Date: 20151223
Docket: 14/68
Citation: *R. v. Diamond*, 2015 NLCA 60

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

BETWEEN:

SCOTT DIAMOND APPELLANT

AND:

HER MAJESTY THE QUEEN RESPONDENT

Coram: Welsh, Harrington and White JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador

Appeal Heard: June 17, 2015
Judgment Rendered: December 23, 2015

Reasons for Judgment by Harrington J.A.
Concurred in by Welsh J.A.
Dissenting Reasons by White J.A.

Counsel for the Appellant: Jason Edwards
Counsel for the Respondent (in Right of Canada): David W. Schermbrucker
Counsel for the Respondent (in Right of Newfoundland and Labrador): Lloyd Strickland

Harrington J.A.:

[1] The appellant appeals convictions by a Provincial Court Judge (judge) for unlawful possession of a weapon dangerous to the public peace and unlawful possession of cocaine for the purpose of trafficking. He claims violations of sections 8 and 9 of the *Canadian Charter of Rights and Freedoms* (*Charter*) regarding protection from unreasonable search and seizure and arrest during a traffic stop by a member of the Royal Canadian Mounted Police (RCMP).

BACKGROUND

[2] The officer, while alone on patrol in a police vehicle at 12:55 a.m. on a remote road in Labrador, observed a pick-up truck immediately ahead accelerate to 30 kilometres per hour above the speed limit. The officer proceeded to direct the appellant to stop his vehicle at roadside.

[3] As he approached the vehicle, the officer saw a police scanner above the driver-side window visor. He also noticed that the appellant's truck body was higher than usual from the surface of the road due to having larger than usual tire rims and suspension lifts. He requested the appellant to provide his driver's license and registration. The appellant checked his window visor and advised the officer that he could not locate his license or vehicle registration. The officer then requested that he check the glove box located on the right hand side of the dashboard where the officer testified a driver would normally store such documents.

[4] While the appellant was leaning towards the glove box, the officer testified that he saw an undetermined amount of money that the appellant appeared to have been sitting on before he moved towards the glove box. The officer's flashlight then revealed "an unsheathed hunting type knife", which the judge found to have been in plain view and within the driver's reach while seated, next to the driver-side door. The officer testified that he was fully familiar with the type of vehicle which was similar to his own vehicle and had "no difficulty in spotting the knife with the aid of the flashlight".

[5] The officer arrested the appellant for possession of a weapon dangerous to the public peace and placed him in handcuffs. In the presence of two officers who drove to the scene, the appellant was later subjected to a pat-down search at roadside. The officers noticed a small bag of what

appeared to be cocaine fall from the appellant's clothing. A subsequent strip-search took place at the detachment which led to the discovery of an additional 28 small bags of cocaine. In total, the police recovered 12 grams of cocaine. The evidence confirmed that the appellant had been advised of his right to counsel which he waived and that he had received the standard police caution.

[6] A *voir dire* hearing was held on the admissibility of the evidence under section 8 of the *Charter* with regard to an alleged search leading to the discovery of the knife and the cocaine, and under section 9 with respect to whether the detention was lawful. The appellant and the officer gave testimony. The officer in his direct evidence testified:

> With the movement of Mr. Diamond to the glove box I observed that he was sitting on money, I looked in the vehicle and that is when I observed a knife in the driver's side door. The knife was a large knife, like a hunting knife and I informed Mr. Diamond he was under arrest for the possession of a knife dangerous to the public.

[7] Counsel for the appellant submitted that this activity constituted a warrantless search since there were not sufficient grounds to search the vehicle arising from the highway traffic offence. The appellant testified that the unsheathed knife belonged to his father, was in need of being sharpened and was normally used for hunting.

