ONTARIO COURT OF JUSTICE

CITATION: *R. v.* [redacted], 2019 ONCJ 782
DATE: October 29, 2019
Old City Hall - Toronto

BETWEEN:

HER MAJESTY THE QUEEN	**For the Crown** **A. Webb and C. Leafloor**
— AND —	
[redacted]	**For the Defendant** **A. Stastny**
	Heard: September 26, 27, 2019

CHARTER RULING

RUSSELL SILVERSTEIN, J.:

A. INTRODUCTION

[1] [redacted] is charged with possession for the purpose of trafficking in carfentanil, as well as possession of proceeds of crime, failing to comply with a recognizance and assault resisting arrest.

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[2] On October 6, 2017 the accused was arrested by Special Constable Derek Anderson in the vicinity of 275 Shuter Street, a Toronto Community Housing (TCH) apartment building in the City of Toronto. Officer Anderson and his partner, Special Constable Christopher Baker, searched the accused incident to this arrest and seized approximately 30 packets of carfentanil from the accused's pockets as well as some money.

[3] The accused has applied for an order pursuant to s. 24(2) of the *Charter* excluding the items seized. Mr. Stastny, counsel for the accused, argues that the arrest of the accused was unlawful, and thus arbitrary, and that the search incident to the arrest was accordingly a breach of his s. 8 right to be secure against unreasonable search and seizure.

[4] He further argues that the breaches of the accused's s. 8 and 9 rights were so serious that the admission of the evidence would bring the administration of justice into disrepute. Mr. Stastny concedes that if the arrest did not violate the accused's s. 8 and 9 *Charter* rights, the evidence seized is admissible.

[5] Ms. Webb for the Crown concedes that, given the warrantless nature of the search, the Crown has the onus of proving the lawfulness of the arrest on a balance of probability. *R. v. Gerson-Foster*, 2019 ONCA 225 at para. 75. She argues that she has met the onus of proving the lawfulness of the arrest and search but, should I rule otherwise, the evidence should nonetheless be admitted.

B. EVIDENCE

(a) Introduction

[6] The Crown called as witnesses the two special constables and filed an agreed statement of fact. The accused called no evidence on the *Charter* application.

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(b) The testimony of Officers Anderson and Baker

[7] Special Constable Anderson, an employee of TCH, is a peace officer as concerns the enforcement of the *Criminal Code* and the *Trespass to Property Act* (*TPA*) on TCH property. He first encountered the accused on June 8, 2017, four months prior to the events giving rise to the charges before the Court.

[8] The accused was walking along a bike path adjacent to the TCH apartment building at 275 Shuter Street.

[9] In the opinion of the officer, the accused was "loitering", which the officer understood to mean being on the property "without a lawful reason". Anderson testified that he approached the accused and asked him who he was and informed him that he was investigating him under the *TPA*. The accused gave Anderson his name and address, which was not 275 Shuter Street. He did not provide any identification documents, although there is no evidence that Anderson asked him for any.

[10] Anderson saw the accused conceal something in his pockets and began to suspect that the accused was in possession of illegal drugs.

[11] Anderson then conducted a Canadian Police Information Centre (CPIC) inquiry into the accused by calling his dispatcher. He testified that the purpose of the CPIC inquiry was to see if the accused "belonged there". The dispatcher informed Anderson that the accused was "wanted on a warrant from Quebec" and that the warrant was in French. The record is silent as to how long it took for him to receive a response, and just what was going on between him and the accused while he waited.

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[12] Defence counsel suggested to Anderson in cross-examination that the reason he ran a CPIC inquiry was that he was hoping that CPIC would provide some reason to arrest the accused, thus allowing for a search for the drugs Anderson suspected the accused had on him. Anderson denied this and maintained that the reason for the CPIC check was to confirm the identity of the accused. Anderson had admitted earlier in his cross-examination that there was no reason to disbelieve the information the accused had given him about who he was.

[13] In examination-in-chief Anderson said that after learning of the existence of the Quebec warrant, he called an officer with the Toronto Police Service (TPS) who told him to arrest the accused. In cross-examination he said that he immediately decided to arrest the accused after learning of the Quebec warrant from his dispatcher and before calling anyone at TPS. He took no steps to find out whether the warrant indeed provided him with the power to arrest the accused.

