COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Gerson-Foster, 2019 ONCA 405
DATE: 20190516
DOCKET: C64645

Feldman, Paciocco and Zarnett JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Tafari Gerson-Foster

Appellant

Andrew Stastny and Adam Little, for the appellant

Rob Morin and Erin Carley, for the respondent

Heard: February 12, 2019

On appeal from the convictions entered by Justice Beverly A. Brown of the Ontario Court of Justice on June 28, 2017, with reasons reported at 2017 ONCJ 609.

Paciocco J.A.:

OVERVIEW

[1] Tafari Gerson-Foster was ostensibly arrested on a surety warrant. That arrest led to a pat down search incident to arrest, and a subsequent strip search. Each of the searches produced evidence that supported the convictions that Mr. Gerson-Foster now appeals, namely, possession of cocaine for the purposes of

trafficking contrary to *Controlled Drugs and Substances Act*, S.C. 1996, c. 19., s. 5(2), and possession of proceeds of an indictable offence, contrary to *Criminal Code*, R.S.C. 1985, c. C-46, s. 354(1).

[2] In fact, the surety warrant relied upon to arrest Mr. Gerson-Foster was no longer in force. A judge presiding at a remand appearance [the "administrative judge"] had rescinded the surety warrant more than a month before Mr. Gerson-Foster's arrest. The Canadian Police Information Centre ("CPIC") had not been updated to reflect this, as it should have been.

[3] At his trial, Mr. Gerson-Foster sought the exclusion of the evidence required for his convictions. Of relevance to this appeal, he argued that ss. 8 and 9 of the *Charter* were violated. The trial judge disagreed. She held that the surety warrant had not been properly addressed by the administrative judge, and was therefore still in effect when Mr. Gerson-Foster was arrested. She also held that the strip search of Mr. Gerson-Foster was lawful and therefore reasonable. She therefore dismissed the *Charter* application.

[4] Mr. Gerson-Foster appeals the trial judge's ss. 8 and 9 rulings, and asks this court to exclude the evidence and acquit him.

[5] For the reasons that follow, I would allow the appeal and substitute a verdict of acquittal on both charges.

THE MATERIAL FACTS

[6] On May 4, 2015, after a short period of pre-trial incarceration on an assault charge, Mr. Gerson-Foster was released on a recognizance with consent of the Crown. His sister, Sachanna Gerson, was his surety.

[7] Things did not go well. On November 3, 2015, Sachanna Gerson applied to be relieved of her surety obligation. An order for committal ["surety warrant"] was issued authorizing peace officers to arrest Mr. Gerson-Foster, and bring him into custody.

[8] On November 4, 2015, the surety warrant was entered on CPIC, a national electronic database accessible to peace officers.

[9] By November 18, 2015, the date set for Mr. Gerson-Foster's next remand court appearance on the assault charge, he had not yet been arrested on the surety warrant. He arranged to attend to the surety warrant during that appearance. His mother, Carla Gerson, who had agreed to act as his new surety, accompanied him to Old City Hall courthouse to facilitate a surety substitution, and Mr. Gerson-Foster's lawyer raised the matter with the remand Crown.

[10] The remand Crown agreed that there would be no need to have peace officers arrest Mr. Gerson-Foster on the surety warrant, and that he could appear before a Judge in the Ontario Court of Justice practice and procedure court ["administrative court'] for the surety substitution. The administrative Crown and

Mr. Gerson-Foster's lawyer asked the administrative judge for the surety substitution and to "deem the warrant executed."

[11] Mr. Gerson-Foster's counsel alerted the administrative judge that a new bail order would be needed since Sachanna Gerson was named on the existing recognizance. The administrative judge said, "I've got to get a brand new bail then." She said that she would note that the surety warrant was executed, saying to Mr. Gerson-Foster, "[t]echnically, you're in custody right now, sir." She told the parties that the new recognizance would have to be done before her "because he's in custody."

[12] Mr. Gerson-Foster's counsel asked whether Mr. Gerson-Foster could just remain seated in the body of the court, and the administrative judge agreed, "[y]eah, he can just sit on the bench here."

[13] Shortly after, the administrative Crown decided that she was not content with one of the proposed terms of release. She asked to hold the matter down so she could have a recess to talk to the remand Crown who had approved the change. The administrative judge agreed, but said of Mr. Gerson-Foster, "[s]o he has to step into custody then." Mr. Gerson-Foster's counsel sought clarification. The administrative judge explained, "[w]ell, he has no bail, though. Well, I've just cancelled the bail that was in existence."

[14] As she was about to leave to consult with the remand Crown, the administrative Crown said, “[s]o maybe if we just hold the matter down and he stays in the body of the court”. It is not clear on the record whether Mr. Gerson-Foster actually stepped into custody as the administrative judge directed.

[15] When Mr. Gerson-Foster’s matter concluded after a brief recess, the administrative judge endorsed the application for surety relief as follows: “[d]eemed executed Nov 18 2015 ext – new bail on consent with added condition below”. The added condition was handwritten below. This document was attached to the surety warrant.

[16] In spite of the administrative judge’s direction that Mr. Gerson-Foster was technically in custody, and her order that the surety warrant was deemed to have been executed, no record was uploaded to CPIC confirming that the surety warrant was dealt with. Only the new bail release order, mistakenly dated May 4, 2015 instead of November 18, 2015, was entered on CPIC.

[17] For reasons that will become apparent in this decision, it is not necessary to recount in its totality the evidence the trial judge heard about how the administrative judge’s order failed to be recorded. Suffice it to say that the procedure followed in this case was unfamiliar.

[18] Typically, surety warrants are executed by a police arrest of the subject, and the arresting officers are responsible for the removal of the warrant from CPIC.

Since Mr. Gerson-Foster was never arrested, no one directly assumed the responsibility for removing the surety warrant.