[8] The judge made the following findings:

> [3] Constable Blackmore was on patrol by himself when he noticed a black 2010 Chevrolet Silverado truck, licence plate number CTD 424, driving ahead of him in the lower part of "the valley". He testified that this vehicle accelerated to a speed of 80 kilometers an hour in a 50 kilometre speed zone. He decided to stop the vehicle pursuant to the provisions of the provincial *Highway Traffic Act*. Before he did that, he communicated his intent to his dispatch office. At that time, he spoke to Constable Maclean who advised him to be cautious with that particular vehicle because the registered owner had earlier been arrested for drugs and that he had a scanner and a knife.
>
> [4] Officer Blackmore subsequently pulled the Applicant over to the roadside and noticed a police scanner above the driver's side visor. Blackmore advised Diamond that he was speeding and asked for his licence and registration. The driver said he could not locate it and asked to check in the glove box. According to the officer, as Diamond moved towards the glove box he noticed that he was sitting on money and then he noticed an unsheathed hunting knife type weapon in the door compartment of the truck in the area of the driver's feet.

[5] The item was placed in evidence at the hearing and it does qualify as a large knife. The officer immediately arrested the Applicant on the basis of possession of a weapon dangerous to the public peace in that time and at that place in the totality of the circumstances. (It was the most opportune moment for the officer to check the area near the driver's door when the Applicant was gaining access to the glove box.)

[6] The Applicant was placed in handcuffs and taken to the police vehicle when Corporal Young and Constable Earle were summoned and arrived to do a "pat down" search incidental to arrest. A baggie dropped to the ground with a substance thought to be cocaine. He was advised of his right to speak to counsel which he declined and advised of and understood the standard police caution. (A subsequent search at the detachment revealed the presence of more drugs.)

[7] The Applicant testified and said his vehicle had 20 inch rims on the wheels and a four inch lift kit. He also said that it was difficult to see inside the vehicle and that he was approximately the same height as Constable Blackmore. For his part, Blackmore was totally familiar with this type of vehicle and claims to have had no difficulty spotting the knife in plain view with the aid of his flashlight. I accept this evidence.

[8] The actions of the officer in spotting the knife with the flashlight are the heart and soul of this application. The Applicant argued that the officer intruded into the vehicle without a warrant in order to spot the knife. On cross examination, the officer did state that his head entered the open window space and the flashlight in his hand which was directed downwards revealed the knife. At least part of his head or arm must have been through the open window.

[9] Counsel for the Applicant described the conduct of the officer in this regard as "quite egregious" and as a "ruse". I do not agree with either characterization.

[10] The initial stop was not a ruse. To my knowledge, a speed of 30 kilometres over the limit is forbidden by law. The officer in advance radioed his intention to stop this vehicle. At dispatch, since he was a single officer on patrol in the darkness of night, he was told to exercise caution. He cannot be said to have anticipated the finding of a knife or contraband, but I am satisfied that he was operating in a "caution" mode. He was operating on the basis of an observed speeding infraction but, since he was alone, in the dark, and told to be cautious, I am satisfied that he needed to take a reasonably thorough view of the vehicle.

[11] Police work is a dangerous job, particularly when one is unaccompanied in the dead of night. Vehicles are capable of transporting weapons, armaments and contraband. People in the position of the Applicant are entitled to an expectation of privacy in the operation of motor vehicles, albeit the expectation is somewhat reduced when serious infractions of the *Highway Traffic Act* are noted.

[12] Where speed is a factor, the officer must be attentive to the possibility of impairment by alcohol or drugs. Where one is alerted to the possibility of the presence of a knife, one might also be expected to rotate one's flashlight around to check the environment. This was not an open convertible or sports car which the officer could survey from above. In order to view the vehicle in a proper manner to address the concern of impairment or personal safety around the possible presence of a weapon, the skills of a gymnast were not needed. Nonetheless, the height of the vehicle required the head of the officer and the flashlight to minimally enter the open window area and the knife was seen immediately.

[13] Had this been a sheathed knife, which would not have been readily usable or accessible, one can speculate whether the officer may have acted differently. However, the court must deal with the events as they transpired.

[14] It is my view that the action of the police officer in stopping the vehicle was correct and legitimate. I do not believe that he used a traffic stop to justify a drug or weapon search. Blackmore was wise to radio his intention to his dispatch centre. At the time of the stop, he was aware of two offences, the offence of speeding and the possession of a police scanner. I do not believe that he expected to find a knife or that he was specifically looking for one. Had he not done a sweep of the vehicle with his flashlight at that time and place, he would have been negligent.

