NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Lewis, 2007 NSCA 2

Date: 20070110
Docket: CAC 264778
Registry: Halifax

Between:

Marlon Dwight Lewis

Appellant

v.

Her Majesty the Queen

Respondent

Revised judgment:	The original judgment has been corrected according to the erratum dated **May 6, 2008**.
Judge(s):	Roscoe, Bateman, Fichaud, JJ.A.
Appeal Heard:	November 28, 2006, in Halifax, Nova Scotia
Held:	Appeal is dismissed per reasons for judgment of Fichaud, J.A.; Roscoe and Bateman concurring.
Counsel:	Anne MacLellan Malick, Q.C., for the appellant David Schermbrucker, for the respondent

Reasons for judgment:

[1] A police dog sniffed a narcotic in Mr. Lewis' backpack at a train station. After Mr. Lewis answered some questions from a police officer, he was arrested for possession of a narcotic, informed of his right to counsel, and he requested counsel. Before Mr. Lewis was given a phone to contact counsel, the police searched his backpack and found cocaine. The issues are whether the police violated Mr. Lewis' ss. 8 and 10(b) *Charter* rights and, if so, whether the cocaine evidence is excludable under s. 24(2).

Background

[2] On April 15, 2004 at 3 p.m. an eastbound train from Montreal arrived at Truro's Via Rail Station. Mr. Lewis alighted from a sleeper car.

[3] Corporal Fraser heads the RCMP Criminal Interdiction Team. This "Jetway" unit monitors passengers at airports, train and bus stations in Halifax and Truro. The team's goal is to intercept passengers who use the transportation system for a criminal purpose, mainly carriage of contraband such as illegal drugs. The Jetway program implements a designed investigative technique. Officers look for travellers whose behaviour exhibits nervousness or avoidance. A police dog may sniff the traveller's luggage. A police officer then approaches, identifies himself as an officer, and strikes a conversation. If the accumulated information leads the officers to believe there are grounds for arrest, they do so, then search.

[4] On April 15, the team was at the Truro Station. With Corporal Fraser were Constables Prevett and Daigle. Constable Daigle, a dog handler, had his yellow Labrador, Boris. The dog is trained to sit beside a container emitting the scent of a narcotic. Also present were two officers with the RCMP Drug Section, Sergeant Brown and Corporal Duggan, stationed in Truro.

[5] The team, except for Constable Daigle and Boris, observed disembarking passengers on the platform. Constable Daigle and the dog stayed inside the reception area. Constable Daigle wore an RCMP jacket. The others had casual dress.

[6] Corporal Fraser noticed that Mr. Lewis was the last person to disembark. Constable Fraser signalled Constable Daigle to approach Mr. Lewis. They were on a platform, 25 to 30 feet wide, between the station and train. Constable Daigle had Boris to his right, on a leash. Mr. Lewis hesitated when he saw Constable Daigle approaching with Boris. Mr. Lewis moved to his right, away from the dog.

[7] Boris did not react as they passed. Constable Daigle turned and followed Mr. Lewis. As the dog approached Mr. Lewis from behind, Boris sniffed at Mr. Lewis' backpack. Mr. Lewis pulled the backpack away, but Boris pursued the backpack. The dog then sat, his trained signal that he had detected the odour of a narcotic.

[8] Constable Daigle motioned to Corporal Fraser that the dog had identified the presence of drugs. Corporal Fraser testified:

> At that time I felt from the reaction by the dog that there was reason for myself to speak to this individual and I approached him. I identified myself as a member of the RCMP using my issue badge and I further asked this individual if he would mind speaking with myself. I advised him that he had done nothing wrong at this point in time and that he was not under arrest.
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> . . .
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> We were just inside the doorway and actually we were on the main thoroughfare walk area of the station and we were impeding the movement of persons in that area so I asked Mr. Lewis if he would mind stepping off to the right . . . my right at the time . . . approximately four to five feet which is just out of the walkway area. He indicated that he would and we stepped aside so this traffic could continue through this general area.

