COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Santana, 2020 ONCA 365
DATE: 20200611
DOCKET: C65685

Doherty, Watt and Miller JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Abel Solano Santana

Appellant

Michael A. Moon and Nadia Klein, for the appellant

Jeannine Plamondon, for the respondent

Heard: In writing

On appeal from the conviction entered by Justice W.D. Newton of the Superior Court of Justice, dated January 10, 2018 and an appeal from the sentence imposed on May 31, 2018.

Doherty J.A.:

I

OVERVIEW

[1] The appellant was convicted, after a trial in Superior Court by a judge alone, of possession of Fentanyl for the purposes of trafficking. The trial judge imposed

a sentence of eight years, which upon reduction of a credit for presentence custody, resulted in a net sentence of 4 years, 320 days.

[2] The appellant appeals conviction and sentence.

[3] At trial, the appellant alleged various *Charter* violations and argued virtually all of the evidence produced by the Crown should be excluded under s. 24(2) of the *Charter*. The trial judge found there were no *Charter* violations and, in any event, he would not have excluded the evidence. The defence offered no evidence and no argument on the merits. The trial judge convicted the appellant on one charge of trafficking in Fentanyl. The other charges against the appellant and all of the charges against his co-accused were stayed at the request of the Crown.

[4] On appeal, the appellant focuses on a single alleged *Charter* violation. He submits the warrantless search of the vehicle in which the appellant was a passenger when arrested, the seizure of his jacket found in the vehicle, and the search of the jacket, constituted an unreasonable search and seizure under s. 8 of the *Charter*. He further submits, if this argument is accepted, the court should not make its own s. 24(2) analysis, but should direct a new trial.

[5] The Crown makes two submissions in response. First, the Crown argues there was no s. 8 violation. Second, the Crown submits, if there was a s. 8 violation, this court should perform its own s. 24(2) analysis. The Crown contends all of the

factors relevant to that analysis favour admission of all of the evidence. The Crown submits the appeal should be dismissed.

[6] For the reasons that follow, I would allow the appeal and direct a new trial.

II

THE EVIDENCE

[7] The appellant was under investigation by a police task force headed by the OPP. The task force was investigating large scale drug trafficking in northeast Ontario. Officers assigned to the task force learned the appellant was in Thunder Bay. He was required to remain in Ottawa under the terms of his bail. The officers commenced surveillance. They saw the appellant with a woman in a Jeep Cherokee. The vehicle made several brief stops.

[8] The officers conducting the surveillance contacted the local Thunder Bay police and provided a description of the appellant and the vehicle. They asked the Thunder Bay police to stop the vehicle. The officers indicated the appellant was wanted on two outstanding warrants, one a province-wide warrant, and was in breach of the terms of his bail order. The officers also advised the Thunder Bay police the taillights of the appellant's vehicle were not operating.

[9] Thunder Bay police officers, Milionis and Bliss, were on patrol. They saw the Jeep Cherokee. A woman was driving and a person they believed to be the appellant was sitting in the front passenger seat. The officers confirmed through

CPIC, the existence of the outstanding warrants. They also noted the rear lights were not functioning. They decided to stop the vehicle for the taillight infraction and arrest the appellant on the province-wide warrant.

[10] The officers stopped the vehicle. Officer Milionis spoke with the driver. He told her the rear lights were off and asked her to produce the relevant *Highway Traffic Act* documents.

[11] Officer Bliss stood by the passenger door. After the appellant falsely identified himself as “Dave”, Officer Milionis told Officer Bliss to arrest the appellant on the province-wide warrant.

[12] Officer Bliss removed the appellant from the vehicle and handcuffed him. He told the appellant he was under arrest on the outstanding warrant and advised him of his right to counsel. Officer Bliss conducted a pat down search and located the appellant’s wallet. The wallet contained the appellant’s identification. Officer Bliss took the appellant to a second Thunder Bay police cruiser that had arrived on the scene and placed him in the back seat.

[13] Officer Bliss testified his arrest of the appellant had nothing to do with any suspected drug activity by the appellant. He agreed he had no reason connected to suspected drug trafficking to either stop the Jeep Cherokee, or arrest the appellant.

[14] While Officer Bliss was occupied with the arrest of the appellant, Officer Milionis continued to speak with the driver. She was becoming quite upset. Apart from addressing the potential *Highway Traffic Act* violation, Officer Milionis had no reason to detain the driver or the vehicle. At this stage of the interaction between the Thunder Bay police and the occupants of the vehicle, there was no suggestion the driver would not be free to go with the vehicle once the *Highway Traffic Act* matter had been adequately addressed by Officer Milionis.

