

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

DAVID McPHAIL

Before Justice J.A. Maresca

Heard on March 22, 2011

Ruling on Charter Application released on June 8, 2011

S. Ferrone for the Crown

I. Collins for the accused David McPhail

MARESCA, J.:

[1] David McPhail is charged with one count of operating a motor vehicle “Over 80” and one count of operating a motor vehicle while impaired by alcohol. The trial of this matter commenced on September 22, 2010. At that time, there were no Charter applications before the court. The case was not finished on that day, and based upon evidence that came to light during the testimony of a Crown witness, further disclosure was ordered. The matter returned for continuation on March 22, 2011. On March 8, 2011, Mr. McPhail brought an application under the Charter for relief under s. 24 (1) and (2) based upon an alleged breach of his rights under s. 8.

[2] There was agreement by counsel that evidence heard on September 22, 2010 would be applicable to the Charter application, and that the proceeding on March 22, 2011 would be conducted as a blended Charter application and trial. The Crown concluded its case at the end of the day on March 22, 2011, and submissions were made on the Charter application. The Court asked for further submissions on the issue of remedies other than a stay or exclusion of evidence, if a Charter breach were found. Those submissions have been received and considered by the Court. This decision is the ruling on the Charter application.

[3] Mr. McPhail was arrested on September 21, 2008, and charged with the offences of driving while impaired, and driving “over 80”. For the purposes of this ruling, it is unnecessary to detail the circumstances leading up to the arrest. Suffice it to say that these were the only offences with which he was charged on that day. He was arrested by Officer Sheldon Langlois of the Peel Regional Police, and was turned over at the scene of the arrest to Officer Jason McCurley, who brought him to the 11 Division police station for breath analysis. The events which transpired there form the subject matter of the application.

[4] Four officers testified regarding these incidents: Officer Sheldon Langlois, Officer Jason McCurley, Officer Chris Allen (the booking officer) and Officer Kevin Faulkener (the Intoxilyzer technician). In his testimony on September 22, 2010, Officer McCurley stated that he brought Mr. McPhail to the cell area, or booking area, of the station at about 4:50 am. He testified that Mr. McPhail was handcuffed and was seated on a bench in the cell area. He said that at about 4:55 am, Staff Sergeant Sue Watson came down to the cell area, spoke with Mr. McPhail, and authorized the removal of his handcuffs. He described Mr. McPhail as “compliant” and said that there were “no issues”.

[5] Officer Faulkener testified that at 4:59, he observed the defendant to be lying on the bench in the cell area, without his handcuffs on. He said that prior to 5:15, Officer McCurley spoke with him and gave him his grounds for arresting Mr. McPhail.

[6] The Prisoner Log, which was filed as an exhibit at the hearing, indicates that the defendant was booked and viewed by Staff Sergeant Leslie at 5:00 am. According to Officer McCurley, at 5:01 Mr. McPhail asked to speak with duty counsel, and he, Officer McCurley, placed a call for that purpose at 5:02. The defendant spoke with duty counsel from 5:18 until 5:31.

[7] According to Officer Allen, he and Officer McCurley searched Mr. McPhail at 5:00 am, before Officer Allen’s shift ended at 5:15. It is that search that forms the basis for the allegation that Mr. McPhail’s s. 8 Charter rights were breached.

[8] It is important to highlight how the search became an issue in this hearing. In his testimony on September 22, 2010, Officer McCurley said:

- “[Mr. McPhail] was there for impaired operation of a motor vehicle. I wouldn’t have done a strip search”. (transcript, pg 119)
- “I don’t strip search. I wasn’t the cells officer, so therefore I don’t strip search.” (transcript, pg. 124 – 125)
- He knew that the defendant was indeed strip searched that morning, by the cells officer, whose name he could not recall. (transcript, pg. 125- 126)
- That he stood in the doorway of a room which opened into the cell area and watched the strip search taking place.