[9] The trial judge related what happened next:

> [14] When he asked the accused if he would mind answering some questions, the accused replied "okay". The corporal then engaged him in a general conversation about where he was coming from, his destination and asked to see his ticket. Corporal Fraser asked for identification and the accused gave him his Ontario driver's license, which Corporal Fraser handed to another member of the team, Constable Prevett, who had been standing about six feet from them and who promptly obtained information about the accused by telephoning the local detachment of the RCMP. He informed Corporal Fraser that the accused had a drug record with a notation for violence. Corporal Fraser noticed that the accused

> was extremely nervous. He concluded the accused had possession of narcotics and arrested him for that offence.
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> [15] Corporal Fraser immediately read the accused his *Charter Rights* and informed him of his right to counsel. Almost immediately, the accused said he wanted to talk to a lawyer.
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> [16] The officers then opened the accused's backpack and located what appeared to be a quantity of cocaine and a set of electronic scales. Boris was brought back into the reception area to confirm the presence of a narcotic. Upon the finding of the cocaine, the accused was re-arrested for the offence of possession for the purpose of trafficking. He was again asked if he wanted to speak to counsel, but it was explained to him that as there was no way to give him any privacy at the railway station; he would be given private access to a phone at the police station - a few minutes drive from the railway station.
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> [17] The accused was then searched and transported to the police station where a private phone was immediately made available to him.

[10] Mr. Lewis was charged with possessing cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 and trafficking in cocaine contrary to s. 5(1) of that *Act*. He was tried before Justice Gruchy, without a jury, in the Nova Scotia Supreme Court.

[11] Mr. Lewis applied for a ruling that he had been detained arbitrarily contrary to s. 9 of the *Charter* and that, after his detention and arrest, he was denied his right to counsel contrary to s. 10(b), and searched contrary to s. 8. At the *voir dire*, Constables Daigle and Prevett and Corporal Fraser testified. Preliminary hearing transcripts of testimony by Corporal Duggan and Sergeant Brown were entered. Mr. Lewis did not testify at the *voir dire*. After the *voir dire*, the trial judge ruled (2005 NSSC 311) that Mr. Lewis had not been detained before his arrest, the officers had sufficient grounds for his arrest, the search incidental to the arrest was justified, and Mr. Lewis was not deprived of his right to counsel under s. 10(b). The trial judge also stated that, if Mr. Lewis' *Charter* rights had been violated, the narcotics were non-conscriptive evidence and should not be excluded under s. 24(2) of the *Charter*.

[12] At the trial, the *voir dire* evidence was adduced and Mr. Lewis testified. The trial judge found Mr. Lewis guilty of both counts, entered a conviction of

possession for the purpose of trafficking contrary to s. 5(2) and stayed the trafficking charge further to *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[13] Mr. Lewis appeals his conviction.

Issues

[14] Mr. Lewis submits first that, while questioned by Corporal Fraser before his arrest, he was detained. On the appeal, he acknowledges that the dog's response gave the officers the limited grounds needed to detain, and that the detention was not arbitrary under s. 9 of the *Charter*. But Mr. Lewis says that, after this detention, he was not promptly informed of his right to counsel contrary to s. 10(b).

[15] Second, Mr. Lewis says that, after his arrest, (1) he was not afforded the opportunity to speak to counsel "without delay", (2) once he requested counsel, the officers should have postponed searching his backpack until he consulted counsel, (3) the backpack search was not incidental to the arrest, and (4) the arrest was illegal rendering the search illegal, all contrary to ss. 8 or 10(b).

[16] He submits that as a result of any of these *Charter* breaches, the trial judge should have excluded the search evidence under s. 24(2).

[17] I will discuss the first and second issues. As, in my view, the trial judge did not err by ruling there was no *Charter* breach, I will not consider s. 24(2).

First Issue: Was there a detention?

[18] Mr. Lewis says that he was detained during his conversation with Constable Fraser, before his arrest, and that Constable Fraser violated s. 10(b) by failing to inform him of his right to counsel immediately upon his detention. The trial judge ruled that Mr. Lewis was not detained before his arrest. Later I will review the trial judge's reasons.

