

# R. v. Lenhardt, [2019] O.J. No. 2576

Ontario Judgments

Ontario Court of Appeal

D.H. Doherty, M.L. Benotto and G. Huscroft JJ.A.

Heard: May 13, 2019.

Oral judgment: May 13, 2019.

Released: May 21, 2019.

Docket: C63533

[2019] O.J. No. 2576 | 2019 ONCA 416

Between Her Majesty the Queen, Respondent, and Joshua Lenhardt, Appellant

(13 paras.)

## Case Summary

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### Appeal From:

On appeal from the convictions entered by Justice Beth A. Allen of the Superior Court of Justice, dated April 20, 2016, reported at 2016 ONSC 2329.

## Counsel

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Breana Vandebek, for the appellant.

Jeanette Gevikoglu, for the respondent.

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## REASONS FOR DECISION

The following judgment was delivered by

### THE COURT (orally)

1 The appellant was convicted of various drug-related offences. His factual guilt was not an issue at trial. He argued that the police obtained the drugs as a result of an unconstitutional arrest and search of a knapsack in his possession at the time of his arrest. The appellant also

argued that the police had violated his right to counsel under s. 10(b) when he was not given access to a lawyer for several hours after his arrest.

2 The trial judge rejected these arguments, convicted the appellant and imposed a conditional sentence. The appellant renews the arguments advanced at trial. He does not appeal sentence.

### **Issue # 1: Was the arrest unconstitutional?**

3 The applicable legal principles are not in issue and were set out by the trial judge. The constitutionality and legality of the arrest turned largely on whether the trial judge erred in accepting the arresting officer's evidence that, immediately before the arrest, he saw marihuana in the open knapsack that was in the appellant's possession in the car.

4 The trial judge accepted the officer's evidence. She did so after a review of the entirety of the relevant evidence, including that offered by the appellant. The trial judge drew factual inferences from the totality of the evidence based on what her experience and common sense told her about the circumstances presented in the evidence. We are not convinced she misapprehended the evidence, nor, in our view, were any of the inferences unreasonable. They were available on the evidence.

5 The trial judge ultimately determined that the arrest was lawful based on:

- \* the appellant's possession of the marihuana in the knapsack;
- \* the appellant's possession of a baggie, an article commonly associated with trafficking in narcotics; and
- \* the time and place of the occurrence.

6 The facts as found by the trial judge provided ample grounds for the arrest.

### **Issue # 2: Was the search constitutional?**

7 The trial judge reviewed the evidence concerning the search, at paras. 110-112 of the reasons. The search was incidental to a lawful arrest and was conducted reasonably. There was no violation of s. 8.

### **Issue # 3: Was there a s. 10(b) violation?**

8 There was very little evidence on this point at trial. The appellant, in his evidence, testified that although the police had finished processing him at around 2:30 a.m., he did not receive access to counsel until about 8:00 a.m. The appellant was not asked any questions about this time period in-chief or in cross-examination. The police officer who was involved in the arrest had testified before the appellant. He was not questioned by the Crown or the defence about the circumstances surrounding the appellant's access to counsel after he was arrested.

9 In the course of argument, counsel for the appellant took the position that, while any s. 10(b) breach, standing alone, would not justify exclusion of the evidence, the s. 10(b) breach, considered in combination with the other alleged breaches, did justify exclusion.

**10** In her reasons, the trial judge noted the paucity of evidence relating to the s. 10(b) breach. She indicated that the evidence "suggested" a delay in providing access to counsel. She went on to hold that, assuming there was a delay, there was very little "prejudice" flowing from that delay. She indicated she would not exclude the evidence under s. 24(2). We agree with the conclusion ultimately arrived at by the trial judge.

**11** The appellant had the onus to show that the evidence should be excluded under s. 24(2). Assuming there was a breach of s. 10(b), it is clear that there was no causal relationship between that breach and the obtaining of the narcotics by the police. There need not be a causal relationship to establish a case for exclusion under s. 24(2), but the absence of any such connection is a factor weighing against exclusion.

**12** Given the absence of virtually any evidence about the circumstances of the alleged breach, apart from the appellant's very brief testimony, it is impossible to make an informed assessment about the nature of the police conduct, or the impact of the police conduct on the appellant's exercise of his s. 10(b) rights. Those are two of the three factors that must be considered in the s. 24(2) analysis. In the absence of any evidence relating to those factors, it cannot be said that the appellant met his onus to demonstrate that the evidence should be excluded under s. 24(2). We also note that the appellant did not argue that the s. 10(b) breach, standing alone, would justify exclusion of the evidence.

**13** The appeal is dismissed.

D.H. DOHERTY J.A.  
M.L. BENOTTO J.A.  
G. HUSCROFT J.A.