

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Richards, 2015 ONCA 348

DATE: 20150515

DOCKET: C58166

Gillese, Tulloch and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Marlon Antonio Richards

Appellant

Danielle Robitaille and Kathleen Heap, for the appellant

John North, for the respondent

Heard: May 4, 2015

On appeal from the convictions entered on August 29, 2013 by Justice Richard C. Gates of the Superior Court of Justice, sitting without a jury.

Gillese J.A.:

[1] Marlon Richards (the “appellant”) was found to be in possession of 28.5 grams of crack cocaine. He was convicted of possession of cocaine for the purpose of trafficking. He was also convicted of two breaches of recognizance for having cell phones and drugs in his possession. He was sentenced to 18 months in prison for the cocaine offence and 30 days concurrent on each of the two counts of breach of recognizance.

[2] He appeals against conviction.

[3] For the reasons that follow, I would dismiss the appeal.

BACKGROUND

[4] On February 16, 2010, a known, reliable confidential informant (the "CI") gave OPP Constable Henderson information about a man whom the CI said was selling cocaine in Leamington. The CI told Constable Henderson the trafficker's nickname and that the trafficker lived in Leamington. He described the trafficker as a short, Jamaican male and gave his approximate age. The CI also told Constable Henderson what kind of car the trafficker drove.

[5] On February 18, 2010, Constable Henderson spoke with a Windsor police officer about the matter. The Windsor officer recognized the nickname that the CI had given. He told Constable Henderson that the person with that nickname was the appellant, Marlon Richards, and that Mr. Richards had been previously arrested by the Windsor police. Using that information, Constable Henderson obtained a description of the appellant, his date of birth and his photograph.

[6] On February 24, 2010, Constable Henderson showed the CI the appellant's photograph. The CI confirmed that the person in the photograph was the person whom he had named as the Leamington cocaine trafficker. The CI also told Constable Henderson that:

- the appellant was going to travel to Toronto to pick up crack cocaine,
- the appellant would return from Toronto on a Greyhound bus to Windsor, arriving at approximately 5:00 a.m. the following morning (i.e. February 25, 2010);
- the appellant would have a quantity of crack cocaine with him;
- a Leamington Yellow Taxi Cab Company taxi would be waiting for the appellant at the Windsor bus station; and
- the appellant would take the taxi from the Windsor bus depot to Leamington.

[7] On receiving this information, Constable Henderson checked the Greyhound bus schedule and confirmed that a Greyhound bus was scheduled to leave Toronto and arrive at the Windsor bus depot at about 5:00 a.m. on February 25, 2010. Constable Henderson made arrangements to conduct surveillance on the bus, with other OPP officers, when it arrived at the Windsor bus depot.

[8] Constable Henderson and the other OPP officers arrived at the Windsor bus depot at 4:45 a.m. on February 25, 2010. Constable Henderson immediately noticed a Leamington Yellow taxi parked in the parking lot next to the bus depot.

The taxi's engine was running and its lights were on. The OPP officers maintained surveillance on the taxi.

[9] Shortly before 5:24 a.m., a Greyhound bus arrived at the Windsor bus depot. Constable Henderson saw a man exit the bus, walk towards the Leamington yellow taxi and enter it on the passenger side. The man was carrying a knapsack and a white plastic bag. While Constable Henderson could not see the man's face because the man had a hoodie pulled up over his head, Constable Henderson believed the man to be the appellant. His belief arose because the man in question was short, there were few people on the bus, and after leaving the bus the man walked directly to the waiting Leamington Yellow taxi and entered it. All of these considerations were consistent with the information which the CI had given him.

[10] Once the appellant entered the taxi, the taxi pulled out of the parking lot and the OPP officers followed it. At that point, Constable Henderson believed that he had reasonable and probable grounds to arrest the appellant for possession of cocaine.

[11] At 5:30 a.m., Constable Henderson called Sergeant Wilkinson of the Leamington Police Service. Sergeant Wilkinson was in charge of a platoon of Leamington police officers who were on regular patrol. Constable Henderson told Sergeant Wilkinson that: OPP officers were following a Leamington Yellow

taxi that had left Windsor and was heading to Leamington; Marlon Richards was in the taxi; and there were reasonable and probable grounds to believe that Marlon Richards was in possession of approximately seven grams of crack cocaine. Constable Henderson asked Sergeant Wilkinson to arrange to have the taxi stopped and the appellant arrested.