[19] As well, since there was no arrest, no “certificate of committal” was generated. This is where the execution of a surety warrant is typically endorsed by the judge. In this case, when the court staff scanned and sent the court documents to the Toronto police office in the courthouse so that the documents could be uploaded to the “versadex” record keeping system, and then onto CPIC, the administrative judge’s endorsement relating to the surety warrant was missed.

[20] This omission was not caught by the backup system, in which court officers record the dispositions made in court. The court officer assigned to the administrative judge’s courtroom thought a surety substitution was occurring, and missed that the administrative judge had dealt with the surety warrant.

[21] CPIC therefore continued to show an outstanding surety warrant for Mr. Gerson-Foster’s arrest.

[22] On the evening of December 22, 2015, there was a shooting in the Lawrence Heights area. The next day, Det. Cst. Jackson, who was investigating the shooting, briefed Csts. Kim and Sharma that “Gerson Tafari” was known to be in the area, that he was wanted on a surety warrant, and that they should arrest him. At 12:55 p.m. the next day, Csts. Kim and Sharma encountered Mr. Gerson-Foster and Cst. Kim arrested him pursuant to the surety warrant.

[23] A pat down search of Mr. Gerson-Foster was conducted incident to that arrest. Approximately five grams of marijuana was discovered in a zip lock bag, along with $3,495.00. Neither constable re-arrested Mr. Gerson-Foster after these items were located.

[24] An audio recording was taken inside of the police car immediately after the arrest. At approximately 1:05 p.m., Mr. Gerson-Foster told the constables that he had entered a new bail, and that the surety warrant was no longer in effect. He asked the constables to “read it in the system.” Cst. Sharma checked using the mobile work station computer and confirmed that the surety warrant was on CPIC. Mr. Gerson-Foster asked, “[h]ow long does it take for stuff to process?” Cst. Kim answered, “[s]ometimes it can take a while, man”.

[25] Cst. Kim would later testify that while CPIC is generally reliable, he has had past experiences where CPIC had not been updated in a timely manner. He said that there have been times when he has effected an arrest based on information that should not have been on CPIC, only to learn subsequently that the information was incorrect. He testified that he was aware of other means that can be used to check the accuracy of CPIC information, including calling the division holding the warrant, or calling the records management department.

[26] Initially, Cst. Sharma could not recall whether he had any plans to look further into the status of the surety warrant. He ultimately agreed that Mr. Gerson-

Foster was told repeatedly that the surety warrant's status would be looked into when they arrived at the station.

[27] Upon arrival at the police station, Mr. Gerson-Foster again raised objection to having been arrested on the surety warrant. Cst. Sharma testified that when Mr. Gerson-Foster complained that the surety warrant had been dealt with on his last court date, Cst. Sharma said, "[i]f you have any issues, we can go upstairs [to the interview room]. Once we're upstairs, we'll, we'll deal with it."

[28] Csts. Kim and Sharma escorted Mr. Gerson-Foster to the booking desk by 1:38 p.m. The booking desk was staffed by Sgt. Vendramini. Cst. Kim did not recall whether he advised anyone at the station of Mr. Gerson-Foster's concerns, and Cst. Sharma said that while it would have been possible for him to have briefed the sergeant at the booking desk, he did not do so because he trusted the information he had about the surety warrant.

[29] Mr. Gerson-Foster complained to Sgt. Vendramini that there was a new surety in place, and that he had already gone to court on the warrant. Sgt. Vendramini assured Mr. Gerson-Foster that "the detectives are gonna have to look into that then … they'll look into it thoroughly".

[30] At 1:50 p.m., Sgt. Vendramini authorized a "Level 3 search" (a strip search) to be done. Without anyone looking into the status of the surety warrant, Csts. Kim and Sharma conducted that strip search in one of the upstairs interview rooms.

Specifically, Mr. Gerson-Foster was made to squat, naked. When he did so, a bag containing 13.22 grams of cocaine fell from his buttocks. The constables took the narcotics with them and turned them over to another officer, leaving Mr. Gerson-Foster in the interview room.

[31] Cst. Figlarz was subsequently given charge of Mr. Gerson-Foster, who he understood to be detained on a surety warrant. He entered the interview room and asked Mr. Gerson-Foster if he wanted to speak to a lawyer. Although no one testified directly to this, it can be inferred from what transpired that Mr. Gerson-Foster told Cst. Figlarz that the surety warrant was no longer in force. Mr. Gerson-Foster gave Cst. Figlarz his lawyer's name. Cst. Figlarz could not reach the lawyer, but left a message at 2:23 p.m. The lawyer called back at 3:34 p.m. and advised Cst. Figlarz that the surety warrant had indeed been dealt with in court. The lawyer undertook to email the details to Cst. Figlarz. It is not clear whether this was done, but Cst. Figlarz contacted Old City Hall to speak to someone who had access to ICON, the courts' computer system, to inquire into the validity of the warrant. He was able to confirm that, indeed, the surety warrant had been brought forward and dealt with in court on November 18, 2015.

[32] Cst. Figlarz agreed that had it been known before the strip search occurred that the surety warrant had been dealt with, Mr. Gerson-Foster would have been released unconditionally. Instead, he was held in the interview room until 8:30 p.m.,

when he was lodged in the cells, and then charged with the two offences under appeal.

THE TRIAL

[33] Mr. Gerson-Foster's trial was a "*Charter* trial". Through his counsel, he made it known early that if his *Charter* application to exclude the evidence failed, he would not contest the charges.

[34] Of relevance, Mr. Gerson-Foster's *Charter* application alleged that his ss. 8 and 9 rights were violated.

[35] Mr. Gerson-Foster's s. 9 argument related to the alleged negligence of the Toronto police in failing to update CPIC, leading to Mr. Gerson-Foster's arrest on a surety warrant that had already been executed.

