

Date: 20110525
Docket: 10/101
Citation: *R. v. Blanchard*, 2011 NLCA 33

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

PHILIP JORDY BLANCHARD

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Rowe, White and Harrington, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
Trial Division, (General), Corner Brook, NL
200804T0475

Appeal Heard: February 15, 2011

Judgment Rendered: May 25, 2011

Reasons for Judgment by Rowe, J.A.

Concurred in by White and Harrington, JJ.A.

Counsel for the Appellant: Derek Hogan

Counsel for the Respondent: David Schermbrucker

Rowe, J.A.:

INTRODUCTION

[1] This is an appeal from conviction for trafficking in marijuana. The principal issue is whether the drugs found in the car driven by the accused should be excluded from evidence under s. 24(2) of the **Charter**. Consideration is also given to s. 8 (search and seizure), s. 9 (arbitrary detention) and s. 10(b) (informed of the right to counsel).

FACTS

[2] The facts were set out by the trial judge, as follows:

[7] Around 9:00 a.m. on the 31st of March 2008, Constables Leon Sheppard and Terry Alexander were patrolling the Trans Canada Highway between Deer Lake and Flat Bay in a marked patrol car as part of the RCMP's roving traffic unit, Traffic Services West, out of the Deer Lake detachment.

[8] The highway was icy and the police vehicle slipped a bit as it headed west on the TCH. Cst. Sheppard noticed four vehicles approaching, traveling rather close together. The RCMP radar picked up the speed of the lead vehicle at 110 kilometers per hour. Cst. Sheppard testified that he believed all four to be doing approximately the same speed as they appeared to remain at the same distance from each other as they approached. While he acknowledged that most officers would not stop people for being 10 kilometers in excess of this speed limit, in light of the road conditions the officers decided to warn the drivers.

[9] The police activated their vehicle's emergency lights, turned their vehicle around on the highway and followed the vehicles headed east. The trailing vehicle pulled over to the side and the RCMP car pulled in behind it at approximately 9:10 a.m.

[10] The driver identified himself with a Newfoundland and Labrador driver's license as Philip Jordan Blanchard and admitted that he had been speeding a bit. Cst. Sheppard told the driver that it would not be fair to give him a ticket since the other three vehicles had not stopped, but he said he wanted to go back to his car and check his driver's license and registration before allowing him to travel on his way.

[11] In the initial contact between Cst. Sheppard and the driver, Cst. Sheppard said that he "noticed some indicators that he may be involved in some criminal activity". I summarize these as follows:

- the driver's legs were shaking uncontrollably; he asked him why that was so and Mr. Blanchard said "I don't know";
- the driver's signs of nervousness did not subside even though Cst. Sheppard explained there would be no ticket;
- on the passenger side on the floor there was a McDonald's restaurant bag being used for garbage which was quite full indicating to the Constable that the driver had been traveling for some time. The vehicle also contained a 2 liter pop bottle partially full, cheesies or chip packages on the seat and a pizza box on the floor in the back seat, all of which suggested to the Constable that the driver was eating on the run and trying to get from point A to point B quickly;
- there was cologne spray bottle in the center console and an air freshner in the vehicle. He explained that by training and experience he recognizes that people carrying drugs often use spray cologne and/or air fresheners as a masking agent to cover up the smell of marihuana;
- on the passenger floor there was a map of Nova Scotia indicating to the Constable that the driver had likely come from that province, which Cst. Sheppard testified is a potential source province for the import of marihuana into Newfoundland and Labrador;
- the back seat contained two duffle bags which in his view suggested an overnight trip. There were also hubcaps close to the top surface of "other stuff" in the back seat suggesting to Cst. Sheppard that there must be something in the trunk displacing the hubcaps which would normally be stowed there. Through his training he testified that he has learned that people transporting marihuana or other controlled substances often conceal them by putting them in the trunk.

These things in combination made Cst. Sheppard suspicious.

[12] Cst. Sheppard returned to his vehicle and told Cst. Alexander about his suspicions. He provided the driver's licence and registration material to the RCMP dispatcher who reported that everything checked out.

[13] Constables Sheppard and Alexander both exited the police vehicle and approached Mr. Blanchard's vehicle (Cst. Alexander explained this as an officer safety issue). Cst. Alexander stayed on the passenger side while Cst. Sheppard returned the driver's licence and registration to Mr. Blanchard. He told Mr. Blanchard about the road conditions, indicated to him that he was free to go and

stepped back from the vehicle, gesturing with his left arm that he could proceed down the road. Then, he stepped in again and asked “would you mind if I ask you a few more questions about your trip?” and Mr. Blanchard said that he could.

