

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: Higgins-Beals v. Fitzgerald, 2010 NSPC 48

Date: August 4, 2010

Docket: 1925315

Registry: Halifax

Between:

MyKeene Higgins-Beals

v.

Glen Fitzgerald and Kristy Peters

Judge: The Honorable Judge Castor H. Williams

Decision: August 4, 2010

Charge: s. 266(b), Criminal Code

Counsel: Mark Knox, for the Defendant
Michael Anthony Beals (father), for the Complainant

Introduction

1 This is a private prosecution. The complainant, MyKeene Higgins-Beals, a minor, of Beachville, Halifax Regional Municipality, is represented by his father, Michael Anthony Beals. The complainant avers that on or about June 17, 2008, when he and a friend visited the Walmart Canada Store located at 220 Chain Lake Drive, Halifax Regional Municipality, he was unlawfully detained and unlawfully assaulted by the defendants, Glen Fitzgerald and Kristy Peters, who were acting in their capacity as Walmart Canada store security personnel.

Evidence on behalf of the Complainant

2 In summary, the testimony of MyKeene Higgins-Beals, although profusely punctuated with the responses, “I do not remember,” “I do not recall,” or “I forgot,” nonetheless, disclosed that he and a friend, James Smith, entered the Walmart store located at 220 Chain Lake Drive, in the Halifax Regional Municipality. Although he was reluctant to do so, he eventually admitted that they were together wandering around the store. Likewise, he was forgetful whether he and Smith were in any specific areas of the store, and in particular whether they had entered the Electronics Department and the men’s washroom. However, when pressed, in cross-examination, and, confronted with his prior under oath testimony and his prior out of court statements, he admitted that, at a point in time, he and his friend were indeed in the Electronic Department and the men’s washroom.

3 Similarly, he was forgetful concerning any of their activities when in the Electronics Department. Again, when pressed, in cross-examination, he remembered and conceded that, they looked at, picked up and examined an iPod case. Although he denied physically taking anything from the store he was ambivalent concerning whether he aided or abetted the unlawful taking of any merchandise by attempting to block or to shield the observance of the transgression. Smith, in fact, had taken an iPod and together they had entered the men’s washroom, where after their exit, store personnel found the discarded packaging for an iPod. Higgins-Beals forgot what Smith or he did in the washroom.

4 In any event, when they both left the store they were stopped by Peters and another who identified themselves as store security. She requested them to come with her to the loss prevention office on suspicion of shoplifting. Also, she made a telephone call and commented that she thought that they were someone else. Nevertheless, she read them their rights and allowed them to call their parents which they did. A search of Higgins-Beals, by Peters revealed that he had no store merchandise. However, he saw Smith give her an iPod. All the same, although he had no store merchandise on his person, he, Higgins-Beals, together with Smith, was charged with theft.

5 While in the loss prevention office, as it was his practice, on his father’s advise in the past, Higgins-Beals refused to identify himself to store security personnel. Nonetheless, when Fitzgerald arrived at the office, Higgins-Beals avers that, he, Fitzgerald slapped him in the face and pushed him to the ground. During the melee that ensued, Peters, kicked him. Additionally, they handcuffed him and his back, head and leg ached. When the police arrived, he complained of an assault but she informed him that she was present only to investigate a theft and not an assault.

6 Significantly, however, Higgins-Beals attested that when he was in the loss prevention office he was listening to music with earphones, ear bud types, in his ear. He asserted that the sound was normal and that he was not necessarily singing and humming to the music. He also denied that anyone told him to stop as the noise was disturbing. However, he admitted that it could have happened but that he did not recall.

7 In support of these allegations, the testimony of Michael Beals disclosed that upon being informed by his wife of the detention of his son he immediately went to Walmart. On his arrival at the main desk he could hear “very terrible crying,” that he soon discovered came from his son whom he saw in handcuffs. Furthermore, he saw Fitzgerald slam his son on the backbench, forcefully pushing him up against the wall, and, he ran forward and pulled Fitzgerald away. Beals declared that it was, for him, very emotional as he observed Fitzgerald manhandling his son. Additionally, he saw Smith sitting on the bench unagitated.