[12] At 5:40 a.m. Sergeant Wilkinson spoke with Constables Hutchinson and Scanlan of the Leamington Police, who were in a marked police car. He gave those officers that same information which Constable Henderson had provided to him, including that there were reasonable and probable grounds to arrest the appellant for possession of a controlled substance. Sergeant Wilkinson instructed Constables Hutchinson and Scanlan to position themselves on a specific spot on highway 3 near Leamington so that they could intercept the taxi. He told the officers that they were to conduct a traffic stop of the taxi when it came into their area.

[13] Constable Hutchison was also advised that the appellant was on a recognizance that included a condition preventing him from possessing any cell phones or electronic devices.

[14] Constables Hutchison and Scanlan then pulled over the taxi, as instructed. Constable Hutchison saw three people in the taxi – the driver, a female in the

front passenger seat, and the appellant, who was sleeping in the back seat, using a backpack as a pillow for his head.

[15] Constable Hutchison spoke to the taxi driver, who said that he had picked up his passengers in Windsor. Constable Hutchison recognized the female passenger as Sherry Smith. In his policing capacity, he had previously been involved in a number of incidents with Ms. Smith. Constable Hutchinson described Ms. Smith as being heavily involved in the Leamington drug scene.

[16] Constable Hutchison opened the taxi's rear sliding door and began a conversation with the appellant. The appellant identified himself as Marlon Richards. Constable Hutchison immediately noticed a fairly large bulge in the left pocket of the appellant's jacket, which he believed could be a weapon. He patted the outside of the jacket pocket, felt something hard and asked the appellant "what do you have in your pocket here?" The appellant reached into his pocket and pulled out three cellphones.

[17] Constable Hutchison then arrested the appellant for breach of recognizance. He escorted the appellant from the taxi to his police cruiser, where he conducted a brief pat-down search before placing the appellant in the back of the cruiser. No drugs were seized during that search.

[18] Sergeant Wilkinson arrived at the scene shortly after the taxi was pulled over and the appellant had been arrested. There is some confusion as to

whether Sergeant Wilkinson understood that the appellant had been arrested only for breach of recognizance and not also for possession of a controlled substance. In any event, Sergeant Wilkinson contacted Constable Henderson to bring him up to date and Constable Henderson reiterated that he continued to have reasonable and probable grounds to believe that the appellant was in possession of a controlled substance.

[19] Sergeant Wilkinson seized the backpack from the rear seat of the taxi. At that time, Ms. Smith claimed the backpack belonged to her. She was placed under arrest for possession of a controlled substance. Constable Boucher, a Leamington police officer, took Ms. Smith and the backpack to the police station.

[20] Leamington police officers searched the taxi but found no drugs.

[21] At the police station, Constable Hutchison began processing the appellant whom, it will be recalled, had at that time been arrested only for breach of recognizance.

[22] Sergeant Wilkinson and Constable Boucher were with Ms. Smith in another area of the police station. Ms. Smith now claimed that the backpack did not belong to her and that she did not know who owned it. Sergeant Wilkinson made the decision that the backpack should be searched and instructed Constable Boucher to search it for drugs.

[23] In Sergeant Wilkinson's presence, Constable Boucher searched the backpack and found 28.5 grams of crack cocaine hidden inside a pair of rolled-up tube socks. He also found a number of the appellant's documents and items of men's clothing.

[24] Constable Hutchison then re-arrested the appellant for possession of a controlled substance for the purpose of trafficking.

[25] At trial, the appellant argued that his rights under ss. 7, 8 and 9 of the *Charter* had been infringed and that the cell phones and drugs should be excluded pursuant to s. 24(2).

[26] The trial judge disagreed. He found that there had been no breaches of the appellant's *Charter* rights and, if there had been, the evidence should not be excluded under s. 24(2).

THE ISSUES

[27] Constable Hutchison's testimony on the *Charter* application is central to this appeal. In his testimony, Constable Hutchison said that, during the initial traffic stop, despite the information he had received from Sergeant Wilkinson about the appellant, he "wanted a little more" before he arrested the appellant for possession of a controlled substance. He testified that when he spoke with the appellant after pulling over the taxi, he intended to "gather[] [his] own grounds" for arrest.

[28] Based on this testimony, the appellant maintains that, during the traffic stop, Constable Hutchison did not have subjective grounds to arrest the appellant and the trial judge failed to properly take this into consideration in his ruling.

[29] Specifically, the appellant submits that the trial judge erred in:

1. failing to find that his ss. 8 and 9 *Charter* rights were breached when the taxi in which he was a passenger was stopped and he was searched;
2. failing to find that his s. 8 rights were breached when his backpack was searched at the police station; and
3. finding that if his *Charter* rights had been breached, the evidence should not be excluded pursuant to s. 24(2) of the *Charter*.

