IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Zahrebelny, 2010 NSPC 91

Date: September 13, 2010
Docket: 2058489
Registry: Halifax

Between:

Her Majesty the Queen

v.

Tony Zahrebelny

Judge:	The Honourable Judge Marc C. Chisholm
Heard:	June 7, 2010; July 15, 2010
Voir Dire Decision:	September 13 2010
Charge:	CDSA 5(2)
Counsel:	Jeff Moors for the Crown Nicole Campbell for the Defence

[1] This is an application for exclusion of evidence, specifically text messages, found on the accused's cellular telephones. The application proceeded by way of *voir dire*.

The Evidence

[2] The court heard the evidence of five witnesses on the *voir dire*. The evidence is not in dispute. I accept the witnesses' evidence and summarize it as follows.

[3] The police obtained a warrant to search the accused residence at 38 Vimy Avenue, Apt. 304, Halifax, Nova Scotia, for cannabis marijuana and evidence relating to the offence of possession of cannabis marihuana for the purpose of trafficking. On June 11, 2009, the police attended the residence and carried out a search. The accused was present at the residence and was arrested at or just inside the doorway for possession of cannabis marihuana for the purpose of trafficking.

[4] The accused, Mr. Zahrebelny, when searched incident to arrest, was found in possession of $435.00.

[5] Found in the small apartment, on a table in the dining area, in open view, were 30 grams of cannabis marihuana, two cell phones, a digital scale, and a

computer. There were several smoked marijuana cigarettes (roaches) and a box of tin foil. Detective Constable Li determined that the two cell phones were working by turning each on (one had a broken view screen). He removed the battery from each phone. This was standard procedure of the Halifax Regional Police, done to ensure no evidence which may be contained in the phone, was lost. There was a box for one of the phones on the livingroom area floor indicating one of the phones may have been recently purchased.

[6] Detective Constable Li testified that, based upon his experience with drug investigations, he believe these cell phones would contain texts, e-mails, etc. which would provide evidence in relation to the allegation of possession of cannabis marihuana for the purpose of trafficking. Consequently he seized the cell phones.

[7] Detective Constable Li subsequently delivered the two cell phones to RCMP Constable Aaron Gallagher at the Tech Lab in Dartmouth for retrieval of information relevant to the alleged offence. In due course the phones were returned to Constable Gallagher with a CD of text messages retrieved from one of the two phones by Constable Gallagher. It is the text messages which are the subject of the present application.

[8] Richard Aaron Gallagher, RCMP tech crime officer described his function as assisting in the extraction of evidence from computers and mobile devices. In relation to the present case, he received two cell phones and a written request form from Detective Constable Li asking for: lists of contacts; calls made and received (including missed call logs); text messages sent and received; voice messages sent and received; emails sent and received.

[9] Constable Gallagher testified that his work is done in a secure environment, ie: in an enclosure which does not permit the transmission of a message from outside the enclosure to the electronic equipment he is examining within the enclosure. This is to prevent a signal being sent to the phone which could alter or delete information inside the device he is examining. Inside the secure enclosure he put the battery into each cell phone and examined them.

[10] The first phone had a broken view screen. Because of the broken screen he was unable to extract any information.

[11] From the second phone he was able to view the text messages without the need of any key or password. Using technology referred to as ZRT he photographed each individual page of the text messages and prepared a disc

of the text message images which he provided to Detective Constable Li when he returned the two cell phones to him.

Position of The Parties

Position of the Defense

[12] The Defense acknowledged that the seizure of the cell phones was lawful, under the authority of s.489(1)(c) of the Criminal Code or incidental to the lawful arrested of Mr. Zahrebelny.

[13] The Defense's position is that the retrieval of information from the cell phones was a warrantless and unlawful search.

[14] The Defense submits that the warrantless search of the cell phones, has not been proven by the Crown to have been authorized by law pursuant to the seizure under s.489(1)(c) of the Criminal Code or pursuant to the common power to search incident to arrest. The Defense submits that the power to search the contents of the phones incident to the lawful arrest of the accused or pursuant to s. 489(1)(c) was limited to a "cursory" search thereof. The Defense submits that Constable Gallagher carried out more than a "cursory"

search and urges the court to exclude the evidence obtained in violation of Mr. Zahrebelny's s.8 Charter Right.

Position of the Crown

[15] The Crown argues that the warrant, as worded in this case, authorized the seizure of the cell phones and the search of the contents thereof.

[16] In the alternative the Crown argues that, if the seizure of the cell phones is found not to have been authorized by warrant, the seizure was authorized by s.489(1)(c) of the Criminal Code and the search of the contents of the phone authorized pursuant to such seizure.