[14] Cst. Sheppard asked Mr. Blanchard where he was coming from and the story provided made Cst. Sheppard more suspicious. He indicated that he was coming from Port aux Basques, but Cst. Sheppard felt that the timing of his location on the highway was consistent with him being part of the traffic disembarking from the ferry that had docked in Port aux Basques that morning. Instead, Mr. Blanchard said that he had been playing hockey in Port aux Basques and was headed to Corner Brook where he was packing up because he had been laid off from his position with the mill. Again, Cst. Sheppard thought that was odd because he was traveling alone and it was early in the morning. Cst. Sheppard asked Mr. Blanchard if he had come off the ferry and he said no. He enquired about the map of Nova Scotia and he indicated that his sister was up there and he had been there three weeks before. He asked about the hubcaps and the driver said that he had removed them a few weeks prior. Cst. Sheppard noticed that, once again, Mr. Blanchard’s legs were shaking but this time not as rapidly.

[15] Based on those factors, Cst. Sheppard requested that Mr. Blanchard exit the vehicle; and when he did so, he placed him under detention on the basis, he explained, that he had reasonable suspicion that he was involved in criminal activity. He read him his *Charter* right to counsel and the standard police warning form a laminated card. Cst. Sheppard’s notes suggested that this occurred at 9:26 a.m. Mr. Blanchard requested to speak to a lawyer and Cst. Alexander made the arrangements for him to speak on the RCMP telephone in the police car with Legal Aid. Both Constables stood outside the car while Mr. Blanchard spoke to counsel. When he indicated to the Constables that he was finished, Cst. Sheppard used the same phone to call for the RCMP dog handler to attend to the scene to do a sniff around the vehicle.

[16] While they waited, the RCMP asked the driver if they could do a consent search of his vehicle and he refused. Feeling confident that a search was going to be conducted, they also called for a tow truck.

[17] Cpl. Glenn A.H. Brown, RCMP dog handler, attended at about 10:35 a.m. with his dog “Cak”. They walked around the car and the handler reported to Cst. Sheppard that Cak had given two positive sit indications that there were drugs in the vehicle. The first positive sit occurred between the driver and rear doors on the driver’s side and the second occurred at the trunk. There were no other signals given denying the remainder of the perimeter search.

[18] On the basis of this, at 10:48 a.m. Cst. Sheppard advised Mr. Blanchard that he was under arrest for possession of a controlled substance for the purpose of trafficking and the *Charter* caution and police warning were repeated. Mr.

Blanchard indicated that he was satisfied with his earlier call to Legal Aid but agreed that if he changed his mind, he could make another call later.

[19] Shortly thereafter the tow truck arrived and Mr. Blanchard's vehicle was towed to Stephenville detachment. The RCMP vehicle followed with Cst. Sheppard driving but Cst. Alexander had been replaced by Cst. Garland. Enroute, Cst. Sheppard said something to Cst. Garland about "Cak, had sat, confirming my suspicions", and he asked Mr. Blanchard about the presence of drugs in the vehicle", in response to which the Accused said something about "the cat sat" which Cst. Sheppard thought was odd and he asked him about it causing Mr. Blanchard to repeat words to the effect "well, you know what's in there basically because the cat sat".

[20] When Cst. Sheppard asked him additional questions about how much drugs he was carrying, Cst. Sheppard testified that he was uncertain if he provided any information or if he would not answer. However, in the Information to Obtain the Warrant, Cst. Sheppard swore at paragraph 13 that on the way to the detachment under police caution Mr. Blanchard said the following: (a) that there was more than five pounds of marihuana in the vehicle and (b) that he was transporting the marihuana for someone else and that he was not sure of the contents of the vehicle.

[21] At the detachment, Mr. Blanchard was lodged into the cells and Cst. Sheppard typed up his warrant. Once completed, he went to the Stephenville courthouse where he swore his Information, saw the judge and obtained a search warrant which was signed by Judge Monaghan.

[22] The Blanchard vehicle was searched at the police station in Stephenville and a total of 59 half-pound bags of marihuana were found in three locations. A small amount was stowed in one of the duffle bags in the back seat and two larger amounts were found in the trunk.

[3] Mr. Blanchard was charged with possession of marijuana for the purposes of trafficking, contrary to s. 5(2) and trafficking contrary to s. 5(1) of the **Controlled Drug and Substance Act**, S.C. 1996, c. 19. He pleaded not guilty.

