

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
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)
HER MAJESTY THE QUEEN) **M. Wilson**, for the Crown
Respondent)
)
)
- and -)
)
)
[REDACTED]) **Aaron Wine and Andrew Stastny**, for
Applicant) Mr. [REDACTED]
)
) **HEARD:** January 15 , 2018
)

2018 ONSC 710 (CanLII)

KELLY J.

**RULING RE:
SS. 8 AND 24(2) OF THE CHARTER**

[1] The applicant, [REDACTED], has been charged with trafficking in marijuana and possession of marijuana for the purpose of trafficking contrary to s. 5(4) of the *Controlled Drugs and Substances Act*. He has also been charged with possessing a firearm (a shotgun) knowing that he was not the holder of a licence and registration certificate to do so contrary to s. 92(3) of the *Criminal Code*.

[2] The apartment occupied by [REDACTED] was searched by members of the Toronto Police Service (the “TPS”) pursuant to a valid warrant on April 23, 2016. During the search an officer looked through the content of a cell phone seized. He observed a string of text messages that are alleged to have been exchanged between [REDACTED] and “Flavio 714”. He also observed a photograph of a bag of marijuana sitting on a digital scale and other pictures that he believed to be child pornography.

[3] The evidence from the search of the cell phone provided part of the basis upon which two subsequent search warrants were granted. Those warrants permitted TPS to search the contents of ██████████ cell phone more thoroughly. Further text messages were found.

[4] ██████████ submits that the examination of the cell phone violated his s. 8 rights and as such, the evidence of the text messages and photographs seized from the cell phone should be excluded pursuant to s. 24(2) of the *Charter*. Crown Counsel agrees that there has been a violation of ██████████ s. 8 rights but that the evidence should not be excluded.

[5] I agree that there has been a violation of s. 8 of the *Charter*. However I conclude that it is serious and warrants exclusion of the evidence. What follows are my reasons.

Factual Background

[6] At the time that these offences are alleged to have occurred, ██████████ was licensed to grow and possess marijuana. His license permitted him to grow up to 15 plants in his apartment and possess 675 grams of marijuana. What he was not allowed to do was traffic in marijuana. Further, he did not have the required paperwork to possess the shotgun in question.

[7] On April 23, 2016, members of the TPS obtained a warrant to search ██████████ apartment because police believed that ██████████ possessed the marijuana for the purpose of trafficking. The warrant authorized TPS to search for a number of items including the following:

- a. Marijuana including plants and seeds;
- b. Canadian currency;
- c. Drug paraphernalia;
- d. Identification;
- e. Debt list;
- f. Scales; and
- g. Equipment being used to grow marijuana plants, including but not limited to lights, enclosures, food, etc.

[8] The warrant to search did not specifically articulate that the TPS was to search for a cell phone. (Despite that, the seizure of the cell phone was authorized by law and is not contested.¹)

[9] Prior to executing the search warrant, police detained Mr. Esteban Vargas who had exited the apartment in question while it was under surveillance. He was found to be in

¹ s. 489 of the *Criminal Code*

possession of four Ran-Nabilone pills (THC pills). He told members of the TPS that he had received them from ██████████. Thereafter he provided a statement to police.

[10] Upon entry into the apartment unit (a small bachelor apartment), ██████████ was located within seconds coming from the back of the unit. He was observed to have a cell phone in his hand when TPS observed him. The cell phone was put down just before he was arrested.

[11] While being arrested for possessing marijuana for the purpose of trafficking, the cell phone was “keeps on ringing” according to P.C. Martsenyuk.² It was not locked.

[12] P.C. Vardym Martsenyuk seized the cell phone and conducted a search of “multiple”³ text messages and photographs. To access both, he was required to access an application to observe text messages and the photographs in question.

[13] When looking at the text messages, P.C. Martsenyuk observed the following text from April 21, 2016 (two days prior to the execution of the search warrant):

Time	Sender	Content
10:18	Mr. ██████████	What do you need
	Flavio 714	Weed to smoke
10:21	Flavio 714	hahaha
10:22	Mr. ██████████	How much? 10? 20?
10:22	Flavio 714	But I don't have any money. Could you save me.
10:22	Mr. ██████████	I can spot ya one ... How soon can you pay me?
	Flavio 714	No worries!!! I found my weed.