[14] After arresting the accused he searched him and found drugs and then, on instructions from an officer at TPS, took the accused to the local TPS division.

[15] According to Anderson, during his June 8 encounter with the accused he orally prohibited him from returning to 275 Shuter Street. There was no notation in the officer's notes to this effect, even though Anderson admitted that this was an important event.

[16] When asked several times on cross-examination what he'd have done with the accused on June 8 if there had been no Quebec warrant, he steadfastly refused to answer.

[17] According to Anderson, approximately one month prior to October 6, 2017, he was briefed by P.C. Estavez that the accused had been made subject to a recognizance prohibiting him from being either at, or near 275 Shuter Street, he wasn't sure which. Anderson made no note of this meeting with Estavez, nor did he make any note or prepare any memorandum regarding this information. Nor did he ever see a copy of the recognizance in question. There is a reference in Anderson's notes regarding the recognizance, but that note refers to Anderson learning of the recognizance **after** the October arrest. Even though the charges against the accused had been withdrawn before the purported meeting with Estavez, according to Anderson, Estavez did not inform him of that during their briefing.

[18] On October 6, 2017, Anderson, while in the company of Special Constable Christopher Baker, saw the accused walking north on the west sidewalk of Seaton Street, approximately 20-30 meters across the street from 275 Shuter Street. In his testimony, Anderson described the accused as "loitering on the property" even though in his testimony, Anderson admitted that the accused was not on the property of 275 Shuter Street at that time. His notes also say that the accused was loitering on the Shuter Street property.

[19] The accused then turned left and began walking west, away from 275 Shuter, in the direction of a parking lot adjacent to 155 Sherbourne Street, which parking lot is shared by the residents of both buildings.

[20] Anderson, believing the accused to now be on the property of 275 Shuter Street, approached the accused, called out his name and held out his hand as if to greet the accused with a handshake. When the accused took Anderson's hand Anderson arrested him. According to Anderson, he

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believed that he had the right to arrest the accused under the *Criminal Code* by virtue of the recognizance, and under the *TPA* by virtue of his oral prohibition given to the accused in June. He testified that he didn't tell the accused why he was being arrested. Constable Baker testified that Anderson told the accused he was being arrested under the *TPA*. Anderson's notes say that he arrested the accused under the *TPA* for "loitering".

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[21] According to Anderson, the accused resisted the arrest and kicked Anderson before Anderson could get handcuffs on him. Baker testified that putting the accused in handcuffs posed no difficulty. Officer Baker's account of the arrest made no mention of the accused kicking Anderson. According to Anderson and Baker, the accused resisted the officers' attempt to seize a plastic bag the accused had in his hands.

(c) The agreed statement of fact

[22] On June 6, 2017 CPIC reported that the accused was wanted on a Quebec arrest warrant for theft over. It was clearly set out on CPIC that the Quebec authorities would not retrieve the accused if he were arrested outside Quebec.

[23] The accused was released on a recognizance the day after his arrest on June 8, 2017. The charges arising from that arrest were withdrawn at the request of the Crown on July 26, 2017, yet the recognizance remained in effect as it also applied to other outstanding charges.

C. ANALYSIS

(a) Was the October 6 arrest of the accused lawful?

[24] Officer Anderson's arrest of the accused on October 6, 2017 is only lawful if he had reasonable and probable grounds to believe that the accused was

either (a) in breach of a criminal recognizance, or (b) in contravention of s. 2 of the *TPA* by being on the Shuter Street property after being given oral notice on June 8, 2017 not to return.

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[25] I am not convinced on a balance of probabilities that Special Constable Anderson was authorized to arrest the accused on October 6.

[26] The principal evidence concerning Officer Anderson's state of mind comes from the testimony of the officer himself. I have great difficulty with his credibility and reliability as a witness.

[27] As concerns the recognizance, I do not accept Anderson's testimony that he was briefed by Officer Estavez about the status of the accused. That the reference to the recognizance only appears for the first time in his notes **after** the October arrest (and even then, without reference to the earlier briefing) belies his testimony. I find it extremely unlikely that if Estavez had told Anderson about the recognizance that he wouldn't have also told him that the June 8 charges had been withdrawn.

