

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

DION DOUGLAS ADEKAT

**REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE ROBERT D. GORIN**

Application to exclude evidence based on breaches of ss. 7, 8, 9, 10(b) of the *Canadian Charter of Rights and Freedoms*.

Heard at: Yellowknife, Northwest Territories

Date: February 24, 2006

Reasons Filed: March 21, 2006

Counsel for the Crown: S. Smallwood

Counsel for the Accused: Robert H. Davidson, QC

(Charged under 5(2) of the *Controlled Drugs and Substances Act*.)

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Introduction

[1] On February 24, 2006, the accused's trial on a single charge of possession of cocaine for the purpose of trafficking commenced. A *voire dire* was held to determine the admissibility of real evidence seized by the police. The entire trial including the *voire dire* lasted less than one day. Following the *voire dire*, I ruled the real evidence in question excluded and advised that written reasons would follow in due course. These are the reasons for my decision.

The Issues

[2] The accused is charged with having possession of cocaine for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*. The accused's takes the position that his rights guaranteed under sections 7, 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms* have been violated. He states that the crack cocaine obtained through a search of his personal property, should be excluded as evidence against him pursuant to section 24(2) of the *Charter*.

[3] I begin by reminding myself that the onus is on the accused to establish his allegations on a balance of probabilities. Under s. 24(1) he must establish, as a minimum, that his *Charter* rights were infringed or denied. Once the accused

establishes that his *Charter* rights were infringed or denied, s. 24(2) requires that he establish the factual and legal prerequisites which will then give rise to an exclusion order.¹

The Facts

[4] The first witness who testified during the *voire dire* was Corporal Greenwood, a member of the Royal Canadian Mounted Police stationed in Yellowknife. His evidence established that during the morning of October 30, 2005, he was contacted by Constable Hamilton, who is also a member of the R.C.M.P. Constable Hamilton advised Corporal Greenwood that he had been contacted by the R.C.M.P Telecommunication Centre (telecoms) and advised that an unidentified caller had contacted telecoms stating that a tall, thin native male wearing glasses was traveling from Edmonton to Yellowknife by airplane with a substantial amount of cocaine on the first flight scheduled for that day which was due to arrive at 9:45 a.m. The only information about the physical appearance of the individual provided to Corporal Greenwood was that he was a tall, slim, native male wearing glasses.

[5] From Corporal Greenwood's testimony it appears that he then attended the Yellowknife airport where he met Constable Hamilton. Corporal Greenwood testified that it was determined that no flight from Edmonton arrived at or around 9:45 a.m. It appears that he and Constable Hamilton then left the airport. However, Corporal Greenwood was later advised by Constable Hamilton that telecoms had contacted him again, stating that the anonymous informer had called back to say that either the suspect had missed his flight or the flight had been cancelled and that the suspect would now be on the flight arriving in Yellowknife at 11:30 a.m.

[6] Corporal Greenwood returned to the airport as did Constable Hamilton and other members of the R.C.M.P. Corporal Greenwood recalls that the screen displaying the

¹ Fontana, James A., *The Law of Search and Seizure in Canada*, 6th ed. (LexisNexis Canada Inc, 2005), at p. 742.

arrival time of the various flights indicated that the next flight from Edmonton was arriving at 11:30 a.m.

[7] The 11:30 a.m. flight from Edmonton arrived and Corporal Greenwood, who was dressed in sweatpants and a baseball cap, went to a location where he could see the passengers disembarking from the incoming flight from Edmonton. After the flight arrived and the passengers began disembarking he saw the accused, who fit the rather vague physical description provided to him by the anonymous informer through telecoms and Constable Hamilton. About half of the people on the flight had disembarked at the time that he observed the accused leaving the airplane. The accused appeared to be with two other male individuals. The accused kept looking back at them while walking to the airport entrance from the airplane. One of these two individuals was about 5' 10" and was wearing glasses. Corporal Greenwood described him as being more "heavy set" than the accused. He appeared to Corporal Greenwood to be native but later turned out to be East Indian. The other individual who appeared to be with the accused was a Caucasian, who was also approximately 5' 10" in height.

[8] It was Corporal Greenwood's opinion that other than the accused no one who had been on the flight matched the physical description with which had been provided.