- That Mr. McPhail's underwear was not removed, and at no time was he naked during the search. "He was there for impaired operation of a motor vehicle, so he would have been able to keep his underwear on." (transcript, pgs. 126 and 130)
- That he did not actually recall standing in the doorway and watching the strip search. (transcript, pg. 132).
- That there would be a record of the strip search in the log book at the station.

[9] Officer McCurley gave his evidence in a very evasive manner. As a result of this information, the Crown agreed to produce the log book referred to by Officer McCurley, as well as the officer who conducted the strip search.

[10] When the case recommenced on March 22, 2011, the Prisoner's Log was produced and made an exhibit. Officer McCurley was recalled to the stand, and gave the following evidence.

- Mr. McPhail's handcuffs were removed after Staff Sgt. Lewis (not Staff Sgt. Watson, as he testified previously) came down to the cell area, spoke with Mr. McPhail, and authorized the removal of the cuffs. (transcript, pg. 11)
- He was standing in the doorway of the locker room where the strip search was conducted. (transcript, pg. 5)
- The defendant was "arrogant and cocky" (transcript, pg. 16)
- When describing a strip search, he said "If they need to, the underwear can come off." (transcript, pg. 26)
- That he had no memory of the defendant being wanded. (transcript pgs. 29 and 35)
- In response to the question "So he was naked except for the underwear at his ankles?", he replied "yes". (transcript, pg. 39)

[11] When confronted with the discrepancies in his evidence on the two days of testimony, Officer McCurley said he was wrong in his evidence on September 22, 2010 and correct on March 22, 2011.

[12] Officer Faulkener, the Intoxilyzer technician, testified on March 22, 2011, along with Officer Allen. Officer Faulkener described Mr. McPhail as "not cooperative with the cells officer", and "belligerent" because he refused to answer questions while in the cell area and he swore in the breath room. When questioned as to whether a strip search of an individual charged with impaired driving was usual, he stated "I've never conducted a strip search for an impaired driving."

[13] Officer Allen was called to describe the strip search. He had no notes whatsoever about the search; he indicated that the Prisoner's Log was the only record of the search. When asked whether he required approval from the Staff Sergeant to conduct a strip search, he said yes, and testified that Staff Sergeant Leslie (yet another individual named as the Staff Sergeant that day) would have approved it (transcript, pg. 52). He later stated in evidence that he in fact did **not** seek approval of the Staff Sergeant before conducting the strip search.

[14] In his evidence regarding the strip search procedure, he said:

- The door to the locker room where the search was conducted was closed except for a very small crack. (transcript, pg. 51)
- Officer McCurley was in the room with him while the search was done. (transcript, pgs. 52 and 61)
- That the defendant's upper body clothing was removed, examined, and put back on the defendant before his lower body clothing was removed and examined, such that the defendant "wouldn't be fully naked all at once". (transcript, pg. 51)
- That the defendant asked why he had to strip, and was told by Officer Allen that it could be done "the easy way or the hard way", after which the defendant complied. (transcript, pg. 56)
- That he first stood the defendant against the wall with his hands above his head, patted him down, and had him kick off his shoes.
- That he found a cell phone in the defendant's shoe
- That he then conducted a wand search
- After finding nothing with the wand search, he then conducted a strip search.
- That **once the defendant was fully naked**, he had him turn around so that he – and presumably Officer McCurley – could see both sides of his body.

[15] Officer Allen testified that it was not usual to conduct a strip search of a person charged with impaired driving, and that he did so on his own initiative because he found a cell phone "hidden" in the defendant's shoe. His rationale was that if the defendant hid a cell phone in his shoe, he may have hidden something else on his person. Nothing was found as a result of the strip search.

The Law

[16] A strip search is a highly intrusive, degrading procedure. The Supreme Court of Canada, in the case of *R. v. Golden* [2001] 3 S.C.R. 679, held that while a strip search is a lawful search incident to arrest, it must only be carried out where the police have reasonable and probable grounds to believe it necessary in order to discover weapons or seize evidence relating to the offence for which the individual was arrested. In addition, the strip search must be conducted reasonably, in such a way that it does not infringe upon the s. 8 Charter rights of the person detained.