[19] Whether there was a detention is a question of mixed fact and law. The court of appeal reviews the trial judge's reasons for correctness respecting extractable issues of law and for palpable and overriding error respecting both factual issues and mixed issues with no extractable legal error: *Housen v.*

Nikolaisen, [2002] 2 S.C.R. 235, at ¶ 8, 10, 19-25, 31-36; *R. v. Clark*, [2005] 1 S.C.R. 6 at ¶ 9-10*; R. v. Buhay*, [2003] 1 S.C.R. 631 at ¶ 45; *R. v. Cooper*, 2005 NSCA 47, at ¶ 22; *R. v. Brown*, 2006 ABCA 199, at ¶ 13-14; *R. v. Rajaratnam*, 2006 ABCA 333 at ¶ 10; *R. v. Groat*, 2006 BCCA 27 at ¶ 15.

[20] In *R. v. Therens*, [1985] 1 S.C.R. 613, Justice LeDain, dissenting on another issue, defined "detention" under the *Charter* as follows:

> 49 In addition to the case of deprivation of liberty by physical constraint, there is in my opinion a detention within s. 10 of the *Charter* when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.
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> 50 In *Chromiak* this Court held that detention connotes "some form of compulsory constraint". There can be no doubt that there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action that amounts to a detention within the meaning of s. 10 of the *Charter*. The issue, as I see it, is whether that compulsion need be of a physical character, or whether it may also be a compulsion of a psychological or mental nature which inhibits the will as effectively as the application, or threat of application, of physical force. The issue is whether a person who is the subject of a demand or direction by a police officer or other agent of the state may reasonably regard himself or herself as free to refuse to comply.
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> . . .
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> 53 Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

To similar effect: *R. v. Thomsen*, [1988] 1 S.C.R. 640 at p. 649 and *R. v Feeney*, [1997] 2 S.C.R. 13 at ¶ 56 per Sopinka, J. for the majority.

[21] Justice LeDain described three types of detention: (1) deprivation of liberty by physical constraint; (2) assumption by an officer of the state of control over a person's movement by a demand or direction connoting a significant legal consequence and impeding access to counsel; (3) psychological compulsion when, following a demand or direction by an officer, the individual acquiesces because he reasonably believes that he has no choice but to submit. The common denominator is that "there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action."

[22] The trial judge expressly applied the *Therens* tests to Mr. Lewis. Respecting physical constraint, he said:

> 24 In the case now before me, the accused was not under any physical constraint prior to his arrest. Corporal Fraser did ask the accused to move out of the way of other disembarking passengers, but that did not amount to any sort of physical restraint. There is no suggestion that the other officers of the interdiction team had any close contact with the accused and appear to have avoided any appearance of physical constraint.

Respecting the demand or direction that may have legal consequences, the trial judge said:

> 25 Until the arrest of the accused the only action by Corporal Fraser which may conceivably be viewed as a demand or direction was, as I mentioned above, his request to the accused to step out of the way of members of the public as they were standing in an area near the entrance to the waiting room. I do not consider that request to have been a demand or direction and in any event, did not impede the accused's right to counsel.

As to psychological detention, the trial judge said:

> 20 I firstly note, as did Krindle, J. in *R. v. Pangman* (*W.G. et al*.) (2000) 146 Man R. (2d) 191, that the accused did not give evidence in the *voir dire* as to how he perceived his situation, nor is there any evidence before me which would suggest the accused had a reasonable perception that he had no choice but to respond to the police.

. . .

> 26 It is clear that the words and manner in which Corporal Fraser engaged the accused were not threatening in any objective sense. But for the actual presence of cocaine and the possession of the accused he should not have felt to be under any sort of threat.