8 In addition, Beals observed that Fitzgerald’s demeanor was aggressive and that Peters was agitated. Fitzgerald asked him to leave the room and grabbed the door and slammed him. He, in any event, sat by his son to wait for the police. Moreover, he requested their names that only Peters gave while Fitzgerald refused to do so.

9 When the police officer arrived, Beals complained to her about being assaulted and demanded that she commenced an investigation of the alleged assault. She, however, informed him that she was present to investigate a theft complaint and that his conduct was obstructive to this investigation. She ordered him to leave the room or else he would be arrested. As she was not interested in his complaint of being assaulted and as the police did not lay any charges against the store security personnel, he commenced this private prosecution against them.

Evidence on behalf of the Defendants

10 Testifying on his own behalf, Glen Fitzgerald asserted that he was a Walmart Canada employee at the Mumford Road store location. On June 17, 2008, he received a call from Peters requesting information on two individuals who had been arrested at his store, on a previous occasion, and who seemingly were in her custody at the Chain Lake Drive store. As a result, he went to her store to physically identify the persons in custody. However, upon arrival, he determined that they were not the same persons whom he had arrested on a previous occasion.

11 Likewise, he observed that Higgins-Beals, who was wearing ear-buds head phones, was humming and singing loudly to listening music. Catching his attention, Fitzgerald informed him that his humming and singing were disruptive to others and that he should stop it. Additionally, he advised the youth that he was under arrest. Thereupon, the youth lowered his head and increased the volume of his musical performance. As a result, Fitzgerald reached out and with his right index finger removed the ear bud from the youth’s ear.

12 Higgins-Beals reacted by jumping up and shouting that Fitzgerald could not touch him. He pushed his shoulder into Fitzgerald’s chest, as if to escape custody, and his momentum brought them

both to the floor. Fitzgerald forced him back onto the bench and ordered him to be seated, but the youth was verbally and physically noncompliant. Therefore, as a trained and certified security personnel, Fitzgerald applied “open hand soft techniques” to control the youth and to handcuff him. The youth calmed down and he exhibited and complained of no injuries.

13 Fitzgerald denied that he was angry and only acted professionally. Additionally, he denied that Peters was in contact with either he or Higgins-Beals when they were both on the floor. Moreover, when Beals arrived on the scene, his son immediately expressed the view, to his father, that: “They punched me out.” Beals advanced quickly with clenched fists as if to strike saying, “Get away from my son.” Fitzgerald requested him to be calm but he was adamant that they could not keep him away from his son. However, Fitzgerald wanted Beals to leave as he felt that Beals, by his presence, was only inflaming the situation.

14 Jeff MacGillivray, was the assistant manager at the Chain Lake Drive store. He testified that Peters alerted him to the possibility of a shoplifting opportunity by two suspects. She informed him that the suspects had entered and exited the men’s washroom and asked him to go in and to retrieve any merchandise. He went immediately into the washroom and retrieved an empty packaging for an iPod or an MP3 item. He, however, admitted that he did not check the washroom before the suspects entered. All the same, the suspects left the store and he and Peters followed them. When outside Peters stopped them and she asked them to come with her to the store’s loss prevention office.

15 In her testimony, Kristy Peters disclosed that since August 2005 she worked for Walmart as a Loss Prevention Officer. On June 17, 2008, when on duty at the Chain Lake Drive store she observed two young males who matched the description of identified shoplifters from the Mumford Road store. Consequently, she kept them under surveillance and saw them enter the Electronics Department. There, she saw Smith select an iPod case, looked at it and passed it to Higgins-Beals, standing besides him, who attempted to open it. Failing to do so, he returned it to Smith and they were both looking up at the ceiling and around the store. They then proceeded to go to and to enter the men’s washroom.

