CANADA
PROVINCE OF NOVA SCOTIA

Case #953619, 953620

June 20, 2001

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

MICHAEL JULIEN BRYDEN
(Cite as R v. Bryden 2001 NSPC 16)

DECISION

HEARD BEFORE: **The Honourable Judge C. H. F. Williams , JPC**

PLACE HEARD: **Halifax Provincial Court**

IN THE MATTER OF: **Criminal Code S. 86(3)(d)**

COUNSEL: **Mr. C. Nicholson, Crown Attorney**
Michael Bryden, unrepresented by counsel

Cite as R v. Michael Bryden 2001 NSPC 16

R V. MICHAEL BRYDEN

Delivered orally June 20, 2001
The Honourable Judge C. H. F. Williams , JPC

Counsel: Mr. C. Nicholson, Crown Attorney
Michael Bryden, unrepresented by counsel

Introduction

The accused, Michael Julien Bryden, stands charged that he unlawfully transported firearms within the Halifax Regional Municipality on January 8, 2000. He has made application to exclude evidence, pursuant to the ***Canadian Charter of Rights and Freedoms*** s. 24(2) because the police violated his rights contrary to ***Charter***, ss. 8 and 10(b).

Summary and Findings on the voire dire Evidence

The *voire dire* evidence discloses that on January 8, 2000, at about 0230 hours, Constable Christopher Thomas of the Halifax Regional Municipality Police Force saw a motor vehicle that was being operated by the accused make a moving violation at an intersection. He further observed the vehicle turn the wrong way onto a one way street and effected other traffic violations. The vehicle eventually stopped at 0233 hours after a low speed chase. I find and accept that.

Constable Thomas called in a traffic stop and approached the vehicle which I accept and find was a two door, maroon red Cavalier. When he approached the vehicle, he observed that there was also a male passenger, Tony Doucette, present in the front passenger seat. I accept and find that the Constable had conversations with the accused with respect to his motor vehicle documents and also about whether he had been drinking. As part of the stop protocol, I also accept and find that Constable Thomas shone his flashlight into the interior of the vehicle, which had dark tinted glass that made the interior not visible from outside. On the totality of the evidence, for reasons on which I will later elaborate, I accept and find that when he shone his flashlight into the vehicle the officer discerned two gun cases protruding side by side from the trunk of the vehicle into its interior. This was due to the fact that the rear seat of the vehicle was folded down permitting access from the trunk area.

At this point in time I accept and find that Constables David Boon and Jason Reid arrived on scene. Further, I accept and find that Thomas informed them of his suspicion that firearms were in the vehicle. Reid went up to the drivers side and looked into the vehicle and nodded in confirmation. On the evidence that I accept, I find and conclude that the accused was then requested to exit the

vehicle. Boon then opened the vehicle door and without permission from the accused got hold of the gun cases and opened them. He discovered that one case contained an unloaded .410 gauge, single shot, shotgun with no trigger locks. In the other case he found an unloaded 12 gauge shotgun with five unfired shot shells enclosed in a plastic folder attached to the weapon. Boon seized the firearms and they arrested the accused for the unlawful storage of firearms which was later amended to unlawfully transporting firearms. I accept and find that the accused told the police that he was rabbit hunting earlier in the day. However, I also find that at no stage of his detention and arrest did the police ask him to produce or if he was ever issued a firearm acquisition certificate, a permit to have the firearms or his hunter's license.

Analysis

First, I must say that my impressions of the Crown's evidence was that, at best, it was impressionistic with just enough information to implicate the accused but had insufficient detail and was vague on substantive and crucial points. As I observed the Crown's witnesses as they testified I formed the impression that sporadically they exhibited a poor recollection of details of the event which, in my opinion, resulted in a narrative that, overall, lacked consistency and internal coherency. Their testimonies appeared to be scripted without detailed background such as an accurate description of the stopped vehicle, recorded notes of relevant and material statements made by both the accused and the police at the time or soon thereafter, and erroneous recollection of events. When closely examined with the probabilities that then existed, as disclosed by the total evidence, the Crown's evidence was, in my view, as put by O'Halloran J.A., in ***Faryna v. Chorny***, [1952] 2 D.L.R. 354 at p.357:

> ... [not in] harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

This was a traffic stop after a low speed chase with several traffic law violations. Thomas saw two persons in the vehicle when it stopped. I do not doubt that he had conversation with the accused about his drivers licence, vehicle registration and insurance. Further, I do not doubt that he used his flashlight to inspect the darkened interior of the vehicle and did see the gun cases. However, I accept the defence's evidence that the gun cases were protruding from the trunk of the vehicle into the rear interior, as the back seat was folded down. I accept this fact when I consider and weigh the evidence that when the accused left home with the vehicle he had the back seat folded down. When the vehicle was picked up from the car impound the following Monday, after his arrest, the back seat was still folded down. The accused had also intended to go rabbit hunting the next day. This lends credence to the defence's assertion that the gun cases containing the firearms were in the trunk of the vehicle.

