] When the police approached the vehicle, they then already had enough information to reasonably cause them to be suspicious that there was a

reason why the young man in the back seat and the driver had reason to avoid any contact with the police. That could have been a bail violation or it could have been something else.

[42] When they approached the vehicle the officers testified that they smelled marijuana. Again, that smell would be consistent with the other information that forms part of the context of this matter. The presence of marijuana would be entirely consistent with the behaviour that the officers had observed. This is contrasted with a situation in which none of the surrounding behaviour logically supports the conclusion that what the sense of smell has detected is, in fact, marijuana.

[43] There was no marijuana found in the vehicle. Just as the smell of burned marijuana is not proof of the presence of marijuana, the absence of marijuana is not proof that marijuana was not, moments before, present in the vehicle.

[44] Each of the young men testified that no one had been smoking marijuana in the car. The behaviour of the young men in the vehicle would

reasonably lead one to conclude that they had something to hide or some reason to avoid contact with the police. The smell of marijuana, in that context, would lead to the credibly based conclusion that marijuana was indeed still present if the smell had been detected.

[45] The issue at this point is whether the police, when they approached the vehicle of which they were already suspicious, and knowing that without more they did not have grounds to make an arrest or perform a search, alternatively, actually smelled marijuana, smelled something reasonably similar to marijuana, smelled nothing like marijuana but convinced themselves that they smelled marijuana or smelled nothing like marijuana and claimed to have smelled marijuana.

[46] The police officers in this situation were patrolling the area. They did not know the accused or any of the people in the car. They were not on the look out for them. It was not a “shakedown” of someone known to the police and justified by the smell of marijuana.

[47] Other than the fact that they are three young men, there is no factor

present with respect to any of them that might give rise to a suspicion of profiling.

[48] The officers were prepared to acknowledge that they saw no smoke in the vehicle. Had smoke been observed it may have added to the strength of their observations. Neither however, was prepared to exaggerate the case in that regard. The constables smelled something, that they reasonably believed to have been marijuana.

[49] The evidence of the passengers in the vehicle that no marijuana was present must be weighed against that of the two officers. The young men maintained that they were going to McDonald's. There was nothing unusual about it. They were innocently going about their own business. The fact that after seeing the police they immediately turned into the McDonald's was, in their view, evidence only of their intention to eat some fast food. Based on the common narrative of the people in the car, they had done nothing that would attract the attention of the police and had not been smoking marijuana that night.

[50] That version of events creates the impression of a situation in which none of the young men in the car had any reason to act in a way that was unusual. Their catching sight of the police, in that case, has nothing to do with their pulling into the McDonald's parking lot.

[51] What that story misses is the presence of twelve bags of an as yet unidentified white powder and a considerable amount of cash in the pockets of the accused. That the three friends in the car were calmly unconcerned, traveling in a vehicle with material that would at the very least be very likely to get one of them arrested on serious charges, is more than merely unlikely. Even if the young men in the vehicle were not aware of the fact that the car had been involved in bail violations and were not aware that the police could perform a check on that, there was reason for them to be nervous. They were feet away from two police officers. One of them had twelve bags of white powder and enough cash that would cause any police officer to act in a way that would preempt any evening of otherwise innocent activity. They had good reason to avoid contact with the police.

[52] It is difficult to accept, as pure a coincidence, that the accused and his

friends, just as they happened to catch sight of the police, arrived at the McDonald's they had planned to visit, and that the presence of twelve bags of white powder in the pockets of the accused, only a few feet away from the police had no impact on their behaviour. Their insistence on the purely coincidental timing and essential calm innocence of their actions in the moments after catching sight of the police, make it difficult to accept that their portrayal of the essentials of event is accurate.

[53] Constable Shannon did smell a substance that he reasonably believed to be recently burned marijuana. While he had no special training and could not lay claim to extraordinary olfactory acuity, but he was, like many people, aware of what burned marijuana smells like. That was in the context of a situation where the vehicle involved had been involved in bail violations, the back seat passenger was behaving nervously having seen the police, and the driver had apparently tried to put some distance between the car and the police as soon as possible.

[54] That context supports the reasonableness of the conclusion of one who, though without special olfactory gifts or training has a normal sense of smell

and not the altogether unusual ability to at least recognize the smell of burned marijuana. Had the smell of marijuana been the sole foundation of the grounds for arrest, the officer would have to show something beyond those rather unremarkable abilities. Where, as here, the smell is part of a larger supporting context, and with that context forms a practically coherent and logically consistent basis for a reasonable conclusion that marijuana may be present, there is no requirement for special training or ability.

[55] The application for the exclusion of evidence obtained from the search and seizure is denied.

J.