

QUEEN'S BENCH FOR SASKATCHEWAN

Date: 2017 06 28
Docket: CRM 5 of 2016
Judicial Centre: Swift Current

BETWEEN:

HER MAJESTY THE QUEEN

- and -




Counsel:

Douglas Curliss, Q.C. and Iatasha Bachelor
Patrick Fagan

for the Crown
for the accused

DECISION ON *VOIR DIRE*
June 28, 2017

KEENE J.

[1] Mr.  is charged with possessing cocaine for the purposes of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. He brought a *Charter* notice (*Canadian Charter of Rights and Freedoms*) asking that evidence be excluded pursuant to s. 24(2) of the *Charter* claiming that his rights under ss. 7, 8, 9 and 10 have been violated. A *voir dire* was held on February 23 and 24, 2017 and this is my decision.

[2] Prior to the start of the *voir dire*, defence counsel made a number of admissions for the purposes of the *voir dire*.

[3] The sole witness for the Crown was Cst. Staples. The accused did not call any witnesses.

[4] Cst. Staples is a member of the RCMP. At the time of the alleged offence, he had about 3 ½ years of service as a general patrol officer. He had been involved in a large number of traffic stops and had been involved in *CDSA* investigations. He had taken a week of RCMP training on investigating contraband and drugs on the highway called the Pipeline Convoy Jetway Course. Cst. Staples testified that he has also talked to other police officers about drug investigations.

[5] Cst. Staples testified that on October 14, 2015 he was on duty in the Maple Creek district of Saskatchewan in a marked police car on Highway #1 about ten kilometres west of the junction of Highway #1 and Highway #21. He was running radar. At about 11:20 p.m. he clocked a truck going in a westerly direction at 143 kilometres per hour. The speed limit was 110 kilometres per hour. He decided to stop the truck because of this and turned on his emergency lights and pursued the vehicle. The truck stopped uneventfully.

[6] Cst. Staples approached the driver's side of the truck. He noticed that the driver's window was already down by the time he got to the door and the driver (Mr. █████) had apparently just lit up a fresh cigarette. Cst. Staples noticed several air fresheners attached to the steering column and he could smell the scent of the air fresheners. Cst. Staples testified that Mr. █████ appeared nervous. He asked Mr. █████ for his driver's license and noticed that Mr. █████'s hands were trembling when he handed over his license. Mr. █████ told the constable the vehicle was a rental. The constable also saw a radar detector in the vehicle.

[7] Cst. Staples then went back to the police car and ran Mr. ██████'s name through the police data systems. Nothing came up.

[8] Cst. Staples then considered what he had observed. He knew that the fresh cigarette and the air fresheners could be masking agents to hide the smell of drugs. He believed that the radar detector would not have normally been provided by the car rental company. Mr. ██████'s nervousness was a concern because it was higher than expected for a routine traffic stop.

[9] At that point, he became concerned that this could be an illegal drug situation based on the above. Cst. Staples also decided not charge the driver with speeding and so, the detention under *The Traffic Safety Act*, SS 2004, c T-18.1 was concluding.

[10] Cst. Staples then went back to the truck and advised Mr. ██████ he was just getting a warning for speeding and that he was free to go. The constable then employed a police technique. He testified he told the driver he was free to go so as to release the "psychological detention". He then walked away a few steps and then turned and asked Mr. ██████ if he could ask him a few questions. The purpose of this appears to further his investigation into the suspicion of a potential drug offence. Mr. ██████ appeared to agree to answer a few more questions.

[11] Cst. Staples asked Mr. ██████ about the rental and Mr. ██████ said that he had hit a deer near Maple Creek and needed to get a rental. The constable said he was a Maple Creek RCMP officer and according to the constable this caused Mr. ██████ to move away from that topic. The constable felt this was odd. Mr. ██████ then said he had been down to Estevan for a job

interview for the last two weeks. Cst. Staples noted that he only had a duffle bag for his belongings in the interior of the truck. This seemed suspicious to him as Mr. ██████'s trip to the job interview, in his mind, would have only taken about three days round trip and there did not appear to be many clothes or personal belongings for such a two week trip.