[15] After Officer Bliss had placed the appellant in the back of the police cruiser, he returned to the Jeep Cherokee "to get the rest of his [appellant's] belongings from the vehicle". According to Officer Bliss, he took it upon himself to look for and gather the appellant's belongings from the Jeep Cherokee because he anticipated the appellant would be held in custody overnight. It is implicit in Officer Bliss's testimony he chose to gather the appellant's belongings from the Jeep Cherokee, anticipating the woman would drive the vehicle away after the *Highway and Traffic Act* matter was adequately addressed. The police had no grounds to hold the driver or the vehicle. Officer Bliss did not ask the appellant if he wanted the police to gather his belongings from the Jeep Cherokee and take them back to the station.

[16] In cross-examination, Officer Bliss gave an additional reason for the search of the vehicle which led to the discovery of the jacket. He testified that he understood he was entitled to search the immediate area around where the appellant had been sitting in the Jeep Cherokee at the time of his arrest "for officer

safety". He understood his right to search that part of the vehicle continued, even though by the time he conducted the search, the appellant had been removed from the vehicle, handcuffed and placed in the back of the cruiser with the intention of driving the appellant to the police station.

[17] Officer Bliss testified when he looked into the passenger side of the Jeep Cherokee, he saw a jacket lying on the back floor between the two front seats. He assumed the jacket belonged to the appellant because it was a cold night, and the driver had her jacket on.

[18] Officer Bliss removed the jacket from the Jeep Cherokee, intending to put the jacket into the police cruiser to take it back to the station with the appellant. Before putting the jacket in the cruiser, he searched the pockets, checking for weapons or other objects relevant to police safety.

[19] The officer found a Ziplock bag containing 495 pills, which appeared to be Percocet. They were later identified as Fentanyl. The appellant and the driver were arrested on a charge of trafficking in narcotics and advised of their right to counsel.

[20] Officers Bliss and Milionis conducted a further search of the vehicle as an incident to the arrest on the charge of trafficking in narcotics. They also searched the driver. The police found two cellphones, one in the vehicle, and one in the driver's purse. A subsequent review of the text messages visible on one of the

cellphones revealed communications consistent with language used in drug trafficking.

[21] Officers with the task force later obtained a warrant to search the hotel room where the appellant and the driver had been staying. The affidavit sworn in support of the search warrant summarized the evidence accumulated in the course of the drug investigation. The discovery of the pills in the jacket seized from the Jeep Cherokee played a central role in the grounds relied on to obtain the warrant. The warrant issued and the subsequent search of the hotel room produced thousands of Fentanyl pills.

III

WAS THE SEIZURE AND SEARCH OF THE JACKET LAWFUL?

[22] Officer Bliss's decision to look inside of the vehicle for things belonging to the appellant and his decision to take possession of the jacket, both decisions made without the consent of the appellant or the driver, constituted a search and seizure for the purposes of s. 8 of the *Charter*: see *R. v. Reeves*, 2018 SCC 56. I do not understand the Crown to suggest otherwise. The subsequent search of the pockets of the jacket was also a search for s. 8 purposes.

[23] The search of the vehicle, the seizure of the jacket, and the subsequent search of the jacket were not authorized by a warrant. The onus fell on the Crown to demonstrate the searches and seizure were nonetheless reasonable within the

meaning of s. 8 of the *Charter*: see *R.* v. *Caslake*, [1998] 1 S.C.R. 51, at para. 11; *R. v. Valentine*, 2014 ONCA 147, at para. 43; *R. v. Aviles*, 2017 ONCA 629, at paras. 13-15. In this case, the Crown argues the warrantless search and seizure were lawful as incidental to the appellant's lawful arrest on the outstanding warrant. A warrantless search and seizure will be lawful if truly incidental to the arrest, and conducted in a reasonable manner: *R. v. Fearon*, [2014] 3 S.C.R. 621, at para. 20.

[24] The trial judge accepted that the visual examination of the interior of the Jeep, the seizure of the jacket from the vehicle, and the search of the jacket before it was placed in the police cruiser were all justified as a search and seizure incident to the appellant's arrest on the outstanding warrant: see *R. v. Solano-Santana*, 2018 ONSC 2609, at paras. 52-56. He focused primarily on the search of the pockets of the jacket. He said, at para. 56:

> As the applicant was taken into custody on an April night in Thunder Bay, it is understandable that the police did not opt to leave his jacket behind. I find that Constable Bliss subjectively had valid purposes in mind when he searched the jacket. Furthermore, those purposes were objectively reasonable. A jacket could contain a weapon, or potential evidence related to the charges, and thus it was objectively reasonable to search the jacket for the purposes of officer safety and the discovery of evidence.

