

**IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA**

**Citation:** R. v. R.C. 2008 NSPC 12

**Date:** March 5, 2008

**Docket:** 1763716

**Registry:** Halifax

Her Majesty the Queen

v.

R.C.

**Restriction**

**on publication:** S. 110(1) YCJA - **Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.**

**Judge:** The Honourable Judge Pamela S. Williams

**Heard:** February 20, 2008 in Halifax Youth Justice Court

**Oral decision:** March 5, 2008

**Charge:** *s. 5(2) Controlled Drugs and Substances Act*

**Counsel:** James Whiting, for the Crown  
Megan Longley, for the Defence

## INTRODUCTION

[1] R.C., a young person within the meaning of the **Youth Criminal Justice Act (YCJA)**, is charged, on or about the 23<sup>rd</sup> of April, 2007, with having in his possession for the purpose of trafficking, crack cocaine, contrary to s. 5(2) of the **Controlled Drugs and Substances Act**.

[2] This is a decision following a *voir dire* held to determine the lawfulness of the strip search of R.C. by police, and the admissibility of 17.8 grams of crack cocaine found on the young person. Crown and defence have agreed that the evidence heard on the *voir dire* is to form part of the trial proper.

## LAW

### STRIP SEARCHES

[3] The leading case on strip searches in Canada is the Supreme Court of Canada case of *R. v. Golden [2001] SCJ 81*. It confirms many of the principles previously enunciated on the law related to warrantless searches and it sets out the parameters for strip searches.

[4] A quick summary of the principles are as follows:

1. There is a constitutional right to privacy.
2. Unjustified searches by the state are prohibited.
3. Warrantless searches are prima facie unreasonable.
4. Search incident to arrest is an established common law exception to the rule.
5. Search incident to arrest does include the power to strip search, subject to limitations.

[5] A strip search is defined at paragraph 47 as:  
the removal or rearrangement of some or all of the clothing of a person as to permit a visual inspection of a person's private areas,

namely genitals, buttocks, breasts (in the case of a female) or undergarments.

[6] The two part test in determining whether a warrantless strip search is lawful can be stated as follows:

1. Were there reasonable and probable grounds to conduct the strip search?
2. Was the strip search, carried out at the police station, conducted in a reasonable manner?

[7] Where the reasonableness of the search is challenged by the accused, the crown bears the onus of proof (on balance of probabilities) that the search was reasonable.

#### **APPLICATION OF THE FACTS TO THE LAW**

##### **Part One - Were there reasonable and probable grounds to conduct the strip search?**

[8] In determining whether reasonable and probable grounds exist to conduct the strip search, three conditions must be met:

1. The individual must be lawfully under arrest;
2. The strip search must be incident to arrest, meaning that it must be specifically related to the reasons for the arrest itself; and
3. If the search is taking place for the purpose of finding evidence, it must be governed by the need to preserve the evidence and prevent its disposal by the arrestee.

[9] R. C. was arrested in possession of a motor vehicle, that had previously been stolen by Scott Tufts and purportedly traded, by Tufts, for drugs.

[10] In an attempt to retrieve the vehicle, after having been arrested and charged with stealing it, Scott Tufts placed a call and arranged for someone to meet him (hopefully in the stolen vehicle) at an agreed upon location to complete another drug transaction.

[11] Police intercepted the stolen vehicle at the agreed upon location. It was being driven by R. C. R. C. was arrested and charged with possession of the stolen vehicle.

[12] Later, at the police station, police conducted a strip search of R. C. and located a quantity of cocaine. R. C. was then charged with possession of cocaine for the purpose of trafficking. Save for the arrest on the stolen vehicle charge and subsequent strip search which resulted in the detection of cocaine, there would have been no grounds to charge R. C. with possession of cocaine for the purpose of trafficking.

**Was R. C. lawfully under arrest?**

[13] Clearly, R. C. was lawfully under arrest for having been found in possession of the stolen vehicle. The vehicle matched the make, model, year and color of Susan Bell's stolen vehicle and it matched the license plate number reported to police. There was only one person in the vehicle, the driver, R. C., and the owner had not given him permission to drive or possess it.