[4] He applied under s. 24(2) of the **Charter** for exclusion of the marijuana from evidence. The trial judge summarized the application as follows:

- **Charter section 10(b)** - Counsel for the Accused claimed that Cst. Sheppard failed to immediately advise Mr. Blanchard of his right to counsel in violation of section 10(b) of the *Charter*.

- **Charter section 9** - The Defence submitted that Mr. Blanchard's questioning and detention at the scene until the arrival of the police dog was an arbitrary detention in contravention of section 9 of the *Charter*.
- **Remedy for breaches of section 9 and 10(b)** - the Defence asserted, therefore, that all evidence obtained as a result of these *Charter* violations should be edited from the Information to Obtain a Search Warrant and that, once deleted, the Information does not disclose reasonable and probable grounds to issue a Search Warrant.
- **Charter sections 8 and 24(2)** - Relying on the foregoing, the Defence claimed that the search conducted on the vehicle was a warrantless and *prima facie* unreasonable search under section 8 of the *Charter* and that the evidence obtained as a result of this separate violation (the drugs) must also be excluded from the Applicant's trial pursuant to section 24(2) of the *Charter*.

A *voir dire* was held. In a written decision (indexed at 2009 NLCA 280), the trial judge decided the s. 24(2) application as follows.

[5] Regarding the period between Mr. Blanchard's release from the **Highway Traffic Act** stop and being asked to step out of his vehicle, the trial judge identified three issues:

- (i) was Mr. Blanchard detained;
- (ii) was there a breach of s. 10(b) by virtue of the failure by the police to advise Mr. Blanchard of his right to counsel; and
- (iii) having regard to s. 9, did the police have grounds to detain Mr. Blanchard.

[6] The trial judge concluded that, by virtue of a "psychological restraint", Mr. Blanchard was subject to "investigative detention" when he was released from the "routine traffic stop" and the police commenced to ask "a few more questions".

[7] At that time, the trial judge said the police should have advised him of his right to counsel. Thus, she held there was a violation of s. 10(b) while the police asked Mr. Blanchard "a few more questions". (The police advised Mr. Blanchard of his right to counsel only after asking him "a few more questions".)

[8] The trial judge held that Mr. Blanchard's detention violated s. 9:

[57] Treated collectively and objectively, on the facts before me, I am left with the picture of an extremely nervous young driver (whose anxiety Cst. Sheppard said did not seem to abate despite being advised that he was not being given a ticket), traveling the Trans Canada Highway eastbound at a time of day consistent with ferry traffic, with a map of another Atlantic Province and a cologne bottle in plain view. These factors, in combination with the fast food containers and loaded back seat, were, in my opinion, insufficient to justify the reasonable suspicion test for the exercise of police authority to detain

[9] The trial judge also dealt with the duration of the detention:

[59] The Defence (relying on para. 45 of [**R. v. Mann**, 2004 SCC 52]) submits that a valid investigative detention must also be brief. Brevity, of course, is also a matter to be addressed in the overall context of the facts of the case. Mr. Blanchard was detained on the highway from at least 9:26 – 10:48 a.m. in part because the RCMP dog handler (who had been called to the scene) misunderstood where the vehicle had been pulled over. I agree that this fact also speaks against the reasonableness of the investigative detention in the overall circumstances.

[10] Thus, the trial judge held that for this period Mr. Blanchard's detention was "unlawful and therefore in contravention of his section 9 **Charter** right not to be arbitrarily detained".

[11] The trial judge next dealt with the dog sniff search, the subsequent obtaining of a search warrant based on the results of the sniff search and the search of Mr. Blanchard's car in accordance with the warrant.

[12] The trial judge held, based on the Supreme Court of Canada's decision in **R. v. Kang-Brown**, 2008 SCC 18, that "the standard for the dog sniff search was reasonable suspicion". The trial judge continued:

[67] I have already concluded that the police did not have reasonable suspicion to detain and therefore it follows that they did not have reasonable suspicion to conduct the perimeter sniff search.

Thus, the "sniff search" breached Mr. Blandford's s. 8 rights.

[13] The trial judge concluded that the search warrant, being based on the results of the sniff search, was unlawful; the arrest, being based on the results of the search, was also unlawful.

[14] The trial judge summarized as follows:

[79] I have found violations of the Accused's

(a) section 10(b) right to counsel on his detention;

(b) section 9 right not to be arbitrarily detained and arrested; and

(c) section 8 right to be secure from an unreasonable search (both the perimeter dog sniff and vehicle search).

[80] I must now address if the Accused is entitled to the primary and powerful remedy of exclusion of evidence under section 24(2) of the *Charter*.

