PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Hussey*, 2017 NSPC 59

Date:2017-09-25
Docket: 2957794, 2957795
2957796, 2957797
Registry: Sydney

Between:

Her Majesty the Queen

v.

Johnathon Hussey and Terri Hawley

Judge:	The Honourable Judge A. Peter Ross,
Heard:	July 12, 2017, in Sydney, Nova Scotia
Decision:	September 25, 2017
Charge:	s.5(2) Controlled Drugs and Substances Act
Counsel:	David Iannetti, for the Crown Ralph Ripley for the accused Hussey James Snow for the accused Hawley

By the Court:

Decision on Charter Application

[1] The accused, Johnathon Hussey and Terri Hawley, are jointly charged with possession of cannabis marijuana for the purpose of trafficking. Two bags of cannabis weighing 259 grams and 350 grams were seized from a vehicle in which they were the sole occupants. A smaller three-gram bag was seized from Hawley after a search of her person. These seizures followed a warrantless search based upon a roadside arrest for possession. The arrest was predicated on the smell of fresh cannabis from the interior of the vehicle. The arresting officer had no other grounds. He had stopped the vehicle at a roadside checkpoint set up for the purpose of intercepting impaired drivers.

[2] The accused brought a pre-trial application to have the evidence excluded as being obtained pursuant to a breach of their s. 8 **Charter** right. This is a decision on that application. The accused also assert a s.9 breach. Ultimately the application stands or falls on the same issues.

[3] Although the onus to establish a **Charter** violation is on an accused, where evidence is obtained without warrant a search is presumptively unreasonable and the Crown must prove otherwise on a balance of probabilities. Where a search is incidental to an arrest, the arrest itself must be justified by law. Crown concedes that the critical issue is whether there were requisite grounds to arrest and detain the accused. It argues that the arrest was lawful and the search, being rationally connected to it, was thus reasonable. It accepts that it has the onus of proving a lawful arrest.

[4] The evidence on the *voir dire* was comprised of the testimony of the arresting officer, the affidavit of the accused Hussey, Hussey's own testimony, and testimony from a Ms. MacDougall who approached the location in a separate vehicle.

[5] On January 9, 2016 Cpl. Nelson of the Ingonish RCMP set up a checkpoint at Wreck Cove, Victoria County. It was 7:00 p.m. on a Saturday evening. He intended to intercept impaired drivers returning to his Detachment area from Sydney. He was working alone. He activated the lights of his parked police

cruiser and was "just putting on his vest" when a Toyota Rav-4 pulled up. Hussey was driving. Hawley was in the front passenger seat.

[6] Cpl. Nelson approached the driver's side window and immediately noticed "a strong odour of marijuana coming from the vehicle." He described it as fresh, not burnt. He also noticed the smell of air freshener. Both occupants were known to him. Although he says he requested the usual identification papers there is no indication he received or examined such.

[7] At that point another vehicle approached and drew the officer's attention. According to the defence this was a vehicle driven by Alicia MacDougall and it was simply waived through. Cpl. Nelson said he performed a check on a vehicle driven by a male. Defence sought to impugn Cpl. Nelson's credibility with the evidence of Ms. MacDougall. It is possible both accounts have elements of truth, and I make nothing of the apparent discrepancy.

[8] Cpl. Nelson returned to the accused's vehicle and without further interaction arrested both occupants for possession of cannabis. He did a personal search of both. He found a small sandwich-bag of marijuana in Hawley's sweater pocket. He said "there was still a strong smell from the car". He noticed groceries in the back seat and a shiny gift bag with a towel stuffed in the top. He searched through these items and found the two bags of marijuana in the gift bag. It is unlikely the gift was meant for him.

[9] The back seat and floor were pretty much filled with groceries in open plastic bags. Hussey produced a receipt showing the purchase of over two hundred dollars of groceries at a Sobey's store at 5:15 p.m.

[10] In the brief interval between arrest and search, Hawley told Cpl. Nelson that she had just smoked a joint (marijuana cigarette). Cpl. Nelson says he did not smell any burnt marijuana in the vehicle or on her clothes. It appears he did not inspect or question either accused about any driving-related offence. An iPhone and cash were also seized, though neither is material to this application.

[11] For better or worse, this was not the first encounter. Five months earlier, on August 3, 2015, these same accused, driving the same vehicle, were stopped by this same police officer. On that occasion, from the side of the vehicle, Cpl. Nelson smelled burnt marijuana and arrested both occupants. Hawley produced a roach and threw it on the ground. Cpl. Nelson searched the vehicle, and both accused, but found no other evidence to substantiate the arrest.