**Was the Strip Search Incident to Arrest, i.e. Was it Specifically Related to the Reasons for the Arrest itself?**

[14] What is meant by "specifically related to the arrest itself"? It is clear from the evidence that the strip search was not "solely related" to the reasons for arrest but was it was "related" to the reasons for arrest. For direction I turn to *R. v. Debot (1989) 52 CCC (3d) 193* wherein the Supreme Court of Canada stated that in assessing the reasonableness of a search the court must consider the totality of the circumstances including the nature of the information supplied by the informer and confirmation of information by the police investigation. Therefore, in determining whether the strip search of R. C. was specifically related to the reasons for the arrest I will consider the totality of the circumstances surrounding the arrest.

[15] On Sunday April 22, 2007 Constable Proulx received a complaint from Susan Bell wherein she reported that Scott Tufts had stolen her 2002 Ford Focus, Nova Scotia License plate number DYN655, the previous day.

[16] On Monday April 23, 2007 Scott Tufts was arrested and interviewed by Constable Proulx. Mr. Tufts provided a story to police about two black males who had kid-napped him and who had subsequently taken Ms. Bell's vehicle. He said he had met them downtown on Saturday to buy drugs. Mr. Tufts said he had escaped when he offered to go get money to pay for crack they were selling.

[17] Police readily admit they did not believe Mr. Tufts story about an abduction. They had serious issues with Mr. Tufts credibility.

[18] While in police custody Scott Tufts told police he could get the motor vehicle back by placing a call and arranging for a place to meet to do a further drug transaction. It was Constable Withrow's opinion that the same person who was the seller of the crack would be transporting it in Ms. Bell's stolen Ford Focus.

[19] Police readily admit they thought, at the time, this might simply have been an attempt on the part of Mr. Tufts to talk himself out of trouble, that is, avoid a theft conviction. Constable Proulx had never dealt with Mr. Tufts before but he knew Tufts had a lengthy criminal record. Constable Withrow testified that he had no expectations. He believed that Tufts was involved in the drug world and was a drug user. In his words, 'it was worth a chance to get the motor vehicle back'. With little or no other options available, police agreed to allow Tufts to place a call to set up a drug deal in the hope that Ms. Bell's motor vehicle would be driven to the pre-arranged location for the drug transaction.

[20] While in police custody Mr. Tufts placed one call at 10 p.m. and arranged for a meeting to do a drug transaction at the Esso on Lady Hammond Road in Halifax. Constable Lobsiger, who was out on patrol in the area, was advised by Constable Withrow at 10:01 p.m. to be on the look-out for a Ford Focus displaying license plate number DYN 655. Constable Lobsiger was sitting in his police car near the West End Mall. At 10:13 p.m. he saw the vehicle near 6960 Chebucto Road and followed it. He and Constable Withrow (each in separate vehicles) stopped the Ford Focus on Romans Avenue and arrested the driver, R. C.

[21] R. C. was arrested because he was the confirmed driver and sole occupant of the motor vehicle that had been reported stolen within the previous 48 hours. The arrival of that vehicle near the location of the arranged drug transaction, so soon after the call had been placed, lent credence to Tuft's assertion that he

could get the vehicle back by arranging a drug deal. It was therefore quite conceivable that the driver and sole occupant of the vehicle would have drugs on his person that were intended to be sold to Tufts. Furthermore, Constable Withrow knew R. C. He knew that R. C. had a prior involvement with drugs. He was also aware of intelligence reports that indicated that R. C. resided in and was associated with areas where the drug trade occurred. And, Constable Withrow stated that he had seen R. C. in areas frequented by people who buy and sell drugs.

[22] The search of R. C., incident to his arrest for possession of a stolen vehicle, did not, and understandably would not result in the detection of drugs if hidden on his person under his clothing. The strip search conducted at the police station later on was not for the purpose of affording evidence related to the stolen vehicle, but it was for the purpose of affording evidence related to the possession of drugs for the purpose of trafficking, which itself, was a reasonable conclusion to draw, based on the substance of Tuft's telephone call together with the subsequent arrival of the stolen vehicle near the agreed upon location. On the balance of probabilities, I find that the strip search was specifically related to the totality of circumstances surrounding the arrest of R. C. and was, therefore, incident to arrest.

