Citation: R v Land, 2018 MBCA 132 Date: 20181210
Docket: AR18-30-09038

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner

B E T W E E N:

HER MAJESTY THE QUEEN	)	***H. D. P. Crawley***
	)	*for the Appellant*
	)	
Appellant	)	***J. H. Youn***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
ANDREW RYAN LAND	)	*Decision pronounced:*
	)	***November 21, 2018***
	)	
(Accused) Respondent	)	*Written reasons:*
	)	***December 10, 2018***

PFUETZNER JA (for the Court):

[1] Prior to the accused's trial, a *voir dire* was held regarding the admissibility of evidence, specifically the marihuana and cash seized by the police after searches of the accused's backpack and wallet. The accused was tried on one count of possession of proceeds of crime contrary to section 354(1)(a) of the *Criminal Code* (the *Code*), one count of possession of marihuana for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, and one count of possession of a weapon for a purpose dangerous to the public peace contrary to section 88 of the *Code*.

[2] In his ruling on the *voir dire*, the trial judge held that the evidence was obtained as a result of unreasonable searches in breach of section 8 of the

Canadian Charter of Rights and Freedoms (the *Charter*). The trial judge determined that the evidence should be excluded under section 24(2) of the *Charter*. The accused was acquitted of the charges relating to possession of proceeds of crime and possession of marihuana for the purpose of trafficking. The Crown appealed and sought a new trial.

[3] In our view, the trial judge failed to consider the correct legal principles in determining whether the searches violated section 8 of the *Charter*. While the Crown conceded that there had been a breach of the accused's rights under section 10(*b*) of the *Charter* during his initial interaction with the arresting officers, if the searches did not violate section 8 of the *Charter*, this finding would have a material effect on the analysis under section 24(2). As a result of our conclusion regarding the trial judge's approach to the section 8 analysis, there is no need to deal with the Crown's second argument regarding the trial judge's analysis under section 24(2) of the *Charter*.

[4] At the hearing of the appeal, we allowed the appeal and ordered a new trial with reasons to follow. These are those reasons.

Background

[5] The facts are not in dispute. On the day of the accused's arrest, a 911 call was made from a 7-Eleven store in the City of Winnipeg at 8:49 a.m. The clerk said that a male was refusing to leave the store and was in possession of a knife. Constables Chabluk and Borland arrived at the 7-Eleven store within minutes and spoke with the clerk, who advised that the male had gone to the store next door. The officers attended next door and approached the accused, who matched the description of the male.

[6] The accused said, “you here for me?” to the officers. Constable Chabluk asked the accused if he had a knife. The accused indicated yes and gestured to his pocket. At 9:05 a.m., Cst. Borland told the accused that he was being detained for a weapons investigation, took hold of the accused and removed the knife from his pocket.

[7] Constable Chabluk asked the accused why he had the knife. The accused said it was because he got “jumped by some guys last week” so he had it for protection.

[8] The officers removed the accused from the store to conduct a more detailed safety search. While walking the accused toward the police vehicle, both officers noticed a strong smell of fresh marihuana emanating from the accused. Based on the smell, both officers believed the accused had a quantity of fresh marihuana on him.

[9] Constable Chabluk asked the accused if he had any marihuana on him. The accused said “I only have a gram on me, maybe a little more”. At 9:08 a.m., the accused was arrested for the weapons offence and for possession of marihuana.

[10] The officers then searched the accused. No marihuana was found on his person; however, a search of his backpack revealed approximately 200 grams of marihuana divided into multiple smaller, labeled packages.

[11] Between approximately 9:10 a.m. and 9:15 a.m., Csts. Cummer and McClean arrived at the scene to transport the accused to the police station. At 9:16 a.m., Cst. Cummer gave the accused his full charge (possession of a weapon for a dangerous purpose and possession of marihuana for the purpose

of trafficking), police caution and right to counsel. At that time, the accused declined to contact counsel.

[12] On arrival at the police station at 9:35 a.m., the accused was turned back over to Csts. Chabluk and Borland. As a result of the amount of drugs found and its packaging, the officers believed he was trafficking drugs, so they searched the accused's wallet. The search revealed cash of $885.35 in small denominations. At 9:50 a.m., Cst. Chabluk rearrested the accused for possession of proceeds of crime and seized the cash. The accused was again provided with his right to counsel and spoke to duty counsel. He was then released on a promise to appear.