[28] The same can be said about Anderson's testimony about giving the accused an oral prohibition on June 8. There is no note or memorandum of this prohibition. Given that keeping track of who is prohibited from being on TCH premises is an important part of Anderson's job, and that of his colleagues, I would expect a written record of such prohibitions to be maintained somewhere, if only in the officer's notes. If Anderson had in fact orally prohibited the accused from being on the property his notes would have set this out as the reason for the October arrest, rather than "loitering".

[29] I found Officer Anderson's testimony to be evasive at times. His outright refusal to address counsel's simple and straightforward hypothetical was

the most glaring manifestation of this evasiveness. The inconsistencies between his direct examination and his cross-examination on the details of the June and October arrests, as set out above, as well as the discrepancies between his testimony and that of Officer Baker, whose evidence I accept, further contribute to my lack of confidence in his testimony.

[30] The Crown, having failed to prove on a balance of probabilities that the arrest of the accused was lawful, has thereby failed to set aside the presumption as to the unreasonableness of the warrantless search incident to arrest. Officer Anderson breached the accused's s.8 and s.9 *Charter* rights.

(b) Should the evidence be excluded?

[31] Section 24(2) of the *Charter* reads as follows:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter , the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[32] Whether the admission of the evidence would bring the administration of justice into disrepute is governed by the test first articulated in the Supreme Court's decision in *R. v. Grant*, 2009 SCC 32 at para. 71:

> [W]hether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter -infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The

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court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

(i) The seriousness of the breach

[33] Mr. Stastny submits that the breach is extremely serious. He argues that Officer Anderson's breach of the accused's *Charter* rights on October 6 was willful and part of a pattern of willful abuse beginning on June 8. He argues that on June 8 Anderson knew he had no right to arrest and search the accused and made a CPIC inquiry in search of an excuse to do so. When he became aware of the Quebec warrant, he seized on the opportunity to arrest the accused without first taking any steps to inquire into whether the Quebec warrant gave him the authority to do so. And when questioned about it at trial, Anderson lied when he maintained that the reason for the CPIC inquiry was merely to confirm the identity of the accused. Mr. Stastny further argues that on October 6 Anderson recognized the accused as the drug dealer he'd arrested in June and, knowing full well that he had no authority to arrest him, did so anyway. As a result, submits Mr. Stastny, this *Grant* factor weighs strongly in favour of exclusion of the evidence.

[34] Ms. Webb argues that the breach was made in good faith. She argues that Anderson did in fact honestly believe that he had the authority to arrest the accused on October 6. She submits that this *Grant* factor does not weigh in favour of exclusion of the evidence.

[35] I do not accept Anderson's evidence concerning his dealings with the accused on June 8. There are simply too many inconsistencies in his evidence concerning his motives for performing the CPIC inquiry and his

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response to the information he received. I agree with defence counsel that on June 8 Officer Anderson was intent on finding some reason to arrest and search the accused. Knowing that mere suspicion would not suffice, he asked for a CPIC inquiry then, without performing any of the follow-up inquiries one would expect a trained peace officer to conduct regarding a Quebec warrant, he immediately arrested and searched the accused. I also find it likely, although I am not called upon to definitively settle this question, that Officer Anderson did not in fact have the authority to arrest the accused on this Quebec warrant. *R. v. Charles*, 2012 SKCA 34.

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[36] The officer's hostile attitude towards the accused on June 8 is further borne out by the officer's insistence in his testimony that he checked CPIC to confirm the identity of the accused even though there was no reason to be suspicious of his identity.

[37] It may well be that Officer Anderson had the authority on June 8 to perform an investigative detention of the accused based on his suspicion. His investigation could well have included a CPIC inquiry. The accused did not challenge the constitutionality of the June encounter and I am not making a finding that the *Charter* rights of the accused were breached on that day. Rather, I see the testimony of the officer regarding his actions that day as demonstrating a lack of concern for the rights of the accused.