[25] A search is properly characterized as an incident to arrest only if the search is conducted for a valid purpose connected to the arrest: *R. v. Nolet*, [2010] 1 S.C.R. 851, at paras. 51-52; *R. v. Balendra*, 2019 ONCA 68, at paras. 44-47. In *R. v. Caslake*, at para. 25, Lamer C.J.C. said:

> If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier*, *supra*, (protecting the police, protecting the evidence, discovering evidence) or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable.

[26] As *Caslake*, and the many cases that have applied *Caslake* instruct, a court, in deciding whether a particular search was a lawful incident to an arrest, must determine:

- the purpose for which the officer conducted the search;
- whether that purpose was a valid law enforcement purpose connected to the arrest; and
- whether the purpose identified for the search was objectively reasonable in the circumstances.

[27] In applying those criteria to this case, I distinguish between Officer Bliss's examination of the inside of the vehicle in search of the appellant's belongings, and his removal of the appellant's jacket from the vehicle on one hand, and his subsequent search of the pockets of the seized jacket on the other hand. I think the appellant's constitutional argument stands or falls on the lawfulness of Officer Bliss's examination of the contents of the vehicle and his seizure of the jacket. If

those acts were lawfully incidental to the appellant's arrest, I would have no difficulty in holding a search of the pockets of the jacket before it was placed in the police cruiser was justified for police safety purposes as a lawful incident of the appellant's arrest. If, however, the visual inspection of the inside of the Jeep and the seizure of the jacket were not incidental to the arrest, and were therefore unreasonable within the meaning of s. 8, it cannot assist the Crown that the police had legitimate safety concerns associated with the possession and control of the unlawfully seized jacket. If the visual search of the interior of the vehicle and the seizure of the jacket from the vehicle were not incidental to the appellant's arrest, the subsequent search of the pockets of the jacket could not be incidental to that arrest.

[28] The scope of the power to search as an incident to an arrest is fact-specific: *R. v. Fearon*, at para. 13. Valid police purposes associated with searches incidental to arrest include police safety, public safety, securing evidence, and discovering evidence. Two points should be stressed. First, the purpose relied on to justify the search at trial must have been the actual reason the police conducted the search. After-the-fact justifications that did not actually cause the police to conduct the search or seizure will not do. Second, the police purpose must be related to the specific reason for the arrest. Here, the appellant was arrested because there was a province-wide warrant for his arrest for driving while under suspension. Any search said to be justified as a search for evidence had to be

evidence in respect of his arrest on the outstanding warrant, and not evidence connecting him to other possible offences such as drug trafficking: see *Caslake*, at paras. 22-25.

[29] Although the trial judge made some reference to the discovery of evidence as a justification for Officer Bliss's actions, Officer Bliss never suggested he was searching for evidence that would confirm either the existence of the outstanding warrant, or the identification of the appellant as the person named in the warrant. In the circumstances of this case, evidence gathering provided no justification for the visual search of the vehicle, the seizure of the jacket, or the search of the jacket.

[30] The reasonableness, and hence the lawfulness, of Officer Bliss's actions turns on whether he had any authority to visually inspect the inside of the vehicle for property belonging to the appellant and, if he located any property, to seize that property and take it to the police station. Counsel did not refer to any statutory authority for Officer Bliss's actions. I am not aware of any.

[31] I see no connection between legitimate law enforcement interests engaged upon the appellant's arrest and Officer Bliss's search for, and seizure of, property from the Jeep, which Officer Bliss believed belonged to the appellant. Officer Bliss was not looking for evidence relating to the reason for the arrest. He had no reason to believe any officer or member of the public was in danger from anything in the

vehicle. Clearly, the appellant posed no danger as he was in handcuffs in the back of the police cruiser. Officer Bliss wrongly believed he was entitled to seize the appellant's property because the appellant was under arrest and was being taken back to the police station. By unlawfully searching the vehicle and taking possession of the jacket, Officer Bliss created a justification for the search of the pockets of the jacket before it was placed in the police cruiser.

