

**SUPREME COURT OF NOVA SCOTIA**

Citation: R. v. Brown, 2010 NSSC 416

**Date:** 20101103

**Docket:** CRH 330361

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

James David Brown

**Judge:** The Honourable Justice Felix A. Cacchione

**Heard:** October 25-28, November 3, 2010,  
in Halifax, Nova Scotia

**Written Decision:** November 17, 2010

**Counsel:** Christopher W. Morris, for the Crown  
Brian J. Church, Q.C., for the defendant

**By the Court:**

[1] The accused, James Brown, is charged on a nine count indictment with assault causing bodily harm, aggravated assault, assault with a weapon or threatening to use a weapon, assaulting a police officer in the execution of his duties and resisting a police officer in the execution of his duties. These are all in relation to Constable Reeves. He is also charged with escaping lawful custody and three counts of breaching either an undertaking, a recognizance or a probation order. All these counts stem from one incident.

[2] From the totality of the evidence presented the following facts emerge.

[3] On December 15<sup>th</sup>, 2009 Constable Reeves and Constable Young both responded in separate vehicles to a call regarding theft at the Bedford Place Mall (the mall). Constable Reeves was met at the mall entrance by mall security who directed him to the accused. At approximately 4:30 p.m. James Brown was arrested for theft. He was handcuffed with his hands behind his back and searched while still in the public area of the mall. The search revealed a small quantity - either a small bag or a joint of marijuana, a prescription for clorazepam in Mr. Brown's name, a bag of Oreo cookies, an MP3 player and headphones. The search revealed nothing else. No weapons were found on Mr. Brown. The accused was taken to the mall security office by Constable Reeves accompanied by mall security.

[4] Constable Young dealt primarily with a young offender who was also being detained for thefts. Constable Reeves, who appears to have been conducting the investigation, dealt with both detainees. They were being held in separate areas of the security office. After spending approximately one hour in the security office while the thefts were being investigated the accused was told by Constable Reeves that he would not be charged with theft, but would be charged for possessing the marijuana found on his person. The accused was in handcuffs while in the security office.

[5] Mr. Brown was placed in the rear seat of Constable Reeves' police vehicle so that he could be processed and released on an Appearance Notice for the marijuana possession charge. The vehicle was equipped with a shield, referred to as a silent partner or private partner, which separates the front and rear passenger

areas of the police vehicle. The shield has a sliding window which locks in the closed position.

[6] While in the vehicle Constable Reeves checked the accused's name on the police computer and noted an outstanding warrant for the accused's arrest. He advised Mr. Brown that he would be taken back to the police headquarters to be processed on that warrant. Mr. Brown disputed that he was the James Brown named in the warrant. Constable Reeves told him that if the warrant was not for Mr. Brown, he, Constable Reeves, would drive him back to Bedford.

[7] While speaking with the accused in the police vehicle Constable Reeves had the sliding window in the shield open. A flashlight, which is standard equipment in police vehicles, sat on its charger located in the front of the vehicle under the sliding window.

[8] The accused remained in the rear of the police vehicle while Constable Reeves completed his computer check. Constable Reeves then exited the vehicle to speak with mall security officers and Constable Young who had the young offender in his police vehicle.

[9] Constable Reeves was scheduled to appear in Halifax night court at 7:00 p.m. that evening.

[10] Prior to responding to the dispatch which brought Constable Reeves into contact with the accused, Constable Reeves had been denied his lunch request by his superiors. In fact, his first words out of his mouth were "I had just been denied my lunch request when I received this dispatch".

[11] When Constable Reeves left the mall parking lot at approximately 5:45 p.m. in the direction of police headquarters the window in the silent partner was closed. The evidence is unclear as to when the window was closed.

[12] After travelling a short distance, Constable Reeves pulled his vehicle into the All Saints Anglican Church parking lot located off the Bedford Highway. He told the accused that he would search him again because he believed that the accused had taken some pills. The accused had been cooperative throughout his detention. He agreed to be searched once more. The search was conducted in the rear of the police vehicle with the accused lying on the rear seat with his head

towards the rear passenger side door and with Constable Reeves outside the vehicle by the rear driver's side door.