[38] I find that on October 6 Officer Anderson's attitude towards the accused was the same as it was in June. This time, even though, as Anderson knew, the accused was walking along Seaton Street, not on the Shuter Street property, Anderson nonetheless noted him as "loitering" on the Shuter Street property.

[39] I find that Anderson knew he had never orally prohibited the accused from being on the Shuter Street property. I also find that he knew nothing about the recognizance that bound the accused. He knew that the accused had walked through the grounds of the property several months ago with drugs in his pocket and he thus felt compelled to search the accused, even though the accused was, to all appearances, minding his own business and was walking away from the 275 Shuter Street apartment building.

[40] His animus towards the accused is further evidenced by his allegation that the accused kicked him, which is not supported by the evidence of his escort, Officer Baker.

[41] Officer Anderson, knowing he had no grounds to arrest the accused, did so anyway. While I have no evidence that Officer Anderson ever turned his mind to s.8 and s.9 of the *Charter*, he certainly knew that reasonable and probable grounds were required for him to be authorized to arrest and search the accused. This intentional, brazen and flagrant breach of Mr. Gray's *Charter* rights falls at the very serious end of the spectrum. *R. v. Harrison*, 2009 SCC 34; *R. v. Brown*, 2012 ONCA 225.

[42] The first *Grant* factor weighs heavily in favour of exclusion of the evidence.

[43] Mr. Stastny argues that I should make a finding that Officer Anderson purposely tried to mislead the Court, further exacerbating the seriousness of the breach. *R. v. Harrison*, *supra* at para. 26.

[44] Given my finding that Officer Anderson did not orally prohibit the accused from attending at the Shuter Street address and my finding that he was unaware of the existence of a recognizance on October 8, I am reluctantly compelled to find that when the officer testified that he had

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orally prohibited the accused and that he did know of the recognizance, he probably knew this testimony was false. I say "probably" because I can see how perhaps Officer Anderson, in his zeal to protect the TCH community, may have unconsciously developed a state of mind prior to the trial where he came to honestly believe in the truth of his testimony. But on balance I do not find that to be the most likely explanation for his testimony.

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(ii) <u>The impact of the breach on the Charter-protected interests of the accused</u>

[45] Both parties agree that the impact of the breach on the *Charter*-protected interests of the accused was significant and that this *Grant* factor favours exclusion.

(iii) <u>Society's interest in the adjudication of the case on its merits</u>

[46] The Supreme Court in *Harrison*, *supra*, at paras. 33 and 34, deals with this factor as follows:

> At this stage, the court considers factors such as the reliability of the evidence and its importance to the Crown's case.
>
> The evidence of the drugs obtained as a consequence of the *Charter* breaches was highly reliable. It was critical evidence, virtually conclusive of guilt on the offence charged. The evidence cannot be said to operate unfairly having regard to the truth-seeking function of the trial. While the charged offence is serious, this factor must not take on disproportionate significance. As noted in *Grant*, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high. With that caveat in mind, the third line of inquiry under the s. 24(2) analysis favours the admission of the evidence as to do so would promote the public's interest in having the case adjudicated on its merits.

[47] I find, and both parties agree, that the third *Grant* factor favours admission of the evidence.

(iv) Balancing the three *Grant* factors

[48] The Supreme Court in *Harrison*, *supra*, at para. 36 explains the proper approach to balancing the three *Grant* factors:

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[49] Justice Doherty, in *R. v. McGuffie*, 2016 ONCA 365 at para. 63, added this to the analysis: "If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility".

[50] The breach of the accused's *Charter* rights was extremely serious, even without the finding that Officer Anderson probably tried to mislead the Court. The impact on the liberty and privacy interests of the accused – being arrested, handcuffed, searched and taken to the police station, was significant.

[51] Notwithstanding the reliability of the evidence, its importance to the Crown's case and the public interest in an adjudication of this case on its merits, the admission of the evidence would nonetheless bring the administration of justice into disrepute. As the Supreme Court explained in *Harrison, supra,* at para. 39:

> To appear to condone wilful and flagrant *Charter* breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this

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case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.

D. CONCLUSION

[52] The accused's *Charter* application is granted, and the evidence is excluded.

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Released on October 29, 2019

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Justice Russell Silverstein