ANALYSIS

1. The Traffic Stop and Pat-down Search

[30] I see nothing in this ground of appeal.

The Traffic Stop

[31] Even if Constable Hutchison did not subjectively believe he had reasonable grounds to arrest the appellant for possession of a controlled substance, he had a lawful basis to conduct an investigative detention.

[32] In *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 34, the Supreme Court stated that an investigative detention must be premised on reasonable grounds. On an objective view of the totality of the circumstances, the officer must have a reasonable suspicion that the particular individual is implicated in

the criminal activity under investigation and that the detention is necessary: *Mann*, at paras. 34, 45.

[33] There is no question that Constable Hutchison reasonably suspected that the appellant was involved in cocaine trafficking. Sergeant Wilkinson had reasonable grounds to believe that the appellant had controlled substances with him. Constable Hutchison conducted the investigative detention based on the direction and information that Sergeant Wilkinson had given him. He was entitled to rely on that information and direction: *R. v. DeBot* (1986), 30 C.C.C. (3d) 207, at p. 221 (Ont. C.A.), *aff'd* [1989] 2 S.C.R. 1140. That information clearly implicated the appellant in the criminal activity under investigation, namely, possession for the purpose of trafficking in cocaine.

The Pat-down Search

[34] A police officer has the power to conduct a safety search incident to an investigative detention when the officer believes, on reasonable grounds, that his or her safety, or the safety of others, is at risk and that, as a result, it is necessary to conduct a search: *Mann*, at para. 45. The search must also be carried out in a reasonable manner: *Mann*, at para. 45. These conditions were met in the present case.

[35] First, when Constable Hutchison patted down the appellant's jacket, did he have reasonable grounds to believe that his safety was at risk? The trial judge found that he did and I see no basis for interfering with that finding.

[36] When Constable Hutchison opened the taxi door to speak with the appellant, he saw a fairly large bulge in the appellant's jacket pocket. He was close to the appellant on a dark and deserted rural highway at about 6:00 a.m. He had been told by his instructing supervisor that there were reasonable and probable grounds to arrest the appellant for possession of crack cocaine, and as a police officer, he knew it is common for drug traffickers to carry weapons. It was entirely reasonable for Constable Hutchison to be concerned that the bulge in the appellant's pocket might be caused by a weapon. As Constable Hutchison testified, he was concerned about his safety.

[37] Second, was the pat-down search conducted in a reasonable manner? Constable Hutchison briefly patted down the outside of the appellant's jacket in the area of the bulging pocket. He did not dig into the appellant's pocket nor did he ask the appellant to empty his pockets. The pat-down was brief, restrained and limited to the one specific area of concern. There is nothing to the appellant's suggestion that it was a "pretext" search, a suggestion that the trial judge properly rejected.

[38] As a safety search incident to detention, the pat-down search of the appellant's jacket pocket did not violate his s. 8 rights.

2. The Search of the Backpack

[39] It will be recalled that following the pat-down search, Constable Hutchison arrested the appellant for breach of recognizance. When the appellant was taken to the police station, he had not yet been arrested for any drug offences. It will further be recalled that the police searched the backpack before the appellant was arrested for possession of a controlled substance.

[40] Nonetheless, in my view, the police conducted a lawful search of the backpack.

[41] A search conducted prior to arrest will nonetheless be incidental to that arrest if: (1) prior to the search, the police had reasonable and probable grounds for the arrest; and (2) the arrest occurs quickly after the search: *DeBot*, at pp. 223-25 (Ont. C.A.); *R. v. Polashek* (1999), 134 C.C.C. (3d) 187 (Ont. C.A.), at para. 21; *R. v. Grant and Campbell*, 2015 ONSC 1646, [2015] O.J. No. 1229, at paras. 87-88. Both conditions are met in this case.

There were Reasonable and Probable Grounds to Arrest the Appellant for Drugs Prior to the Backpack Search

[42] When Sergeant Wilkinson made the decision that the backpack should be searched for drugs and instructed Constable Boucher to perform the search, he

had reasonable and probable grounds to arrest the appellant for possession of a controlled substance. The grounds for arrest did not arise from the discovery of the drugs in the backpack. It came from the sufficiently compelling and credible information that he had been given by Constable Henderson. Thus, he had reasonable grounds to arrest for possession before the search.

[43] In determining whether information provided by a tipster constitutes reasonable grounds for an arrest, the court considers the “totality of the circumstances”: *R. v. Lewis* (1998), 38 O.R. (3d) 540 (C.A.), at p. 546. Relevant factors include the reliability of the tipster as a source of information for the police, the source of the tipster’s information, and the extent to which the police are able to confirm the information before the arrest: *Lewis*, at pp. 546-47.