[23] Mr. Lewis' counsel submits that the demand or direction, the compulsion and Mr. Lewis' reasonable belief that he had to comply may be presumed from the circumstances. The key circumstances are the presence of the dog and officers and Corporal Fraser's scrutiny of Mr. Lewis' behaviour. I agree that such inferences may be drawn from the evidence in appropriate circumstances. But there is no legal presumption of the necessary demand or direction and reasonable perception of compulsion from the mere fact that a police officer conducts an interview. In *R. v. Mann*, [2004] 3 S.C.R. 59, at ¶ 19, Justice Iacobucci for the majority said:

> 19 "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

To similar effect: *R. v. H.(C.R.) [C.R.H.]*, 2003 MBCA 38, at ¶ 15-17, 23-26; *R. v. Brown*, 2006 ABCA 199 at ¶ 6 - 22; *R. v. Esposito* (1985), 24 C.C.C. (3d) 88 (OCA) at pp. 94-95, leave to appeal denied (1986) 24 C.C.C. (3d) 88 (note); *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (OCA) at 274; *USA v. Alfaro* (1992), 75 C.C.C. (3d) 211 (QCA) at 236 per LeBel, J.A.

[24] The trial judge made no legal error. So the question is whether the trial judge made a palpable and overriding error in his findings that there was no physical constraint, no demand or direction from the officer to Mr. Lewis, and no evidence to "suggest the accused had a reasonable perception that he had no choice but to respond to the police".

[25] Corporal Fraser's testimony was straight-forward. He said: "I asked if he minded answering some questions and he said, 'okay officer'." At Corporal Fraser's request, Mr. Lewis identified himself. The identification allowed the officers to determine from the detachment that Mr. Lewis had a drug record. This, with the dog's trained response to a narcotic, led to the arrest.

[26] Mr. Lewis did not testify at the *voir dire*. Even without an accused's testimony, a court may infer from the circumstances that the objective reasonableness standard for psychological detention has been satisfied: eg. *R. v. Dolynchuk*, 2004 MBCA 45 at ¶ 20-33. But the trial judge here declined to draw that inference. The practical reality is that Mr. Lewis' appellate armoury lacks this potential weapon - his own testimony of his perception - to attack the trial judge's adverse finding as a palpable and overriding error: see *R. v. H.(C.R.)* at ¶ 45-46.

[27] The record does not support the contention that the trial judge palpably erred by finding no physical constraint, no demand or direction and no reasonable perception of compulsion. The trial judge made no reviewable error in his conclusion that Mr. Lewis was not detained before his arrest. I would dismiss this ground of appeal.

Second Issue: The search and access to counsel under ss. 8 and 10(b)

[28] Mr. Lewis' factum in this court did not argue that the dog sniff on the station platform was a search under s. 8. So it is unnecessary to consider Mr. Lewis' reasonable expectation of privacy from a dog sniffing for narcotics in a public transportation terminal, an issue discussed in cases such as *Brown*, at ¶ 52-55, *R. v. Taylor*, 2006 NLCA 41, at ¶ 22-29 and *R. v. Gallant*, 2006 NBQB 114, at ¶ 11-39. Mr. Lewis focuses on the search after his arrest. This was a search within s. 8, without a warrant.

[29] Immediately before the search, he had been arrested and informed of his right to counsel and he requested counsel. After his request, but before implementing his access to counsel, the officers searched the backpack and found the cocaine and scales. From these facts, Mr. Lewis makes several submissions.

[30] Mr. Lewis first says that the police did not facilitate his access to counsel "without delay", contrary to the implementational duty in s. 10(b). The trial judge said:

> 39 While the accused did promptly request his right to retain counsel it was clearly impractical to do so on a public phone in a railway station, and if it had been so provided would likely have amounted to an infringement of his right to retain and instruct counsel in private. He was, however, transported almost immediately to the Truro Drug Section and in the intervening period between his arrest and being provided a phone there is no evidence of any interrogation.
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> 40 When the accused was given the opportunity to speak to a local legal aid lawyer he declined to do so, but wanted to call a lawyer in Toronto whose name he could not pronounce. He was therefore given the opportunity to call his girlfriend to make arrangements to contact the lawyer. There is no evidence that after making that phone call he asked for further access to a phone.
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> 41 The accused was not deprived of his s. 10(b) right to counsel.

[31] In *R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 269 Chief Justice Lamer said:

> . . . Once a detainee has indicated a desire to exercise his or her right to counsel, the state is required to provide him or her with a reasonable opportunity in which to do so. In addition, state agents must refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel. . . . In other words, the police are obliged to "hold off" from attempting to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel.
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> In my view, what constitutes a "reasonable opportunity" will depend on all the surrounding circumstances.