[15] The Crown argues that the discovery of the knife brings into play the "plain view" doctrine. The Applicant argues an intrusion of his vehicle was a warrantless search in violation of the *Charter of Rights and Freedoms* and was a search which in the circumstances cannot be justified by the Crown.

[16] I am persuaded to the view of the Crown in this respect for the following reasons:

1. The initial stop was based on a clear statutory violation (speeding). It was not based on a "hunch" or an anonymous tip.

2. For the reasons I have stated, I believe that the finding of an unsheathed knife was inadvertent. The officer did not expect to find a knife. Nor was he given any information from dispatch as to whether the knife in question was a switchblade, a dagger, a jackknife, a machete, or a hunting knife. All the officer did was a routine scan of the vehicle with his flashlight as he had to do in that place and that circumstance and the physical dimensions of the vehicle required a minimal insertion of head, hand and flashlight far enough through the open window to allow a view of this large knife, unsheathed and

> available for ready use in the lower door compartment on the driver's side of the truck.

(Emphasis added.)

[9] Appellant's counsel concedes that the officer was authorized to conduct a traffic stop, that the traffic stop was valid, and that if the arrest is found to be lawful then the search incident to arrest is also lawful.

ISSUES

[10] The appellant submits that the trial judge erred:

(i) in finding that the officer's inspection of the cab of the appellant's vehicle was not a search;

(ii) in determining that the arrest of the appellant for possession of the knife was lawful; and

(iii) in determining that the pat-down search and the strip search which revealed the presence of cocaine were lawful.

[11] The appellant argues that all of the evidence ought to be excluded under section 24(2) of the *Charter* and both convictions set aside. If the discovery of the knife was lawful, but did not provide reasonable and probable grounds for an arrest, then the cocaine was discovered unlawfully. The appellant's second argument is that the cocaine ought to be excluded and the conviction for possession with the intent of trafficking set aside.

[12] The Provincial Crown takes the position that no search of the driver's side of the appellant's vehicle took place which infringed upon the appellant's section 8 rights. In the alternative, if the inspection of the area of the driver's seat did constitute a search, it was not unreasonable and was incidental to the appellant's lawful detention. The Federal Crown argues that if the inspection of the appellant's vehicle constituted an unreasonable search pursuant to section 8 of the *Charter* or if the arrest for possession of a dangerous weapon was unlawful or both, the evidence of possession of cocaine should be admitted pursuant to section 24(2) of the *Charter*.

ANALYSIS

[13] The judge found that the appellant was in possession of a large unsheathed knife which was in "plain view" of the officer and constituted a

weapon dangerous to the public peace in the circumstances in which it was found.

Was There an Unreasonable Search?

[14] The appellant acknowledges that the initial traffic stop was legal and that the police officer was entitled to conduct a visual inspection of the vehicle. The appellant's submission is that the officer performed a search and not a simple visual inspection when he physically placed part of his head and hand while holding a flashlight inside the interior of the vehicle.

[15] In *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, Binnie J. writing for a unanimous Court explained the reasonable expectation of privacy surrounding police investigations in the context of the reasonable expectation of privacy arising under section 8 of the *Charter* as follows:

> 19 Accordingly, the Court early on established a purposive approach to s. 8 in which privacy became the dominant organizing principle. "The guarantee of security from unreasonable search and seizure only protects a reasonable expectation": *Hunter v. Southam*, *supra*, at p. 159 (emphasis in original). Given the bewildering array of different techniques available to the police (either existing or under development), the alternative approach of a judicial "catalogue" of what is or is not permitted by s. 8 is scarcely feasible. The principled approach was carried forward in *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45, where Cory J., referring to the need to consider "the totality of the circumstances", laid particular emphasis on (1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation.
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> 20 Within the general principle thus stated, the cases have come to distinguish among a number of privacy interests protected by s. 8. These include personal privacy, territorial privacy and informational privacy. …
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> 22 The original notion of territorial privacy ("the house of everyone is to him as his castle and fortress": *Semayne's Case*, [1558-1774] All E.R. Rep. 62 (1604), at p. 63) developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are most likely to take place (*Evans*, *supra*, at para. 42; *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 140, *per* Cory J.: "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'"; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 43), in diluted measure, in the perimeter space around the home (*R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 237 and 241; *R. v. Wiley*, [1993] 3 S.C.R. 263, at p. 273), in commercial space (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 517-19; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pp. 641 *et seq.*), in private

> cars (*Wise*, *supra*, at p. 533; *R. v. Mellenthin*, [1992] 3 S.C.R. 615), in a school (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 32), and even, at the bottom of the spectrum, a prison (*Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, at p. 877). Such a hierarchy of places does not contradict the underlying principle that s. 8 protects "people, not places", but uses the notion of place as an analytical tool to evaluate the reasonableness of a person's expectation of privacy.