[12] Police are entitled to rely on their senses - sight, hearing, touch, etc. Like other witnesses police are entitled to describe to a court what they saw, heard, felt etc. In this respect, smell is a sense like the others. If a witness were to testify in an arson trial that she detected a "burning smell" while passing a house at a given time, would anyone even think to question the admissibility of this evidence? There would be a common idea of what "burning" smelled like (as opposed to "rotting", for instance). The witness might be asked whether what she smelled was the exhaust of a passing car, but this would factor into the assessment of weight. In *R. v. Graat* the Supreme Court held that police officers, like anyone else, can give simple opinion evidence (lay opinion) concerning things widely known and experienced by the general public.

[13] In countless cases, police have been permitted to say that they smelled alcoholic beverage on a person's breath, or emanating from a vehicle. In one case I had a doctor testify that he could distinguish between someone who had been drinking beer and another who had been drinking wine. I dare say this sort of distinction exceeds the capabilities of the average layperson.

[14] In the plethora of cannabis-smell cases in the literature, no court has ever held that a police officer cannot give reliable evidence of what they detect or recognize by smell. But difficulties arises when the police claim to be able to recognize this particular smell (raw cannabis) as a basis for arrest, with no other supporting grounds.

[15] The day may be fast approaching when the smell of fresh cannabis is widely known to the public and, by extension, familiar to triers of fact. The smell of burnt marijuana is familiar to many people now, given its widespread use, its pungency, and its tendency to disperse. Today, however, the law is such that where the smell of raw marijuana alone is offered up as the basis for a belief in possession (and the validity of an ensuing arrest) that opinion must have substantial underpinnings in training and/or experience, and even then should be treated with caution.

[16] As Cpl. Nelson acknowledged, he could not determine the *quantity* of marijuana from smell alone. It might have been a relatively small amount, which would constitute only a summary conviction offence. As noted in R. v. S.T.P., 2009 NSCA 86 the officer's power to arrest must therefore fall within s.495(1)(b) – "finds committing". This involves a number of requirements, the one germane to the cannabis-smell cases being the third of those identified at par. 22 of this decision:

> Thirdly, there must be an objective basis for the officer's conclusion that an offence is being committed. In other words, as the Supreme Court noted in *Roberge, supra,* "it must be 'apparent' to a reasonable person placed in the circumstances of the arresting officer at the time".

[17] In *S.T.P.* our Court of Appeal upheld the trial judge's view that the smell evidence together with a "larger supporting context" justified the arrest. At par. 5 it approved of this statement:

> That context supports th e 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.

[18] That same trial judge heard R. v. J.C.L. 2011 NSPC 91 and said, after referring to *S.T.P.:*

> **14** The Ontario Court of Appeal in R. v. Polaschek, [1999] O.J. No.968 (Ont C.A.) took an approach that required a consideration of the broader context. Where the sense of smell is used to establish grounds for arrest, the circumstances in which that observation was made will determine the matter.
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> **15** Those circumstances will of course include information available to the police officer through a variety of sources. They might include his or her own visual observations, what he or she hears, and information that he or she might have obtained that would allow the conclusion to be reached that the actions that he or she was observing constituted an offence.
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> **16** That full context will of course include the officer's sense of smell. Where the sense of smell is the only factor upon which the police rely, the situation has to be subjected to considerable scrutiny. Those observations are, by their very nature, hard to verify. They can be used to justify actions after the fact.

[19] These and other cases indicate that where the Crown relies on smell and smell alone to supply grounds for an arrest there must be very cogent evidence of the ability of the arresting officer to recognize and distinguish the smell of raw marijuana from the many other odours which one might find in a motor vehicle. Smells may originate from numerous other substances and/or various activities, past or present. As well, regardless of how well-honed the officer's sense of smell

may be in general terms, other things might impact on the reliability of his or her opinion in a given case.

[20] Cpl Nelson testified that he could identify the smell of burnt and fresh marijuana, and distinguish between the two. He said he has encountered marijuana more than 300 times in his career. He estimates that about 75 of these were searches. He has been qualified as an expert witness a number of times with respect to drug trafficking. Parenthetically I note that such opinion evidence typically concerns the quantity, packaging and distribution of drugs; it does not concern their smell. That said, he took two courses during which he was exposed to fresh and burnt marijuana in order to distinguish them.

[21] The Crown did not seek to qualify Cpl. Nelson as a cannabis-smell expert, *per se*. I am not aware that this has ever been done, nor what it would entail. Be that as it may, his experience and training is a factor to be considered in assessing the reasonableness of his belief that the smell of fresh marijuana was emanating from the vehicle. The lack of such experience has sunk a goodly number of cases.