**Was the Search for the Purpose of Finding Evidence? If so, Was it Governed by the Need to Preserve Evidence and Prevent its Disposal by the Arrestee?**

[23] The strip search took place for the purpose of finding drugs. Drugs by their very nature can be easily concealed, disposed of or ingested. Police had earlier determined that R. C. would be held overnight and taken to court the following day to be arraigned on a charge of possession of a stolen vehicle. Police were concerned that R.C. was potentially in possession of drugs and that, in custody, they might be to be ingested, hidden or destroyed by the accused. Furthermore, police were concerned that there was potential for drugs to enter the cells or the Courthouse. As one knows, metal detectors are of no assistance in detecting drugs on a person.

[24] I conclude, therefore, that the search was for the purpose of not only preserving evidence, that is, the drugs, but also for the purpose of preventing their destruction, their ingestion by the accused or their dissemination in the jail setting or courthouse cells. These were both legitimate and real concerns on the part of police.

**Part Two - Was the strip search carried out at the police station conducted in a reasonable manner?**

[25] As pointed out by counsel, *Golden, supra*, at para. 101 provides a framework for police in deciding how best to conduct a strip search incident to arrest that is in compliance with the **Charter**. The evidence will be analyzed in reference to that framework.

[26] **Was the strip search conducted at the police station?**  
Clearly, it was.

[27] **Was it conducted in a manner that ensured the health and safety of all involved?**

Yes it did. Whether one accepts the young person's version of events or that of the officers, it is obvious that the officers advised the young person, in advance, that they were going to do a strip search. They afforded the young person the opportunity to remove his own clothing or have it removed by officers, with force, if necessary, if he refused to remove it himself. After an initial refusal, R. C. reluctantly removed and/or rearranged his outer clothing in the presence of at least one officer

after which a bag containing cocaine was removed from his underwear. There was no physical contact by officers to the person of R. C. during the strip search.

[28] **Was the strip search authorized by a police officer acting in a supervisory capacity?**

The evidence establishes that Constable Lobsiger called his road sergeant to let him know of their intention to do a strip search. Though there was no evidence that the road sergeant authorized the strip search, I conclude, based on the evidence of Constables Lobsiger and Withrow that he did not forbid it.

[29] **Were the officer(s) carrying out the strip search of the same gender as the individual being searched?**

The young person and the officers involved were all males.

**[30] Were the number of police officers involved in the search no more than was reasonably necessary in the circumstances?**

Although there is a discrepancy in the evidence of R. C. and that of the police officers, I find that whether Constable Lobsiger was by the door on the inside of the room or on the other side of the door, outside of the room, the number of officers

(either one or two) in the room was reasonable. It was clear from the evidence that only one officer, Constable Withrow, was actually participating in the strip search of R. C.

**[31] Was minimum force necessary used, to conduct the strip search?**

No physical force was used. Officers advised that physical force would be used if R. C. chose not to cooperate with the strip search. I find this was not a threat. It was a statement of fact based on the lawful authority the police felt they had at the time. R. C. reluctantly cooperated and thus no force was used.

**[32] Was the strip search carried out in a private area such that no one other than the individuals engaged in the search could observe the search?**

The strip search was conducted in a private cubicle, without windows, upstairs in the police station. There was a video camera in the room but it was not activated. According to the officers, Constable Lobsiger left the room, at the request of R.C., for the purpose of the strip search. The door was left ajar. Constable Lobsiger says he did not watch the search being conducted nor does he recall hearing any conversation. R. C. says that Constable Lobsiger was in the room during the

search but by the door holding it open and apparently was not directly involved in the search itself. Either way, the evidence establishes that the search was carried out in a private area and, at most, two officers were privy to the search of R.C.

**[33] Was the strip search conducted as quickly as possible and in a way that ensured that the young person was not completely undressed at any one time?**

R. C. was never completely undressed. He had removed his outer clothing but at no time did he remove his tank top or his underwear. According to Constable



Withrow the strip search was completed within 30 seconds. R.C. said that it took approximately 15 minutes to complete. The discrepancy may be attributed to differing time period that each estimated. The time period estimated by Constable Withrow appeared to encompass the time it took to undo clothing and remove the drugs from the underwear. The time period described by R. C. appears to have encompassed the whole process, that is, the time from when the officers advised him there would be a strip search to the time of the discovery of the drugs. In any event, I conclude that the entire process took longer than 30 seconds but likely much less than 15 minutes. Several minutes were obviously spent over an exchange as to whether the police had a right to do a strip search and whether R. C. first had the right to contact a lawyer or his grandmother. The strip search itself however was conducted as quickly as possible.