[17] In the further alternative the Crown submits that the search of the cell phones was authorized by the common law power to search the accused and his immediate surrounding incident to arrest.

[18] In the further alternative, the Crown submits that if the search of the contents of the cell phones was in violation of the accused's s. 8 Charter rights, the balancing of factors pursuant to s. 24 of the Charter should result in a finding that the evidence found should not be excluded.

Analysis

[19] The Crown did not dispute that the accused had an expectation of privacy in the contents of his cell phones and that such and expectation was objectively reasonable.

[20] The evidence was that cell phones were in the accused's name and found in the accused's residence. The accused lived alone. There is no indication of use of the cell phones by anyone other than the accused. One cell phone contained a series of personal text messages.

[21] While the accused did not testify, a subjective expectation of privacy may be presumed (see *R v. Little* 2009 CanLII 41212(Ont. S.C.)). I find that the accused had an expectation of privacy in the contents of his cell phones and it was objectively reasonable.

[22] For a search to be reasonable and in compliance with s. 8 of the Charter it must be authorized by law, the law itself must be reasonable and the search must be carried out in a reasonable manner. In cases involving a warrantless search the search is *prima facie* unreasonable and the burden rests on the Crown to establish that the search was reasonable authorization to search the contents of the cell phones.

[23] The Crown submits that the search of the contents of the accused's cell phones was authorized:

(a) as incidental to a seizure of the cell phones pursuant to a search warrant;

(b) as a consequence of the seizure of the cell phones pursuant to s.489(1)(c) of the Criminal Code; and/or

(c) by the common law power to search incidental to a lawful arrest.

[24] The search warrant was introduced on the *voir dire* but not the information to obtain the search warrant. Whether the grounds for the warrant dealt with the issue of a search of the contents of a cell phone was not before the court.

[25] On the wording of the search warrant alone, I am not persuaded that the search of the contents of the cell phones was authorized by warrant. In my view the search of the cell phones was warrantless. The burden of establishing that the search was lawful rests on the Crown.

[26] As previously stated, I accept Cst. Li's evidence that he believed, based upon his previous police experience, that the cell phones would contain evidence relating to the offence under investigation. Based upon his

experience, the presence of two phones, the location of the phones, the cannabis marijuana found near the phones and the other items found at the scene, I find that Constable Li had reasonable grounds for his belief.

[27] I accept Cst. Li's evidence that the seizure of the cell phones was to locate and preserve evidence.

[28] As such I find that the seizure of the cell phones was lawful, pursuant to s.489(1)(c) of the Criminal Code.

[29] What authority do the police have to search the contents of cell phones once they have lawfully seized them pursuant to s.489(1)(c)?

[30] In my view the law is correctly stated by Her Honour Fuerst J. in *R. v. Little*, supra, at paragraph 145:

> "[S]earches must be authorized by law and the limits of the law on which the Crown relies to authorize the search must be respected: see, for example, *R. Caslake [1998], S.C.R. 51; R.V.L.F."*

[31] And at paragraph 146

> "Before seizing an item under s.489(1)(c), the seizing officer must form a belief on reasonable grounds that the item will afford evidence of an offence"

[32] In *Little* there were no reasonable grounds to justify a search of the contents of the communication device seized beyond turning it on to obtain its' telephone number.

[33] In my view, the power to search a cell phone incident to the lawful seizure of it under s.489(1)(c) is limited to that which is directly connected to the reasonable grounds upon which the device was seized. In cases where the police are investigating offences under section 5(1) or 5(2) of the CDSA, the power to search will usually include a search of the contents of the cell phones as the seizure of the device is meaningless without the ability to examine its contents (See R v. Giles [2009] B. C. J. No 2918 (S. C.)).

[34] The facts of the present case are distinguishable from those in *R. v. Little* in that, in the present case, Det. Cst. Li had reasonable grounds to believe that the contents of the cell phones would afford evidence of the offence of possession of cannabis marihuana for the purpose of trafficking.

[35] Consequently, he or someone assisting him had the authority to search the contents of the cell phones to gather evidence relating to that offence.

[36] The time delay and transfer to Cst. Gallagher has been reasonably explained by the Crown as a precaution to protect against the possible loss of evidence and to ensure the recovery of all relevant evidence.

[37] Defense counsel referred the court to *R. v. Polius, [2009] O.J. No. 3074 (Ontario Sup. Ct. Of Justice) Trafford, J.*, in relation to the proper scope of a search pursuant to a seizure under s. 489(1)(c) or a search incident to arrest.

[38] In *Polius* the police were investigating an offence of counselling the commission of murder. The accused was searched incident to arrest and his cell phone seized. The arresting officer was not the investigating officer and had no reasonable basis for a belief that the cell phone might afford evidence of the offence under investigation. Based upon the information found in the cell phone a warrant was obtained for the accused's phone records and they were also seized.