See also *R. v. Manninen*, [1987] 1 S.C.R. 1233 at p. 1241-43.

[32] The trial judge said that there was no private phone at the station. A right to consultative privacy inheres in the right to counsel under s. 10(b) and should be respected: *R. v. LePage* (1986), 32 C.C.C. (3d) 171 (NSSCAD) at p. 177; *R. v. McKane* (1987), 35 C.C.C. (3d) 481 (OCA) at p. 486; *R. v. Jackson* (1993), 86 C.C.C. (3d) 233 (OCA) at p. 239. But clearly the police may not use the absence of privacy as a pretext or investigative stratagem to delay contact with counsel: *R. v.*

Luu, 2006 BCCA 73 at ¶ 30-31. The trial judge found that there was no telephone in the train station to give Mr. Lewis any privacy for consultation with counsel, that he was "transported almost immediately" to the detachment and given a phone, and that "in the intervening period between his arrest and being provided a phone, there was no evidence of any interrogation". In my view, the trial judge made no reviewable error in his conclusion that, in all the surrounding circumstances, the officers respected Mr. Lewis' right to a reasonable opportunity of access to counsel without delay.

[33] Mr. Lewis points to the search of his backpack, detecting the cocaine and scales, after he requested counsel but before he was given a telephone. He says this violates the police officers' duty to suspend obtaining incriminating evidence until the detainee has the opportunity to consult counsel.

[34] With respect, this submission misconstrues the police duty to "hold off". In *R. v. Debot*, [1989] 2 S.C.R. 1140, at pp. 1146-7, Justice Lamer said:

> 2 On the first point, I note that as a general rule police proceeding to a search are not obligated to suspend the search and give a person the opportunity to retain and instruct counsel, as for example when the search is of a home pursuant to a search warrant. When the police are conducting a body search, however, the matter is entirely different. In such a case, it is impossible to search without detaining the individual within the meaning of s. 10 of the *Canadian Charter of Rights and Freedoms*. It is in that context that I now turn to a discussion of searches incident to arrest.
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> 3 The right to search incident to arrest derives from the fact of arrest or detention of the person. The right to retain and instruct counsel derives from the arrest or detention, not from the fact of being searched. Therefore immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel. There are, in my view, exceptions to this general rule. One is where the lawfulness of the search is dependent on the detainee's consent. That situation is governed by this Court's decision in *R. v. Ross*, [1989] 1 S.C.R. 3, at p. 12:
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> > In my view, the right to counsel also means that, once an accused or detained person has asserted that right, the police cannot, in any way, compel the detainee or accused person to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of

> an eventual trial until that person has had a reasonable opportunity to exercise that right.
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> Another is when a statute gives a person a right to seek review of the decision to search as was the case in *R. v. Simmons*, [1988] 2 S.C.R. 495. In this case, when the person invokes the right, and pending its exercise, the authority to proceed to search is suspended. Obviously, the person must be given the same rights as when arrested, and the officers wanting to search cannot assume that they may proceed absent the suspect's invoking his right to review, until he or she has been given reasonable opportunity to consult counsel.

[35] The exceptions to the rule, noted in *Debot,* do not apply here. The police were entitled to search incidental to the arrest, before Mr. Lewis consulted counsel.

[36] Mr. Lewis next argues that the search of his backpack was not incidental to his arrest. Rather, he says it was incidental to his initial detention, inherent in what Mr. Lewis describes as the officers' predetermined "Jetway strategy" to develop grounds for arrest and search of a targeted individual.

