

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Cromwell*, 2024 NSPC 53

Date: 20240731

Docket: 8682938 to 8682949;
8682951, 8682953;
8682955; 8682957;
8682959; 8682961;
8682963; and 8715098.

Registry: Halifax

Between:

His Majesty the King

v.

Dante Warnell Cromwell

<p>DECISION ON <i>CHARTER</i> APPLICATION FOR A STAY OF PROCEEDING</p>

Judge: The Honourable Judge Alonzo Wright

Heard: March 18 and May 14, 2024, in Halifax, Nova Scotia

Decision: July 31, 2024

Charge: Section 5(2) of the *Controlled Drugs and Substances Act*
Sections 267(a), 264.1(1)(a), 266, 85(1)(a), 86(1), 87(1), 90(1),
117.01(1)(x2), 117.01(2)(x2), 86(2), 88(1), 91(1), 92(1), 94(1), 95(1),
96(1), 108(1)(b) of the *Criminal Code*

Counsel: Colin Strapps and Angnakuluk Friesen, for the Public Prosecution
Service of Canada – Atlantic Region
Ian Hutchison for the Defence

By the Court:

Introduction

[1] This is a decision that I gave orally on July 31, 2024. At that time I reserved the right to adjust or edit the decision should it be released in written form for grammar, structure, readability, and organization, as well as to provide complete citations and references, without changing the reasoning or the result.

[2] It is not my intention to re-state the entirety of the testimony of all of the officers. Rather, I will address the central elements and core items of the evidence. I have, however, reviewed, weighed, and considered all of the evidence in this blended *voir dire*/trial in coming to my decision, even if I do not refer to every individual item here.

[3] As an overview, Dante Warnell Cromwell has been charged with possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act* (“CDSA”), as well as a number of other offences including assault with a weapon, uttering threats, common assault, and possession of a prohibited weapon, a handgun, on the date and time in question.

[4] The police located the firearm in Mr. Cromwell's vehicle after conducting a high-risk takedown of both he and his passenger, the co-accused, Emma Findley. The police located the cocaine on Mr. Cromwell during a subsequent strip search on April 16, 2023.

[5] On March 18 and May 17, 2024, I presided over Mr. Cromwell's blended *voir dire* and trial. As part of that hearing there was a *voir dire* with respect to the constitutionality of the strip search and the admissibility of the evidence obtained from the strip search. This is my decision.

Issue

[6] The issue here is whether the strip search of Mr. Cromwell violated his section 8 *Charter* rights.

Overview of Evidence

[7] The facts, in more detail, are as follows.

[8] Mr. Cromwell was alleged to have been involved in an incident that could only be described as an extreme act of road rage that involved a handgun. The

alleged victim contacted the police and followed Mr. Cromwell toward the Macdonald Bridge in Halifax.

[9] Sgt. Perry Astephen received the call and ordered the bridge to be closed to traffic. The Emergency Response Team then conducted a high-risk take down of Mr. Cromwell. Sgt. Astephen assumed control and arrested Mr. Cromwell. He performed a search of Mr. Cromwell for weapons. Nothing was found. Sgt. Astephen then handcuffed Mr. Cromwell's hands behind his back.

[10] After the police searched Mr. Cromwell's vehicle, they found a loaded 9 mm handgun.

[11] Cst. Maxwell, an officer with the Halifax Regional Police ("HRP") for nine years, and Cst. Chestney, an officer for over six years, were working in the Spryfield zone. Both were on general patrol with limited experience in drug investigations and almost zero training in strip searches from the HRP. Cst. Chestney did receive training in 2016 while employed with a different police agency.

[12] On April 16, 2023, Constables Chestney and Maxwell heard the call for a weapons complaint in the downtown core of the Halifax Regional Municipality

("HRM"). They stated they believed that the suspect's vehicle might be headed in their direction so they left the Spryfield area and headed towards the MacDonald Bridge. This bridge was outside of their zone. Leaving their zone would not be surprising to this Court. I am sure that officers from other zones would routinely assist outside of their zones for serious matters like weapons complaints.

[13] Once Constables Chestney and Maxwell arrived at the MacDonald bridge, Sgt. Astephen turned the arrest of Mr. Cromwell over to Cst. Chestney.