[17] The police must have reasonable and probable grounds to justify conducting a strip search. In most cases, a "frisk" search, or "pat down" search will suffice:

In addition to searching for evidence related to the reason for the arrest, the

common law also authorizes police to search for weapons as an incident to arrest for the purpose of ensuring the safety of the police, the detainee and other persons. However, a “frisk” or “pat-down” search at the point of arrest will generally suffice for the purposes of determining if the accused has secreted weapons on his person. Only if the frisk search reveals a possible weapon secreted on the detainee’s person or if the particular circumstances of the case raise the risk that a weapon is concealed on the detainee’s person will a strip search be justified. Whether searching for evidence or for weapons, the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search. *R. v. Golden, supra*, paragraph 94

[18] Reasonable and probable grounds for conducting an arrest do not automatically lead to reasonable and probable grounds to conduct a strip search; the two are distinct. There must be a compelling reason to conduct a strip search. *R. v. Golden, supra*.

[19] If a strip search is carried out in order to humiliate or put a defendant in his place, or in response to belligerent conduct on the part of an accused, it will always be unreasonable. *R. v. Golden, supra*.

[20] In *R. v. Golden, supra*, the Supreme Court set out a list of factors that ought to be considered when assessing whether a strip search was reasonable:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. *Will the strip search be authorized by a police officer acting in a supervisory capacity?*
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. *Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?*
9. Will the strip search involve only a visual inspection of the arrestee’s genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. *Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?*

(emphasis added)

[21] Each case must be addressed on its own merits and set of unique facts.

Application of the Law to the Case at Bar

[22] With respect to the factors set out by the Supreme Court of Canada, I note the following. Officer Allen did not seek the authorization of the Staff Sergeant or other supervisory officer before conducting the strip search. If the evidence of Officer McCurley is to be believed, Mr. McPhail was indeed completely naked during the strip search. There were no notes by any officer, other than a box ticked off in the Prisoner's Log, about the strip search.

[23] The fact that there was no recording of the process of the strip search is very troubling. In addition, Officer McCurley initially denied in his evidence that a strip search had occurred. It was only after persistent questioning by defence counsel that he finally admitted that a strip search was done. He continued to minimize the intrusiveness of the search. His evidence on the second day of his testimony directly contradicted that of his first day on the stand. Overall, his evidence was not only inconsistent internally, it was also inconsistent with the evidence of Officer Allen.

[24] Officer Allen's evidence was also troubling. He gave as his reason for conducting the strip search the fact that he found a cell phone in the defendant's shoe. There was no evidence led as to where exactly the cell phone was placed in the shoe, what type of shoe the defendant was wearing, or what type of cell phone it was. He gave what can only be described as fanciful evidence of a cell phone he read about in a police bulletin that was capable of firing bullets:

And also with cell phones, I've actually seen officer bulletins that if they've actually modified them and then have bullets in them, they can actually fire. It's just one round but it's, it's kind of an old school looking cell phone. It's not like a modern I-phone or a blackberry or anything like that, but they're actually modified that they can shoot bullets.

[25] His evidence was that once he found the cell phone, he proceeded to a strip search, because having found one item secreted on Mr. McPhail's person, he believe it was "possible" that "something else" could be hidden as well. It is important to note that after finding the cell phone in the defendant's shoe, Officer Allen conducted a wand search, and found nothing. Despite that, he proceeded to strip search the defendant. In my view, there was no justifiable reason to do so.

[26] Finally, it was disturbing to note that neither Officer Langlois who arrested Mr. McPhail, nor Officer McCurley during his first day of testimony, described the defendant as presenting any threat, or indeed, any difficulty at all. As noted above, Officer McCurley described Mr. McPhail as "compliant", saying there were "no issues". On the second day of the hearing, Officer McCurley, Officer Allen, and Officer Faulkener all described Mr. McPhail as "cocky", "arrogant", "belligerent" and as having an "attitude". There were

complaints in the evidence that the defendant would not sit up on the bench; would not answer questions; and cursed in the breath room. Officer Allen told the defendant at the commencement of the strip search that he could “do this the easy way or the hard way”. A very different picture was painted of the defendant on the second day of the hearing. This evidence leaves the strong impression that the strip search was conducted in order to humiliate or intimidate Mr. McPhail.