[39] Justice Trafford found that the search of the contents of the cell phone was not authorized as incidental to arrest as the arresting officer had no reasonable basis for a belief that the contents of the phone would yield evidence relating to the offence under investigation.

[40] After reviewing the leading decisions on the common law power to search incident to arrest, Justice Trafford stated at paragraph 41:

> "In my view, the power of SITA includes a power to conduct inspection of an item to determine where there is a reasonable basis to believe it may be evidence of the crime for which the arrest was made. However, any examination of an item beyond a cursory examination of it is not within the scope of the power to SITA. Using other words, the evidentiary value of the item must be reasonably apparent on its face, in the context of all of the information known by the arresting officer. Where the purpose of the SITA is to find evidence of the crime, the standard governing the manner and scope of the search is a "...reasonable prospect of securing evidence...". See *R. v. Caslake, supra*, at para. 21. The police "...must be in a position to assess the circumstances of the case so as to determine whether a search meets the underlying objectives..." of the SITA. See *Cloutier v. Langlois, supra*, at paras. 60-62.

[41] And at paragraph 57 he stated:

> "It is the range of privacy interest that may be implicated by the information of the cell phone that leads me to conclude the values underlying s.8 of the *Charter* are best cared for by limiting the power of the SITA and to seize a cell phone to a power to seize it, where there is reasonable basis to believe it may contain evidence of the crime, for the purpose of preserving its evidentiary value, pending a search of it content under a search warrant. The issuing justice could, if necessary, place conditions on the warrant to ensure that the search was conducted by a named person who was technologically capable of conducting the search, in the presence of a named officer who was knowledgeable about the investigation of the alleged crime or, in some cases, the issuing judge for an *ex parte* determination of what information in the cell phone, or computer, may be seized. This would ensure that the cursory inspection of the information on the cell phone during the execution of the warrant would lead to the seizure of evidence specified in the warrant, or evidence otherwise within the plain view doctrine. The legitimate privacy interests of the arrestee would be optimally cared for during any such execution of the warrant. Principles of minimization would be respected throughout this process. Any information on the cell phone that was not within the authority conferred by the warrant would not be seized by the police. In any event, the process of the police officer returning to the issuing judge after the execution of the warrant and filing the reports required by the *Code* for the purpose of obtained an order that the detention of the seized information is required for trial is an especially important one for search warrants relating to cell phones, computers or other electronic devices."

[42] Defense counsel urges this Court to follow Justice Trafford's ruling limiting the common law power to search a cell phone incident to arrest and to find that such a limitation also applies to the power to search the contents of a cell phone seized pursuant to s.489(1)(c) of the Criminal Code.

[43] I find that I needn't decide the first point advanced by defense counsel, that is the scope of authority to search cell phones incident to lawful arrest and will not do so because there were issues not fully argued by counsel, including:

Whether or not Det. Cst. Li was required to put his mind to the basis of his authority to search the accused's residence and if he put his mind to the power to search incident to arrest, did he consider the lawful scope of such authority (See R v. Caslake, [1998] 1. S. C. R. 51).

[44] Whether the scope of a search of a cell phone under the authority of a search incident to lawful arrest is limited to a "cursory" search thereof, I am of the view that no such limitation applies to the authority to search a cell phone seized under the authority of s. 489(1)(c) of the Criminal Code.

[45] Under s. 489(1)(c) the seizing officer must "believe on reasonable grounds" that the seizure will afford evidence of an offence.

[46] Under the common law power to search incident to arrest there is not a requirement of reasonable grounds (See *Caslake* - supra). The arresting officer must have some reason related to the arrest for conducting the search. In other words, the officer must have "a reasonable prospect of securing evidence." This is a lesser standard for the authority to search than that required under s. 489 (1)(c) of the Criminal Code.

[47] In my view, Justice Trafford's comments are distinguishable from cases involving a seizure of a cell phone pursuant to s. 489(1)(c) because of the different standard to be met by the officer to authorize the search and the seizure under s. 489(1)(c) of the Criminal Code.

[48] In the present case, in my view, the search of the contents of the accused's cell phones was authorized as a consequence of the lawful seizure of the phones pursuant to s.489(1)(c) and the scope of the search was consistent with the reasonable grounds of the seizing officer.

[49] I find that the search of the contents of the accused's cell phones was authorized by law, I find the law itself to be reasonable and I find the manner in which the search was carried out to have been reasonable.

[50] I find no violation of the accused's s. 8 Charter Rights in the circumstances of this case.

[51] The motion to exclude the information found in the accused's cell phones is rejected.