[13] At the *voir dire*, the accused sought exclusion of the marihuana and cash under section 24(2) of the *Charter* on the basis that he had a reasonable expectation of privacy with respect to his backpack and the search and seizure by the officers violated his "right to be secure against unreasonable search or seizure" under section 8 of the *Charter*.

[14] At the *voir dire*, the Crown argued that there was no breach of section 8 of the *Charter*. It maintained that the accused was lawfully arrested for possession of marihuana based on the strong odour and that the subsequent search of his backpack was incidental to that arrest. The search of the wallet occurred after, and was incidental to, the accused's arrest for possession of marihuana for the purposes of trafficking. The Crown conceded that the accused's right on detention or arrest to retain and instruct counsel without delay and to be informed of that right under section 10(*b*) of the *Charter* was infringed when the officers questioned the accused prior to advising him of his section 10(*b*) rights in relation to the weapon charge. However, the Crown

stated that it was not seeking admission of the statements made by the accused prior to being advised of his right to counsel and submitted that there was no nexus between the section 10(*b*) breach and the discovery of the marihuana and cash.

[15] In his ruling on the *voir dire,* the trial judge characterised the legal issue as "whether [the accused] had a reasonable expectation of privacy as it relates to his backpack." He found that the accused was cooperative with the police and identified the location of the knife immediately. As a result, the trial judge stated, "officer safety was not, in my opinion, a consideration." The trial judge stated that "the search was not authorized by law". Relying on *R v AM,* 2008 SCC 19, the trial judge found that "the case law is clear that the accused has a reasonable expectation of privacy as it relates to a closed backpack on his person." As the accused was "already in custody on another charge," the trial judge concluded that the officers "should have taken steps to get a legal search warrant to search the bag." He said that "The search and seizure at the police station of the accused's wallet is further aggravating as there is no evidence of [a] drug transaction occurring, which could lead to a seizure of cash in a person's wallet."

[16] The trial judge then analysed whether the evidence should be excluded under section 24(2) of the *Charter*, ultimately concluding that it should.

Issues

[17] The Crown raises two issues on this appeal. The first is whether the trial judge erred in law by failing to state or apply the correct legal principles in assessing the alleged violation of section 8 of the *Charter* by failing to

consider if the searches of the backpack and wallet and seizure of the cash were reasonable as a result of being incidental to a lawful arrest.

[18] The second issue is whether the trial judge erred in his decision to exclude the evidence under section 24(2) of the *Charter* by improperly inflating the seriousness of the officers' conduct and the impact of the breaches of section 8 and section 10(*b*) on the *Charter*-protected interests of the accused. As explained, because of our conclusion on the first issue, we will not address the second issue.

Positions of the Parties

[19] The Crown argues that the trial judge failed to consider the police power to search incidental to arrest. It states that the accused was under lawful arrest for possession of marihuana at the time of the search of the backpack and was under lawful arrest for possession of marihuana for the purpose of trafficking at the time the accused's wallet was searched and the cash was seized. The Crown maintains that each search and the seizure was reasonable under section 8 of the *Charter* as incidental to lawful arrest.

[20] The accused submits that the trial judge was correct in finding that the search of his backpack, and the subsequent search of his wallet and seizure of cash, violated section 8 of the *Charter*. Relying on *R v Polashek* (1999), 172 DLR (4th) 350 (Ont CA), he argues that the trial judge must have concluded that the odour of marihuana alone did not provide reasonable grounds to search his backpack.

Standard of Review

[21] On a Crown appeal, the standard of review that applies to the question of whether the trial judge erred in finding that there was a breach of section 8 of the *Charter* is set out in *R v Koczab (A)*, 2013 MBCA 43 (at para 16):

> [T]he appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.

Analysis and Decision

[22] The Supreme Court of Canada, in *R v Caslake*, [1998] 1 SCR 51, discussed the common law police power of search incidental to arrest. The test, set out in *R v Collins*, [1987] 1 SCR 265, for whether a search is reasonable and therefore in compliance with section 8 of the *Charter*, was confirmed in *Caslake* at para 10. First, the search must be authorised by law. Second, the law must be reasonable and, third, the search must be carried out in a reasonable manner. See also *R v Fearon*, 2014 SCC 77 at para 12.