[36] In rejecting that *Charter* challenge, the trial judge agreed with submissions made by the Crown. The trial judge concluded that the surety warrant was still in force when Mr. Gerson-Foster was arrested, because the administrative judge had not followed a valid legal procedure when she purported to deem the warrant to have been executed.

[37] Mr. Gerson-Foster's s. 8 arguments fared no better. His first argument hinged on his claim that since the arrest was unlawful, the initial pat down search incident to the arrest was also illegal and therefore unreasonable. The trial judge, having accepted that the arrest was lawful, rejected this challenge.

[38] Mr. Gerson-Foster's second s. 8 argument urged that the strip search was unreasonable, contrary to the *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, requirement that the purpose for the search must relate to the purpose or reasons for the arrest. Since Mr. Gerson-Foster was arrested only on a surety warrant, and not for possession of narcotics, the purpose for the arrest provided no basis for strip searching him for narcotic contraband.

[39] The trial judge rejected this *Charter* claim as well, commenting that "it is important to distinguish between strip searches immediately incident to arrest, and strip searches related to safety issues in a custodial setting." The trial judge accepted that since Mr. Gerson-Foster had to go into the prison population to await a show cause hearing for a new recognizance, the strip search for contraband was reasonable and related to the purpose for his arrest. In support, she relied upon the fact that during the initial pat down search upon arrest, Mr. Gerson-Foster was found to have been in possession of marijuana.

THE ISSUES

[40] Several issues were raised on appeal. The issues can be described conveniently as follows:

A. The s. 9 breach: Did the trial judge err in finding that the surety warrant was in force when Mr. Gerson-Foster was arrested?

B. The s. 9 breach: If the surety warrant was not in force, can the Crown justify the arrest based on reasonable grounds?

C. The s. 8 breaches: Did the trial judge err in finding that the pat down search was reasonable, as incidental to a lawful arrest?

D. The s. 8 breaches: Did the trial judge err in finding that the strip search was reasonable?

E. The remedy: If any of the *Charter* challenges succeed, should this court exclude the evidence obtained?

[41] Counsel for Mr. Gerson-Foster also contended during oral argument that the strip search was conducted in an unreasonable manner, due to the fact that Mr. Gerson-Foster was completely nude at the time of the search. Since this issue was not raised at trial or in the appeal documents, and it is not necessary to resolve this matter to determine this appeal, I will not address it.

ANALYSIS

A. The section 9 breach: Did the trial judge err in FINDING THAT THE SURETY WARRANT WAS IN FORCE WHEN Mr. GERSON-FOSTER WAS ARRESTED?

(1) The Error Conceded

[42] The Crown maintains that the administrative judge's order relating to the surety warrant was made without jurisdiction, since the procedure used was at odds with the process required by *Criminal Code*, s. 766. In spite of this, the Crown

conceded before us that the trial judge erred in finding that the surety warrant was in force when Mr. Gerson-Foster was arrested. The Crown accepts that orders made without jurisdiction remain in force until validly challenged and set aside: *R. v. Raponi*, 2004 SCC 50, [2004] 3 S.C.R. 35, at paras. 34, 41. In this case, perhaps because the Crown joined in inviting the administrative judge to proceed as she did, the Crown never challenged the validity of the administrative judge's order.

[43] Strictly speaking, it is therefore unnecessary to consider whether the trial judge was correct in finding that the administrative judge failed to comply with the relevant surety release provisions. In my view, it is nonetheless important to address the validity of the administrative judge's order. This issue was fully argued before us, and the process and its propriety continue to bear on the arbitrary detention issue that remains before us.

[44] I therefore intend to address whether the administrative judge acted properly in making the order that she did. In my view she did, and the trial judge erred in holding otherwise.

(2) The Statutory Provisions

[45] The relevant provisions of the *Criminal Code* dealing with both surety warrants and surety substitutions are as follows:

> Render of accused by sureties

766(1) A surety for a person who is bound by recognizance to appear may, by an application in writing to a court, justice or provincial court judge, apply to be relieved of his obligation under the recognizance, and the court, justice or provincial court judge shall thereupon issue an order in writing for committal of that person to the prison nearest to the place where he was, under the recognizance, bound to appear.

Arrest

(2) An order under subsection (1) shall be given to the surety and on receipt thereof he or any peace officer may arrest the person named in the order and deliver that person with the order to the keeper of the prison named therein, and the keeper shall receive and imprison that person until he is discharged according to law.

Certificate and entry of render

(3) Where a court, justice or provincial court judge issues an order under subsection (1) and receives from the sheriff a certificate that the person named in the order has been committed to prison pursuant to subsection (2), the court, justice or provincial court judge shall order an entry of the committal to be endorsed on the recognizance.

Discharge of sureties

(4) An endorsement under subsection (3) vacates the recognizance and discharges the sureties.

Render of accused in court by sureties

767 A surety for a person who is bound by recognizance to appear may bring that person into the court at which he is required to appear at any time during the sittings thereof and before his trial and the surety may discharge his obligation under the recognizance by giving that person into the custody of the court, and the court shall thereupon commit that person to prison until he is discharged according to law.

Substitution of surety

767.1(1) Notwithstanding subsection 766(1) and section 767, where a surety for a person who is bound by a recognizance has rendered the person into the custody of a court pursuant to section 767 or applies to be relieved of his obligation under the recognizance pursuant to subsection 766(1), the court, justice or provincial court judge, as the case may be, may, instead of committing or issuing an order for the committal of the person to prison, substitute any other suitable person for the surety under the recognizance.

(2) Where a person substituted for a surety under a recognizance pursuant to subsection (1) signs the recognizance, the original surety is discharged,

but the recognizance and the order for judicial interim release pursuant to which the recognizance was entered into are not otherwise affected.

Rights of surety preserved

768 Nothing in this Part limits or restricts any right that a surety has of taking and giving into custody any person for whom, under a recognizance, he is a surety.