[12] Mr. ██████ further told the Cst. Staples that he had gotten the radar detector from the shop that was repairing his damaged vehicle. Cst. Staples thought that was unusual. Mr. ██████ displayed continued nervousness.

[13] Cst. Staples considered all of this:

- The freshly lit cigarette and air fresheners;
- The rental vehicle;
- The radar detector;
- The purpose of the trip seemed questionable;
- Minimal luggage for two weeks; and
- The level of nervousness and continued nervousness.

[14] The constable decided that Mr. ██████ was transporting drugs and told him he was being detained for drugs. The constable had Mr. ██████ exit the truck and follow him to the police car. Mr. ██████ was initially cooperative and then as he was about to get into the police car appeared to have started balking a bit. The constable spoke in a more authoritarian tone and this appears to

have resulted in Mr. ██████ again cooperating and getting into the back of the police car.

[15] Cst. Staples was about to read Mr. ██████ his rights to counsel and police warning when, according to the constable, Mr. ██████ became panicky and started “bargaining” – saying that if he would let the constable look into his duffle bag maybe the constable would let him go. This caused the constable to decide that he now had reasonable and probable grounds to arrest Mr. ██████ for drug possession. He arrested Mr. ██████ at this time.

[16] Cst. Staples then went to the truck and searched it. The constable found cocaine in a locked compartment in the truck.

ANALYSIS AND DECISION

[17] Both counsel provided briefs. Crown counsel extensively went through many authorities. In my view, as helpful as the detailed review of the case law was: the *voir dire* turns on the testimony of Cst. Staples and how it fits into the application of the authorities and the principles.

[18] There is no question (nor was it seemingly contested) that the traffic safety stop was legitimate and the constable had the authority to detain Mr. ██████ pursuant to that investigation. The case law supports this.

[19] I will move on to what I think the core of the *voir dire* is.

[20] Firstly, I am satisfied that Cst. Staples had a reasonable suspicion based on the above *indicia* to detain Mr. ██████ for the purposes of a drug investigation. I can objectively conclude there is a factual basis for the reasonable suspicion. I will state that this is “close to the line” (as the phrase

has been used by our Court of Appeal in *R v MacKenzie*, 2011 SKCA 64, 371 Sask R 291 [*MacKenzie*] and by Justice Gunn in *R v Santos*, 2014 SKQB 5, 436 Sask R 1 [*Santos*]) but nevertheless I am satisfied Cst. Staples had the factual basis to detain Mr. [REDACTED] under the *CDSA* investigation (see *R v Chehil*, 2013 SCC 49 at paras 29-34, [2013] 3 SCR 220).

[21] The real issue is: were the comments by Mr. [REDACTED] made to Cst. Staples in the police car enough to move past the next *Charter* barrier – the creation of reasonable and probable grounds to arrest the accused?

[22] The legal standard of “reasonable grounds to believe” has been described by our Court of Appeal in *R v Shinkewski*, 2012 SKCA 63, [2012] 9 WWR 674 [*Shinkewski*] where Justice Caldwell stated:

13 The legal standard of "reasonable grounds to believe" has been the subject of considerable judicial interpretation. I do not propose to review it all; however, I make the following observations from the jurisprudence:

(a) an arresting officer must subjectively hold reasonable grounds to arrest and those grounds must be justifiable from an objective point of view - in other words, a reasonable person placed in the position of the arresting officer must be able to conclude there were indeed reasonable grounds for the arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241;

(b) an arresting officer is not required to establish the commission of an indictable offence on a balance of probabilities (*Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100) or a *prima facie* case for conviction (*R. v. Storrey*) before making the arrest; but an arresting officer must act on something more than a "reasonable suspicion" or a hunch (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para 91; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.);

(c) an arresting officer must consider all incriminating and exonerating information which the circumstances reasonably permit, but may disregard information which the officer has reason to believe may be unreliable: *R. v. Storrey*;

