

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Millett, 2004 NSPC 57

Date: 20040616

Docket: 1372597

Registry: Kentville

Between:

Her Majesty the Queen

v.

Daniel Lee Millett

Judge: The Honourable Judge Alan T. Tufts

Heard: May 11, 2004 and May 19, 2004,
in Kentville, Nova Scotia

(Oral) decision: June 16, 2004

Charge: On or about the 15th day of September, 2003, at, or near 5139 Hwy 221 Grafton, NS did unlawfully produce Cannabis Marijuana, a substance included in Schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 7(1) of the said Act.

Counsel: David Greener, for the Crown
Chris Manning, for the defence

By the Court:

- [1] The accused is charged under s. 7(1) of the **Controlled Drugs and Substances Act**. A *voir dire* was conducted to determine the admissibility of certain evidence which was seized as a result of a search at the accused's property located near Grafton, Kings County, Nova Scotia.
- [2] The issues to be decided are as follows:
 1. Were the accused's s. 8 **Charter** rights violated when the RCMP constable travelled onto the accused's property beyond knocking on the accused's door;
 2. If the accused's **Charter** rights were violated should the evidence be excluded.
- [3] Counsel have agreed that the validity of the search warrant obtained is not challenged other than to determine if the accused's **Charter** rights were violated by the police entrance into his property and if so the observations of the police would then be excised from the information to obtain the warrant. If these observations are removed counsel agree that the search warrant would not have been granted and the search is accordingly warrantless. Counsel have agreed conversely that if the observations are included the warrant is otherwise valid.
- [4] The facts are disputed. I will briefly review the background and emphasize the areas of dispute. The accused and his neighbours were having a dispute which centered partially around the neighbour's dog. Complaints had been made about the animal which caused a problem with the neighbour. The neighbour then began complaining about the accused's movements around the neighbour's home and in her driveway. As a result of all this the police were asked to intervene.
- [5] Constable Foley tried on a number of occasions to contact the accused by telephone without success. On the day in question he decided to visit the accused at his residence to speak to him about the matter. The accused lives in a rural area on a secondary paved highway. He lives alone with his mother.

- [6] Constable Foley went to the accused's side door in the afternoon. He knocked. It was obvious no one was at home. He then went to the garage door and looked in the window thinking the accused may be outside in his garage. When it appeared the accused was not inside, the constable then went around the front and side of the garage and located himself where he could see the remainder of the accused's property. The accused was not present.
- [7] He could, however, see a small frame covered with plastic similar to vapour barrier used in home construction. This structure was located in the accused's garden and was built with a peaked roof on walls of about twelve to fourteen inches high. Constable Foley testified that from that vantage point he could see leaves pressing against the plastic which he believed were the leaves of a marijuana plant. This point of observation was estimated to be approximately 75 feet from the structure, although shorter distances were also given as estimates.
- [8] The defence disputes Constable Foley's testimony on this point. In the information to obtain the search warrant the deponent, Constable Doyle, who spoke to Constable Foley, deposed that he, Constable Foley, had walked past the structure when returning to his police car when he observed the leaves pressed up against the plastic. This clearly did not happen. The defence argues that Constable Foley was pre-disposed to suspicions about the accused's drug use or cultivation and Constable Foley went there with that pre-disposition and that when the accused was not at home he took the liberty to "nose around" as the defence suggests. Accordingly it is argued that Constable Foley was a trespasser and he was conducting a search without a warrant.
- [9] The Crown argues that Constable Foley was merely acting within an implied license to enter the accused's home to speak with him and that his actions were limited to the practise of simply entering the accused's property only to the extent necessary to see if the accused was home.
- [10] There was much argument between counsel as to what Constable Foley saw from the edge of the garden and whether he could actually see the leaves as he described. One other officer, that is Constable Doyle, said that he would

have to be 25 feet from the structure to discern the nature of the plants inside.