16 She called on MacGillivray for assistance. He entered the men’s washroom, came out and showed her a packaging for an iPod. The youths left the store without paying for any merchandise. As a result, she followed them outside and stopped and arrested them for theft and possession. When inside the loss prevention office and upon her inquiry whether they had in their possession any store merchandise Smith produced the iPod and gave it to her. She searched neither of them. Further, she requested their identification but Higgins-Beals was uncooperative. He even advised Smith not to give her any information.

17 Calling Fitzgerald for some assistance to identify the youths as he had dealt with two youths of similar description at his store, she also allowed them to call their parents. When Fitzgerald arrived on the scene, he advised that they were not the same previously identified youths. Nonetheless, they placed the youths under arrest for theft and possession and awaited the arrival of the police.

18 Higgins-Beals had his MP3 player or iPod plugged into his ear and was humming quite loudly.

They asked him to be quiet as he was being disruptive. He abated his noise for a few minutes and then recommenced to sing and grunt loudly to the listening music. Fitzgerald requested him to be quiet but Higgins-Beals ignored him and persisted with his loud disruptive cadence. Thereupon, Fitzgerald reached out and removed the ear plug from Higgins-Beals left ear. Higgins-Beals jumped up saying that Fitzgerald could not touch him. He also put his shoulder into Fitzgerald's chest and attempted to pass. Fitzgerald pushed him back unto the bench. Peters assisted by placing her hand on Higgins-Beals shoulder. Several times Higgins-Beals attempted to push pass Fitzgerald and on the last attempt Fitzgerald held him in a bear-hug and they both fell to the floor. Fitzgerald requested her assistance to handcuff Higgins-Beals which she did. When handcuffed they both placed him on the bench and he quieted down.

19 Michael Beals arrived on the scene. He rushed into the room quite agitated and angrily confronted Fitzgerald with his fists as if to strike. Fearing for Fitzgerald's safety Peters called 911 and requested Beals, who was sweating and shaking, to be calm. Beals did not calm down even when the police arrived and, as a result, the police asked him to leave the room.

20 As Beals, in his utterances, had threatened to sue Walmart and to press charges, Peters initially prepared a report that recounted the events in the loss prevention office and gave that to the police. She also prepared a supplementary report, appended to the first, detailing the theft occurrence. She declared that no assault happened in the loss prevention office as neither she nor Fitzgerald struck Higgins-Beals. Rather, all that they did, in the circumstances, was to apply reasonable force to restrain him as he was noncompliant with their commands, and to detain him from escaping lawful custody when he was under arrest for theft and unlawful possession.

Position of the Parties

21 The defendants, through counsel, submitted that the credibility of the parties was an issue. Additionally, Peters had reasonable grounds to believe that the complainant, Higgins-Beals, had committed the offences of theft and unlawful possession. The complainant has tried to distance himself from the theft in an incredulous way and incredibly, given his initiative to file various complaints against the defendants, could not recall any details of his movements around the store until confronted by his prior out of court statement and testimony on the same issues. Nonetheless, he was a party to the commission of the offence of theft by his friend Smith. Also, when under lawful arrest, he was noncompliant to commands, disrespectful and disruptive. Thus, any force used by the defendants was, in the circumstances, reasonable and justifiable to control the situation as he was in custody and under lawful arrest for theft and possession.

22 On the other hand, the complainant essentially submitted that as he did not take any store merchandise the defendants had no grounds to detain or to arrest him. He did not steal anything and had done nothing wrong. Thus, his detention and arrest were not justified. Even if it could be argued that his detention was warranted, nonetheless, in all the circumstances, the defendants physically abused him by using unreasonable and excessive force.

Analysis

23 Here, in the Court's opinion, there were not only issues of credibility but also whether the complainant's detention and arrest was lawful and, if so, whether while in custody he was physically abused by the defendants. It should be noted, however, that a criminal trial is not a credibility contest. The Court must consider all the evidence and apply the principle of reasonable doubt not only to the credibility of the witnesses but also to the facts in issue.