[27] In my view, the evidence adduced by the Crown did not support a finding that the strip search was reasonable. I find that it was not reasonable, and violated Mr. McPhail’s constitutional rights.

Remedy

[28] Once a breach of the defendant’s Charter rights is established, the Court must consider what remedy, if any, is appropriate in the circumstances. In the case of *R. v. Flintoff* [1998] O.J. No. 2337, the Ontario Court of Appeal considered a case with facts very similar to the case at bar. In that case, the Court held that the “usual remedy for an unreasonable search in violation of s. 8 of the Charter is to exclude under s. 24 (2) the evidence that is the product of the unconstitutional search”. I therefore begin the analysis on that basis. While the defence argued that a stay of proceedings would be the appropriate remedy, in my view the law is clear that a stay ought only to be granted in the clearest of cases, as a result of the most serious of breaches of a person’s Charter rights. It must be the only appropriate remedy in the circumstances, given the otherwise compelling interest that criminal charges be tried on their merits. *R. v O’Connor* [1995] 4 S.C.R. 411 (SCC). While the breach in this case was egregious, in my view, it does not reach the threshold of conduct that requires a stay of the proceedings.

[29] Prior to embarking upon an analysis as to what remedy, if any, is appropriate in this case, the question must be addressed as to whether the evidence of Mr. McPhail’s BAC readings was sufficiently connected to the conduct which breached the defendant’s Charter rights to be appropriately excluded.

[30] In *R. v Flintoff supra*, the Ontario Court of Appeal excluded the evidence of a breathalyser test where the defendant’s s. 8 Charter rights had been infringed by the conduct of a strip search. The Court held that “There was a temporal connection between the search and the breathalyser test. The breathalyser test was tainted by the unconstitutional and unnecessary strip search which formed an integral part of a single investigation”.

[31] This decision can be distinguished from the case of *R. v Ferguson* [2005] O.J. No. 182 (Ont. SCJ). In that case, the court declined to exclude the evidence led by the Crown with respect to the charge of impaired operation of a motor vehicle. This evidence was obtained before the breach of the defendant’s rights, and it was upon this basis that the Court refused to exclude that evidence. The charge of driving “over 80” had been conditionally stayed. In my view, the impugned conduct of the officers in Mr. McPhail’s case “formed an integral part of a single investigation”, and therefore calls for consideration as to whether the Intoxilyzer evidence gathered after the Charter breach ought to be excluded.

[32] In considering the question of whether the evidence of Mr. McPhail’s BAC results should be excluded from evidence, the analysis set out by the Supreme Court of Canada in *R. v. Grant* [2009] 245 C.C.C. (3d) 1, must be applied. In deciding whether evidence obtained as a result of a breach of s. 8 of the Charter should be excluded, the Court must “assess and balance” the effect of the admission of the evidence on the public’s confidence in the proper administration of justice. In conducting that analysis, the Court must consider the following three factors:

- The seriousness of the conduct which constitutes the Charter breach;
- The impact of the breach on the defendant’s rights under the Charter;
- Society’s interest in having the case adjudicated on its merits.

Seriousness of the State Conduct

[33] There was no evidence in this case that the strip search was conducted as a matter of policy in so far as more than one officer testified that strips searches are rarely, if ever, done where the offence alleged is a drinking and driving offence. The evidence of Officer Allen that he conducted the strip search of Mr. McPhail, despite the fact that the use of a wand to search him yielded no results, because he found a cell phone in the defendant’s shoe, is very troubling. The leap made by the officer that “hiding” a cell phone in a shoe meant that there were reasonable and probable grounds to believe that the defendant was hiding **either weapons or evidence of the crime being investigated** (*R. v. Golden, supra*) is simply too great to be given credence, particularly since he had already been given a pat down search **and** a wand search.