Application of judicial interim release provisions

769 Where a surety for a person has rendered him into custody and that person has been committed to prison, the provisions of Parts XVI, XXI and XXVII relating to judicial interim release apply, with such modifications as the circumstances require, in respect of him and he shall forthwith be taken before a justice or judge as an accused charged with an offence or as an appellant, as the case may be, for the purposes of those provisions.

(3) Analysis

(i) The trial judge's reasoning

[46] In her decision, the trial judge reasoned that once the surety warrant was issued under s. 766(1), it could only properly be executed by arresting Mr. Gerson-Foster and placing him into police custody. Since Mr. Gerson-Foster did not go "into actual detention and into custody", the procedure required by s. 766(1) was

not followed. The administrative judge therefore did not succeed in setting aside the surety warrant.

[47] The trial judge further reasoned that the administrative judge's attempt to deem the surety warrant to have been executed was also improper, since there is no provision for doing so in the case of surety warrants as there is for arrest warrants in *Criminal Code*, s. 511(4).

[48] Finally, the trial judge held that the administrative judge proceeded on the basis of a "surety substitution" contemplated by s. 767.1, which improperly "ignored the fact that there had been a surety warrant for arrest that had already been issued, so the court could not proceed on an alternate procedure outlined in s. 767.1."

[49] To be fair to the trial judge, the process used was unfamiliar and left room for confusion, and the material considerations are not without their subtlety. However, in my view the trial judge erred in coming to each of these conclusions.

[50] For convenience, I will approach her reasons by beginning with the surety substitution issue.

(ii) The administrative judge did not order a surety substitution

[51] In my view, the administrative judge did not err by ordering an improper surety substitution, as the trial judge held. As the term suggests, a "surety substitution" is an order that substitutes one surety for another under an existing

recognizance. This is not what the administrative judge did. She made it clear that she was cancelling the existing recognizance, treating the surety warrant as having been executed, and issuing an entirely new judicial interim release order. The fact that the administrative judge changed a term of the recognizance is also inconsistent with a surety substitution having been ordered. She did not order an improper surety substitution. She issued a new judicial interim release order.

[52] I must also comment on the trial judge's conclusion that once a surety warrant has been issued, a surety substitution is no longer possible. The trial judge relied on *R. v. Smith*, 2013 OSNC 1341, at para. 41, for that proposition. In my view, *Smith* does not support it. In *Smith*, the surety warrant for arrest was not simply issued. It had been executed and the accused had been committed to custody. As a result of Mr. Smith's incarceration, Dambrot J. deemed the recognizance to have been vacated. There was therefore no recognizance left on which to make a surety substitution. Simply put, it is the committal to prison of the accused that makes a surety substitution impossible, not the issuance of a surety warrant.

[53] One final point about surety substitutions. During oral argument, Mr. Gerson-Foster's counsel urged us to recognize that the administrative judge could simply have ordered a surety substitution under s. 767.1. In my view, we should not do so. Leaving the more complicated legal questions that arise aside, the parties before the administrative judge wanted to add a condition to the recognizance. A

new recognizance was therefore required. For that reason alone, a surety substitution could not have been ordered in this case.

(iii) The trial judge should not have found that the administrative judge acted without lawful authority

[54] The trial judge should not have found that the administrative judge acted without lawful authority, thereby failing to succeed in setting aside the surety warrant.

[55] In coming to this conclusion, I prefer not to express an opinion on Mr. Gerson-Foster's counsel's argument that the administrative judge had jurisdiction under *Criminal Code*, s. 523(2)(c) to vacate and replace the recognizance containing Sachanna Gerson's surety. That is not the procedure the administrative judge purported to use.

[56] In any event, it is not necessary to consider s. 523(2)(c). In the unusual circumstances of this case, the trial judge should have proceeded on the basis that the surety release provisions were satisfied.

[57] I agree with the trial judge that the surety release provisions do contemplate that the accused will be detained and placed into police custody before a surety release occurs. According to the relevant provisions, unless a surety substitution is going to be ordered under s. 767.1, the accused is to be "committed to prison". The judicial release hearing that follows under s. 769 also contemplates that the accused will have been committed to prison.

[58] However, different modes of achieving the “committal of the person to prison” are recognized in the relevant sections.

[59] Section 767 describes the committal to prison being achieved by judicial order. After the accused attends before the court and is “rendered” into the custody of the court by the surety, the accused is subsequently committed to prison.

[60] The provisions in ss. 766(2) – 766(4) contemplate expressly the arrest and imprisonment of the accused pursuant to a surety warrant, and then being committed to prison.

[61] In my view, while imprisonment is a requirement of a proper s. 766(1) release, a formal “arrest” is not. Section 766(2) provides that where a surety warrant order has been made, a peace officer “may arrest the person named in the order” (emphasis added). It therefore authorizes but does not require an arrest. An arrest is an available mode of securing the committal to prison of the person named in the order, but an arrest does not establish jurisdiction. So long as the person named in the order is committed to prison, including by surrendering into custody without the formalities of an arrest, an s. 766(1) surety release is appropriate.

[62] I do not read the trial judge as disagreeing with any of this. The errors I believe she made relate not to her understanding of these provisions, but to the findings she arrived at.

[63] First, although of less significance, the trial judge erred in finding that Mr. Gerson-Foster was never placed “into actual detention”. A finding that Mr. Gerson-Foster was detained necessarily follows from the facts found by the trial judge. As she noted, the administrative judge told Mr. Gerson-Foster that he was technically in custody. At that point he was no longer free to leave. Contrary to the trial judge’s conclusion, Mr. Gerson-Foster was “actually detained”.

[64] More importantly, the trial judge should not have found that the administrative judge failed to follow proper procedure because Mr. Gerson-Foster was not placed into police custody. Subsequent to telling Mr. Gerson-Foster that he was technically in custody, the trial judge directed that Mr. Gerson-Foster “has to step into custody”. This clearly meant the prisoner’s box.

