Citation: *R. v. Lockrem*, 2004 YKTC 26 Date: 20040427
Docket: 03-11039
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Lilles

R e g i n a

v.

Larry George Lockrem

Appearances:
Michael Cozens Counsel for Crown
Elaine Cairns Counsel for Defence

RULING ON *VOIR DIRE*

[1] Mr. Lockrem is charged with one count of possession of marihuana, contrary to s. 4(1) of the *Controlled Drugs and Substances Act.* A *voir dire* was held to determine whether there were reasonable and probable grounds to arrest and search Mr. Lockrem and whether the evidence of the small amount of marihuana seized by Constable Groves should be excluded from the trial proper.

Evidence on *Voir Dire*

[2] On November 18, 2003, Constable Groves was on general duty patrol in Dawson City, Yukon. He observed a person, known to him as Larry Lockrem, park his vehicle on 3rd Avenue near the Downtown Hotel. Mr. Lockrem was not wearing his seatbelt. Mr. Lockrem exited his vehicle and locked it. He was approached by Constable Groves who asked him for his driver's licence and advised him of the seat belt violation. Mr. Lockrem told the officer he did not have a driver's licence.

[3] As it was -32°C outside and Mr. Lockrem had locked his vehicle, Constable Groves “requested that Lockrem sit in the passenger seat of the vehicle” (according to the prosecutor’s information sheet). In his *viva voce* evidence and in a letter to Crown counsel he stated “Being –32 degrees outside I offered Lockrem the police vehicle to sit in where it was warm while I completed a driver’s licence check to confirm his statement and to issue a ticket”.

[4] In any event, Mr. Lockrem joined the police officer by taking the passenger seat in the front of the police vehicle. Unlike the back seat of the police cruiser that could only be opened from the outside, the door in the front could be opened by Mr. Lockrem from the inside.

[5] The driver’s licence check by Constable Groves confirmed that Mr. Lockrem did not have a valid driver’s licence. A CPIC check showed that he had a previous drug conviction in 1998 in Alberta. While sitting beside Mr. Lockrem, Constable Groves could smell a very strong odour of marihuana emanating from the person of Mr. Lockrem. In his evidence, he described the smell as “overwhelming” and that it was fresh, not burnt marihuana. The constable told Mr. Lockrem that he could smell a strong odour of marihuana on his person and that he had reasonable and probable grounds to believe that Mr. Lockrem was in possession of drugs. Constable Groves then said “I am going to arrest and search you or you can turn it over”. Mr. Lockrem told the officer he had just had a “hoot” (smoked some marihuana) with a friend outside another hotel. Constable Groves told him he was smelling fresh marihuana, not burnt marihuana. Mr. Lockrem then reached into the breast pocket of his jacket and produced two film canisters; one contained 1.4 grams of dried bud; the other, a pipe and a small instrument used to prepare marihuana for smoking. These were seized by Constable Groves.

[6] Constable Groves conducted a cursory “pat-down” search of Mr. Lockrem but did not locate anything of interest. The constable realized that the small amount of marihuana seized did not explain the strong odour that he observed. Nevertheless, he did not arrest and take Mr. Lockrem to the detachment to conduct a more intrusive search. Instead, Constable Groves gave Mr. Lockrem an appearance notice for the drug charge and decided to only give warnings regarding the seat belt and driver’s licence infractions.

[7] Constable Groves testified that he had been an undercover operator in a drug unit for two years. As a result, he was trained in all aspects of drug undercover work and marihuana grow operations. As a result of spending two years with gang members and attending over 30 marihuana grow operations, he was very familiar with the odour of both burnt and fresh marihuana. Constable Groves testified that he has a good sense of smell and has, on numerous occasions, conducted arrests based in part on detecting an odour of marihuana. He further testified that although his training has not specifically involved identifying marihuana by smell, all the individuals he has arrested based on his detection of marihuana by smell were found to have marihuana on them.