[81] Constable Sheppard's decision to detain and search was based in part on subjective conclusions (including that he did not think Mr. Blanchard had played hockey early in the morning) drawn from his brief conversation with the Accused after I found he was detained and before he was cautioned.

[82] The admissibility of Mr. Blanchard's allegedly incriminating statements, however, are not in issue since they have no independent evidentiary value (**Grant**, para. 130). The only issue, therefore, is the admission or exclusion of the drugs.

[15] The trial judge considered the "three avenues of inquiry" mandated by the Supreme Court of Canada in **R. v. Grant**, 2009 SCC 32:

- (i) the seriousness of the **Charter**-infringing state conduct;
- (ii) the impact of the breach on the **Charter**-protected interests of the accused; and
- (iii) society's interest in the adjudication of the case on its merits.

[16] The trial judge noted (in para. 91) that the police "did not have the benefit of the Supreme Court of Canada's decision in **Grant** which established what constitutes detention". She continued by saying that the "police error was an understandable one, not made in bad faith and in these circumstances admitting the drugs into evidence would not greatly undermine public confidence in the rule of law".

[17] Regarding the circumstances of Mr. Blanchard's arbitrary detention, the trial judge noted that there was only a brief period before he was advised

of his right to counsel. As well, she noted he was detained waiting for the dog for “a little over an hour”.

[18] The trial judge underlined (in para. 93) that the police “did not have the benefit of the Supreme Court of Canada’s decision in **Kang-Brown** and [**R. v. A.M.**, 2008 SCC 19] which established that a dog sniff is a search within the meaning of **Charter** section 8”.

[19] The trial judge concluded (in paras. 97 and 99) that, “the seriousness of the **Charter**-infringing state conduct was not significant and the effect of admitting the evidence would not greatly undermine public confidence in the rule of law ... The first stage of the **Grant** inquiry favours admission of the evidence”.

[20] The trial judge then turned to the impact of the breaches on the **Charter**-protected interests of the accused.

[21] The trial judge characterized the brief failure to advise the accused of his right to counsel as not a “significant” breach of s. 10(b).

[22] By contrast, she characterized as “significant” Mr. Blanchard’s arbitrary detention (for 90 minutes) and his subsequent unlawful arrest. She characterized the undermining of the accused’s “liberty interests [during the arbitrary definition] ... to be moderate”, while in the case of the unlawful arrest “The extent of the breach was far greater” (para. 103).

[23] The trial judge found that the dog sniff and the subsequent search of the car “affect[ed] Mr. Blanchard’s rights of privacy and human dignity” (para. 104). I am skeptical whether a search of one’s car affects “human dignity”.

[24] The trial judge underlined the distinction between the facts of this case and those in **R. v. Harrison**, 2009 SCC 34, where “the police conduct represented a blatant disregard for *Charter* rights” (para. 106).

[25] The trial judge concluded that “[T]he infringement of Mr. Blanchard’s rights under s. 8 [unreasonable search] and 9 [arbitrary detention and arrest] combined are at the higher end of the scale and would speak in favour of exclusion of the drugs” (para. 108).

[26] Regarding society’s interest in the adjudication of the matter on its merits, the trial judge wrote:

[110] Society has a general interest in seeing that those who break the law are prosecuted and modern society has a legitimate and specific concern about the import and trafficking of illegal drugs in particular.

[27] While noting the defence's point that the seriousness of the offence "makes it all the more important that Mr. Blanchard's rights are respected" (para. 111), she concluded that "this third concern speaks strongly in favour of the admission of the evidence" (para. 112).

[28] In reaching her decision, the trial judge emphasized that "[n]either of the *Charter* breaches was deliberately unlawful or flagrant" and that "[r]eliable evidence (drugs) was found as a result of good faith infringements ... [relating to] issues that were clarified after the event by the Supreme Court of Canada in [**Kang-Brown, A.M. and Grant**]" (para. 113).

[29] With admission of the drugs, conviction of the accused followed.

ISSUE

[30] The sole issue, as stated by the Appellant, is:

Did the trial judge misinterpret and misapply s. 24(2) of the *Charter*?

[31] The Crown in its factum engages a wider range of issues:

[15] The respondent respectfully puts in issue the question whether the police infringed the appellant's rights under sections 8, 9 or 10(b) of the *Charter*. The respondent's position is that they did not. Specifically:

- a. The trial judge erred in finding that the appellant was still detained at the conclusion of the traffic stop, so that his s. 10(b) rights were not infringed;
- b. The trial judge erred in finding that there were not reasonable grounds to suspect the appellant of involvement in crime, sufficient to justify an investigative detention, or sufficient to justify employment of a drug detector dog, so that his s. 8 rights were not infringed;
- c. The trial judge erred in finding that the investigate detention of the appellant was arbitrary within s. 9 because it was not "brief".