[34] Further, the evidence as it unfolded from the first day of trial to the second, demonstrated, in my view, that the police officers involved were not happy with the defendant’s attitude, leaving the strong flavour that he was strip searched to “take him down a peg”. This abuse of police power is as egregious as a blanket policy to strip search all accused persons. *R. v. Golden, supra*

[35] What is also gravely concerning about the conduct of the police in this case is the attempt made to conceal the fact that a strip search was done. Officer McCurley admitted that his evidence on the first day of trial was irreconcilable with his evidence on the second day. His testimony that a strip search was not conducted was wrong. There were no notes made regarding the strip search; only the Prisoner’s Log contained any reference to it, despite the fact that all three officers knew it had taken place. What can only be viewed as the attempted cover up of the strip search makes this conduct especially egregious.

[36] In my view, the conduct of the police both in conducting the strip search and in attempting to hide it at trial mitigates in favour of excluding the evidence obtained after the breach.

Impact on the Defendant's Charter-protected Rights

[37] The impact of the breach on the defendant's Charter rights is significant. As the Court stated in *R. v Flintoff* [1998] O.J. No. 2337:

...strip-searching is one of the most intrusive manners of searching and also one of the most extreme exercises of police power. Though the common law allows the police to search a person as an incident to arrest, the degree of intrusion must be reasonable and in pursuit of a valid objective such as safety.

[38] While it is difficult to determine which, if any of the officers, was telling the truth about the strip search, there is evidence that Mr. McPhail was required to remove all of his clothing, including his underwear, and to turn around so that he could be viewed by the officers while he was completely naked. This was a flagrant and arrogant breach of the defendant's Charter right to be safe from unreasonable search and seizure.

[39] As the Supreme Court of Canada stated in *R. v. Golden*, *supra*:

.....in our view it is unquestionable that [strip searches] represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them.....A strip search will always be unreasonable if it is carried out abusively or for the purpose of humiliating or punishing the arrestee.

[40] I have found in this case that Mr. McPhail was strip searched in part to put him in his place, as the officers did not like his attitude. It was only after the strip search that he was given the opportunity to speak with duty counsel, and was thereafter subject to a breath analysis. In my view, the impact of the State conduct on the defendant's Charter protected rights is significant, and mitigates against inclusion of the evidence.

Society's Interest in a Trial on the Merits

[41] There is no question that society has a serious interest in ensuring that prosecutions for drinking and driving offences proceed on their merits, with all admissible evidence before the Court. These offences exact a tremendous toll on human life. It is easy to see how the exclusion of evidence critical to the Crown's case serves to thwart that interest. It is more difficult, perhaps, to see the correlation between the unlawful conduct of the police and confidence in the criminal justice system. The police have wide ranging powers in the investigation of the conduct of ordinary citizens alleged to have committed crimes. In the confines of a police station, where a prisoner is handcuffed and has no ability to effectively object to the conduct of the police, that power can easily be abused. Officers must be vigilant in scrutinizing their own conduct to ensure that the rights of citizens under arrest are not breached. Where they are unable or unwilling to exercise that vigilance, society must condemn their conduct so that the justice system is worthy of its confidence, and its citizens can rely with confidence on the fact that their rights are respected.

[42] The societal interest in the vigorous prosecution of drinking and driving offences is justifiably great, and on this factor, the balance tips in favour of inclusion of the evidence. It

cannot, however, trump the State's unconstitutional abuse of its powers.

[43] In my view, in the circumstances of this case as I have found them, the fact that the community has a significant interest in trying these offences on their merits is outweighed by the factors outlined above.

[44] To permit Mr. McPhail's BAC readings to be accepted into evidence would bring the administration of justice into disrepute. On a weighing of all of the *Grant* factors, therefore, the balance tips in favour of exclusion of the evidence obtained after the s. 8 breach.

[45] In the result, the evidence of Mr. McPhail's BAC readings, and any evidence obtained **after** the strip search, will be excluded.

Released: June 8, 2011

Justice J.A. Maresca