(Emphasis added.)

[16] There is a significant amount of jurisprudence affirming that a police officer may use a flashlight at night to observe activities or objects inside vehicles. See *R. v. Belliveau and Losier* (1986), 75 N.B.R. (2d) 18 (C.A.); *R. v. Mellenthin*, [1992] 3 S.C.R. 615 at pages 623-624. In *R. v. Lotozky* (2006), 81 O.R. (3d) 335 (C.A.) Rosenberg J.A. stated at paragraph 13 that "[i]t seems that merely peering into a car window at night with the aid of a flashlight on a public highway is not a search." See also *R. v. Grunwald,* 2010 BCCA 288, 257 C.C.C. (3d) 53 leave to appeal to SCC refused, 33836 (December 23, 2010).

[17] In *R. v. Mellenthin*, Cory J. cited *R. v. Tessling* for the recognition of a "diluted measure" of privacy protection regarding searches of motor vehicles. He also emphasized the need for the protection of officers' safety when carrying out check stops or traffic stops at night. He wrote at page 623:

> There can be no quarrel with the visual inspection of the car by police officers. At night the inspection can only be carried out with the aid of a flashlight and it is necessarily incidental to a check stop program carried out after dark. The inspection is essential for the protection of those on duty in the check stops. There have been more than enough incidents of violence to police officers when vehicles have been stopped. …

(Emphasis added.)

[18] The judge found that the officer minimally inserted his head and a hand holding a flashlight inside the vehicle only briefly, to assess his immediate surroundings for his own safety. This minimal intrusion was necessary due to the height of the truck. I agree with his finding that this did not constitute a search.

[19] In the alternative, the judge also held that the plain view doctrine was operative. The applicable test was summarized by this Court in *R. v. Chaisson,* 2005 NLCA 55, 249 Nfld. & P.E.I.R. 252 at para. 33:

> Reliance on the doctrine depends on three requirements. First, the officer must be lawfully in a position from which the evidence was plainly in view. Second, discovery of the evidence must be inadvertent, that is, the officer must not have knowledge of the evidence in advance. Third, it must be apparent to the officer at the time that the observed item may be evidence of a crime or otherwise subject to seizure.

[20] The appellant argued that the officer was not in a lawful position from which to view the knife. Having concluded that the officer saw the unsheathed knife in the course of a lawful visual inspection of the truck I concur with the judge's rejection of that argument.

[21] In reaching this conclusion, I am not suggesting that, in every instance when an unsheathed knife is located in a door pocket beside the driver of a vehicle, this would be the basis for arresting the driver for possession of a weapon dangerous to the public peace. It is the confluence of circumstances that supports the arrest for that offence in this case. The officer had been warned to proceed with caution since the owner of the vehicle had previously been charged with drug offences and, at the time, he had had a knife. The officer was alone on a rural road at 12:55 a.m. The officer saw that the appellant had been sitting on an amount of money which was visible when he leaned over to open the glove box. In the circumstances, he reasonably suspected the involvement of drugs which alerted him to the possibility that the knife was intended for a use dangerous to the public peace, including to himself.

Was the Arrest Lawful?

[22] The appellant argues that even if the knife was discovered lawfully, it was insufficient on its own to justify the subsequent arrest. If so, the searches that ultimately uncovered the cocaine were unlawful. However, I accept the judge's findings that the arrest was lawful since the arresting officer had reasonable and probable grounds to believe that the appellant had committed an indictable offence. See section 495(1) of the *Criminal Code*; *R. v. Storrey*, [1990] 1 S.C.R. 241. In this case the offence was the possession of a weapon for a purpose dangerous to the public peace under section 88 of the *Criminal Code* in the circumstances in which the knife was found.