[32] There are circumstances when the police arrest a person in a vehicle in which the police are authorized, indeed required, to take control of, and responsibility for the vehicle and its contents. In those circumstances, the police are also sometimes authorized to itemize and secure the contents of the vehicle: e.g. see *R. v. Russell*, 2018 BCCA 330; *R. v. Cuff*, 2018 ONCA 276. Those circumstances did not exist here.

[33] The Thunder Bay police had no intention of taking control of the vehicle when Officer Bliss went looking for the appellant's belongings and seized the jacket. To the knowledge of Officer Bliss and Officer Milionis, the woman driving the vehicle would be on her way, wherever she was going, once the *Highway Traffic Act* matter had been addressed. The police had no authority to prevent the driver from leaving with the vehicle after the *Highway Traffic Act* matter was completed. Equally, the police had no power to itemize the contents of the Jeep or, more specifically, to look for, and take possession of, the appellant's personal property in the Jeep. If Officer Bliss was concerned about the appellant losing track

of his property, or being cold while in custody, Officer Bliss could have offered to collect the appellant's belongings from the Jeep for him.

[34] At trial, and again on appeal, the Crown relies on two cases from this court, *R. v. Aviles*, [2017] O.J. No. 3968 and *R. v. Valentine*, 2014 ONCA 147. Both cases are factually different from the present case, and make the point that the scope of the power to search incidental to arrest is necessarily fact-specific.

[35] In *Aviles*, the accused was arrested for an assault which had occurred shortly before the arrest. As he was being arrested, a shoulder bag fell from the accused's shoulder on to the ground. After the police had secured the accused, a police officer picked the bag up and searched it quickly for a weapon before taking the bag into custody. The bag was searched more thoroughly, subsequently. Narcotics and a knife were found in the bag.

[36] On appeal, the court focused on the lawfulness of the initial search. The accused argued there was no objectively reasonable basis to search the bag for officer safety purposes. The trial judge found, in all the circumstances, there were legitimate officer safety concerns.

[37] *Aviles* involved the application of well-settled legal principles to a specific set of facts. The argument in this court focused on the reasonableness of the trial judge's finding the police had grounds to search the bag for officer safety reasons. The authority of the police, as an incident of an arrest, to take possession of a bag

dropped on the ground by an accused during his arrest is beyond question. The authority to look into the bag for officer safety purposes, or some other legitimate arrest-related purpose, depends on the facts. In *Aviles*, the trial judge found there was a basis for officer safety concerns. This court held the trial judge's finding was not unreasonable.

[38] *R. v. Valentine* is relied on by the Crown to support the contention that a police officer may search an area of a vehicle in which an arrested person was sitting, for officer safety reasons, even after the person has been arrested, handcuffed and placed in police custody. Before considering *Valentine*, I observe the trial judge, to the extent he considered police safety concerns, focused on those concerns as a justification for the search of the pockets of the jacket before it was placed into the police cruiser. I do not read the trial judge as finding the visual search of the interior of the vehicle and the seizure of the jacket from the vehicle were justified on police safety grounds: *R. v. Solano-Santana*, at paras. 55-56. It is unclear from Officer Bliss's evidence whether he relied on officer safety concerns when examining the interior of the vehicle and seizing the jacket. If he did, those concerns were not objectively justifiable in the circumstances and could not provide a legitimate purpose for either the visual search of the inside of the vehicle, or the seizure of the jacket.

[39] Returning to *Valentine*, a police officer stopped a vehicle for a traffic infraction. A CPIC search indicated a potential breach of an outstanding bail order.

The officer took the accused from his vehicle to the police cruiser and arrested him on that charge.

[40] The arresting officer testified he was trying to decide whether to release the driver at the scene on some form of promise to appear, or take him back to the police station. If the officer chose to release the arrested person, he would be free to return to his automobile. The officer had concerns, for reasons which need not be detailed here, about his safety if the appellant was allowed to return to his vehicle. The officer decided to perform a brief safety search of the vicinity around the driver's seat in the vehicle. He discovered drugs.

[41] In upholding the trial judge's ruling the officer's search was a lawful incident of arrest, this court said, at para. 47:

> The route leading to the trial judge's conclusion that the search was for a valid objective of officer safety was as follows. The trial judge accepted Constable Dowling's testimony that he was concerned about releasing the appellant … The trial judge then held that the prospect of allowing the appellant back into his car gave rise to a concern over officer safety based on the possibility there may be weapons in the car proximate to the driver's seat. The concern was valid in the light of the appellant's criminal antecedents and the disturbing behaviour he had exhibited in the course of the stop.
>
> On this record, I see no reason to interfere with the trial judge's finding that the search of the front of the car was reasonable based on a valid objective – officer safety.