[44] Constable Henderson’s information began with the receipt of detailed, compelling information from a reliable CI. The CI told Constable Henderson that the appellant would arrive on a Greyhound bus from Toronto, in the Windsor bus station at about 5:00 a.m. on February 25, 2010, with a quantity of crack cocaine and that a Leamington Yellow taxi would be waiting for the appellant to take him to Leamington, where he lived.

[45] Constable Henderson testified that the CI had never provided false information. The CI had frequently given him information about drugs and firearms over the two-year period leading up to the events in question. On two

occasions, firearms were seized and arrests made as a result of information from the CI. The CI did have a criminal record and provided the information for financial compensation. Constable Henderson testified that the CI had first-hand knowledge of the information provided.

[46] Furthermore, as on many prior occasions, Constable Henderson was able to verify material aspects of the information provided by the CI. In this case, Constable Henderson corroborated the following information he had received from the CI:¹

Information received from the Confidential Informant	Corroboration
The CI provided Constable Henderson with the nickname and description of a man who was selling cocaine in Leamington. The CI described the man as a short Jamaican.	Constable Henderson contacted the Windsor Police, who recognized the nickname he had been given from the CI. The Windsor Police identified the person as Marlon Richards, the appellant. Constable Henderson then obtained a photograph of Marlon Richards and other information, including his date of birth. Constable Henderson showed the photograph to the CI who confirmed that Marlon Richards was the man who had been selling cocaine in Leamington.
On February 24, 2010, the CI told Constable Henderson that the appellant was going to travel to Toronto to pick up crack cocaine and would return to Windsor by Greyhound bus the following	Constable Henderson reviewed the Greyhound bus schedule and confirmed that a Greyhound bus was scheduled to leave Toronto and arrive in Windsor about 5:00 a.m. on February 25, 2010. Constable Henderson arrived at the Windsor

¹ This is a modified version of the chart contained at pages 23-24 of the Crown's factum.

day around 5 a.m.	bus depot at 4:45 a.m. on February 25, 2010. He saw a Greyhound bus from Toronto arrive at the Windsor depot at 5:24 a.m.
The CI told Constable Henderson that a Yellow Taxi Cab Company taxi from Leamington would be waiting for Marlon Richards' arrival at the Windsor bus station.	When Constable Henderson arrived at the Windsor bus depot, he immediately noticed a Leamington Yellow Taxi Cab Company taxi parked in the parking lot next to the bus depot. The taxi's engine was running and its lights were on.
The CI told Constable Henderson that after Marlon Richards' bus arrived at the Windsor bus depot, he would take the Leamington Yellow Taxi Cab Company taxi that had been waiting for him from Windsor to Leamington.	At approximately 5:24 a.m., Constable Henderson saw a person he believed to be Marlon Richards leave the bus at the Windsor bus depot, walk towards the Leamington Yellow Taxi Cab and enter it. The police followed the taxi as it drove to Leamington. Constable Henderson could not see the man's face as he walked towards the taxi because he had a hoodie pulled up over his head. Constable Henderson believed that this person was Marlon Richards because he exited the bus and walked towards the waiting Yellow taxi, he was a short man and because there were not many people on the bus.

The Arrest for Drugs was Made Shortly After the Search

[47] There is no contest in respect of the second requirement that the arrest must be made shortly after the search. The appellant was in the police station when the backpack was searched. He was arrested on the drug charges shortly after the police discovered the drugs in the backpack.

3. Section 24(2)

[48] Having found that there were no breaches of the appellant's ss. 8 and 9 *Charter* rights, it is unnecessary to address this ground of appeal.

[49] Nonetheless, I would note that as the appellant did not allege a breach of his s. 10 rights at trial, it is inappropriate for him to seek to rely on those alleged breaches, on appeal, as a factor for consideration under s. 24(2). New issues that significantly expand or alter the landscape of the litigation should not be raised for the first time on appeal, absent exceptional circumstances: *Perez (Litigation Guardian of) v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229 (C.A.), at p. 233. The alleged s. 10 violation cannot be determined without a proper factual record. Furthermore, it would be unfair to the Crown to hear the s. 10 argument for the first time on appeal, as it did not have the opportunity to lay an evidentiary foundation at trial to rebut the allegation.

DISPOSITION

[50] Accordingly, I would dismiss the appeal.

Released: May 15, 2015 ("E.E.G.")

"E.E. Gillese J.A."

"I agree. M. Tulloch J.A."

"I agree. P. Lauwers J.A."