[23] This Court explained in *R. v. Warford*, 2001 NFCA 64, 207 Nfld. & P.E.I.R. 263, at para. 19 that reasonable and probable grounds has both a subjective and an objective aspect:

> … The proper test is twofold: (1) did the police officer, from a subjective perspective, have reasonable and probable grounds for arresting [the accused], and (2) could a reasonable person in the position of the officer conclude there were reasonable and probable grounds for the arrest?

[24] The appellant acknowledges that the officer subjectively believed he had reasonable and probable grounds to arrest the appellant. The only question is whether a reasonable person could conclude that there were reasonable and probable grounds to believe that the appellant had possession of the knife for a purpose dangerous to the public peace.

[25] The judge found reasonable and probable grounds not in the mere presence of a knife but in "the totality of the circumstances":

(i) The knife was located on the driver's side, where it would be most easily accessible;

(ii) It was unsheathed. If the knife was related to illegal drug activity, it would be advantageous to have it unsheathed for quicker access;

(iii) Involvement in the drug trade can be a motive to carry a weapon for a purpose dangerous to the public;

(iv) The officer knew the appellant had previously been arrested for possession of drugs;

(v) The appellant was carrying a machete type knife when he was last arrested for possession of drugs;

(vi) The appellant's vehicle was carrying a police scanner. That is a known drug-trafficking accessory; and

(vii) The appellant was carrying a police scanner the last time he was arrested for possession of drugs.

[26] I agree that the judge's reasons, taken together, support his conclusion that the arrest was lawful, satisfying the objective prong of the *Storrey* test. The trial judge did not err in concluding that the officer had reasonable and probable grounds for arresting the appellant.

SUMMARY AND DISPOSITION

[27] I conclude that the judge conducting the *voir dire* hearing:

(i) did not err in finding that the officer's actions at the side of the road did not constitute a search;

(ii) did not err in finding that the seizure of the knife was justified given the unsheathed knife was in plain view and easily accessible to the appellant;

(iii) did not err in finding that the officer had reasonable and probable grounds to arrest the appellant; and

(iv) did not err in finding that seizure of the cocaine was justifiable incidental to the arrest of the appellant.

[28] In the result, I would dismiss the appeal.

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M. F. Harrington J.A.

I concur: ______________________________

B. G. Welsh J.A.

Dissenting Reasons by White J.A.:

[29] I have reviewed the reasons of my colleague, Harrington J.A. and while I largely accept the facts and issues as stated by him, with respect, I am unable to agree with parts of his analysis and with the disposition of the appeal.

ANALYSIS

Was there a search?

[30] My colleague concludes that the police officer, in placing his head and hand into the interior of the appellant's vehicle and scanning it with a flashlight, was not conducting a search. I disagree. The fact determinative of this issue is not that the officer relied on the assistance of a flashlight to illuminate the otherwise dark interior of the vehicle as my colleague contends, but that, without permission, the officer physically placed himself inside the interior of the vehicle, a space where the appellant had a reasonable expectation of privacy.

[31] In concluding that the actions of the officer did not constitute a search my colleague references several cases where police, with the assistance of a flashlight, observed the interior of a vehicle, while remaining <u>outside</u> the vehicle (*Mellenthin*, *Grunwald*; see also *Lotozky* and *Belliveau*, which did not themselves concern a search of a vehicle with a flashlight, but described the concept. I would also note that *Belliveau* upheld a section 8 violation found by the lower courts). These cases reflect some debate about the meaning of the comments of Cory J. in *Mellenthin* at 623, where he stated:

> There can be no quarrel with the visual inspection of the car by police officers. At night the inspection can only be carried out with the aid of a flashlight and it is necessarily incidental to a check stop program carried out after dark. The inspection is essential for the protection of those on duty in the check stops…

[32] The question has arisen whether or not the Supreme Court of Canada in *Mellenthin* determined that there was no search when the officer used a flashlight to see what his unaided eyes could not, or whether there was a search but it was justified for reasons of officer safety.