[22] It is difficult to describe smells except by reference to others. People sometimes say that something "doesn't pass the smell test", or "something just didn't smell right". This speaks to an intuitive sense that something isn't quite the way it is supposed to be. Intuition can be put to good and proper use, but it does not always fit easily in a paradigm of individual rights and state authority where the law expects "articulable cause" for the exercise of police powers. Perhaps standardized measurement, testing and training of the smell sense would yield a language capable of uniform application to legal situations. Perhaps the pending legalization of simple possession of cannabis, and concern over a rise in drug-impaired driving, will prompt such efforts. Perhaps it will become a matter of such common experience and understanding that this will not be necessary.

[23] In R. v. Polaschek [1999] O.J. No.968 (Ont.C.A.) the court left open the possibility that the smell of marijuana alone might provide sufficient grounds for an arrest, but at the same time it issued the following caution, at par. 13:

> The sense of smell is highly subjective and to authorize an arrest solely on that basis puts an unreviewable discretion in the hands of the officer. By their nature, smells are transitory, and thus largely incapable of objective verification. A smell will often leave no trace. As Doherty J.A. observed in R. v. Simpson, at p. 202: ". . . subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation."

[24] *Polaschek* was cited with approval in R. v. Morgan, 2017 NSSC 206. The facts were somewhat different than those in the present case, but similar concerns were voiced by the trial judge who said at par 43:

> While I am satisfied that Cpl. Kutcha's experience equipped him to distinguish between fresh and burned marijuana, I am not convinced that a "slight" odor, detected at roadside, more than fifteen minutes into the interaction, is a reliable piece of evidence. While there may have been a subjective belief on Cpl. Kutcha's part that the smell was that of "fresh" marijuana, I don't find his conclusion objectively sustainable (See: *R. v. Gee*, 2015 BCSC 1013, for a case with somewhat similar facts).

[25] In R. v. Gonzales 2017 ONCA 3437 at par. 97 the court said this:

> No bright line rule prohibits the presence of the smell of marijuana as the source of reasonable grounds for an arrest. However, what is dispositive are the circumstances under which the olfactory observation was made. Sometimes, police officers can convince a trial judge that their training and experience is sufficient to yield a reliable opinion of present possession. As with any item of evidence, it is for the trial judge to determine the value and effect of the evidence

[26] The bag containing the 259 grams of cannabis was in a clear plastic bag which was itself inside another vacuum-sealed bag. The 350 grams was inside a single zip-lock freezer bag, which was "zipped" shut. Both were inside the gift bag closed over by the towel. Cpl Nelson said he did not know whether he was smelling the cannabis through the vacuum-sealed bag, but believed, based on this training, that this was possible.

[27] Asked to describe to smell of burnt marijuana, Cpl. Nelson described it as being like charcoal. In cross-examination he said that fresh marijuana smelled like freshly cut grass, or something like a skunk, "a very distinct smell". He was invited to agree, and seemed to agree, that the smell of fresh marijuana might be likened to cat urine. Defence counsel then produced a vacuum-sealed bag of used cat litter. Thankfully this was not marked as an exhibit nor exposed to the otherwise amenable atmosphere in the courtroom. The witness, however, accepted the premise, and Crown did not register any objection. To all concerned it appeared to be used cat litter. He could not smell the contents through the vacuum-sealed bag.

[28] In redirect, Cpl. Nelson opined that there would be more smell emanating from the ziplock freezer bag than from the vacuum-sealed bag. He said that different strains of cannabis smell to a greater or lesser degree. Hussey, in cross-

examination, agreed that it was more likely that a smell would come from the ziplock freezer bag which had not been vacuum-sealed. I don't know whether any such comparison has been tested.

[29] In many of the "cannabis-smell" cases where the arrest has been ruled lawful, the opinion of the arresting officer has been corroborated by the opinion of another (e.g. R. v. Harding, 2010 ABCA 180). In the instant case Cpl. Nelson had nobody else to assist and thus was unable to glean any support for his belief.

[30] The prior stop, arrest and search of these same accused in August of 2015 is a complicating factor (par. 11, above). The similarities are striking though the situations are not identical. In the former instance the arrest was based on the smell of burnt marijuana; in the present case it was based on the smell of fresh marijuana. I note that some courts have determined a smell of burnt marijuana to be evidence only of past possession (R. v. Janvier, 2007 SKCA 147), while others have said that an officer may reasonably believe that a recent user still has a remainder of unconsumed cannabis in his or her possession (R. v. Loewen, 2010 ABCA 255). In August, Hawley said that she had been smoking a joint, and produced a "roach". In the present case, Hawley said that she'd just smoked a joint, but produced no evidence, and Cpl. Nelson did not believe that this accounted for the smell. Be that as it may, on both occasions Cpl. Nelson's belief was based primarily on the smell from the vehicle. Once his senses led to a subsequently-confirmed belief, once they were not. Additionally, one is required to consider whether his experience in the former coloured his perception and actions in the latter.