[8] Constable Groves acknowledged that the smell of marihuana lingers, and could be noticed on clothing up to a day after a person has been in contact with a large amount, for example, in a grow operation. But it was also his experience that a person who has been in contact with marihuana in a grow operation was likely to have marihuana on their person.

Findings of Fact

1. Mr. Lockrem was initially detained by Constable Groves for a seatbelt violation and then also for not having a valid driver’s licence.

2. This limited detention continued while Constable Groves confirmed Mr. Lockrem’s identity, confirmed his warrant and driver’s licence status and

prepared the necessary paperwork, in this case, an appearance notice. Mr. Lockrem was not free to depart or leave the scene. Constable Groves stated he would not have allowed Mr. Lockrem to leave and enter the hotel. This is not the kind of detention that has significant legal consequences. It does not trigger the right to counsel or the right to be advised of that right. It is a temporary detention of short duration: See *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Johnson,* [2000] B.C.J. No. 824 (B.C.C.A.).

3. As Mr. Lockrem was detained, it does not matter whether the officer "requested that Mr. Lockrem sit in the passenger seat" or "offered Mr. Lockrem the police vehicle to sit in" while the officer conducted a licence and warrant check. Nevertheless, I am satisfied that Constable Groves did not have an ulterior or improper motive when he offered the front seat of his vehicle to Mr. Lockrem. Constable Groves did so because it was very cold outside and he did not want Mr. Lockrem to leave the vicinity until he completed his checks and paperwork.

4. Constable Groves had extensive training and experience related to marihuana grow operations and as an undercover officer became very familiar with the smell of both burnt and fresh marihuana. His evidence satisfies me that he has, in the past, demonstrated an ability to accurately identify the smell of fresh marihuana.

5. Constable Groves acted in good faith without any ulterior motive or improper purpose in all of his dealings with Mr. Lockrem.

6. Mr. Lockrem turned over the marihuana when Constable Groves said he had reasonable and probable grounds to believe Mr. Lockrem was in possession of marihuana and should turn it over or Constable Groves would arrest and search him. This amounted to a *de facto* arrest of Mr.

Lockrem. In those circumstances, Mr. Lockrem's surrender of the marihuana to Constable Groves constituted a *de facto* search and seizure.

The Law

[9] Although the amount of marihuana seized in this case was very small (1.4 grams or the equivalent of less than 2 cigarettes), counsel provided a quantity of case law that was inversely proportionate to the narcotic in Mr. Lockrem's possession. These cases were very helpful and established the following principles applicable to the case at bar.

[10] An arresting officer must subjectively have reasonable and probable grounds on which to base an arrest. In addition, these grounds must be justifiable from an objective point of view. Reasonable and probable grounds require a relatively low evidentiary threshold, something less than a *prima facie* case. See *R. v. Storrey*, [1990] 1 S.C.R. 241.

[11] The common law authorizes search incident to lawful arrest, provided the search is truly incidental to the arrest. There must be some reason related to the arrest for conducting the search when it was carried out, and that reason must be objectively reasonable. If the justification for the search is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the accused is arrested. See *R. v. Caslake*, [1998] 1 S.C.R. 51.

[12] A number of cases distinguish between the smell of fresh marihuana and burnt marihuana. When an officer encounters the smell of burnt marihuana upon stopping a vehicle, this merely indicates that, at some time previous, someone had smoked marihuana in the vehicle. That person may no longer be in the vehicle. On the other hand, the smell of fresh marihuana can indicate the actual presence of marihuana. The difference between the smell of fresh and burnt marihuana was considered in the American case of *People v. Hilber* (1978), 269 N.W. (2d) 159 (S. C. Mich.). The *Hilber* case, *supra*, was considered in *R. v.*

Huebschwerlen, [1997] Y.J. No. 24 (Y. Terr. Ct.), wherein the court stated (at para. 39):

> Evidence of the "strength" of odour, or whether it was "recent", involves sensory perceptions. Unlike visual and auditory perceptions, there is no standard or norm for the sense of smell, and one person's sense of smell may differ significantly from another's. Certain common odours, and even uncommon ones, such as burned marihuana, may be recognized without special training, but it is "beyond ordinary experience to be able to determine with reasonable accuracy the length of time a persistent residual odour has lingered". In the absence of some special training on the part of the officer, a judge has no basis for determining the time frame in which the marihuana was burned, unless it is very recent and evidenced by smoke in the vehicle.