[9] The accused entered the airport and immediately placed two telephone calls. The two individuals who appeared to be with him went to the luggage carousel and retrieved a duffel bag and a Samsonite suitcase.

[10] The accused then went in the direction of the only public washroom in the airport. After a period of time had passed, Corporal Greenwood felt that the accused had been in the washroom too long and followed the route that he had taken. He then crossed paths with the accused, who was by now returning from the washroom area. The accused asked him how to get out of the airport. Corporal Greenwood gave the accused the necessary directions. At this time, the accused would have had no reason to believe that Corporal Greenwood was a police officer.

[11] The accused advised Corporal Greenwood that he and his two companions were up from Edmonton and walked to the exit. Corporal Greenwood asked the accused what he was doing in Yellowknife. The accused replied that he was on business having to do with his snow removal company. At this point in time the accused was in the process of exiting the airport terminal and approaching a taxi, which was parked outside the terminal. From the evidence presented during the *voire-dire* it would seem that Officer Greenwood was walking with or immediately behind the accused while the accused made his way to the taxi stand outside. The two other individuals that the accused appeared to be with were also walking in the same direction.

[12] Corporal Greenwood then advised the accused that he was a police officer. He asked the accused whether the suitcase one of the accused's companions had with him belonged to the accused. The accused replied that it did belong to him. Corporal Greenwood advised the accused that he matched the physical description provided by the anonymous informant. The accused did not respond or react to this information. He asked the accused if there was anything in the suitcase of which he should be aware. The accused replied that he did not know. He asked the accused if he had packed the suitcase. The accused replied that his buddy had packed the suitcase.

[13] The accused's demeanor had now, in Corporal Greenwood's view, changed from being calm to being nervous. Corporal Greenwood testified that he seemed more "standoffish" by this point in time.

[14] During examination-in-chief by the Crown, Corporal Greenwood testified that he formed the impression that the accused wanted to leave in the taxi and placed himself in the way of the taxi's door so that it could not be closed.

[15] However, during cross-examination by Mr. Davidson, Corporal Greenwood admitted that after speaking with the accused, the accused had actually entered the front passenger side of the taxi. Corporal Greenwood stated that he opened the door to the taxi and asked the accused to get out. It seems clear that the accused had closed

the door behind him when he got into the taxi. Corporal Greenwood conceded that in opening the door and telling the accused to get out of the taxi he took control of the accused's movements. By doing so, he placed the accused under detention and triggered the accused's rights provided under section 10(a) and (b) of the *Charter*. Subsections 10(a) and 10(b) of the *Charter* provide:

10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefore;
 - (b) to retain and instruct counsel without delay and to be informed of that right;

[16] Corporal Greenwood testified that immediately after he assumed control of the accused's movement he did not tell the accused that he was under investigative detention or any other form of detention. He did not tell the accused why he was being detained. He further testified that at this point in time, he did not advise the accused of his right to counsel or give him the standard police warning. He simply told the accused to get out of the taxi and that he wanted to speak to him.

[17] Corporal Greenwood asked the accused if he would mind if he looked inside the suitcase. The accused replied that he wished to speak to a lawyer first.

[18] During his testimony Corporal Greenwood stated on a number of occasions that it was immediately following the point in time when the accused said that he wished to speak to a lawyer before allowing Corporal Greenwood to look inside his suitcase that he felt he had been provided with the necessary grounds to arrest the accused and to search the suitcase as an incident to that arrest. He also testified he felt that up to the point in time he engaged the accused in discussion, he had "60 percent" of the necessary grounds to search the suitcase. He felt that it was through his subsequent interaction with the accused, including the accused's refusal to allow the search and the invocation by the accused of his right to counsel, that he was ultimately provided with the necessary grounds.

[19] Immediately following the point in time when the accused advised that he wanted to speak to a lawyer before allowing the search, Corporal Greenwood arrested the accused who was then informed of his right to counsel and given the standard police warning. The accused again said he wished to call a lawyer. The suitcase had a large padlock on it. Corporal Greenwood asked the accused if he had the key. The accused retrieved the key to the padlock from his pocket.