[65] As the trial judge noted, it cannot be determined on the record whether Mr. Gerson-Foster actually entered the prisoner’s box, or remained in the body of the court. I will therefore address both possibilities.

[66] Assuming that Mr. Gerson-Foster entered the prisoner’s box as directed, he would have been placed in the charge of the peace officers responsible for the courthouse lockup, without a bail release order in effect. If his bail hearing could not be completed at that time for any reason, he would have remained in custody until released, likely in a police station cell. In my view, he would therefore have been imprisoned immediately upon being placed in the prisoner’s box. This would

have satisfied s. 766(2)'s requirement that he be received by the keeper of the prison, and s. 766(3)'s requirement that he be committed to prison.

[67] Even if Mr. Gerson-Foster never entered the prisoner's box, the trial judge should not have relied upon the absence of police custody to impugn the administrative judge's order in this case. This is because after the administrative judge directed Mr. Gerson-Foster to enter the prisoner's box, the Crown interjected suggesting that Mr. Gerson-Foster should remain in the body of the court. In these circumstances, it was unfair for the Crown to challenge the legality of the administrative judge's order during the *Charter voir dire* on the basis that Mr. Gerson-Foster was not put into police custody. In my view, the trial judge should not have done so either. By relying on the absence of actual imprisonment, she indirectly enabled the Crown to benefit during the *Charter voir dire* from an argument that was not fair for the Crown to rely upon.

[68] In sum, whether or not Mr. Gerson-Foster actually went into the prisoner's box, the trial judge should not have relied upon the absence of police custody as a basis for finding the administrative judge's order to be ineffective. The administrative judge's entitlement to vacate the initial recognizance and to discharge Sachanna Gerson should have been recognized by the trial judge, even leaving aside the concession the Crown made before us. The trial judge erred in failing to do so.

(iv) The administrative judge effectively rescinded the surety warrant

[69] I am also persuaded that the administrative judge had the authority to rescind the surety warrant once she vacated the recognizance that imposed the surety obligations on Sachanna Gerson. The whole point of the surety warrant was to place Mr. Gerson-Foster into custody in order to relieve Sachanna Gerson of those obligations, and to enable his interim release status to be re-evaluated. Those concerns became moot once the administrative judge vacated and replaced the initial recognizance.

[70] It is noteworthy that none of the surety release provisions address the judicial authority to rescind. In my view, the power to do so arises from the inherent jurisdiction of superior court judges, and from the administrative judge's inherent authority as a provincial court judge to administer justice fully and effectively: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 112. Had the administrative judge not rescinded the warrant, its continued existence would do nothing other than pointlessly imperil Mr. Gerson-Foster's liberty.

[71] Nor am I am troubled by the administrative judge's use of the phrase "deemed executed" to describe why the surety warrant was no longer in effect. Even if she misspoke by using the term, the administrative judge's intent was clear. The surety warrant was rescinded, of no further force or effect.

(4) Conclusion

[72] The trial judge erred in finding the surety warrant was in force when Mr. Gerson-Foster was arrested. There was no valid warrant to support his arrest.

B. THE SECTION 9 BREACH: CAN THE CROWN JUSTIFY THE ARREST BASED ON REASONABLE GROUNDS?

[73] The Crown contends that despite the fact that the trial judge erred in treating the surety warrant as in effect at the time of the arrest, Mr. Gerson-Foster's detention was constitutionally valid because Cst. Kim had reasonable grounds for his arrest. In the circumstances of this case, I disagree.

(1) The Relevant Legal Principles

[74] Section 9 of the *Charter* provides that "everyone has the right not to be arbitrarily detained or imprisoned." The arbitrariness of a detention turns on its legality. As McLachlin C.J. and Charron J. explained in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 54:

> Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9, unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9. [Citations omitted.]

[75] In order to defeat Mr. Gerson-Foster's s. 9 claim, the Crown has to prove that Mr. Gerson-Foster's arrest was lawful. Ordinarily it would have been Mr. Gerson-Foster's burden, as the *Charter* claimant, to prove his arrest to have been

unlawful, but Mr. Gerson-Foster has also brought an s. 8 claim against the warrantless searches that were conducted. Warrantless searches are presumptively unreasonable, and where, as here, the Crown seeks to rebut that presumption by claiming a search was lawfully conducted incident to an arrest, the Crown must show that the arrest was lawful: *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 87. In order to avoid inconsistent outcomes on the same issue because of conflicting burdens, where the arrest the Crown is relying upon to justify the search incident to arrest is subject to an s. 9 challenge, the Crown will carry the burden on both of the overlapping ss. 8 and 9 claims and must prove that the arrest was legal: *R. v. Lee*, 2017 ONCA 654, 351 C.C.C. (3d) 187, at paras. 82-83; *R. v. Brown* (1996), 47 C.R. (4th) 134 (Ont. C.A.); *R. v. Besharah*, 2010 SKCA 2, 251 C.C.C. (3d) 516, at paras. 32-35.

[76] In this case, the Crown relies upon *Criminal Code*, s. 495(1)(c) to support the legality of Mr. Gerson-Foster's arrest. Pursuant to s. 495(1)(c), an arrest will be legal where the arresting officer has reasonable and probable grounds to believe that an arrest warrant is in force. Section 495(1)(c) provides:

> Arrest without warrant by peace officer
>
> **495 (1)** A peace officer may arrest without warrant
>
> …

> **(c)** a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[77] In *R. v. Storrey*, [1990] 1 S.C.R 241, at pp. 250-251, Cory J. explained what is required:

> [A]n arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.