[14] After observing this text message exchange on the cell phone, P.C. Martsenyuk accessed the photographs stored on it. He observed the following:

- a. A photograph of a silver digital scale with a plastic container on it. The plastic container had marijuana in it and the digital scale display showed “12.36 g.”
- b. A photograph of ██████████ with two older females.
- c. Multiple photographs of marijuana plants.

² See: Notes of P.C. Vardym Martsenyuk

³ *Ibid.*

- d. Photographs of young nude females who P.C. Martsenyuk believed to be 12-13 years of age.

[15] After having observed the photographs of the children P.C. Martsenyuk ceased examining the cell phone. He arrested ██████████ for possession of child pornography and all electronics were seized.

[16] Also located during the search were the following:

- a. Three prescription bottles of Ran-Naboline pills;
- b. A significant amount of dried marijuana;
- c. A number of marijuana plants;
- d. A digital scale;
- e. Dime bag packaging;
- f. A Lakefield Mossberg 12 gauge shotgun; and
- g. 114 rounds of Winchester 12 gauge shotgun ammunition.

[17] The cell phone was later submitted for examination pursuant to warrants issued June 13, 2016 and February 13, 2017. Found on the cell phone were numerous text conversations consistent with drug trafficking. Also found were multiple photographs of marijuana in various forms.

Analysis

[18] As stated previously, Crown Counsel concedes that there has been a violation of Mr. ██████████ s.8 rights. He disputes that the evidence that arises from this violation should be excluded pursuant to s. 24(2). I disagree.

[19] In coming to my conclusion, I have considered the principles articulated by the Supreme Court of Canada in *R. v. Grant*.⁴

- a. Seriousness of the *Charter*-Infringing State Conduct

[20] *R. v. Fearon*⁵ gives this court guidance in identifying the circumstances in which the search of a cell phone will be justified incident to arrest and is relevant to a consideration of the seriousness of the *Charter*-infringing state conduct. Cromwell J. identified those circumstances regarding the search of a cell phone at para. 83 as follows:

⁴ 2009 SCC 32 (CanLII) at para. 71

⁵ 2014 SCC 77

To summarize, police officers will not be justified in searching a cell phone or similar device incidental to every arrest. Rather, such a search will comply with s. 8 where:

- (1) The arrest was lawful;
- (2) The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:
 - (a) Protecting the police, the accused, or the public;
 - (b) Preserving evidence; or
 - (c) Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest;
- (3) The nature and the extent of the search are tailored to the purpose of the search; and
- (4) The police take detailed notes of what they have examined on the device and how it was searched.

[21] It is agreed that the arrest of ██████████ was lawful. I also agree that the search was tailored to the purpose of the search: P.C. Martsenyuk was searching the phone as it was ringing after Mr. Varga had left the apartment. Marijuana and other drug paraphernalia had been observed in the apartment.

[22] P.C. Martensyuk restricted his search to both text messages and photographs. In his experience, drug traffickers arrange their transactions via text. Often, they take photos of their product and monies received illustrating their involvement in an illegal business. He believed that ██████████ privacy interest in the cell phone was reduced because it was not password protected when he seized it.

[23] P.C. Martsenyuk discontinued his search of the text messages after reading the first string of messages confirming his belief that drug traffickers use text messages as part of their business. He further curtailed his search of photographs when he observed, what he believed to be, child pornography. He sought guidance and warrants were sought and obtained. I accept that P.C. Martsenyuk conducted his search in good faith but did so in violation of ██████████ Charter rights.

[24] I agree, that a cell phone can be a tool of the trade of drug trafficking, but that does not permit an officer to search a cell phone incident to arrest for drug offences in all circumstances. I accept that there are situations in which cell phone searches may be conducted incident to a lawful arrest for drug trafficking because they serve important law enforcement objectives including public safety. A prompt perusal of a cell phone may

identify accomplices or locate and preserve evidence that might be disposed of if not located quickly. That is not the case here.

[25] In this case, the TPS had a valid warrant to search the home of ██████████ based on the information of two confidential informants and a review of surveillance showing traffic outside of ██████████ home consistent with drug trafficking. While conducting surveillance on Mr. ██████████ home, police detained Mr. Varga who had admitted that he had just purchased a marijuana product from Mr. ██████████

[26] When TPS entered the apartment, Mr. ██████████ was almost immediately arrested. He was handcuffed and thereafter, the cell phone was not in his possession. It was in the possession of TPS. Evidence of drug trafficking was readily observable by TPS.