[20] The suitcase was immediately opened with the key supplied by the accused and searched by Corporal Greenwood. A package containing a substance later determined to be crack cocaine was found. The crack cocaine weighed 197.5 grams. The street value of the crack cocaine, if broken down into grams with each gram sold separately, would be between \$15,800 and \$19,750.

[21] Corporal Greenwood testified that he searched the suitcase because he thought there was “something” inside it, although he didn’t know what that something was. He testified that he “suspected that it was a drug of some form”.

[22] In finding the facts, I rely on the evidence of Corporal Greenwood. Corporal Greenwood’s evidence was for the most part consistent, although some portions of his narrative of events were certainly clarified during cross-examination. In my view any inconsistencies between what he said during examination-in-chief and cross-examination were such that they could easily be explained by the fact that he was testifying on events that had occurred 4 months before. I find that the narrative of events as set out in Corporal Greenwood’s testimony during examination-in-chief and clarified during cross-examination has been established as accurate on a balance of probabilities.

[23] I appreciate that Corporal Greenwood’s evidence differed in a number of respects from that of Constable Hamilton. Constable Hamilton testified that he had been provided with more detail concerning the individual who was transporting the cocaine. He testified that the information he had received was that the tall, slim, native male

wearing glasses was traveling with two other males. He further testified that he passed this information on to Corporal Greenwood. According to Constable Hamilton, the accused was carrying a black “carry-on” bag with him during the time he observed the accused leaving the plane and walking to the taxi. Constable Hamilton also stated it was he and not Corporal Greenwood who arrested the accused. He said he did so at the direction of Corporal Greenwood. He said that it was the accused’s black “carry-on” bag in which the cocaine was found. Finally, he testified that the accused was asked if he consented to the search of his luggage and that the accused provided such consent prior to the search being performed.

[24] However, it appears that Corporal Greenwood’s notes, which he relied upon to refresh his memory, were far more complete and detailed than those of Constable Hamilton. Corporal Greenwood also appeared to be far more confident and detailed in his recollection of the events in question than did Constable Hamilton. For example, Corporal Greenwood made it clear that he attached no significance to the fact that the accused was together with two other individuals while at the airport. Constable Hamilton agreed that his notes were only two pages long and did not contain any information concerning what happened prior to the detention of the accused. He admitted that he had taken “no detailed notes” of what occurred.

Analysis

Were the Accused’s *Charter* Rights Violated?

[25] Crown Counsel concedes that the accused’s rights guaranteed under sections 9, 10 and 8 of the *Canadian Charter of Rights and Freedoms* were violated, but takes the position that notwithstanding the said breaches, the applicant should not succeed in his application to have the crack cocaine excluded pursuant to subsection 24(2) of the *Charter*.

[26] I agree with Crown counsel that the accused's *Charter* rights were violated. The search was conducted without a warrant. It is presumed to be unreasonable in these circumstances. The Crown has not rebutted this presumption.

[27] For the purpose of analysis I will assume that Corporal Greenwood had the articulable cause necessary to place the accused under investigative detention. However, even if one assumes that the initial detention of the accused was lawful, the fact remains that he was not advised of his right to counsel as required by subsection 10(b) of the *Charter*.

[28] The police had no right to search the suitcase of the accused as an incident to the investigative detention. In *Mann v. The Queen*, [2004] 185 C.C.C.(3d) 308, the Supreme Court of Canada held that where an accused is lawfully detained for investigative purposes and a police officer has reasonable grounds to believe that his or her safety or the safety of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Corporal Greenwood did not have reasonable grounds to believe that his safety or the safety of others was at risk. Even if he had had such grounds, the right to search would not have extended to the suitcase.

[29] In *R. v. Calderon*, [2003] O.J. No. 3474 (C.A.) the Ontario Court of Appeal held that even if there is a broader search power incidental to an investigative detention, it does not extend to a search for the purpose of discovering evidence of a crime. A search for that purpose would not be "reasonably necessary".

[30] The accused exercised his legal rights by refusing to agree to Corporal Greenwood's request to search his luggage and said that he wished to speak to a lawyer first. As stated, Corporal Greenwood was of the view that as a result of the accused taking this position, he now had the reasonable and probable grounds necessary to arrest the accused and that he could therefore search the accused's suitcase as an incident to that arrest once the arrest was made.