[14] Cst. Chestney stated that he searched Mr. Cromwell before placing him into the back of the police car. Nothing was discovered on Mr. Cromwell after being searched for the second time.

[15] Cst. Chestney then stated that he went to retrieve Mr. Cromwell's phone. This left Cst. Maxwell, the driver of the police car, alone with Mr. Cromwell who was handcuffed and seated in the rear of the police vehicle.

[16] Coincidentally, at the same time, Mr. Cromwell's mother was working in the area because of her employment. Cst Maxwell allowed her to speak to her son though the open window of the rear of the police car.

[17] Cst. Maxwell stated that during this conversation he heard what sounded like a plastic rustling noise and Mr. Cromwell moving in the back seat. He says that he ended the conversation between Mr. Cromwell and his mother by closing the window.

[18] Cst. Chestney returned and Mr. Cromwell was transported to the police prisoner care facility by the two officers. The duration of the transport was approximately ten minutes. No sound of the plastic noise was heard by either officer during the transport.

[19] Once at the police station, the police placed Mr. Cromwell in an interview room that was audio and video recorded. In this interview room, Cst. Chestney and Cst. Maxwell conducted a secondary, thorough search of Mr. Cromwell. Sgt. Astephen could be seen in the video monitoring the search from the doorway of the room.

[20] This was a very intensive and methodical search of Mr. Cromwell, from his head to his toes. His waistband was searched and his shoes were removed. The police did not locate anything on his person, nor were there any rustling “plastic-like sounds” noted by Cst. Chestney or any of the other officers during this search. Cst. Chestney was centimetres away from Mr. Cromwell’s person.

[21] The police then left Mr. Cromwell alone in the interview room for a period of time.

[22] The police then decided to perform a strip search of Mr. Cromwell. The police took him to another room that was not subject to video monitoring. Four officers were present during this search: Cst. Maxwell; Cst. Strowbridge; Cst. Chestney; and Sgt. Astephen. The officers asked Mr. Cromwell if he had anything to hide, to which he allegedly replied he had nothing to hide. The police asked Mr. Cromwell if he would agree to a strip search. The accused asked what would happen if he didn't comply. The police told him that force would be used. Therefore, Mr. Cromwell removed all of his clothing.

[23] Mr. Cromwell was standing naked facing the officers. A large plastic baggie allegedly fell from behind his testicles and landed on the floor. Cst. Maxwell made no mention of the discovery of this plastic baggie in his testimony, nor was there any mention of this contained in his personal notes.

[24] Cst. Chestney then directed Mr. Cromwell to turn around and another plastic baggie – or baggies – were visibly noted in the crack of his buttocks. Cst. Maxwell directed Mr. Cromwell to remove the baggies. However, Mr. Cromwell refused.

As a result, Cst. Chestney removed the bags from Mr. Cromwell's butt crack with his hands.

[25] Within the three plastic baggies that were located as a result of this strip search, there were a total of 41 individual baggies which contained either crack or crack cocaine, for a total weight of 25.5 grams.

[26] No formal report was prepared by any of the officers as a result of this strip search.

[27] One officer did not prepare notes of his involvement in the strip search despite being mentioned as being present.

The Crown's Position

[28] The Crown says the police did have reasonable grounds to perform a strip search of Mr. Cromwell and that they conducted the search in a reasonable manner. The Crown asks that the Defence application be dismissed for the following reason: that the strip search of Mr. Cromwell did not violate his s. 8 rights or, if it did, the violation did not reach the threshold required to justify a stay of proceedings.

The Defence's Position

[29] The Defence submits that Mr. Cromwell's strip search was unlawful and a significant violation of his bodily integrity. The Defence argues that the police actions in conducting this search were a grievous violation of Mr. Cromwell's rights under s.8 of the *Charter* – that the humiliation and embarrassment of an individual being strip searched naked cannot be overstated.

[30] The Defence argues that the police lacked reasonable grounds to conduct the strip search. The Defence submits that the purpose of the search was not to discover if Mr. Cromwell was in possession of any weapons or any evidence related to his arrest. Rather, the search was carried out on a mere suspicion that Mr. Cromwell was attempting to conceal "something".