24 In assessing reliability and trustworthiness, the Court refers to the words of Estey J., in **R. v. White**, [1947] S.C.J. No. 10, [1947] S.C.R. 268:

Eminent judges have from time to time indicated certain guides that have been of the greatest assistance, but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biassed, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

25 Additionally, as this Court opined in **R. v. Killen**, [2005] N.S.J. No. 41, 2005 NSPC 4 at paras. 19 and 20:

19 ... that in accepting the testimony of any witness, because credit is presumed, the truthfulness of the witness is also presumed. However, that presumption can be displaced and, in my view, can easily be refuted by evidence that raises a reasonable doubt about the witness's truthfulness particularly if that witness is never rehabilitated by belief or supportive evidence as explained in **R. v. Vetrovec** [1982] 1 S.C.R. 811 and [1991] 1 S.C.R. 742. If credit is displaced and it is not restored, the witness's testimony becomes unreliable and untrustworthy and, in my view, it would have little or no probative value in deciding the facts in issue. See also **R. v. O.J.M.**, [1998] N.S.J. No. 362 at para. 35.

20 Second, there is always a common sense approach to the assessment of witnesses and the weighing of their testimonies with the total evidence as was underscored by O'Halloran J.A., in **Faryna v. Chorny** [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357, and by Cory J., in *W.(D.)* at p. 747. In short, even if a witness is not disbelieved but remains discredited, reasonably, I could still refuse not to rely upon his or her testimony especially if, in my view, "it is not in harmony with the

preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the set of circumstances disclosed by the total evidence and material to the facts in issue.

26 Further, as was put by Saunders J.A., in **R. v. D.D.S.**, [2006] N.S.J. No. 103 at para. 77:

Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

27 In this context, the critical factor is whether the complainant's recollection of the events was "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable." In the Court's opinion, upon its assessment of the witnesses as they testified and its impressions of their testimonies, Higgins-Beals was not only inconsistent but also tended to minimize the significance of his participation and association with Smith. Aside from continuously and persistently repeating, as mantras, "I forgot," "I do not recall," or "I do not remember" to events that as a reasonable and intelligent youth who had experienced the events and to which a practical and informed person would readily recognize as reasonable for him to easily recollect in the surrounding and existing conditions, he created doubts as to the veracity of his own testimony. Thus, in the end and on the total evidence, it is the Court's opinion that his testimony lacked credit, was unreliable and untrustworthy and was not rehabilitated by belief or supportive evidence.

28 For example, he forgot or could not recall being in the Electronics Department with Smith or going together, with Smith, to the men's washroom. He only conceded to these facts, when incontrovertible proof was presented to him. Similarly, his testimony on the events that occurred in the loss prevention office was easily refuted by evidence that, in the Court's opinion, raised a reasonable doubt about his truthfulness. In short, and as a result, the evidence presented on behalf of the complainant also was refuted by evidence that raised a reasonable doubt. Furthermore, their creditworthiness was never rehabilitated by belief or supportive evidence. To this end the Court observes that the evidence of Smith, who was present at all times, would have been critical. However,

in the Court's opinion, on the total evidence and material to the facts in issue, the testimonies presented, by and on behalf of the complainant, became unreliable and had little or no probative value.

29 Thus, on the total evidence, the Court accepts and finds that the complainant and his friend Smith, on June 17, 2008, were in the Walmart Canada store located at 220 Chain Lake Drive, Halifax Regional Municipality. Furthermore, the Court accepts and finds that both youths entered the Electronics Department where they examined an iPod that Smith removed, and, together with Higgins-Beals went into the men's washroom. Additionally, the Court accepts and finds that the assistant store manager went into the men's washroom, after the youths had exited, and he found in the waste bin a discarded packaging for an iPod.

30 Likewise, the Court accepts and finds that the youths were detained and arrested for theft and possession and that Smith turned over to store security personnel an iPod as store merchandise for which he had not paid. Also, the Court accepts and finds that while in the loss prevention office Higgins-Beals was disruptive, uncooperative and non compliant with reasonable demands made to him by the loss prevention officers. As a result, he had to be restrained.