[33] It is, however, unnecessary to attempt to resolve this debate in this case because the facts are entirely distinguishable. There is closer to a bright line standard governing cases where the police place themselves <u>into the interior</u> of a vehicle as there is a reasonable expectation of privacy in the interior of a vehicle. If the police activity invades a reasonable expectation of privacy, then the activity is a search (*R. v. Wise*, [1992] 1 S.C.R. 527, at 533, *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, at para. 15).

[34] A police officer is either outside the vehicle conducting a visual inspection, whether aided by a flashlight or not, or inside the vehicle to such

extent that he can see items it would be impossible to see from outside and the public's access to which the owner of the vehicle has sought to restrict. The degree of intrusion in the case at bar is no different in principle to the officer opening the door and sitting on the car seat. There is either an intrusion into the vehicle or there is not. Here there was, resulting in a warrantless search.

[35] The conclusion of my colleague that there is no search when a police officer enters the physical space of a vehicle driven by its owner, with or without the assistance of a flashlight, is unprecedented. The Supreme Court of Canada has confirmed that the driver and owner of a vehicle has a reasonable expectation of privacy in its interior (*Tessling* at para. 22, *R. v. Belnavis*, [1997] 3 S.C.R. 341 at para. 26, *Wise* and *Mellethin*. See also *R. v. Higgins* (1996), 141 D.L.R. (4th) 737, 111 C.C.C. (3d) 206 (QCCA), *R v. Christie*, 2013 NBCA 64). In *Belnavis* at paragraph 26, Cory J. of the Supreme Court of Canada, agreed with the Ontario Court of Appeal (see *R. v. Belnavis* (1996), 25 O.R. (3d) 21, 101 C.C.C. (3d) 195), that the officer's presence inside of the vehicle constituted a warrantless search which violated section 8 of the *Charter*. The Ontario Court of Appeal in that case had stated:

> *Edwards*, at pp. 145-46 S.C.R., pp. 150-51 C.C.C, lists some factors that should be considered in deciding whether in the totality of the circumstances, an accused had a reasonable expectation of privacy. In my opinion, it is appropriate when considering the totality of the circumstances to begin with the nature of the state intrusion: *R. v. Evans*, [1996] 1 S.C.R. 8 at p. 18, 104 C.C.C. (3d) 23 at p. 31. One may legitimately have a reasonable expectation of privacy with respect to certain kinds of state encroachments, but not others. For example, persons driving motor vehicles on public highways cannot reasonably expect that they can keep information or documentation referable to their entitlement to drive that motor vehicle confidential from the police: *R. v. Hufsky*, [1988] 1 S.C.R. 621 at p. 637, 40 C.C.C. (3d) 398 at p. 410. Those same persons could, however, have a reasonable expectation that the agents of the state cannot enter the vehicle and examine its contents.
>
> Here, Constable Boyce began with efforts to determine the ownership of the vehicle and Ms. Belnavis' entitlement to drive it; he proceeded to a visual and physical examination of material in the back seat; he then opened the trunk and examined its contents; and finally, he examined the contents of a purse found on the floor of the front seat. Constable Boyce's conduct went well beyond the kind of state intrusion which reasonable motorists would regard as incidental to the exercise of the privilege of operating a motor vehicle on a public highway. While the nature of the state intrusion does not create a reasonable expectation of

> privacy, it is an important part of the factual composite. The intrusion in this case was certainly sufficient to engage a consideration of the other relevant factors.
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> I am satisfied, on a consideration of the totality of the circumstances, that Ms. Belnavis established a reasonable expectation of privacy in relation to the Nissan. She was present when the search occurred, and had possession of and control over the vehicle. The evidence compels the conclusion that Ms. Belnavis had the owner's consent to operate it. As such, she could control access to the vehicle and exclude others from the vehicle. Control of access is central to the privacy concept: *R. v. Edwards*, supra, at pp. 147-48 S.C.R., pp. 151-52 C.C.C.; *Rawlings v. Kentucky*, 100 S.Ct. 2556 (1980), per Blackmun J. (concurring) at p. 2565. I am also satisfied, despite the reduced expectation of privacy which attaches to a motor vehicle (*R. v. Grant*, [1993] 3 S.C.R. 223 at p. 241, 24 C.R. (4th) 1 at p. 18), that it is reasonable for a person who is driving a motor vehicle with the owner's consent to expect that agents of the state cannot invade that vehicle absent a demonstrable state interest which is sufficiently compelling to override the driver's entitlement to maintain the privacy of the vehicle. To deny Ms. Belnavis a privacy interest in the vehicle would, in my view, ". . . see the amount of privacy and freedom remaining to citizens diminished to a compass inconsistent with the aims of a free and open society": *R. v. Wong*, [1990] 3 S.C.R. 36 at p. 46, 60 C.C.C. (3d) 460 at p. 478, per La Forest J.
>
> (Emphasis added.)