[13] The sense of smell is subjective and to authorize an arrest solely on that basis puts an unreviewable discretion in the hands of the police. However, it cannot be said that smelling an odour of marihuana can never provide the requisite reasonable and probable grounds for arrest. The circumstances under which the olfactory observation was made will determine the matter. See *R. v. Polashek* (1999), 45 O.R. (3d) 434, [1999] O.J. No 968 (C.A.); *R. v. Omeslusik,* [2003] B.C.J. No. 1237 (C.A.); *R. v. Stansfeld*, [2003] B.C.J. No. 3084 (B.C.S.C.).

[14] In *R. v. Huebschwerlen*, *supra*, this court identified a number of factors that should be considered when a person is giving olfactory evidence. These include evidence that the officer:

a) had any special training in this area.

b) had any formal experience with regard to marihuana, such as working on a drug squad.

c) was able to, or that it was even possible to, distinguish between a very recent, recent, or dated smell of burnt marihuana.

d) had a good “smell memory”, meaning that he was able to recognize, store and recall different smells.

e) had successfully identified marihuana by smell on previous occasions.

Conclusions

(1) The original stop and detention of Mr. Lockrem by Constable Groves was for a seatbelt violation and for driving without a licence. It was not a “fishing expedition” nor was it a surreptitious drug search.

(2) Mr. Lockrem was detained while Constable Groves completed his investigation and prepared the necessary documents. This is not the kind of detention that requires the police officer to provide *Charter* warnings or a right to counsel.

(3) The smell of marihuana in this case, taken in the context of all the circumstances, was sufficient to provide reasonable and probable grounds to believe that Mr. Lockrem was in possession of an unlawful drug:

- The smell was of fresh and not burnt marihuana.
- The smell was strong, not faint, and as Mr. Lockrem was seated in the police vehicle, the officer knew that it was coming from his person.
- As a result of his work on the drug squad, Constable Groves had been exposed to the smells of marihuana on numerous occasions and was familiar with both burnt and fresh marihuana.
- Constable Groves has arrested a number of individuals as a result of smelling marihuana on their persons. In all such instances, marihuana was located on their person.

- The strong smell of marihuana indicated that Mr. Lockrem had marihuana on his person or that he had recently been in contact with a grow operation. It was Constable Groves' experience that individuals who have had recent contact with grow operations are often in possession of marihuana.

- Constable Groves acted in good faith throughout the investigation and in his dealings with Mr. Lockrem. The motor vehicle charges were not a ruse to enable the officer to pursue a drug investigation. For example, after the small amount of marihuana was turned over to him, he did not arrest Mr. Lockrem, take him back to the detachment or conduct a more intrusive search of his person. Moreover, he exercised his discretion and issued a warning on both motor vehicle infractions, rather than tickets.

[15] In conclusion, in all the circumstances, I find that Constable Groves had reasonable and probable grounds to believe that Mr. Lockrem had marihuana on his person. The constable was entitled to arrest him for the possession of marihuana and to conduct a search incidental to that arrest. Advising Mr. Lockrem that he had grounds to arrest and search him and then giving Mr. Lockrem an opportunity to turn over the drugs on his own prior to conducting an actual search constituted a *de facto* search. In the circumstances, this search was not conducted in an unreasonable fashion and it was incidental to the arrest, namely to search for marihuana. On the facts as I found them, there has been no *Charter* breach.

[16] The marihuana and associated paraphernalia seized by Constable Groves are admissible and will be marked as exhibits in the trial proper.

Lilles C.J.T.C.