[37] Mr. Lewis' counsel cites *R. v. Caslake*, [1998] 1 S.C.R. 51. The police searched the accused's vehicle because of an RCMP policy to inventory the contents of an impounded vehicle. The search discovered the narcotic. Chief Justice Lamer said (¶ 26-27):

> 26 The police arrested the appellant because they believed that he was either buying or selling the nine-pound bag of marijuana which Natural Resource Officer Kamann found. In this case, the appellant was arrested in his car, which had been observed at the place where the marijuana was discovered. Had Constable Boyle searched the car, even hours later, for the purpose of finding evidence which could be used at the appellant's trial on the charge of possessing marijuana for purpose of trafficking, this would have been well within the scope of the search incident to arrest power, as there was clearly sufficient circumstantial evidence to justify a search of the vehicle. However, by his own testimony, this is not why he searched. Rather, the sole reason for the search was to comply with an RCMP policy requiring that the contents of an impounded car be inventoried. This is not within the bounds of the legitimate purposes of search incident to arrest.
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> 27 Naturally, the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched. The *Charter* requires that agents of the state act in accordance with the

> rule of law. This means that they must not only objectively search within the permissible scope, but that they must turn their mind to this scope before searching. The subjective part of the test forces the police officer to satisfy him or herself that there is a valid purpose for the search incident to arrest before the search is carried out. This accords with the ultimate purpose of s. 8, which, as Dickson J. stated in *Hunter, supra*, is to prevent unreasonable searches before they occur.

[38] These principles do not assist Mr. Lewis. In *Caslake,* Chief Justice Lamer (¶ 14) adopted Justice L'Heureux-Dubé's statement in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at 186:

> . . . the search must be for a valid objective in pursuit of the ends of criminal justice -- such as the discovery of an object that may . . . act as evidence against the accused ...

Chief Justice Lamer said:

> 19 As L'Heureux-Dubé J. stated in *Cloutier*, the three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial.

See also *R. v. Golden*, [2001] 3 S.C.R. 679 at ¶ 49 and *R. v. Mann*, [2004] 3 S.C.R. 59 at ¶ 37.

[39] Mr. Lewis was arrested for possession of a narcotic. The search was for the purpose of locating the narcotic - ie. discovery of evidence that may be used at Mr. Lewis' trial. This was a search incidental to arrest within the principles of *Caslake* and *Cloutier*. It was not a search for an unrelated purpose.

[40] Mr. Lewis argues finally that, if the search was incidental to arrest, the arrest was illegal and therefore the search also is illegal. He says that the arrest was illegal because the grounds for the arrest included the information of Mr. Lewis' drug record, and this information was obtained by Corporal Fraser's questioning during Mr. Lewis' detention before he was informed of his right to counsel.

[41] I agree that a search incidental to an illegal arrest is an illegal search. In *R. v. Collins*, [1987] 1 S.C.R. 265 at p. 278, Justice Lamer said that the three

prerequisites of a reasonable search under s. 8 are that the search be authorized by law, the law itself be reasonable, and the search be executed reasonably. See also *Caslake*, at ¶ 10., *Golden* at ¶ 44-5 and *Mann* at ¶ 36. Under the first prerequisite, a search incidental to arrest is authorized by common law. As Chief Justice Lamer said in *Caslake*, ¶ 13:

> ... However, since the legality of the search is derived from the legality of arrest, if the arrest is later found to be invalid, the search will be also.

[42] But Mr. Lewis' arrest was not illegal. It was based on reasonable and probable grounds - the dog's detection of a narcotic in the backpack of someone with a drug record. These facts are not concoctions of any "Jetway strategy". The trial judge made no error in his ruling that these were reasonable and probable grounds for arrest.

[43] Mr. Lewis' identification - permitting the police to learn of his drug record - occurred in conversation with Corporal Fraser. I have concluded earlier that Mr. Lewis was not under detention when he identified himself to Corporal Fraser during that conversation. In *Feeney* at ¶ 56, Justice Sopinka for the majority said:

> 56 The requirement that a person be informed of his or her s. 10(b) rights begins upon detention or arrest.

When Mr. Lewis informed Corporal Fraser of his identity during the conversation, he was not under detention. So there was no violation of his informational right under s. 10(b). The officers were entitled to use the identification provided by Mr. Lewis to research his record.

[44] The trial judge made no error in his conclusion that Mr. Lewis' rights under s. 8 and 10(b) were not violated.

Conclusion

[45] I would dismiss the appeal.

Fichaud, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.