[36] I would note that this reasoning applies even more strongly where, as here, the appellant is both the driver and the owner of the vehicle.

Was the search justified by law?

[37] Unlike my colleague, I do not accept that the plain view doctrine is applicable to this case. The question to be determined is whether or not the officer’s presence in a vantage point from which the knife was viewable, that is inside the vehicle, was lawful. Once the officer was inside the vehicle he could see items he could not see from the exterior. If his entry into the vehicle was justified by law, the search is lawful. If it is not - the item is not in plain view and the search that began unlawfully cannot become lawful because evidence is discovered. Here, the knife was in the side pocket on the lower portion of the driver’s side door. It was impossible to see it without entry into the vehicle.

[38] The only real justification offered for the search was that it was required for officer safety. The officer did not testify that he feared for his safety and he could, if safety was his primary concern, have chosen to wait

for backup. Instead, he placed himself into the vehicle with a man he thought might have been armed with a knife.

[39] I am, nevertheless, mindful that he had been advised to be cautious.

[40] While the stated concerns for officer safety were rather vague and perhaps a different conclusion was available, considering all of the circumstances and the law as set out by the Supreme Court of Canada in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 and *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, I cannot say that the trial judge made a palpable and overriding error in finding that officer safety was a concern. There was a warrantless search but it was justified for officer safety reasons.

[41] There was no "unreasonable" search and, therefore, no violation of the appellant's section 8 rights for this reason alone.

Was the appellant's arrest lawful?

[42] I have considered my colleague's reasons and the circumstances surrounding the appellant's arrest and I am unable to conclude that the arrest was lawful. I do not share the view that the officer had reasonable or probable grounds to arrest the appellant.

[43] The sole reason given by the officer for arresting the appellant was that the officer saw that he had a large knife. While I doubt that this fact on its own is enough to substantiate the officer's subjective belief that he had reasonable and probable grounds to arrest the appellant, I will assume that this requirement was met. The real question is whether the objective circumstances indicated sufficient reasonable and probable grounds to arrest.

[44] An arrest requires reasonable and probable grounds to believe that an offence has been, will soon be, or is being committed. "Reasonable and probable grounds" is a standard of belief higher than mere suspicion, but occasionally described as lower than the civil standard of proof (balance of probabilities). A *prima facie* case is not required. Moreover, it is not enough for the officer to believe subjectively that he or she has reasonable and probable grounds – the belief must be objectively reasonable in the circumstances. The test is whether a reasonable person in the position of the officer would believe they have grounds for the arrest. (*Storrey* at 250-51).

[45] While the reasonable and probable grounds standard is relatively low, it must nonetheless be applied with some precision. Circumstances should

indicate that a particular offence or at least a type of offence has been, will soon be, or is being committed. It is not enough that there are factors that may indicate some kind of general criminal behavior.

[46] My colleague references a number of loosely connected facts each of which is perhaps individually suspicious and somewhat indicative of the appellant being on occasion involved in unsavoury activities. However, the question on this appeal is whether, taken together, all of these facts could have reasonably and probably indicated to the officer that the appellant had committed, was about to commit or was committing the offence of possessing a weapon for purposes dangerous to the public peace or for committing an offence contrary to section 88(1) of the *Criminal Code*. In my view they do not. Simply put, the officer's mere general knowledge that the appellant had been previously arrested for drug offences and during that arrest was in possession of a knife, does not give the officer reasonable and probable grounds to arrest the appellant for possessing a weapon for a purpose dangerous to the public peace on any subsequent occasion when the officer sees the appellant with a knife. Otherwise a person in the position of the appellant would always thereafter be at risk of arrest if he ever carried a knife again, even though possessing such a knife is not *per* se unlawful. This is especially so when there is no evidence the knife was used to commit any offence or used for dangerous purposes on either occasion.