(d) a reviewing court must view the evidence available to an arresting officer cumulatively, not in a piecemeal fashion: *R. v. Savage*, 2011 SKCA 65, 371 Sask. R. 283; *R. v. Nguyen*, 2010 ABCA 146, 477 A.R. 395; and *R. v. Storrey*; and

(e) "...the standard must be interpreted contextually, having regard to the circumstances in their entirety, including the timing involved, the events leading up to the arrest both immediate and over time, and the dynamics at play in the arrest": *R. v. Nguyen*, at para. 18; and, context includes the experience and training of the arresting officer: *R. v. Nolet*, at para 48; *R. v. Whyte*, 2011 ONCA 24, 266 C.C.C. (3d) 5, at para 31; and *R. v. Luong*, 2010 BCCA 158, 286 B.C.A.C. 53, at para. 19.

[23] The court has the benefit of a transcript for this *voir dire* and I will quote as follows:

Transcript of Trial Proceedings, p. T26, line 39 to p. T29, line 16

Q So in -- in your mind, kind of what -- what was your thinking at that point when you announced to him that he was being detained?

A I thought he had drugs in his vehicle. Just with the totality of the situation, with everything that I was seeing, I -- I was -- I was convinced that there was drugs in the vehicle.

Q Mhmm.

A And that's why I told him he was being detained.

Q Okay. And -- and then what happened? Just carry on with the narrative there.

A He -- he got out of the truck. He -- he was cooperative at that point. I pointed him back towards my police vehicle. I took him to the passenger side of my police vehicle, so more towards the north side of the road to keep him away from traffic, and I brought him around that side. And I told him to get in the back seat of my vehicle. Or I

should-- I should go back. I asked him he had anything on -- on himself, like needles, knives, anything like that. He -- he said, No, and he was kind of showing me that he didn't have anything. I believe he pulled a wallet out of his pocket and he said, This is all I have. And I was satisfied that he -- he didn't have anything else on him. He -- he wasn't wearing any big, baggy clothes or coats or anything. I told him to get in the back seat of my car and -- and he—didn't. He -- he was reluctant, and he -- he stood there and he said, Can you really just do this? And I said, Yeah .. get -- get in the backseat of my car. And he kind of just stood there again and he wasn't doing what I told him and I had to tell him a third time and raise my voice quite a bit, and I said, Get in the back of the car, now. And-- and then he did. He got in the backseat.

Q Okay. If I can just stop you there and just deal with that little chunk of time.

A Sure.

Q So you told him he was being detained for a drug investigation?

A Correct.

Q And at that -- was -- was there any -- what was going through your mind in terms of what you may or may not have to say to him concerning detaining him for the drug investigation?

A Well I knew that detainment is similar to arrest and it comes with rights to counsel and police caution, and those were things that I had to tell to him. But I -- he heard me clearly at his door tell him he was detained for a drug investigation. He didn't -- didn't question it. He got out of the truck.

Q Right.

A When-- before I put him in the back seat of my car, I just want to make sure that he doesn't have anything really dangerous on him, like for -- for officer safety reasons, my own safety reasons. And the way he was showing me he didn't have anything else other than his wallet, I -- I was okay with that. I usually don't put somebody in handcuffs when they're detained, especially when they're being cooperative, and he was be cooperative until he got to the back of my vehicle. Sorry-- sorry, does that

answer your question?

Q Yeah. No, I'm just -- at -- at what stage of the detainment do you read them their rights so to speak?

A As soon-- as soon as I can.

Q Mmhmm.

A So -- what my plan was, as soon as he was in the back seat of the car, I was going to get in the front seat of the car. I was going to pull out a card that I read from and I was going to read him -- I was going to tell him again his reason for detainment, but then I was going to read him his rights to counsel and the police caution.

Q Okay.

A So if the detainment happened at 11 :28 --

Q Mmhmm.

A --p.m. which would have been six minutes after I wrote in my notebook that I had stopped this truck. So it would have been somewhere between I would say six to eight minutes after I started the traffic stop.

Q Okay.

A I made a note that -- well, I won't go -- get ahead of myself here.

Q Okay. So-- so he said-- you had to tell him a third time to get in the car and you raised your voice.

A Yes.