[42] In this case, unlike *Valentine*, there was no possibility the appellant would be released and allowed to return to his vehicle. He was in the police cruiser and

was going to be taken to the police station and held in custody. *Valentine* does not assist the Crown.

[43] For the reasons set out above, Officer Bliss did not act lawfully when he visually examined the interior of the Jeep, seized the jacket, and searched the jacket. His actions constituted an unreasonable search and seizure in violation of s. 8 of the *Charter*.

IV

SECTION 24(2) OF THE *CHARTER*

[44] When this court finds a *Charter* violation not found at trial, this court will, if the trial record permits a full and fair assessment, engage in its own s. 24(2) analysis: e.g. see *R. v. Balendra*, at para. 62. The appellant submits the assessment cannot be done on this record. The Crown says it can be.

[45] The trial judge addressed s. 24(2), even though he found no *Charter* breach. His consideration of s. 24(2) is, however, brief, no doubt because it was hypothetical. The trial judge does not make findings of fact that would assist this court in a s. 24(2) analysis. His description of the *Charter*-infringing conduct as “not very serious” and the impact of any *Charter* violations on the appellant’s rights as “minimal” are not helpful. The trial judge does not identify the breaches he is assuming for the purpose of his characterization of those breaches: *R. v. Solano*-

Santana, at paras. 75-76. The trial judge's reasons do not assist this court in considering the application of s. 24(2).

[46] The Crown, in submitting this court can do the necessary s. 24(2) analysis, focuses exclusively on the s. 8 breach, which occurred in respect of the visual search of the car, the seizure of the jacket, and the search of the jacket. Were the s. 24(2) focus that narrow, the Crown would have a good argument for this court making the s. 24(2) analysis. However, the impact of a *Charter* breach on the administration of justice, for the purposes of s. 24(2), must look to the overall conduct of the police investigation and the impact of any *Charter* breach on the investigation as a whole: see *R. v. Gonzales*, 2017 ONCA 543, at paras. 163-66.

[47] In this case, the breach of the appellant's s. 8 rights led directly to the discovery of the pills in the jacket pocket. That discovery led immediately to the arrest of the appellant and the driver on drug trafficking charges. Without the pills, that arrest would not have occurred. The arrest, in turn, led to further searches which yielded cellphones that ultimately led to evidence consistent with drug trafficking. Without the illegal seizure of the pills, there would have been no arrest on drug trafficking charges, and no search of the cellphones. Lastly, the discovery of the pills in the jacket played a prominent role in the police obtaining a search warrant for the appellant's hotel room. That search yielded thousands of pills.

[48] It is arguable all of the evidence seized from the Jeep Cherokee was tainted by the s. 8 violation and “obtained in a manner” that infringed the appellant’s s. 8 rights. On this view, the privacy infringement went well beyond the seizure of a jacket from the back of the vehicle: see *R. v. Whittwer*, [2008] 1 S.C.R. 235, at para. 21; *R. v. Kokesch*, [1990] 3 S.C.R. 3.

[49] It is also arguable, if the information that the police discovered pills in the appellant’s jacket were to be removed from the affidavit relied on to obtain the search warrant, the remaining information would not justify the issuance of the warrant. The warrant would fall, rendering the search of the hotel room warrantless and unconstitutional: e.g. see *R. v. Evans*, [1996] 1 S.C.R. 8, at para. 19. An unlawful search of the appellant’s hotel room raises significantly different privacy concerns than does the visual search of the vehicle and the seizure of a jacket from the vehicle.

[50] There was some argument at trial about the effect of the unconstitutional seizure of the appellant’s jacket and the pills in that jacket on the constitutionality of subsequent police conduct. The trial judge did not address those submissions in his reasons. The arguments advanced on appeal also did not address the impact of the s. 8 breach on the constitutionality of other aspects of the police investigation.

[51] The determination of whether the evidence seized from the Jeep, the jacket, and the hotel room, should be excluded under s. 24(2) cannot be done on appeal. On this record, the court cannot, with any confidence, make the findings necessary to put sufficient meat on the evidentiary bones so as to properly perform a s. 24(2) analysis. I cannot say what part, if any, of the evidence should be excluded under s. 24(2) as a consequence of the s. 8 breach I have identified. There must be a new trial.

Released: “DD” “JUN 11 2020”

“Doherty J.A.”
“I agree David Watt J.A.”
“I agree B.W. Miller J.A.”