[31] As stated, the accused had the legal right to refuse to allow Corporal Greenwood to search his suitcase. He also had the legal right to speak to a lawyer before allowing such a search. I find that the accused did not contribute towards providing Corporal Greenwood with the grounds necessary for his arrest by exercising either of these legal rights.

[32] Moreover, as Corporal Greenwood testified during examination-in-chief, at the time of the arrest and search he thought “something” was in the suitcase and he “suspected” that it might be drugs. The reasonable and probable grounds required to make the arrest were not present. They were not present before Corporal Greenwood asked the accused if he could search his suitcase. They were not present after the accused refused.

[33] The search, which was incidental to the unlawful arrest, was unreasonable.

The accused’s *Charter* rights guaranteed under sections 9, 10 and 8 were all violated within a very short time span.

Section 24(2) *Charter* Analysis

[34] I do not feel it necessary to consider whether or not admission of the evidence of the crack cocaine, which was seized, would undermine the fairness of the accused’s trial.

[35] In my view the serious nature of the breaches of the accused *Charter* rights requires exclusion. I come to this conclusion while taking into account the serious nature of the charge against the accused. As stated, the accused’s *Charter* rights under sections 9, 10 and 8 were violated in rapid succession. Viewed as a whole, the violations were serious and, in my view, flagrant. All of the *Charter* violations had a strong temporal link and causal connection to the discovery of the drugs in the accused’s suitcase.

[36] Crown Counsel concedes that the violation of the accused's section 10 *Charter* rights was flagrant. She states that the violations of the accused's rights under section 9 and 8 were not flagrant in that they appear to have been committed in good faith by the police. She states that this is so because Corporal Greenwood thought the arrest and the subsequent search of the accused were lawful.

[37] In my view an absence of bad faith does not necessarily equal good faith. Corporal Greenwood has been a drug investigator for 7 years. He has participated in 25 to 30 investigations involving crack cocaine. He ought to have known better. At the very least he was quite negligent. In my view, the seriousness of the breaches must be examined in their totality. The fact that the breaches occurred in a short period of time must also be taken into account. The police engaged in a closely-knit pattern of unconstitutional conduct.

[38] In assessing the seriousness of the violations I am of the view that I must take into account Corporal Greenwood's belief that it was by the accused exercising his legal right to not consent to the search before speaking with counsel that he was provided with the reasonable and probable grounds necessary to arrest the accused and search his suitcase as an incident to that arrest. This is completely unacceptable and must not be condoned by the courts. The *Canadian Charter of Rights and Freedoms* is now 24 years old. It is well established that the exercise of the right to counsel cannot be the basis for the reasonable and probable grounds necessary for either an arrest of an accused or a search of his property.

[39] In *R. v. Buhay*, [2003] 1 S.C.R. 223, 174 C.C.C. (3d) 97, 10 C.R. (6th) 205, it was held that the officer's subjective belief that the accused's rights under s. 8 were not affected does not make the violation less serious, unless the belief was reasonable. Good faith cannot be claimed if based on an unreasonable error or ignorance as to the scope of the officer's authority. I find that Corporal Greenwood's erroneous belief was unreasonable.

[40] In determining the seriousness of the breaches, in particular the breach of the accused's section 8 *Charter* rights, I appreciate that there is certainly a reduced expectation of privacy in luggage, which has been checked onto a commercial airplane. I also take into account that the evidence which the accused asks that I exclude is necessary to substantiate the Crown's case.

[41] Finally, I am also alive to the fact that the offence charged is, without doubt, a serious offence. In this jurisdiction, sentences imposed for trafficking offences involving crack cocaine in the quantity present in this case often result in penitentiary terms.

[42] After carefully considering the overall seriousness of the violations of the accused *Charter* rights, the seriousness of the charge and all of the other circumstances I have referred to, I find that the admission of the seized drugs "could" bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate and fully apprised of the circumstances of this case: *R. v. Collins*, [1987] 1 S.C.R. 265; 333 C.C.C. (3d) 1, 56 C.R. (3d) 193.

[43] The accused has discharged the burdens of persuasion borne by him. I rule that the crack cocaine seized by the police is inadmissible as evidence.

Robert D. Gorin
J.T.C.

Dated at Yellowknife, in the Northwest Territories
this 21st day of March, 2006

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