- [11] Photographs of the area and the structure from Constable Foley's vantage point were in evidence. These photos did not reveal the leaves as were described by Constable Foley. Only photos taken within a foot or two showed the leaves pressed up against the plastic.
- [12] In my opinion Constable Foley must have been closer than the edge of the garden to make the observation he described. This is the only conclusion that I can reach from the evidence, notwithstanding Constable Foley's testimony. I can only conclude that he walked over to the structure and passed it and most likely walked around it in order to make the observations that he did. In my opinion when he rounded the edge of the garage looking for the accused he saw the structure, ie. the little "greenhouse". The accused was clearly not present. This structure, I can only conclude, caught the officer's attention and curiosity and he walked over to it. He was not looking for the accused nor was he acting within an implied license. He was trespassing and searching. This would explain why Constable Doyle stated that what he did in the information to obtain as to what Constable Foley had told him.
- [13] There is no evidence, however, that the officer was predisposed to the accused's conduct or harboured suspicions, although, once he saw the greenhouse, in my opinion, he obviously became suspicious and went further to investigate. In my opinion this amounts to a perimeter search and the principles set out in **R. v. Kokesch**, [1990] 3 S.C.R. 3 and **R. v. Evans**, [1996] 1 S.C.R. 8 apply. I acknowledge that in **R. v. Evans** and **R. v. Kokesch** the police initially went to the accused's residence looking for evidence of drug use and here that may not have been Constable Foley's original intent, at least there is no evidence of that when he started to investigate the greenhouse as I conclude that he did. However, the nature of his conduct amounts to the same as the police did in **Evans** and **Kokesch**. The accused's s. 8 **Charter** rights were violated.
- [14] This would necessarily make the search warrant invalid if Constable Foley's observations are excluded from the information to obtain, as I concluded

they should be. The search is accordingly warrantless and in my opinion unreasonable and the accused's s. 8 **Charter** rights are breached.

- [15] The remaining issue is whether the evidence should be excluded. The law on this subject is reviewed by the Supreme Court of Canada in **R. v. Buhay** [2003] 1 S.C.R. 631. There the court reviews the factors to be considered as set out in **R. v. Collins** [1987] 1 S.C.R. 265 and **R. v. Stillman** [1997] 1 S.C.R. 607. I have also reviewed the authorities referred to me by counsel and in particular by Crown counsel which deal with this issue as well as the s. 8 violation.
- [16] The three areas the Court must consider are as follows:
1. Trial fairness;
 2. Seriousness of the breach;
 3. The effect of exclusion on the administration of justice.
- [17] Defence counsel concedes that the trial fairness issue is not engaged because this was real evidence.
- [18] The seriousness of the breach depended on the following factors, namely:
1. Whether the police were acting in good faith or whether their actions were inadvertent;
 2. Could the evidence be obtained by other means;
 3. Obtrusiveness of the search;
 4. Expectation of privacy; and finally,
 5. The existence of reasonable and probable grounds.
- [19] I cannot conclude that the police acted in good faith. In my opinion, as I concluded above, Constable Foley went beyond the implied license he had to enter the accused's property. He was a trespasser and was investigating without permission. He knew, or ought to have known, he was trespassing. This is not the same case as in **Evans** where the police thought that they were acting within their authority and within the scope of **R. v. Kokesch**, *supra*. His actions could not be described as inadvertent.

- [20] It is not clear whether Constable Foley told Constable Doyle that he did not “walk past” the structure on his way to the police car or not, but that did not happen in the way Constable Foley described in his evidence.
- [21] There was no other evidence suggesting the presence of these plants or connecting the accused to drugs other than his record which certainly could not come within reasonable and probable grounds to justify this type of search. I cannot conclude that these drugs were discoverable in any event. They were not, in my opinion, in plain view. Clearly the obtrusiveness of the search and the expectation of privacy is not as severe or as high as in other types of searches, such as a search of a dwelling house or body searches, however, there is not without some measure of obtrusiveness here and there is some expectation of privacy in one's private property. There is certainly more of an expectation of privacy here than in an open field given the structure of the “little greenhouse”.
- [22] In my opinion, based on the factors above, I can only conclude that the **Charter** violation is serious.
- [23] Finally, I cannot conclude that the exclusion of the evidence would affect the reputation of the administration of justice. This area deals most particularly with the seriousness of the offence and the importance of the evidence to the Crown's case. The accused was charged with cultivation, not trafficking, or possession for the purpose of trafficking. The amount of plants was not inconsistent with personal use. The area of plants was relatively small and was not consistent with a sophisticated operation. This involved marihuana, not hard drugs, as pointed out in **Buhay**, and while the evidence is undoubtedly critical I am not persuaded that the administration of justice is brought into disrepute if the evidence is excluded.
- [24] Finally, I have concluded that the evidence should be excluded. Balancing all the factors I am required to do, I am satisfied it would bring the administration of justice into disrepute if the evidence was admitted. It is accordingly excluded.