[31] Furthermore, the Defence submits that the strip search was carried out in an unreasonable manner. The search was conducted in the presence of at least four officers and the police did not keep a proper written record.

[32] Mr. Cromwell seeks a remedy of a stay of proceedings pursuant to s. 24(1) of the *Charter*.

The Law

[33] As stated in *R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.) at para. 22-3, the Crown bears the burden of establishing that a warrantless search was authorized by law, the law itself is reasonable, and that the search was conducted in a reasonable manner. The standard is on a balance of probabilities.

[34] The seminal case for strip searches is *R. v. Golden*, 2001 SCC 83.

[35] As stated in *Golden* at para. 104, "...the common law of search incident to arrest, which permits strip searches, does not violate s.8 of the *Charter*".

[36] In *Golden* at para. 89, the Supreme Court of Canada adopted the following comments from the Ontario Court of Appeal in *R. v. Flintoff*, [1998] O.J. No. 2337 (C.A.) at para. 24:

...[s]trip searching is one of the most intrusive manners of searching, and also one of the most extreme exercises of police power. ...

[37] The Court in *Golden* continues on at para. 90 to say:

Strip searches are ... inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy. The adjectives used by individuals to describe their experience of being strip searched give some sense of how a strip search, even one that is carried out in a reasonable manner, can affect detainees: "humiliating" "degrading", "demeaning", "upsetting", and "devastating" ...

[38] The Court in *Golden* goes on to say:

In order for a strip search to be justified as an incident to arrest, it is of course necessary that the arrest itself be lawful. ...(para. 91)

...

The second requirement before a strip search incident to arrest may be performed is that the search must be *incident* to the arrest. ...the search must be related to the reasons for the arrest itself. ... a search "is only justifiable if the purpose of the search is related to the purpose of the arrest". ...(para. 92) (emphasis in the original)

...In [*Golden*]... ...[t]he arrest was for drug trafficking and the purpose of the search was to discover illegal drugs secreted on the appellant's person. Had the appellant been arrested for a different reason, such as for a traffic violation, the common law would not have conferred on the police the authority to conduct a strip search for drugs, even if the police had knowledge of previous involvement in drug related offences, since the reason for the search would have been unrelated to the purpose of the arrest. ...(para. 92)

...

...In order to meet the constitutional standard of reasonableness that will justify a strip search, the police must establish that they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest. (para. 98)

...

In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. ... (para. 99)

...the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. ...(para. 99)

... Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the *Charter*. (para. 99)

[39] In *R. v. Muller*, 2014 ONCA 780, the police lawfully arrested the accused

and transported him to the police station to be strip searched. The police took him

to a room, told him to strip, and ordered him to bend over. The police found drugs in his buttocks. The door to the search room was never closed, allowing people of either gender who happened by to be able to see the search take place. He was not given the choice to remove the bag himself and was not told the search was being videotaped. Watt J.A. ordered a new trial.

[40] In *R. v. Pilon*, 2018 ONCA 959, the police strip searched the accused at the scene of a drug bust. The Court described the incident as follows beginning at para. 3:

... the Sudbury Police Service obtained a warrant under the Controlled Drugs and Substances Act... for a room at the Knights Inn motel. When police entered the room they found three individuals, including the appellant. All occupants of the room were arrested. The appellant resisted arrest, while the arrest of the other occupants occurred without incident. The appellant was eventually placed in handcuffs, with his hands behind his back. Despite the handcuffs, he was observed repeatedly trying to place his hands in the front and back of the shorts he was wearing.

The police conducted a search incident to arrest and noticed that the appellant was wearing two pairs of athletic shorts. They removed the outer pair of shorts and discovered a roll of cash tucked in the pocket of the inner pair of shorts. Sergeant Train decided to continue the search incident to arrest and looked inside the second pair of shorts. The appellant was not wearing underwear and Sergeant Train briefly observed the top of the appellant's buttocks and an elastic band attached to the appellant's penis.

