

Police Search Powers

Section 21 Law Enforcement (Powers & Responsibilities) Act (NSW) 2002
R v Rondo [2001] NSWCCA 540

Police in NSW have power to detain and search any person but only in limited circumstances. If a search is subsequently deemed to be unlawful, then any evidence obtained from it can be excluded pursuant to the court's discretion in s138 Evidence Act. So, every lawyer needs to understand the law relating to police powers to represent their clients effectively. This article aims to assist practitioners appearing in the Local Court of NSW.

Firstly, Don't Resist

If police intend to search you, they will do so whether you consent or not. By all means, say you don't consent, but do not resist. It is very rare to win an argument with a police officer. If the search is unlawful, that will be determined by a court later. If you resist, the most likely outcome is that you will be charged with assault police and hinder an officer – regardless of whether the search turns up any contraband.

'Suspect on Reasonable Grounds'

This is the key phrase that limits police powers. Section 21 of LEPR¹ gives a police officer power to detain and search any person if he or she 'suspects on reasonable grounds' that the person has in their possession or under their control:

- a) Anything stolen or unlawfully obtained,
- b) Anything used or intended to be used in or in connection with the commission of a relevant offence,
- c) A dangerous article that is being or was used in or in connection with the commission of a relevant offence, or
- d) A prohibited plant or a prohibited drug.

Unfortunately, every case turns on its own particular factual scenario and reasonable minds can differ as to whether a suspicion has reasonable grounds. The Court of Appeal attempted to elucidate the meaning of this key phrase in *Rondo*.² The court dealt with the previous legislation which used the same phrase. Smart AJ reviewed the authorities and distilled three propositions at [53]:

- a) *A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s.357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.*

¹ Law Enforcement (Powers & Responsibilities) Act (NSW) 2002

² *R v Rondo* [2001] NSWCCA 540

- b) *Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.*
- c) *What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.*

Voir Dire

So, at the beginning of the hearing, the defence apply to exclude the evidence on the basis that the search was unlawful. This question will be determined in a special hearing called a voir dire.³ The burden will be on the police officer to give evidence to prove that:

1. They had information in their mind,
2. At the time they stopped the person,
3. That would cause a reasonable person to apprehend or fear one of the four states of affairs referred to in s21 LEPR.

Submissions

*May it please the court, the burden falls on the police to prove that they had reasonable grounds to suspect one of the four circumstances in section 21 of LEPR **at the time of the search**. In my submission they have failed to discharge that onus.*

That fact that they found contraband in my client's possession cannot provide those grounds retrospectively. Nor can my client's criminal antecedents be sufficient grounds. If it were, then my client could be subject to arbitrary searches on a daily basis.

It is a longstanding tenant of our law that a person's body is inviolate. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest would be a negation of any true right to personal liberty.

In my submission, the police officer did not have a reasonable suspicion and the search was a violation of my client's civil rights which this court has sworn to uphold. I further submit that, in the context of the case, the undesirability of admitting evidence obtained in this manner far outweighs the desirability of admitting the evidence.

I'm available every day if you have any interesting issues.

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³ Pronounced 'v-wah deer'