Constable Thomas suggested that he asked the accused whether the firearms were in the cases and whether they had locks attached before Boon and Reid arrived and he then arrested the accused for

unsafe storage of firearms. However, he never made any notes, in his note book, of this relevant and material piece of evidence at the time or soon thereafter when it was fresh in his memory. Additionally, he testified that it was "later" that he opened a gun case and discovered a firearm.

Further, Boon's testimony suggests that Thomas and the accused were outside the vehicle when he arrived on scene and Thomas said he saw firearms. The accused was not then under arrest, as asserted by Thomas. On the information that Thomas relayed concerning the gun cases, he, Boon, went to the vehicle and saw the two gun cases, "in plain view." Reid also went up to the vehicle looked inside and nodded, apparently that he too saw the gun cases. Constable Reid did not testify at trial. Boon had to take the cases from the vehicle through the driver's door yet he cannot recall whether it was a four door or two door vehicle. It seems probable as asserted by the defence that it was a two-door vehicle and that was why Boon had to open the driver's door to get to the gun cases. He opened the cases and saw the firearms. The accused, according to Boon, was then arrested for unsafe storage of firearms. In short, upon close analysis, in my mind, doubts arise as to what in fact and in what sequence the police did what they asserted that they did. The inconsistency of the police witnesses on these important particulars was problematic.

The Crown in argument has conceded that the police conducted a warrantless search of the vehicle and, as a result, violated the accused's right against unreasonable search and seizure guaranteed by s.8 ***Charter***. I too would have come to the same conclusion on the evidence that I accept. Nonetheless, Crown counsel urges me to admit the evidence as it was a minimal intrusion and that I ought to adopt and apply the assumptions decided in ***R. v. Belnavis*** (1997), 118 C.C.C.(3d) 405, affirming 107 C.C.C. (3d) 195 (S.C.C.).

On the other hand, the defence submitted that the firearms were in gun cases in the trunk of the vehicle but were partially protruding into the vehicle's interior. The police had stopped the accused for traffic violations and on the evidence did not appear to have arrested him for those violations. They, however, saw the gun cases but did not know what was in them. They were, in any event curious. He argues, in effect, that if I were to accept Constable Thomas' testimony, which is in doubt, that, on the evidence, before he cautioned and Chartered the accused, he questioned him concerning what was in the cases and what was the condition of the firearms, then the accused's response was incriminating and was evidence that conscripted himself as that was the basis for the police warrantless search and seizure and the subsequent charges. This would violate, and I would agree, his ***Charter*** s.10 (b) right "to retain and instruct counsel without delay and to be informed of that right." On that basis, defence submitted that the admission of the evidence would render the trial unfair.

Further, he submitted that the police, under the authority of ***Criminal Code*** s.117.02, did not have reasonable and probable grounds to believe that the accused had committed any offence that involved a firearm and exigent circumstances existed that made it impracticable to obtain a search warrant. Thus, from the defence's perspective it was not a minimal intrusion but a gross violation and the evidence ought to be excluded.

I now turn to consider whether I should admit or exclude the firearms seized from the vehicle as

evidence against the accused.

First, I do not accept that the police searched the vehicle **after** the accused informed them that firearms were in the gun cases. On the evidence, I find and conclude that they **first** searched the vehicle and after confirming their suspicions that firearms were indeed inside the gun cases, they then arrested him accordingly and Chartered and cautioned him. Thus, on those accepted facts, I do not agree that the accused's ***Charter*** s, 10(b) rights were violated.

Second, as a warrantless search is presumed unreasonable, here, the Crown must rebut that presumption. ***Hunter et al. v. Southam Inc***. (1984), 14 C.C.C. (3d) 97, [1984] 2 S.C.R. 145; ***R. v. Evans*** (1996), 104 C.C.C. (3d) 23, [1996] 1 S.C.R. 8; ***R. v. Caslake*** (1998), 121 C.C.C. (3d) 97 (S.C.C.). Additionally, in order for the warrantless search to be constitutionally permissible it must be authorized by law. ***Kokesch*** (1990), 61 C.C.C. (3d) 207, [1990] 3 S.C.R.3.

Third, in ***R. v. Collins*** , [1987] 1 S.C.R. 265, reaffirmed and clarified in ***R. v. Stillman*** (1997), 113 C.C.C. (3d) 321, [1997] 1 S.C.R. 607, the Supreme Court articulated the approach to be taken in determining whether or not impugned evidence ought to be admitted at trial. Thus, applying the ***Collins*** test, on the first branch, I find that the police violated the defendant's right to be secure against unreasonable search and seizure. He had a reasonable expectation of privacy, in the vehicle. See, ***Belnavis,*** *supra*. Here, the items seized, the gun cases containing the firearms, on the evidence that I accept, existed independent of the ***Charter*** violation and are therefore non-conscriptive evidence. Consequently, their admission would not render the trial unfair.