**[34] Did the strip search involve a visual inspection of the arrestee's genital and/or anal areas?**

On the evidence it is clear that there was no visual inspection of the young persons private areas. The drugs were removed from the underwear without any view of the private area.

**[35] Was the detainee given the option of removing the object himself?**

The evidence on this point is contradictory. Constable Withrow testified that it was the accused, R. C., who removed the plastic bag from his underwear. According to the officer's evidence, R. C. lifted up his shirt, undid the front of his jeans, pulled them down slightly (approximately one foot) opened his boxers 6-12 inches, put his hand down the front of his underwear and pulled the drugs out. R. C. for his part, testified that he himself removed his sweatshirt and t-shirt and that he lowered his pants to his ankles and then removed his gym shorts. He stated that Constable Withrow patted him down and pulled the drugs out of R. C.'s underwear. On cross-examination however R. C. was not very clear on exactly how the drugs were located. He stated that the officer 'dug around his private area' but did not touch his private area. He opined that the officer must have seen the plastic; that it was visible poking out of his underwear. He stated that the officer reached and grabbed the bag and touched him while grabbing and removing the plastic bag. When asked specifically where the touching occurred, R. C.'s evidence was less than clear. He had indicated that the officer reached to the side of his briefs'. At another point he said the officer was 'feeling on his leg', after which he backed up and the officer then pulled the bag out. When asked to describe the location from where the bag was pulled, R. C. pointed to the zipper area of the jeans he was wearing while testifying. When

asked whether the drugs were pulled from the ‘fly/pocket area’ of his briefs, through the waistband or through the leg, R. C. was ambivalent. Based on R. C.’s testimony I am left with the impression that R. C. either doesn’t know how the drugs were removed from his shorts or that he removed them himself and was unable to provide a convincing version of events otherwise. Either way, I find R. C.’s explanation unreliable and unbelievable. I accept the evidence of Constable Withrow who described a situation in which the young person removed the drugs from his own underwear. His evidence was clear, concise and entirely plausible.

**[36] Was a proper record kept of the reasons for and the manner in which the strip search was conducted?**

It is unclear from the evidence exactly what type of record was kept. Police officers made notes which were referred to in the course of testimony but the court was not privy to the notes themselves to determine what reference, if any, was made to the strip search. Telephone contact was made with a superior officer before and after the search was conducted. The contents of those conversations did not form part of the evidence. One might conclude that the reasons for the strip search were discussed with the supervising officer prior to the search but there is no evidence of this. Constable Withrow was able to enunciate, during the course of his testimony, the reasons why he wanted to conduct a strip search and how the strip search was conducted. This may or may not have been recorded elsewhere. In this case little turns on it as there was not a great deal of a discrepancy in the accounts given by the young person and the police as it relates to the type of strip search that was conducted. It was relatively quick and minimally invasive.

**APPLICATION OF THE YOUTH CRIMINAL JUSTICE ACT**

[37] As defense counsel points out, *Golden, supra*, was decided prior to the enactment of the **YCJA** which affords young persons charged with criminal offences enhanced procedural protections. Counsel for R. C., therefore, argues that these codified enhanced procedural protections should be interpreted such that police be required to allow a young person to contact counsel and/or a parent or guardian prior to embarking on a strip search.

[38] Section 3(1)(b)(iii) of the **YCJA** indicates that the criminal justice system for young persons must be separate from that of adults and emphasize, among other things, enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected. This is a general guiding principle intended to ensure that young persons, given their age and level of maturity, are treated fairly by the criminal justice system and that their rights (afforded to them under the law) are respected. It does not, in my view, confer upon them greater rights or privileges than those afforded to adults. Had this been the intention of Parliament, surely it would have been clearly stated as such.

[39] One can see, from a review of the provisions of the **YCJA**, that there are, in fact instances when privacy interests of youth are to be afforded given greater protection than those of adults. For example Part 6 of the **YCJA**, related to the protection of privacy of young persons in relation to publication, records and information, mandates that disclosure and publication of certain information pertaining to young persons occur only within certain parameters. As well there are provisions in the legislation pertaining to the admissibility of statements given by young persons to persons in authority, whereby certain procedural protections must be afforded to young persons.