[78] As this passage suggests, the relevant inquiry is into the officer's grounds and the officer's basis for those grounds. Put otherwise, an arrest can be justified only on the officer's subjective purpose for the arrest: *R. v. Caslake*, [1998] 1 S.C.R. 51, at paras. 21, 27; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 85. And since it is the officer's belief that must be objectively reasonable, that arrest can be justified objectively solely on the "facts known to the officer which were available to the officer at the time he or she formed the requisite belief": *R. v. Slippery*, 2014 SKCA 23, 433 Sask. R. 183, at para. 21; *R. v. Muller*, 2014 ONCA 780, 318 C.C.C. (3d) 539, at paras. 36-37; *R. v. Notaro*, 2018 ONCA 449, 47 C.R. (7th) 229, at para. 39.

[79] To be clear, the "facts" relied upon by the officer need not be true. "Reasonable grounds can be based on [an officer's] reasonable belief that certain facts exist even if it turns out that the belief is mistaken": *R. v. Robinson*, 2016 ONCA 402, 336 C.C.C. (3d) 22, at para. 40. This includes an honest but reasonably mistaken subjective belief that an arrest warrant relied upon to make an arrest is valid: *R. v. Kossick*, 2018 SKCA 55, 365 C.C.C. (3d) 186, at para. 26.

(2) The CPIC Entry and Reasonableness

[80] Here, Cst. Kim arrested Mr. Gerson-Foster solely on an outstanding surety warrant. It is not contested that subjectively Cst. Kim believed he had reasonable and probable grounds to do so. The disagreement before us is with his objective grounds.

[81] The Crown contends that even though the surety warrant was no longer in effect, it was reasonable for Cst. Kim to rely upon the erroneous CPIC entry as providing the reasonable and probable grounds for Mr. Gerson-Foster's arrest. I disagree. Although ordinarily the legality of an arrest and detention can be supported by a CPIC entry that proves to be erroneous, not in this case.

(i) Cst. Kim lacked objective grounds

[82] The immediate difficulty with this argument is that the Crown has not demonstrated that Cst. Kim relied upon CPIC to justify the arrest of Mr. Gerson-Foster. Cst. Kim's evidence was that he relied upon information provided by Det.

Cst. Jackson, who told him that Mr. Gerson-Foster was wanted on a surety warrant. The only evidence Cst. Kim gave relating to CPIC was that Cst. Sharma checked CPIC after Mr. Gerson-Foster's arrest. Cst Sharma gave evidence to the same effect.

[83] This matters. As explained, Cst. Kim's subjective grounds for arrest cannot be found to be objectively reasonable based on the fact that the surety warrant was still shown to be valid on CPIC, since CPIC was not a basis for Cst. Kim's subjective belief that he had grounds to arrest Mr. Gerson-Foster. He relied solely upon Det. Cst. Jackson's instructions to make the arrest.

[84] Although a police officer is entitled to follow instructions from another officer to arrest someone even where the arresting officer personally lacks the objective grounds to do so, that arrest will be lawful only if the instructing officer had reasonable and probable grounds: *R. v. Debot*, [1989] 2 S.C.R. 1140, at pp. 1166-1167; *R. v. Stevenson*, 2014 ONCA 842, 317 C.C.C. (3d) 385, at para. 51. Were this not so, an officer without reasonable and probable grounds could arrest lawfully on the instruction of another officer without reasonable and probable grounds. The law would countenance an arrest without anyone having reasonable and probable grounds, an untenable proposition.

[85] There is no evidence in this case capable of showing that Det. Cst. Jackson, the instructing officer, had reasonable and probable grounds to believe that there

was a surety warrant in force authorizing Mr. Gerson-Foster's arrest. Det. Cst. Jackson did not testify and no indirect evidence was presented as to what his grounds would have been. We are left to speculate.

[86] As a result, the Crown has failed to demonstrate that Mr. Gerson-Foster's arrest was lawful. His arrest was therefore arbitrary, contrary to s. 9, on this basis alone.

(ii) The continued detention was unlawful

[87] Even if the Crown had succeeded in establishing that Cst. Kim reasonably relied upon the erroneous entry of the surety warrant on CPIC as the basis for Mr. Gerson-Foster's arrest, in my view, s. 9 was still contravened. In the circumstances of this case, the failure of the police to follow up on Mr. Gerson-Foster's complaints that the surety warrant was no longer in force because it had already been dealt with in court made his continued detention illegal.

[88] In *Kossick*, at para. 26, Caldwell J.A. held that reliance by an arresting officer on erroneous information will not be objectively reasonable if, in the circumstances, "the police could reasonably have made inquiries which would have led to the discovery of the deficiencies or defects". I agree, and in my view, this principle applies not simply to the initial arrest, but to the continued detention where reasonably, the officers ought to make further inquiry into the basis for the arrest that supports the continued detention.

[89] In *Kossick*, the arresting officer relied on information from another officer indicating there was an arrest warrant in place. The arresting officer proceeded with the arrest in non-urgent circumstances and without personally checking the electronic databases, including CPIC, which he had open in front of him and that would have revealed the arrest warrant had already been executed. In *Kossick*, the finding that the police could reasonably have made inquiries was not triggered by any reason to doubt that an arrest warrant was in place, but by the ease with which the status of the warrant could have been checked before depriving Mr. Kossick of his liberty.

[90] In this case, the need for reasonable inquiry was triggered when Mr. Gerson-Foster informed Cst. Kim and other officers involved in his continued detention that the arrest warrant had already been dealt with in court.

[91] In saying this I do not disagree with Durno J.'s comment in *R. v. Bacchus*, 2012 ONSC 5082, at para. 116, that an arresting officer is not required to believe what an accused person says, and I appreciate that an arresting officer may "disregard information which the officer has reason to believe may be unreliable": *R. v. Shinkewski*, 2012 SKCA 63, 289 C.C.C. (3d) 145, at para 13. However, Cst. Kim did not have reason to disbelieve what Mr. Gerson-Foster was saying, as was true in *Bacchus*. Nor did he disregard as unreliable what Mr. Gerson-Foster was telling him. Instead, Cst. Kim agreed that CPIC could be out of date. He had seen it happen before and mistakenly arrested others because of CPIC errors.