The next consideration is the seriousness of the breach. ***Belnavis***, *supra.* , relied upon by the Crown, was a situation where the operator of a motor vehicle did not have ownership documents of the vehicle since she had borrowed it. There, the police had the power to search for registration documents. Also, the police saw, in plain view, on the back seat, garbage bags with clothing that showed price tags on them. The occupants of the vehicle could not give a reasonable explanation and had conflicting stories about the ownership of the bags. On the facts of that case, the Supreme Court ruled that in the total circumstances, the warrantless search was reasonable and the evidence seized was admissible.

In the case at bar, there is no evidence that the police were not satisfied with the vehicle documentation, if at all, that the accused presented when requested to do so. There is no evidence that the accused did not have the authority to operate the motor vehicle. Further, it is clear to me that the police did not intend to search for vehicle documentation but had the sole intention to search the vehicle for what they suspected were firearms. Thus, in the circumstances of this case, did the police have reasonable and probable grounds to conduct the warrantless search?

As put by La Forest J., dissenting in ***Belnavis***, *supra*., at p. 428:

> ...there are narrow exceptions including certain searches incidental to an arrest based on reasonable and probable grounds for believing that

> the accused had committed a criminal offence.

Here, in my view, to have the requisite reasonable and probable grounds to conduct the warrantless search of the vehicle the Crown must show that the police were aware that:

> (a) a firearm was used in the commission of an offence
>
> (b) the firearm was likely to be found in the vehicle,
>
> (c) exigent circumstances exist that would have made it impracticable to obtain a search warrant. See, for example, ***R. v. Lind***, [2000] S.J. No. 757 (Prov.Ct) and ***Criminal Code***, s.117.02.

Nonetheless, as put by Dickson J., in ***Southam***, *supra*, C.C.C. at pp. 114-115:

> The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement.

However, here, there is no evidence that when the police stopped the accused vehicle they were aware of any crime committed in which a firearm was used in its commission. On the evidence, they were neither preventing nor detecting the commission of a crime. Thus, they had no reasonable grounds to believe that the vehicle contained any evidence of any offence. They were suspicious that firearms were in the gun cases. But, I must bear in mind that the firearms ***were not*** in plain view and visible to anyone. What was in view, not plain, were closed gun cases which without being opened could one say objectively that they contained firearms which were in plain view or plainly visible? On the evidence, the firearms were enclosed in the gun cases and therefore could not be seen without an intrusive search by the police.

I should also point out that the accused and the passenger were removed from the vehicle. Further, there is no evidence that there was any danger to the police officers or to their security. They were able to look into the interior of the vehicle and they had detained and impounded it under the ***Motor Vehicles Act***. Thus, in my view, no exigent circumstances existed to justify a warrantless search. I therefore find and conclude that the police had no common-law authority or reasonable and probable grounds to search the vehicle without a warrant. Consequently, on the evidence that I accept and on the analysis that I have made I find and conclude that the police conduct was a very serious violation of the accused s.8 ***Charter*** right.

On the third branch of the ***Collins*** test, I must consider the effect of exclusion on the repute of the administration of justice. Here, it seems to me that the police failed to make even the minimum

inquiry with respect to the accused's lawful possession, if at all, of the firearms. I accept that the accused told them that he was out earlier rabbit hunting. Yet, they did not ask him whether he had a firearm acquisition certificate, a hunting license or a permit to have the firearms. Further, it is possible that the ***Firearms Act Regulations*** s. 10(2), although not addressed by counsels, conceivably could have provided the accused some answers to the purported. allegations.

Thus, I find that the police had nothing but suspicions and the search was conducted to confirm these suspicions. I cannot and do not find that they acted in good faith nor that they believed that there existed a potentially dangerous situation. Their prime concern was to open the gun cases to determine whether they contained any firearms. I find that in maintaining that objective, they ignored the legal and constitutional limits of their power to intrude on the accused's reasonable expectation of privacy. Further, while I do not doubt its witnesses' sincerity and dedication to duty, which is not in issue, the Crown's evidence, when considered and weighed with the total evidence, raises in my mind concerns as to its reliability on what the police did and when. These factors, in my opinion, counterbalance any speculations on the disrepute of the administration of justice should I decide to exclude the impugned evidence. The value protected by s.8 ***Charter*** should never be trivialized nor be minimized. See, ***R. v. Dyment*** (1988), 45 C.C.C. (3d) 244, [1988] 2 S.C.R.417. Additionally, as was expressed by Sopinka J., in ***Kokesch***, *supra*. , at p.226, "The court must refuse to condone, and must dissociate itself from egregious police conduct."

Conclusion

In summary I find that there was a very serious violation of the accused's s.8 ***Charter*** right that, in the circumstances of this case, brings into play s.24 ***Charter*** to ensure that the long term good repute of the administration of justice is maintained. In short, in my opinion, the administration of justice would suffer far greater disrepute from the admission of this evidence than from its exclusion. As a result the impugned evidence, the seized gun cases, firearms and ammunition must be and is hereby excluded pursuant to ***Charter*** s. 24(2).