The appellant remained non-compliant and continued reaching inside his shorts. The police believed that he was attempting to hide items. They also had concerns about their safety and the safety of the appellant. When asked by police whether he was concealing anything in his shorts, the appellant repeatedly denied doing so.

Sergeant Train authorized officers to take the appellant to the bathroom in the motel room. There, Sergeant Train conducted a strip search, which consisted of pulling the waistband of the appellant's shorts away from his body, so that Sergeant Train could view his genital area, and reaching in and pulling out objects attached by the elastic band. Sergeant Train was wearing surgical gloves at the time and did not touch the appellant's genitals. The objects retrieved were a pill bottle containing fentanyl patches and a ball of electrical tape with crack cocaine inside.

[41] The Court of Appeal in *Pilon*, drawing upon *Golden* at para. 99, stated at para. 16:

...strip searches are only constitutionally valid where: (1) they are conducted incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the arrest; (2) the police establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest and; (3) the strip search is carried out in a manner that does not infringe s. 8...

[42] At para. 42, the Court found that:

...the police have failed to meet their onus of establishing exigent circumstances that would justify a field strip search. Both strip searches violated the appellant's s. 8 rights.

[43] Even if necessary grounds exist to conduct a strip search, the police must conduct the search in a reasonable manner. The Supreme Court of Canada in *Golden* provided the framework as to how a properly carried out strip search should be conducted at para. 101. They set out eleven prerequisites. I will get into those a bit later.

[44] In *R. v. Cater*, 2019 NSSC 302, Justice Jamieson stated at para. 37:

What is reasonable must be assessed in context. The Alberta Court of Appeal in *R v. Loewen*, 2010 ABCA 255, affirmed, 2011 SCC 21, said the following concerning the meaning of “reasonable and probable grounds”:

18 Therefore "reasonable and probable grounds" does not necessarily mean the same thing as "more likely than not on a balance of probabilities". In *Storrey* at p. 251 it was observed that even a standard of "reasonable and probable grounds" does not require a prima facie case. Rather than meaning "more probable than not", "reasonable grounds" conveys more the idea of an event not unlikely to occur for reasons that rise above mere suspicion: *Mugesera* at para. 114; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52 (S.C.C.) at paras. 34, 41; *R. v. Hall* (1995), 22 O.R. (3d) 289 (Ont. C.A.) at p. 298. It follows that a belief in the existence of a set of facts can be "reasonable" even if the existence of those facts is not "probable". In this context "reasonable" relates to legitimate expectations that a fact exists, without being able to say that it is "more likely than not".

[45] Even if a search is conducted in a reasonable manner, it does not mean that the search itself was reasonable (*R. v. Deschamps*, 2017 BCSC 1989 at para. 40).

[46] The mere possibility that an individual may be carrying drugs on his person is not sufficient to justify a strip search (*Golden*, para. 94).

[47] For years now the courts have taken judicial notice of the impact of overt and systemic racism that has been within the criminal justice system. In *R. v. Morris*, 2021 ONCA 680, the Court stated at para.1:

It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis...

Analysis

[48] There is no issue as to whether Mr. Cromwell was lawfully arrested.

[49] It was alleged that he had produced a gun and pointed it at the complainant's face.

[50] It is alleged that the complainant called 911 and followed Mr. Cromwell until the police intercepted Mr. Cromwell on the bridge.

[51] It is clear that the police had a clear and strong case against Mr. Cromwell at this point.

[52] The next question I must answer is whether the officers had reasonable and probable grounds to conduct the strip search?

[53] A lawful strip search is a warrantless search conducted incidental to arrest. In conducting the search the police must hold reasonable grounds that the purpose of the search is to discover evidence relating to the reasons for the arrest or weapons.

[54] In this case, Mr. Cromwell was first searched by Sgt. Astephen when he was first arrested for weapons related offences. No weapons were located. Nor was

there any suspicious activity by Mr. Cromwell that he was hiding any other evidence.

[55] He was next searched by Cst. Chestney before being placed in the rear of the police car. Nothing was found and no plastic noise was heard.