31 The Court accepts that Higgins-Beals did not physically take the iPod from its case and discarded the packaging. However, the Court finds that he was in the Electronics Department with Smith who actually took the item. Likewise, he, Higgins-Beals, had also examined the item and tried to open it and when he could not do so gave it to Smith. Additionally, their conduct by furtively looking around the store and in the ceiling imputed that they were up to some mischief. Moreover, Higgins-Beals did not dissociate himself from Smith but accompanied him into the men's washroom where the packaging of the iPod was discarded. Further, they walked out of the washroom and left the store together without paying for any item.

32 Accordingly, concerning his legal liability, under the provisions of the **Criminal Code**, s.21, it makes no difference whether Higgins Beals aided and abetted Smith or personally committed the offence of theft. Either mode of committing the offence makes him liable. As was put by Cacchione J., in **R. v. Hemeon**, [2005] N.S.J. No. 268, 2005 NSSC 171 at paras. 115-116:

115 An aider may help another person commit an offence by doing something or failing to do something. It is not enough that what the aider does or fails to do has the effect of helping the other person commit the offence. The aider must intend to help the other person commit the offence. Actual assistance is necessary. It is not enough under this section that a person was simply there when a crime was committed by someone else. In other words, just being there does not make a person guilty as an aider of any or every crime somebody else commits in the person's presence. Sometimes people are in the wrong place at the wrong time.

116 On the other hand, if a person knows that someone intends to commit an offence and goes to or is present at a place when the offence

is committed to help the other person commit the offence that person is an aider of the other's offence and equally guilty of it. Aiding relates to a specific offence. An aider must intend that the offence be committed or know that the other person intends to commit it and intend to help that person accomplish his goal.

33 Thus, on the total evidence the Court concludes and finds that Higgins-Beals assisted Smith in Smith's unlawful taking of the iPod. When he accompanied Smith to the washroom, his knowledge can be imputed and a reasonable inference can be drawn that he must have known that Smith intended to take the iPod without paying for it. Further, his presence with Smith not only in the Electronics Department and walking to and in the men's washroom reasonably imputed that he intended to help Smith steal the iPod. He was present with Smith at all the material times. In the result, the Court finds, on the total evidence, that he aided Smith in Smith's commission of the offence of theft. Therefore, in the Court's opinion, Peters, as the loss prevention officer, observing their activities, under the provisions of the **Criminal Code**, s.494(2)(b) had authority and reasonable and probable grounds to detain and arrest him.

34 On the evidence, the Court finds that Fitzgerald, another loss prevention officer, was assisting Peters, on her request, in identifying the youths. The Court also finds that when in the loss prevention office, Higgins-Beals was disruptive, disrespectful, uncooperative and noncompliant with reasonable lawful commands. To this end, the Court finds that he was making loud discordant and disruptive noises that, when asked to do so, he failed to reduce in volume. Likewise, the Court accepts and finds that Fitzgerald was attempting to control the situation when he removed from Higgins-Beals ear the earphone. Additionally, the court accepts and finds that Higgins-Beals had to be physically restrained as the defendants reasonably believe that he was attempting to leave the office when he was under lawful arrest and awaiting the arrival of the police. On the evidence that the Court accepts, it finds that in applying force to the person of Higgins-Beals in order to get him to remain seated on the bench and to control the situation, Peters and Fitzgerald acted reasonably and were justified in applying such force which, on the evidence, the Court finds to be no more than what was necessary for that purpose.

Conclusion

35 In the end, the burden is on the complainant to prove beyond a reasonable doubt that the defendants unlawfully assaulted him. Here, applying the principles enunciated in **R.v. W.(D.)**, [1991] 1 S.C.R. 742, I am left in doubt by the testimonies of the defendants. In short, the defendants' testimonies have raised reasonable doubts and the Court, on the total evidence, is not persuaded beyond a reasonable doubt of the guilt of the defendants by the evidence which was presented by and on behalf of the complainant.

36 As a result, the Court finds the defendants, Glen Fitzgerald and Kristy Peters, not guilty as charged on the Information tried before it.