[16] In the alternative, if one or more of the appellant's *Charter* rights was infringed, the respondent's position is that the trial judge correctly admitted the evidence under s. 24(2) of the *Charter*.

STANDARD OF REVIEW

[32] Addressing whether there were **Charter** violations, the Crown in its Factum quoted the following passage from In *R. v. Sheppard*, 2009 SCC 35, per McLachlin C.J. and Charron J., writing for the Court:

[20] While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23. In our view, the summary conviction appeal judge erred in failing to distinguish between the trial judge's findings of fact and his ultimate ruling that those facts were insufficient, *at law*, to constitute reasonable and probable grounds. Although the trial judge's factual findings are entitled to deference, the trial judge's ultimate ruling is subject to review for correctness.

The foregoing I take to be authoritative.

[33] As to the standard of review relating to the s. 24(2) decision, the Appellant stated in his factum:

[26] The remedy under s. 24(2) of the Charter is discretionary and “where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination”. **R. v. Grant** [2009] 2 S.C.R. 353 (tab 9) at para 86. An appellate court may intervene if the decision to admit or exclude evidence “was based on a wrong principle or had been exercised unreasonably.” Binnie J. in **R. v. Brown** [2008] 1 S.C.R. 456 (tab 2) at para 102 citing **R. v. Collins** [1987] 1 S.C.R. 265 at p. 276; **R. v. Stillman** [1997] 1 S.C.R. 607 at para 68; **R. v. Buhay** [2003] 1 S.C.R. 631 at para 48.

This accurately reflects the authorities. I would note, as well, **R. v. Loewen**, 2011 SCC 21.

ANALYSIS

[34] I am in substantial agreement with the findings of the trial judge regarding violations of Mr. Blanchard's rights under the **Charter**. Her key finding was that the police did not have “reasonable suspicion” to conduct

the dog sniff. This was critical, as the dog sniff led to the search warrant, which led to discovery of the drugs, which led to Mr. Blanchard's arrest. The unlawfulness of the dog sniff caused this cascade of **Charter** violations. The Crown has shown no reversible error with respect to these matters.

[35] Before turning to s. 24(2), I would raise a (perhaps heterodoxical) question. Provided there is a valid basis to call for a dog sniff, should it matter how long it takes to get a dog on site, provided reasonable diligence is used by the police to do so? Given the vast scale of this country ... we are not Singapore ... in many places, of necessity, there will be significant delays in getting a dog to where it is needed. In such circumstances, why not release the individual, but impound the vehicle pending the dog's arrival? Otherwise, is not the investigation of drug cases seriously impaired outside of places where a sniffer dog is readily available? These comments are, of course, *obiter* as they go beyond what is necessary to decide this case.

[36] Turning now to the s. 24(2) issue, one must bear in mind always that for decisions under s. 24(2) a degree of deference is warranted: **R. v. Beaulieu**, 2010 SCC 7, para. 5; **R. v. Grant**, *supra*, para. 86; **R. v. Traverse**, 2003 NLCA 18, paras. 54-56.

[37] That said, I am in substantial agreement with the trial judge's reasons on the s. 24(2) issue, notably when she wrote:

[114] I do not believe that to admit the drugs in these circumstances would either shock the conscience of the public or cause further loss of confidence in the administration of justice. In fact, I believe the reverse to be true. I conclude that "a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the [exclusion] of the evidence would bring the administration of justice into disrepute". (**Grant**, para. 68)

[38] What is critical is that the police believed they were acting lawfully and that they could not reasonably have been aware they were not so doing, in that their actions preceded the guidance provided by the Supreme Court of Canada in **Kang-Brown, A.M.** and **Grant**.

[39] The police officers proceeded in a way that they reasonably believed was in accordance with law. They obtained evidence that was highly reliable. With the benefit of subsequent guidance from the Supreme Court we now know they violated Mr. Blanchard's **Charter** rights. Some of those violations were significant; however, none amounted to a grave infringement on his liberty or personal dignity. That is important.

CONCLUSION

[40] The appeal is dismissed. The accused's conviction is affirmed.

M. H. Rowe, J.A.

I Concur: _____

C. W. White, J.A.

I Concur: _____

M. F. Harrington, J.A.