[23] *Caslake* also confirmed the Supreme Court of Canada's previous ruling in *Cloutier v Langlois*, [1990] 1 SCR 158 that the police power to search incidental to arrest complies with the first branch of the *Collins* test as it is authorised by law—in this case a common law doctrine. No warrant or independent reasonable and probable grounds are required to conduct such a search. This is because the search must be truly incidental to a lawful arrest and, for an arrest to be lawful, the police must have an arrest warrant or reasonable grounds for arrest (see *Caslake* at para 13; and *Fearon* at paras 16-

19, 21-22).

[24] The concept of "reasonable grounds" for arrest was discussed in *R v Storrey*, [1990] 1 SCR 241 at 250-51. The concept requires that an arresting officer must subjectively believe that he or she has reasonable grounds to arrest and those grounds must be objectively reasonable. See also *R v Janvier*, 2007 SKCA 147 at paras 10-16; *R v Tontarelli*, 2009 NBCA 52 at paras 52-53; *R v McKay*, 2009 MBCA 121 at para 24; *R v Harding*, 2010 ABCA 180 at paras 15-22; and *R v Acosta*, 2014 BCCA 218 at paras 11-22.

[25] Several appellate courts have confirmed that the detection by a police officer of the odour of fresh or vegetative marihuana can, on its own, satisfy the subjective belief needed to constitute reasonable grounds for arrest and those grounds can be objectively reasonable (see *R v Sewell*, 2003 SKCA 52 at para 36; *Janvier* at para 44; *Harding* at para 29; and *Acosta* at paras 16-22).

[26] *Caslake* succinctly summarised the limits and scope of a search incidental to arrest as follows (at para 25):

> In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier*, *supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from

> being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

[27] In our view, the trial judge erred initially by failing to consider whether the accused's arrest for possession of marihuana based on the odour alone was lawful. Consequently, the trial judge erred by failing to consider whether the search of the backpack was a lawful search incidental to that arrest and whether the subsequent search of the accused's wallet and seizure of cash were lawful as incidental to his arrest for possession of marihuana for the purposes of trafficking. A reading of the trial judge's ruling as a whole indicates that he did not consider the fact that, at the time of each search and the seizure of the cash, the accused was under arrest for marihuana offences.

[28] While the trial judge accepted that Cst. Chabluk's explanation for conducting both searches was "for officer safety and incident to arrest", he failed to analyse whether the searches were justified as searches incidental to arrest. His analysis of whether either search was justified on the basis of officer safety can only be described as minimal and consisted of the conclusory statement that "officer safety was not, in my opinion, a consideration." This is despite the fact that the officers had already removed a knife from the accused's possession.

[29] As for the search of the wallet and seizure of the cash, it is apparent that the trial judge failed to consider the fact that the accused had, by that time, been charged with possession for the purpose of trafficking when he said, "there is no evidence of [a] drug transaction occurring".

[30] Instead of turning his mind to the doctrine of search incidental to

arrest, the trial judge characterised the sole legal issue as being whether the accused "had a reasonable expectation of privacy as it relates to his backpack." Relying on *AM*, he found that the accused did. There is no dispute that the accused had a reasonable expectation of privacy in his backpack. However, the only relevance of this is that it gives the accused standing under section 8 of the *Charter* to challenge the reasonableness of the search (see *R v Edwards*, [1996] 1 SCR 128 at paras 29-30). Whether an accused has a reasonable expectation of privacy in the place or thing searched is the first step in the analysis, the second step being to determine if the search was reasonable (see *Edwards* at paras 33, 45 at pt 4).

[31] In conclusion, the trial judge failed to consider the proper legal principles in analysing whether the searches of the accused's backpack and wallet and the seizure of cash were in breach of section 8 of the *Charter*. As previously indicated, the Crown conceded a breach of section 10(*b*) of the *Charter* and it sought a new trial where all the *Charter* issues—under sections 8, 10(*b*) and 24(2)—can be freshly considered applying the proper legal framework.

[32] Accordingly, for these reasons, we allowed the appeal and ordered a new trial.

Pfuetzner JA

Steel JA

Beard JA