[56] Mr. Cromwell was next searched at the police station and this search was video and audio recorded. This search did not find whatever Mr. Cromwell was hiding or any weapons. I have viewed this video several times. The video depicts the room where this search was conducted and it was very small. The officers were centimetres away from Mr. Cromwell. The search was very detailed. Cst. Chestney searched Mr. Cromwell's pants – this should have revealed any weapons that he would have had on his person. Nothing was found. Nor was there any plastic noise heard by any of the officers that were present in the room.

[57] Cst. Maxwell is the only officer who provided evidence of hearing what sounded like a plastic baggie rustling noise coming from Mr. Cromwell. This was only while he was seated in the backseat of the police car with the window down speaking to his mother - and there was outside traffic noise.

[58] I remind myself that the burden here is on the Crown to show that there were reasonable and probable grounds to conduct the most intrusive and degrading search available to the police.

[59] Cst. Maxwell says that Sgt. Astephen approved the strip search based upon his information.

[60] Sgt. Astephen also says that he approved the search based upon this information.

[61] I am surprised that given the size of the baggie that the noise was not heard on any other occasions. Mr. Cromwell was with these officers for a period of time. He was with them during the arrest on the bridge. He was with them as they walked into the police station. He was with them in the private room that was video and audio recorded. He was patted down on at least three occasions.

[62] Nothing was found.

[63] Surely, the police, if they had their suspicions, could have employed other methods of investigative techniques to inquire whether or not Mr. Cromwell had something on him.

[64] The officers told this court that they believed that because Mr. Cromwell was alleged to have had a gun, that he might have drugs. They say that where there are guns there are often drugs. Cst. Maxwell says that he was unsure what was on Mr. Cromwell. Sgt. Astephen said that it was drugs, ammunition, cigarettes, or even a lighter, that could have been on Mr. Cromwell.

[65] Cst. Chestney told this court that he believed that it was drugs. He states in his notes that this was based upon Mr. Cromwell's involvement in guns and drug offences. Cst. Chestney attempted to draw a connection between the guns and the drugs. However, in cross-examination, Cst. Chestney agreed that Mr. Cromwell has no history of drug-related offences. I ask myself, where would this information come from? Why would it be in Cst. Chestney's notes that were made after that search of Mr. Cromwell? Was this a mistake? Or was it a fabrication to support the strip search?

[66] I find that the Crown has not proven on a balance of probabilities that the police had the required objective and subjective grounds to form the reasonable and probable grounds to conduct the strip search of Mr. Cromwell.

[67] I next turn to whether the strip search was done in a reasonable manner.

[68] As mentioned earlier, *Golden* sets out the eleven steps or principles that guide a strip search at para. 101. I will now examine them in detail.

[69] The first - can the strip search be conducted at the police station and, if not, why not?

[70] The answer to this here is in the affirmative. Mr. Cromwell was searched at the police station.

[71] The second - will the strip search be conducted in a manner that ensures the health and safety of all involved?

[72] The answer is in the affirmative as well. It appears that the physical health of all involved was protected. However, the mental health of Mr. Cromwell is open to debate at a later date.

[73] The third - will the strip search be authorized by a police officer acting in a supervisory capacity?

[74] The answer to this is in the affirmative but it requires a deeper dive. The officer that authorized the search was the same officer that first arrested and searched Mr. Cromwell on the MacDonald Bridge - Sgt. Astephen.

[75] Sgt. Astephen did not find any weapons or hear any plastic noise when he arrested Mr. Cromwell. He was also present in the first search at the police station. No weapons were found after an intensive search. Nor was there any plastic noise heard during this search.

[76] Surely, as the officer in charge, Sgt. Astephen would have questioned Cst. Maxwell on the noise and inquired if it could have been coming from outside of the car, from Mr. Cromwell's mother, or why they hadn't heard the noise since Cst. Maxwell heard it on the bridge in the back of the police car?

[77] The granting of the strip search took seconds. There was no formal documentation or checklist submitted to the officer in charge setting out the grounds or the reasons for the request for the strip search. It was the word of one officer based upon what he thought he heard and the movements he saw in the rear of his police car.

[78] More importantly, the approval was based upon incorrect information – an incorrect belief - that the accused had a history of guns and drugs. This was simply not true and Cst. Chestney walked this comment back in cross-examination.