Q And did -- did he, at some point, get in the back of the police car?

A Yeah. That time when I -- when I said it loudly and -- and more forcefully, he -- he got in the backseat on his own.

Q Okay. And just pick up the narrative then, what-- take us through with your interaction between --

A So I got in the front seat of my car, and as soon as I did, he said something like, Why-- why am I being detained? Or, Why am I being detained for a drug investigation -- or something. It -- it was -- it sounded like kind of a -- a genuine question. So I -- I told him, Because I think you have a large amount of drugs and/or money in your vehicle. That's exactly what I said to him. And then he started going into -- well, I think he was already sort of

in a -- a panic mode when he wouldn't get in the back of the car. But then inside, after I told him that I thought he had a large amount of money or drugs in that vehicle, he started trying to bargain with me. He said, Well, if I just show you what's in -- what's in my duffel bag, will you let me go? Will you -- you know, and he started pleading with me. And it -- it was -- he was sort of acting like a -- like he was trapped. Like his back was against the wall and knew I was going to search his vehicle. So it was that -- it was that sort of panicking, that bargaining, that -- that he was displaying in the back of my car, that had me switch to an arrest at that point. So instead of detaining him for a drug investigation, I said, You're -- you're now under arrest for possession of a controlled substance. I -- I had my card. I read him what I read from my card verbatim, which would be the arrest, the rights to counsel, and the police caution. The rights to counsel were at 11:31 p.m. I believe. I would have to --

...

Transcript of Trial Proceedings, p. T96, line 40 to p. T97, line 21

- Q Thank you. So I take it that it was your intention, when you put him in the vehicle the first time, the patrol car, bear with me -- to continue asking him questions in the police vehicle, and to continue forming your grounds; am -- am I right?
- A Yeah. That -- that would be the purpose of detainment.
- Q Okay. So you're planning on asking him questions in the patrol car, correct?
- A My intention -- I -- I would have been looking at calling a dog. But it -- it depends on his answer to the rights to counsel, because if you want me to elaborate-- I don't know if you do-- when he was detained, if I get through rights to counsel and he declines a lawyer, then I'll keep asking him questions and building my case towards either arrest or release. If he says he does want to speak to a lawyer, I'd see if there was a dog available in Swift Current.
- Q So if he had asserted his right to counsel, you would have called a dog; is that correct?
- A Correct.

Q But you're saying you -- you never got a chance to advise him of his right to counsel because of this bargaining that went on between the two of you?

A The -- the reason I switched to an arrest instead of detainment was because of the way he was acting before he got in my police vehicle and after he got in my police vehicle. His actions are what made me switch to an arrest.

[24] What I gather from this is Cst. Staples knew he only had enough to detain the accused but not enough to arrest him. When the accused got into the police car, the constable appears to have already formulated a plan of action to take place after reading the *Charter* rights to counsel:

1. If the accused wanted to talk to a lawyer: then he would try to get a sniffer dog. Implicit in this is the constable knew he would need more -- he would need a dog (like in *MacKenzie* where it went in two steps, reasonable suspicion to detain then the dog was deployed, made a hit and this led to the arrest); and

2. If the accused waived his right to talk to a lawyer, the constable knew he needed to get the accused to give him more inculpatory information by questioning him further.

[25] However, it seems Mr. ██████ became panicky and began "bargaining". This bargaining is not detailed very much in Cst. Staples' evidence. It appears that the exchange was very brief, perhaps a matter of seconds, between the constable and Mr. ██████ Mr. ██████ may have been

attempting to agree to some sort of limited consensual search of the truck but the constable decided at that instant to arrest the accused. Thus, the arrest took place seemingly based on what had transpired before (the *indicia* referred to) and now the *indicia* were being augmented by this very brief moment in time when the accused started talking about his duffle bag. This appears to be the push over the top that the constable believed culminated in him having reasonable and probable grounds to make an arrest.