[31] The presence of the 3-gram baggie in Hawley's personal possession is another complicating factor. Cpl. Nelson said in cross-examination that he could not ascertain precisely where the smell was coming from, agreeing that it might have been coming from the 3-gram baggie. His belief in the presence of cannabis in the vehicle was formed almost immediately, when he first approached the driver's window. When he found the baggie on Hawley, outside the vehicle, it seems to me he should have re-evaluated his grounds.

[32] Even though Cpl. Nelson said that there was still a strong smell coming from the vehicle *after* Hawley was removed and searched, I do not know how much time elapsed between these two things. I do not know how much the smell of fresh marijuana persists, or lingers, once it is removed from its surroundings. Possibly

Cpl. Nelson should have waited a certain interval for any smell that might have come from the small baggie to dissipate through open doors of the vehicle.

[33] Hussey's evidence is that Hawley had smoked a marijuana cigarette in the vehicle. Hawley said as much to Cpl. Nelson at roadside. She may have been attempting to "cover" for the smell of fresh marijuana in the vehicle; Cpl. Nelson said he didn't smell any burnt marijuana. That said, Hussey's assertion was not tested in cross-examination and is uncontradicted except for Cpl. Nelson's claim *not* to have smelled something, which begs its own line of inquiry.

[34] A police officer making an arrest is entitled to act on incriminating factors, but is also required to take account of things which appear to exonerate the suspect. Whether it is "apparent to a reasonable person" (R. v. Roberge, 1983 1 S.C.R. 312) that an offence was being committed is a conclusion which must take account of all the prevailing circumstances. If, after an arrest, something emerges which might provide an alternative explanation for the grounds, the police officer should re-evaluate those grounds before proceeding to conduct an ancillary search.

[35] The presence of air freshener may have heightened suspicion. It was mentioned, and I may suppose it was mentioned for a reason. However I don't know how commonly air fresheners are used nor what type of air-freshener it was (spray, plug-in, hanging variety). I have not heard that the use of such is associated with transportation of marijuana. Consequently it adds nothing to the grounds for arrest.

[36] Fresh marijuana has been described as its "vegetative state". Scanning the Sobey's receipt I see that the groceries in the back seat of the vehicle were short on vegetables and heavy on canned goods. There were packages of fresh meat. It still seems possible that this quantity of goods, readily apparent to the officer, might bear a smell of some sort, although this point was not addressed in the evidence.

[37] There is no evidence of the occupants acting suspiciously, as in *S.T.P*. The smell was described as strong, but the quantity was not nearly as great as in many cases where the odour of fresh cannabis was detected (e.g. R. v. Taylor 2012 BCSC 1517, R. v. Sewell 2003 SKCA 52, R. v. Noel 2010 NBCA 28, R. v. Gonzales 2017 ONCA 543)

[38] As noted above, courts treat stand-alone olfactory identification evidence with an abundance of caution. It is a form of evidence where the inherent trustworthiness of the observation is as important as the honest belief of the person

drawing the conclusion. Concerns have been raised about potential abuse by those who rely upon it to exercise an arrest or search power. I do not mean to trivialize the issue by saying that people will not want their vehicles searched because it happens to smell of the family dog.

[39] Nothing has come to my attention about the accuracy of smell-observations of raw cannabis by police, how such things as packaging might affect the ability to detect it, whether other smells might be mistaken for it, and to what extent training and repeated exposure might enhance the ability to discern the presence of raw cannabis by smell alone.

[40] As defence counsel pointed out in argument, a police officer may be proven correct in a given case, but courts will never know how many times the same officer may have arrested on an honest but mistaken belief and then searched fruitlessly, because no charges will arise in those situations.

[41] For these reasons I conclude that there were insufficient grounds for the arrest, resulting in an unlawful detention and search and a breach of the accused's s.8 and s.9 **Charter** rights.

[42] On the question of whether the impugned evidence should be excluded from evidence at trial - speaking here of the two large bags of marijuana which are foundation for the Crown's case for the s.5(2) charge – I have the benefit of the recent decision in *Morgan*, supra. While not a decision on appeal it is a decision of a superior court in this jurisdiction and is therefore particularly instructive, both on the s.8 and s.9 issues (as noted above) and also on the issue of exclusion under s.24(2). In *Morgan*, significant quantities of both cannabis and cocaine were seized. While the facts in Morgan are somewhat different the underlying concerns are the same. The actions of Cpl. Nelson vis-à-vis Hussey and Hawley were somewhat precipitous. The result was a violation of important rights - not to be arbitrarily detained, nor to have one's private belongings unreasonably searched. Application of the *Grant* analysis leads me to the same result as in *Morgan*, i.e. that the evidence should be excluded from the trial.

Dated at Sydney, N.S. this 25th day of September, 2017

Judge A. Peter Ross