[27] The search of the cell phone after Mr. ██████████ arrest was not truly incidental to arrest. The cell phone was in the possession of TPS and there was no urgency to reviewing its contents. To examine both the text messages and the photographs, P.C. Martsenyuk had to access two separate applications by opening them, searching and then closing them. The evidence was not accessible simply by picking up and looking at the cell phone. The string of text messages is from two days prior – how many texts did the officer look at before he found these ones that he found relevant? How many photos did he look at before finding something that he thought was relevant? His notes do not answer these questions.

[28] There was no risk that Mr. ██████████ would be able to use the phone to advise accomplices or customers of his arrest and suggest that they stop phoning or dispose of any product. Public safety was not at risk: the officers were in the home and the phone was secured.

[29] In essence, “the cell phone was not sufficiently linked to an important law enforcement objective” as it was secure and there was no risk that ██████████ would continue drug trafficking.⁶ In these circumstances, the comments of Cromwell J. stated in *Fearon* are applicable:

This will mean, in practice, that cell phone searches are not routinely permitted simply for the purpose of discovering additional evidence. The search power must be used with great circumspection. It also means, in practice, that the police will have to be prepared to explain why it was not practical (and I emphasize that this does not mean impossible), in all of the circumstances of the investigation, to postpone the search until they could obtain a warrant.⁷

[30] It is my view that the search of the cell phone was not incident to ██████████ arrest in that public safety was not in issue and there was no risk that evidence would be

⁶ See: *Fearon, supra*, at para. 81

⁷ *Ibid.*

disposed of. I do not accept P.C. ██████████ explanation that he looked at the content of the cell phone because he was concerned that the content could be remotely deleted.

[31] Further, P. C. Martsenyuk's belief that ██████████ privacy interest in his cell phone was reduced because it was not password protected is misguided. As Cromwell J. stated in *Fearon* at para. 53: "An individual's decision not to password protect his or her cell phone does not indicate any sort of abandonment of the significant privacy interests one generally will have in the contents of the phone ... Cell phones – locked or unlocked – engage significant privacy interests".

[32] P.C. Martsenyuk could have seized the cell phone awaiting a search warrant before it was searched. The investigation would not have been "stymied" or "significantly hampered absent the ability to promptly search the cell phone incident to arrest".⁸

[33] Lastly, the notes of P.C. Martensyuk do not comply with the decision in *Fearon*. There are no times referenced for when the search occurred. Further, the notes are not detailed as to how P.C. Martensyuk accessed the text messages and photographs (*i.e.* what specific applications were searched?) Further, there is no indication of the length of time for both searches.

[34] The search of the cell phone could have been postponed until a warrant was obtained. To condone a search such as this one would provide little limitation on the search of a cell phone incident to arrest in contravention to the principles in *Fearon* set out 16 months prior.⁹ I do not find that P.C. Martsenyuk has acted in bad faith. However, his search of the cell phone in these circumstances ignored or he was wilfully blind to the *Charter* principles set out in *Fearon*. As such, I find that the *Charter* infringement is serious and this factor warrants exclusion.

b. The Impact of the Breach on the *Charter*-Protected Interests

[35] I agree with Cromwell in *Fearon*: "Any search of any cell phone has the potential to be a very significant invasion of a person's informational privacy interests".¹⁰ I find that the impact of viewing the contents of ██████████ cell phone in these circumstances warrants exclusion.

c. Society's Interest in Adjudication on the Merits

[36] The evidence obtained on the cell phone is reliable and cogent evidence. The exclusion of the evidence does not "gut" the prosecution. That said, the absence of text messages as evidence of trafficking somewhat undermines the truth seeking function of the justice system. As such, this factor favours inclusion.

⁸ See: *Fearon, supra*, at para. 83

⁹ *Fearon* was decided on December 11, 2014. This incident occurred on April 23, 2016, approximately 16 months after.

¹⁰ *Fearon, supra*, at para. 96

[37] Based on all of the above and after having weighed all factors, I conclude that the evidence should be excluded.

Kelly J.

Released: January 16, 2018

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