[92] Cst. Sharma did not dismiss Mr. Gerson-Foster's claims as untenable either. When Mr. Gerson-Foster arrived at the station, Cst. Sharma told him this problem could be dealt with once they were upstairs.

[93] And Sgt. Vendramini, the booking desk sergeant, did not dismiss the need for further inquiry. He said that the issue would be looked into by the detectives.

[94] Each of these officers acknowledged the need for reasonable inquiry, and appropriately so. Detention in police lockup is a serious intrusion into the liberty of an individual. Mr. Gerson-Foster was adamant that there had been an error and the officers conceded the possibility of error. The officers continuing to detain Mr. Gerson-Foster should have investigated further, certainly before Sgt. Vendramini authorized a strip search, a point I will return to.

[95] When the matter was finally looked into by Cst. Figlarz, the inquiries he took were not exceptional, but reasonable, given that the issue was the accuracy of the CPIC entry. Once Cst. Figlarz went behind the impugned CPIC entry by taking the reasonable and obvious steps of speaking to Mr. Gerson-Foster's counsel and contacting Old City Hall, he readily discovered that the surety warrant was no longer in place.

[96] In these circumstances, even if Cst. Kim had legally arrested Mr. Gerson-Foster in reasonable reliance on the CPIC entry, Mr. Gerson-Foster's continued detention soon became illegal. Given that Mr. Gerson-Foster was not, in fact,

lawfully arrested in the first place, this illegal continued detention represents an additional *Charter* violation.

(3) Did the Failure to Record the Execution of the Surety Warrant on CPIC Violate the *Charter*?

[97] Mr. Gerson-Foster argued before the trial judge that he was arbitrarily detained because state agents were negligent in leaving the surety warrant on CPIC, after it was dealt with by the administrative judge. It is not necessary to determine whether this is so, since serious breaches of Mr. Gerson-Foster's s. 9 rights have already been demonstrated.

[98] I will say, however, that I am not attracted to the Crown position that a detention is immune from *Charter* scrutiny, regardless of how negligent or even malicious state agents have been in maintaining CPIC, simply because another state agent – an arresting officer – unknowingly and innocently relied upon the CPIC entry. State agents maintain CPIC so that it can be used to make decisions that affect liberty interests. CPIC's impact on the liberty interests of Canadians is arguably far too great to make CPIC a *Charter* free zone. It has been recognized that an abuse of process contrary to s. 7 of the *Charter* will arise where there is "conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play", including through an "unacceptable degree of negligent conduct": *R. v. La*, [1997] 2 S.C.R. 680, at para. 22. Since it is illegal to act in a manner that is an abuse of process, it

is arguable that s. 9 can be relied upon in lieu of s. 7 where the gravamen of the complaint is that the abusive recording of CPIC information resulted in detention. I will not recount them here, but the facts in *Bacchus* may be illustrative.

[99] I see nothing in this court's decision in *R. v. Wilson*, [2006] O.J. No. 4461 (C.A.), or *R. v. Harris*, 2007 ONCA 574, 87 O.R. (3d) 214, preventing *Charter* claims being brought under s. 7 or s. 9 based on the improper maintenance of CPIC. In *Wilson* this court refused, in a three paragraph endorsement, to entertain a *Charter* challenge to Wilson's arrest based on a CPIC error because that issue had not been raised at trial. In *Harris*, Doherty J.A. found that a six day delay in removing a bail condition did not make the arresting officer's reliance on CPIC unreasonable. The focus of the challenge in that case was the propriety of the arresting officer's reliance on CPIC. The untenable claim that was made was that an error in a CPIC entry undermines the officer's grounds. Simply put, *Harris* did not involve the kind of directed challenge to the maintenance of the CPIC entry that instigated the arrest, as is contemplated here.

[100] I have said enough to raise question about the legal proposition relied upon by the Crown. Since I need not finally resolve whether *Charter* intervention based on maintenance of CPIC is tenable, or whether such a breach occurred in this case, I will say no more.

C. THE SECTION 8 BREACHES: DID THE TRIAL JUDGE ERR IN FINDING THAT THE PAT DOWN SEARCH WAS REASONABLE AS INCIDENTAL TO A LAWFUL ARREST?

[101] In order for a search to be lawful as incident to an arrest, the arrest itself must be lawful: *Golden*, at para. 91. As indicated, Mr. Gerson-Foster's arrest was unlawful. It follows that the pat down search incident to that arrest was also unlawful, in violation of s. 8. The trial judge erred in finding otherwise.

D. THE SECTION 8 BREACHES: DID THE TRIAL JUDGE ERR IN FINDING THAT THE STRIP SEARCH WAS REASONABLE?

[102] It is not controversial that Mr. Gerson-Foster was subjected to a strip search. "[W]here the reasonableness of a strip search is challenged, it is the Crown that bears the onus of proving its legality": *Golden*, at para. 105. The trial judge held that the Crown discharged its onus. In my view, she erred in doing so.

(1) The Strip Search was Illegal

[103] The trial judge was correct in recognizing that in appropriate cases strip searches may be conducted incidental to an arrest, and that for this to be so, the arrest must be legal. I have already held that Mr. Gerson-Foster's arrest was not legal. The trial judge's error on that issue carried into her determination of this issue. Since the arrest was not legal, a strip search incidental to that arrest was not legal, contrary to s. 8.