[26] It is useful to look at a couple of cases (and there are many in this area) about how reasonable grounds for an arrest were cultivated. I have already mentioned *MacKenzie* and the use of the sniffer dog to establish reasonable grounds for the arrest (para 90 of *MacKenzie*). I also wish to refer to *Santos* in which Justice Gunn, not only provides a very useful summary of the law in this area, but also concluded that reasonable grounds existed for the arrest of Mr. Santos based on an application of the principles and the facts of that case.

[27] Briefly, Mr. Santos had been stopped by a relatively inexperienced RCMP officer. During the course of the investigation for drugs, Mr. Santos initially gave his consent to search his vehicle. Two very experienced RCMP officers assisted the initial lead investigating officer. These officers found what appeared to be an after-market alteration in Mr. Santos' car to create what could have been a hidden compartment. At that approximate same time, the sniffer dog was deployed but did not indicate drugs. Mr. Santos withdrew his consent. The corporal (whose experience in drug investigations was impressive) decided that the timing of this revocation

of consent under the circumstances gave him reasonable grounds to arrest Mr. Santos. Justice Gunn accepted this.

[28] Our case falls short of the *Santos* circumstances. Here, Cst. Staples' experience at the time of the alleged offence may have been more than the lead investigating constable in *Santos*, but well short of the two senior RCMP officers.

[29] Here, there is no sign of a hidden compartment or the sudden change of mind of the accused after a sniffer dog did not detect drugs. What we have here is the basis for a reasonable suspicion (although close to the line) and Cst. Staples acknowledging that is where he is at in the investigation. He has not gotten to the stage of reasonable and probable grounds and he clearly needs more and candidly admitted this. I do not find that the brief outburst by the accused about the duffle bag would amount to enough to push past the barrier between reasonable suspicion for detention and reasonable and probable grounds for arrest (see *R v Ngai*, 2017 ABCA 199 at para 9 regarding heightened anxiety).

[30] I have considered the direction of the Court of Appeal in *Shinkewski* in this regard. I find that the accused has persuaded me, on a balance of probabilities, that when I take all of the accumulated observations of the constable, in their best light, and apply his level of training and experience, I do not find that I am able to conclude there are reasonable grounds for the arrest. I believe the constable reacted too quickly and should have maintained his original plan of either getting a sniffer dog or possible a further conversation with the accused or other investigation. It is not for the court on this *voir dire* to second guess what could have happened. The power

to arrest is only available when the officer subjectively believes he had reasonable and probable grounds to make the arrest. These grounds must be justified from an objective point of view, as assessed from the standpoint of the reasonable person. I do not see that here.

[31] Therefore, I find that the accused has persuaded me on the balance of probabilities that his *Charter* rights, primarily under ss. 7, 8 and 9 of the *Charter*, have been breached.

[32] The next question is should the evidence obtained as a result of the search of the truck be excluded? This invites a *Grant* analysis (*R v Grant*, 2009 SCC 32, [2009] 2 SCR 353). In *Santos*, the court summarized:

249 In *R. v. Grant*, supra the Supreme Court held that evidence ought to be excluded as a result of a *Charter* violation only after the court has balanced the effect of admitting the evidence on society's confidence in the justice system. This analysis is to be done having regard to: (1) the seriousness of the *Charter* infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits.

[33] Cst. Staples appears to have been aware of the workings of the *Charter* and his evidence shows he understood the difference between having a reasonable suspicion to detain Mr. ██████ for the purposes of a drug investigation and the next step to have reasonable and probable grounds to arrest him and then proceed to search the truck incidental to the arrest. I find that while the constable appears to have been well intended nonetheless this is a serious infringement. I also find that this had a significant impact on the *Charter* protected interests of Mr. ██████. I accept that society has a keen interest in the adjudication of such a case on its merits, but nonetheless find

that I should accede to Mr. [REDACTED]'s application to exclude the evidence arising from the search and seizure of the subject truck and I do so.

CONCLUSION

[34] Accordingly, Mr. Todd's application is granted and I find pursuant to s. 24(2) of the *Charter*, the evidence was obtained in a manner that infringed Mr. [REDACTED]'s rights and should be excluded. Therefore, for clarity everything that was seized out of the rental truck cannot be put into evidence in the trial.



J.
T.J. KEENE