[79] The fourth - has it been ensured that the police officers carrying out the strip search are of the same gender as the individual being searched?

[80] The too can be answered in the affirmative. All the officers were male.

[81] The fifth - will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?

[82] This is answered in the negative. I find that four officers were present for the search of Mr. Cromwell. At no time was Mr. Cromwell argumentative or aggressive with the officers. He was taken into custody without incident. He was transported to the police station without incident. He was searched without incident and complied with the demands of the officers at all times.

[83] I viewed the video of the search room. Mr. Cromwell complied when he was asked to put his hands on the wall. They asked Mr. Cromwell to put his hands higher. He put his hands higher. At all times Mr. Cromwell complied with their demands. There was no need to have four officers present when Mr. Cromwell was stripped naked.

[84] The sixth - what is the minimum of force necessary to conduct the strip search?

[85] Here I find that while the police say that Mr. Cromwell voluntarily removed his clothes, this was not the case. He was told that he was going to be searched. He was asked would he comply. He asked 'what would happen if I don't comply?' The answer was that force would be used. I find that no request to remove his clothes was made to Mr. Cromwell. The option of force was not acceptable for Mr. Cromwell and I find that that is why he removed his clothes.

[86] The seventh - will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?

[87] The answer to this is in the negative. It is clear from the evidence that the door to the strip search room was open. Cst. Maxwell said that he was standing in the doorway. One cannot stand in the doorway of a door that is ajar. It is clear that anyone walking by would be able to see Mr. Cromwell's naked body.

[88] The eighth -will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?

[89] The answer to this is in the negative. While the search may have been completed as quickly as possible, the fact that Mr. Cromwell was completely naked is not acceptable. There was zero structure to this strip search. The Supreme

Court of Canada and our Court of Appeal have warned the police many times of the effects that this type of search has upon the individuals that are being searched. They are degrading and harmful to members of our society. They are particularly harmful to members of the Black community who have historically been mistreated and who have mistrust of the justice system. These types of searches do not help to ensure or instill trust in our communities when this happens. It was clear from the Wortley Report on police checks that the Black community was not trusting the police (Dr. Scott Wortley (University of Toronto Centre for Criminology & Sociological Studies), "Halifax, Nova Scotia Street Checks Report" (2019) Nova Scotia Human Rights Commission).

[90] The ninth - will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?

[91] This I can answer in the affirmative. The police did not touch the genitals or buttocks of Mr. Cromwell.

[92] The tenth - if the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?

[93] In this case, the plastic baggies were found between Mr. Cromwell's buttocks – his butt cheeks. He was given the option to remove the object himself. When he refused, Cst. Chestney removed the items. A trained medical professional was not offered or requested. The lack of training by these officers in this most intrusive act of policing is shocking.

[94] Cst. Chestney stated that he received training by another police agency in 2016. Neither he nor Cst. Maxwell received any training from the HRP. This Court and others have spoken about the need for police officers to be properly trained in the area of strip searches. This appears not to have been acted on to any degree. *Golden* is not new law – it has been around since 2001.

[95] Finally, the eleventh - will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[96] The answer to this is in the negative.

[97] Notes and documentation are one of the key aspects of policing. It is one of the key methods in assisting the officers with their memory, their accuracy, and the transparency of an investigation. This all goes towards the credibility of the

officers and the faith and trust that the public has in the law enforcement community and, ultimately, the justice system.

[98] There were zero notes that were taken at the time of the strip search of Mr. Cromwell. This is despite four officers being present. It is this lack of proper documentation that leads to inconsistency in police testimony. There were no details about what or how Mr. Cromwell's clothes were removed, or what ones were removed and in what order.

[99] I am well aware of the issues that the HRP have in relation to staffing and attracting members. I am also all too familiar with the increase in crime in our city and our community, and the toll that it takes upon officers. However, the process by which Sgt. Astephen granted permission to conduct the strip search was woefully lacking in documentation. I was told that the approval took only seconds. I ask myself, how could something so intrusive and so serious be granted in such a cavalier and unprofessional manner.