[40] There is nothing in the **YCJA** or the common law however that requires that young persons be afforded an opportunity to consult counsel and/or a parent or guardian prior to a police strip search. The police must, however, comply with the law as it relates to strip searches, and I find they have done so here. The strip search was lawful and there was no breach of Section 8 of the **Charter**.

## **APPLICATION OF SECTION 24(2) OF THE CHARTER**

[41] In the event there was a breach of R. C.'s section 8 rights to be free from unreasonable search and seizure this is not a case in which the evidence should be excluded.

[42] The burden is on the Applicant, the defence, to establish, on a balance of probabilities, that the admission of evidence would bring the administration of justice into disrepute. We are familiar with the Supreme Court of Canada's pronouncements in *R v. Collins*, [1987] 1 S.C.R. 265 as to the list of factors to consider in determining whether the admission of evidence would bring the administration of justice into disrepute. The non-exhaustive list of factors have commonly been grouped into three categories:

1. those affecting the fairness of the trial;
2. those relevant to the seriousness of the Charter breach; and
3. those related to the effect of excluding the evidence.

### **Fairness of the trial**

[43] The evidence sought to be excluded is 17.8 grams of crack cocaine. It is real, non-conscripted evidence which existed irrespective on any **Charter** breach. Admission of evidence of this type will, according to the Supreme Court of Canada in *R. v. Stillman*, [1997] 1 S.C.J. 34 at paras. 74-75, rarely render a trial unfair. The Applicant has not satisfied me that the admission of the drugs located on the person of R.C. would render the trial unfair.

### **Seriousness of the breach**

[44] In considering the seriousness of the breach, once again we apply the framework established by the Supreme Court of Canada in *Collins, supra*:

1. Was the breach committed in good faith or by inadvertence, was it was technical in nature or was it was deliberate, wilful or flagrant?;
2. Was the breach motivated by the urgency of the situation or by the necessity to prevent the loss or destruction of evidence?;
3. Was the search obtrusive and what was the individual's expectation of privacy in the area searched?

[45] I find that the officers reasonably believed that they had both the legal authority and the necessity to conduct the strip search. R. C. had been properly arrested for possession of a stolen motor vehicle which had arrived at a pre-destined location for the purpose of completing a drug transaction arranged by Mr. Tufts. Mr. Tufts was known by police to be involved in the drug world and to be a drug user. R. C. was known to have had a prior drug conviction. Constable Withrow was also aware of intelligence reports that indicated that R. C. lived in and was associated with areas where the drug trade occurred. The decision to strip search was neither flagrant nor arbitrary.

[46] The search was motivated by a degree of urgency and by the necessity to prevent the loss or destruction of drugs. Crack cocaine can be concealed easily and is not readily discoverable by a 'pat-down' search. There was a concern not only about the loss or destruction of drugs but also about the potential that they could be ingested or disseminated within a custody population at the detention center or at the courthouse.

[47] All strip searches, by their very nature, are intrusive. I agree however, that here, significant efforts were made to respect the privacy and personal integrity of the young person. Though it can not be said that R. C. was a willing participant to the strip search, he reluctantly agreed to the search despite the refusal to his request to call counsel or his grandmother. As indicated earlier, I find that neither officer touched R. C., that at no time was R. C. totally undressed and that R. C. removed the drugs from his underwear himself. All of the guidelines set out in *Golden, supra*, were followed except for detailed written records being kept. But again, as indicated above, I find that nothing of consequence turns on this as the search was minimally intrusive, even by R. C.'s account.

## **CONCLUSION**

[48] To exclude the evidence, in my view, would call into question the very reputation of the administration of justice. Possession of crack cocaine for the purpose of trafficking is a very serious criminal offence and poses a very real danger to the community. We are all too familiar with the harmful social consequences of cocaine trafficking. We need look no further than the facts of this case where an innocent third party's motor vehicle was stolen and probably pledged or traded for

a quantity of the drug. The drugs seized from the person of R. C. do represent the essence of the offence itself. Their exclusion would end the prosecution and that would surely call into question the reputation of the administration of justice. Therefore, in the event of a **Charter** breach, the evidence would nonetheless be ruled admissible.

Order Accordingly

Pamela S. Williams  
Judge of Youth Justice Court