[104] Indeed, even had Mr. Gerson-Foster's initial arrest been lawful, I have already found that Mr. Gerson-Foster's detention became unlawful when the

police, having reason to do so, failed to make reasonable inquiries that would have led them to discover the defective foundation for that arrest. I need not identity the precise point in time when the obligation to inquire was triggered because one thing is clear. At the very least, it was unreasonable for Sgt. Vendramini to authorize a strip search of Mr. Gerson-Foster, and for Csts. Kim and Sharma to conduct one, before checking into the status of the surety warrant. A strip search is highly intrusive and demeaning. At the relevant time, Mr. Gerson-Foster was secure in a locked interview room, isolated from other prisoners. Even if he was able to destroy contraband in his possession, which seems unrealistic, doing so would have kept it from the prison population, the purported purpose for the search. There was therefore no urgency. If Mr. Gerson-Foster proved right and the surety warrant relied upon for his detention was not in effect, he would have been released unconditionally without this indignity. Clearly, even if otherwise appropriate, the strip search should not have been conducted until it was assured that Mr. Gerson-Foster would be mingling with other prisoners. The trial judge therefore erred in failing to find that the strip search violated s. 8.

(2) Did the Police Lack the Legal Foundation for a Strip Search?

[105] Mr. Gerson-Foster argues that the trial judge erred in holding that his strip search was legal because he was entering the prison population and it was necessary to ensure he did not have additional drugs on his person. He contends that: (1) the trial judge misapprehended the evidence about the purpose of the

search, (2) the police did not have the grounds for a strip search, and (3) the purpose of the search (a search for drugs) was unrelated to Mr. Gerson-Foster's arrest on a surety warrant.

[106] The second argument related to the grounds required for a custodial strip search is complex, and was not argued fully before us and we should not comment on it.

[107] Moreover, it is once again unnecessary to resolve any of these *Charter* claims since Mr. Gerson-Foster has already demonstrated serious s. 8 violations. The arrest relied upon to support his strip search was illegal, and he was illegally strip searched without the police making reasonable inquiries that they ought to have made to determine the status of the surety warrant.

[108] I will say, however, that Mr. Gerson-Foster's contention that, to be lawful, a custodial strip search must be related to the purpose of the arrest, is not an obviously correct proposition of law. I will address this legal proposition briefly because in her reasons, recounted earlier in this decision, the trial judge assumed that a custodial strip search can only be conducted if related to the purpose of the arrest. I do not want to leave the impression that we are expressing agreement with that proposition.

[109] In *Golden*, at para. 96, Iacobucci and Arbour JJ. underscored the utility in "distinguish[ing] between strip searches immediately incidental to arrest, and

searches related to safety issues in a custodial setting." Requiring strip searches immediately incidental to arrest to be related to the purpose of the arrest makes sense, since a strip search that is unrelated to the purpose for an arrest cannot be for the purpose of searching for and preserving evidence of the offence. Custodial searches are conducted, however, because of the "greater need" to ensure that individuals entering the prison population do not possess concealed weapons or illegal drugs on their person. This risk can be presented by any prisoner, regardless of the purpose of their arrest. The "purpose of the arrest" limit does not operate sensibly in the custodial setting and I do not read *Golden* as mandating it.

[110] In my view, the proposition relied upon by Mr. Gerson-Foster that custodial strip searches must be related to the purpose of the arrest should not be taken as settled.

E. THE REMEDY: SHOULD THIS COURT EXCLUDE THE EVIDENCE OBTAINED?

[111] Mr. Gerson-Foster has therefore made out four related *Charter* violations. His s. 9 right not to be arbitrarily detained was contravened when he was arrested without reasonable grounds, and again when that arrest was continued without reasonable inquiries being made into the validity of the surety warrant the police were relying upon. His s. 8 right to be free from unreasonable search was contravened because the arrest relied upon to justify both his pat-down and strip searches was illegal, and he was strip searched before the police made

reasonable inquiries that they ought to have been made into the validity of the surety warrant.

[112] In my view, we are in a position to determine whether the admission of the evidence linked to these *Charter* violations would bring the administration of justice into disrepute, and we should do so. The evidence relevant to this determination is not in dispute; only its characterization is at issue. This is an appropriate case for this court resolving the s. 24(2) question: *R. v. Caputo* (1997), 114 C.C.C. (3d) 1 (Ont. C.A.), at p. 13.

[113] As I see it, taken collectively, the *Charter* breaches were extremely serious. I recognize that Cst. Kim believed he was entitled to arrest Mr. Gerson-Foster, and that it was not his fault that the Crown did not call Det. Cst. Jackson in an effort to demonstrate objective grounds for the arrest. However, things became serious once the officers, aware of the need to inquire into the validity of the surety warrant, failed to do so. Instead of taking steps to ensure that they were acting lawfully and respecting the liberty interests of Mr. Gerson-Foster, all of them, save Cst. Figlarz, to use the vernacular, “passed the buck”. Things became extremely serious when, knowing of the need to inquire, Mr. Gerson-Foster was strip searched without the inquiry having been made. That, in my view, was bad faith. This, coupled with the fact that there were several *Charter* breaches, makes for a strong case for exclusion based on the seriousness of the *Charter* violations.

[114] The impact of the breach on Mr. Gerson-Foster's *Charter* rights was also considerable. He was improperly arrested without reasonable and probable grounds, taken into custody, and then subjected to the indignity of a strip search that should never have happened. The impact of the breaches on Mr. Gerson-Foster's *Charter* interests strongly favour exclusion.

[115] In my view, because the first and second *Grant* inquiries strongly favour exclusion, the evidence obtained must be excluded. In the circumstances of this case, the disrepute that would be caused by the loss of the reliable real evidence, even recognizing that this evidence is necessary to the prosecution of the charges Mr. Gerson-Foster faces, cannot outweigh the force of these considerations: *R. v. McGuffie*, 2016 ONCA 365, 336 C.C.C. (3d) 486, at para. 63. The evidence must be rejected in the long term interests of the repute of the administration of justice.

CONCLUSION

[116] I would therefore allow the appeal, set aside Mr. Gerson-Foster's convictions, and substitute verdicts of acquittal.

Released: May 16, 2019 "K.F."

"David M. Paciocco J.A."

"I agree. K. Feldman J.A."

"I agree. B. Zarnett J.A."