[100] One of the most striking examples of a lack of documentation is that of Cst. Maxwell. Cst. Maxwell made no mention of a baggie containing 25 grams of cocaine or crack cocaine that was found during the strip search of Mr. Cromwell. This again is shocking that these details would not be in Cst. Maxwell's notes.

[101] For all of the above reasons, I find that the strip search of Mr. Cromwell was not carried out in a reasonable manner and as such was a clear violation of his s. 8 *Charter* rights.

Remedy

[102] As a remedy for the breach of s. 8 of the *Charter*, the applicant applies for a stay under s. 24(1) of the *Charter*.

[103] In *R. v. Mullings*, 2019 ONSC 2408, Justice Boucher summarized the law relating to a stay of proceedings at para. 40:

A stay of proceedings is the most drastic remedy available in a criminal case for a *Charter* violation. A stay will be warranted only in the clearest of cases, where state conduct either compromises the fairness of an accused's trial, or risks undermining the integrity of the judicial process. The test for determining whether to grant a stay has three requirements:

- (1) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome,
- (2) there must be no alternative remedy capable of redressing the prejudice, and
- (3) where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the Court must balance the interests in favor of granting a stay against the interest that society has in having a final decision on the merits.

...See *R. v. Babos*, 2014 SCC 16; *R. v. Regan*, 2002 SCC 12.

[104] In this court's opinion, allowing Mr. Cromwell's case to proceed means that the prejudice to the integrity of the justice system will be manifested, perpetuated or aggravated.

[105] As stated by Justice Boucher in *Mullings* at para. 41:

...the police conduct in strip searching the applicant was "offensive to societal notions of fair play and decency" such that "proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system." *Babos*, para. 35.

[106] Strip searching Mr. Cromwell in the presence of four white officers subjected Mr. Cromwell, a member of the Black community, to a humiliating and embarrassing strip search that was without lawful authority. The search was carried out based upon mere suspicion that Mr. Cromwell was concealing something that made a "plastic-like" rustling sound. The police carried out the search without any evidence that Mr. Cromwell was in possession of a weapon or evidence relating to his arrest. Mr. Cromwell had no history of drug-related activity and was not arrested for drug possession or drug trafficking.

[107] As a result of the lack or failure of the police to take proper written notes and record the search, the details pertaining to the search are limited, misleading, and inconsistent.

[108] Mr. Cromwell was always cooperative with the police. The only question he asked was “what would happen if I do not comply with the strip search?”.

[109] To have four officers present while the strip search was conducted, one of whom did not appear to have any interaction with Mr. Cromwell whatsoever, was offensive. While Cst. Strowbridge was present, no notes relating to his involvement were made by him. The police actions were serious and highly intrusive.

[110] It was unnecessary to have the door to the strip search room open. Those walking past could easily have seen what was taking place inside, including Mr. Cromwell’s naked body.

[111] I am well aware of the prevalence of guns, and in particular, handguns, in our community, and the potential danger and harm resulting from their possession by unauthorized individuals. I am also well aware of the events that took place on Saturday, July 27, 2024, where five people were taken to hospital as a result of gunshot wounds.

Conclusion

[112] I am aware of the remedy under s.24(2) that is available - that the exclusion of the drugs as a result of the strip search is an option.

[113] However, the offensive and degrading conduct by the officers that lead Mr. Cromwell here – that he has had to endure - warrants a stay of proceedings. Mr. Cromwell was subject to an unlawful search by four police officers. The search was not related to the reasons for his arrest and the case law dictates a strip search on mere suspicion is simply not sufficient to meet the high threshold that is required for a police officer to undertake such a search.

[114] This behaviour respectfully cannot be condoned by this court. I say again, the law in respect of strip searches is not new or novel: *Golden* was issued in 2001. Our Supreme Court in Nova Scotia has emphasized this in *Cater*. The police should have been properly trained in conducting such a highly intrusive search. The public and Mr. Cromwell are therefore better served by the imposition of a stay of proceedings. The continuation of this type of unlawful conduct by the police must be prevented.

[115] There is no remedy, aside from a stay of the proceedings on all matters, that would be capable of adequately addressing the harm done to the justice system.

[116] Therefore, I issue a stay of proceedings against Mr. Cromwell.

Alonzo Wright, JPC