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File No. 59753-1
Registry: Abbotsford

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Ruling on Voir Dire
Before the Honourable Judge MacGregor
October 12, 2005

REGINA

v

STEVEN EARLE HILL

Counsel for the Federal Crown

J. Filek

Counsel for the Defence

K. Pacey, appearing on
behalf of J.W. Conroy, Q.C.

[1] **THE COURT:** This is *R. v. Hill*. These are my reasons for judgment on the voir dire.

[2] **FACTS:** On May the 3rd, 2004, several members of the RCMP set up a roadblock in the Deroche area of Mission, British Columbia, on Highway 7 for the purpose of checking for impaired drivers or for vehicle defects. Cst. Cluney noted a black Ford Ranger approaching the vehicle stop along Highway 7. She noted the driver bend down at some point. The vehicle

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slightly swerved and straightened within its own lane. She did not note any other aberrant driving. She pulled over the black Ranger and stopped Mr. Hill, who was the sole occupant of the vehicle.

[3] As Cst. Cluney approached the vehicle, Mr. Hill produced a valid driver's licence and registration. Cst. Cluney at that point while dealing with Mr. Hill at the side of the truck discerned the smell of marihuana from the cab of the vehicle. She described that smell as moderate, more of a burnt smell. Cst. Cluney immediately arrested Mr. Hill for possession of a controlled substance under the CDSA, that is, for possession of cannabis marihuana. She Chartered and warned Mr. Hill on the scene. He exited the vehicle and waited outside of the truck. She then began to search the truck.

[4] In the course of that search and with the co-operation of Mr. Hill she did find a small white plastic container, I understand a Tupperware container which, as subsequently analyzed, contained marihuana, cannabis. I have no evidence of the actual weight, but counsel have agreed that the amount was not greater than 30 grams pursuant to the charge on the Information.

[5] Cst. Cluney, after seizing the substance, placed Mr. Hill on a 24-hour suspension and a Promise to Appear in court.

[6] Cst. Cluney's observations consisted only of her sense of smell of burnt marihuana. She noted no smoke in the vehicle. She saw nothing in view. She did not describe the smell as fresh or recent.

ISSUES:

[7] The issue here on the voir dire is whether Cst. Cluney had reasonable and probable grounds to arrest Mr. Hill at that point. It is conceded by the Crown that the search of the vehicle would be lawful only if the constable had reasonable and probable grounds to arrest Mr. Hill at the time she did.

[8] The standard of proof for reasonable and probable grounds is the reasonable probability or a reasonable belief, as determined by the Supreme Court of Canada in *R. v. Debot*, and at page 16, paragraph 54.

AUTHORITIES:

[9] I have been referred to numerous cases by both Crown and defence with respect to marihuana in vehicles, either fresh or burnt or smoked, and one of the factors in each of those cases is the odour of marihuana.

[10] In *R. v. Dubois*, a case of our Court of Appeal from 2004, BCCA 589, at paragraph 9 the Court said:

... It cannot be said that the evidence of odour alone is insufficient in all circumstances to found an objective belief that a crime has been or is about to be committed.

In that case, however, there were two officers involved who had detected a "distinct odour of burning marihuana" as they passed a car heading in the opposite direction while they were on their bicycles. As they approached the vehicle there was a strong odour emanating from the vehicle from the passenger's side, and in that case the accused prior to arrest were advised they were detained for investigation. A police dog then conducted a search of the vehicle and found drugs inside. There was a much stronger case of smell by both officers than in the case before me.

[11] In the case of *R. v. Stansfield* (2003), the evidence there was an "overpowering smell of fresh cut marihuana" and that constituted reasonable and probable grounds to arrest the occupant for possession of marihuana. A subsequent search was an appropriate incident to lawful arrest at that time.

[12] In *R. v. Duray*, a decision of our B.C. Supreme Court, (1993) BCJ 185, the evidence was of "a pungent odour of marihuana".

[13] In the decision of now Chief Judge Stansfield, *R. v. Cornell* (2004), the evidence was of "freshly smoked marihuana".

ANALYSIS:

[14] In each of the authorities the evidence of an odour of marihuana was far stronger than in the case before me. Cst. Cluney's observations consisted only of her sense of smell uncorroborated by any other officer in the vicinity, of a "moderate smell", of "more of a burnt smell" was her evidence.

[15] I do not find that the constable's observations were sufficient to provide grounds for arrest. They were sufficient to provide the constable with grounds for suspicion, but suspicion only. Accordingly, I find that Cst. Cluney did not have reasonable and probable grounds to believe subjectively and objectively that there was marihuana in Mr. Hill's possession at the time she dealt with him at the roadside.

[16] Accordingly, his arrest was not lawful and the subsequent search of the vehicle was a breach of Mr. Hill's rights under s. 8 of the *Charter*.

[17] There is no question that the police have the authority to stop and check a motor vehicle for motor vehicle

infractions or for impaired drivers. However, in this case once Mr. Hill had produced his driver's licence and his registration and there was no evidence that he was impaired in any way, then he ought to have been allowed to go.

[18] I must now consider the facts relevant to the issues under s. 24(2) of the *Charter*, with respect to the admissibility of the evidence.

[19] Marihuana is real evidence, not conscripted evidence. Mr. Hill's statement after being Chartered and warned was, "Here's what you're looking for," was voluntary. However, I must consider the seriousness of the breach.

[20] Cst. Cluney did not act in bad faith; however, she did not discern the difference in her powers of search and seizure between detention on suspicion only and for investigative purposes, and her powers on lawful arrest.

[21] In the decision of *R. v. Huebschwerlen* (1997), a decision of the Yukon Territorial Court, His Honour Judge Lilles, dealing with a similar case, said at paragraph 55:

This violation is a serious one. It was conducted as an adjunct to a lawful check stop and was grounded only on suspicion, not on reasonable and probable grounds. To extend the random stop programs to include a right to search without a warrant or without reasonable grounds constitutes a serious *Charter* violation.

I adopt that reasoning.

[22] Further in the Supreme Court of Canada case in *R. v. Mellenthin* (1992) 3 SCR 615, the Court concluded at paragraph 28:

... To admit evidence as a result of an unreasonable and unjustified search of a motorist in a check stop would render the trial of the appellant unfair. Admitting such evidence would thus bring the administration of justice into disrepute.

CONCLUSION:

[23] It is for these reasons that I find the evidence which was derived from the unreasonable search of Mr. Hill's vehicle will be excluded pursuant to s. 24(2) of the *Charter*; that is the small plastic container of marihuana which was found in Mr. Hill's possession.

[24] MR. FILEK: Crown has no further evidence to call.

[25] THE COURT: Accordingly, the charge is dismissed. Mr. Hill is acquitted of the charge before the Court.

(RULING CONCLUDED)