[47] A knife is not a prohibited or restricted weapon such as a gun. Unlike a gun, a knife is inherently a tool, not a weapon. The fact of possessing a knife is not, without more, a criminal offence. While knives may be considered weapons within the meaning of section 2 of the *Criminal Code* with possession in some circumstances regulated by section 88(1), there is not a scintilla of evidence in this case that the appellant had previously used the knife dangerously, that he was attempting to use the knife dangerously, that he was committing any offence with the knife or that he had any purpose dangerous to the public peace. Even though it was nighttime, the appellant was driving alone in his vehicle, without exposing any other persons to the knife and he cooperated fully with the officer. I cannot conclude that a reasonable person would say that the officer had anything close to reasonable and probable grounds for arresting the appellant for possession of this knife. I note that similar circumstances were insufficient to justify an investigative detention in *Christie*.

[48] In my view, the circumstances here are insufficient to justify an arrest.

[49] I would conclude that the appellant's section 9 *Charter* rights were violated.

Search incident to the arrest

[50] Because the arrest was unlawful, it follows that the search incident to it was unlawful and a violation of the appellant's section 8 *Charter* rights.

Should the evidence be excluded under section 24(2) of the *Charter*

[51] Following *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 the Court should undertake a three-step analysis to determine whether the admission of the evidence would bring the administration of justice into disrepute by considering the seriousness of the *Charter* infringing conduct, the impact on the *Charter* rights of the accused and the interests of society in adjudication of the case on the merits.

[52] When assessing the seriousness of the *Charter* breach, the availability of other investigative alternatives, the good faith of police officers, and the extent of the privacy expectation are all relevant factors. In this case, one might suspect that the search and arrest were a ruse enacted by police to search for drugs. As this was not developed in a meaningful way it must be assumed that the initial motives of the officer were innocent, as found by the trial judge. However, the situation quickly escalated into a barely permissible search and then a groundless arrest, followed by an unlawful invasive search incident to arrest. The officer did not make any effort to investigate whether or not he had grounds for the arrest (for example, he did not ask the appellant any questions about what he was doing or his purpose in having the knife). As in *Christie*, he had many options other than immediate arrest. The officer's good faith can be questioned since he could not articulate his grounds for arresting the appellant beyond stating that the latter had a knife. The requirement of reasonable and probable grounds for an arrest is not novel or ambiguous and the officer could not have been unaware of it.

[53] The impact of the arrest and subsequent search on the appellant were serious. He was hand-cuffed and placed in the police vehicle. He was searched, then strip-searched and detained overnight before he could be brought before the Court. These are significant and highly intrusive interferences with his privacy and liberty.

[54] It is in the interests of society to seek out and prosecute those who possess illegal drugs. The third factor favours admission in this case.

[55] Although he informed the appellant of his right to counsel, the officer did not testify that he had any serious reflection upon the legality of the searches and arrest, despite the fact that the appellant was compliant throughout with all requests. I agree with the New Brunswick Court of Appeal in *Christie* at paragraph 59 that, as in that case, the officer's actions were "overkill".

[56] In these circumstances it would bring the administration of justice into disrepute to admit the evidence (see *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215).

[57] In *Coté* the Supreme Court has affirmed that evidence, independently discovered or not, may be excluded under section 24(2) of the *Charter*. Here, the knife was discovered pursuant to the search that engaged section 8 but was authorized for reasons of officer safety. The concept of officer safety permits conduct of a minimally invasive search for weapons, not for evidence. Here, the knife was seized <u>as evidence of an offence incident to the arrest</u>, which arrest was not justified under section 9. As such, this evidence was causally connected to the *Charter* breach.

DISPOSITION

[58] I would allow the appeal and order that all evidence discovered in breach of the appellant's sections 8 and 9 *Charter* rights be excluded under section 24(2) of the *Charter*. I would further order that verdicts of acquittal be entered in respect of all charges.

C. W. White J.A.