[13] The Anglican Church lot was dark. Constable Reeves' vehicle was followed by a vehicle containing the accused's mother and step-father, Mr. and Mrs. Pottie who had seen the accused in the rear of the police vehicle while they were at the Bedford Place Mall. Mr. And Mrs. Pottie witnessed some, but not all, of the events leading to the present charges as did Mrs. Fontaine, the nurse, Mr. Meredith and Mr. Curran. None of these witnesses saw the entirety of the event.

[14] It is common knowledge that witnesses to an event see and hear things differently and that recollection of past events differs from witness to witness. This is evidenced in the present case by the testimony of the main witnesses: Constable Reeves, Mr. and Mrs. Pottie, Mr. Brown, Mr. Meredith, Mrs. Fontaine and Mr. Curran.

[15] Constable Reeves and the accused are the only two witnesses who were present for the entire incident.

[16] Constable Reeves and the accused both testified about what happened from their initial contact at the mall to what transpired in the church parking lot which led to the present charges. Their versions mirror each other in most respects with some variation.

[17] Both were in agreement as to the arrest and search of the accused at the mall and to the accused being in handcuffs while in the security office. Constable Reeves testified that the handcuffs were removed when the accused was placed in the rear of the police vehicle. The accused's evidence was that handcuffs which had been behind his back were at some point moved to the front of his body so that he could have a cigarette once outside the mall. He testified that he remained handcuffed in this position while being driven to the police headquarters.

[18] Constable Reeves and Constable Young both stated that the police protocol requires persons under arrest to be handcuffed with their hands behind their back.

[19] Constable Reeves admitted to not following this protocol.

[20] Both Constable Reeves and the accused's evidence is the same with respect to the second search of the accused taking place in the rear of the police vehicle. Their evidence differs as to what precipitated the search. Constable Reeves testified that he saw the accused ingest what he believed were pills because he had been told by mall security officers that the accused had taken a pill while in the security office and was therefore concerned for the accused's safety. The accused testified that he was texting and speaking on a cell phone which had been in his coat.

[21] Their evidence also differs with respect to whether the accused was in handcuffs when this second search took place. Constable Reeves, a police officer who trains other officers, testified that the accused was not handcuffed when he searched him the second time and the accused testified that he was handcuffed, but that his hands were in front and not behind his back. The evidence also differs as to how the accused came to be out of the police vehicle - Constable Reeves testifying that the accused rolled out of the car when he uncrossed his legs to roll over in the rear seat of the vehicle, and the accused testifying that he fell backwards out of the police vehicle while attempting to uncross his legs and when Constable Reeves pulled at his coat. Constable Reeves acknowledged that the rear seat of the police vehicle, because of the material used in its fabrication, is slippery.

[22] Both Constable Reeves and the accused testified that the accused struck his head as he got out of the vehicle. Constable Reeves testified that the accused then swung at him in an arching manner with a black cylindrical object and that this blow grazed his head. The accused denied having anything in his hands, swinging anything at Constable Reeves or hitting him.

[23] The testimony of Constable Reeves and the accused is in accord with respect to a blow being struck to the accused's face by Constable Reeves when the accused was out of the police vehicle. The accused testified that this blow to his face caused him to stumble and that Constable Reeves grabbed his coat, but it ripped causing him to stumble again, this time to the downward slope of the driveway from the church parking lot leading to the Bedford Highway where he was tackled by Constable Reeves and where both fell to the ground. The accused testified that he recalled nothing of what transpired from that point on.

[24] Constable Reeves' evidence differs from that of the accused in that he testified that the accused bolted from the car and, once tackled, they both rolled down the driveway and were punching at each other. Constable Reeves could not say what happened to the black cylindrical object other than it was given to him by the "Aliant guy", that is Mr. Curran, who had stopped his vehicle to assist the Constable. Constable Reeves testified that he managed to get one handcuff on the accused and was assisted by Mr. Curran in getting the other one on.

[25] Both Constable Reeves and the accused suffered injuries as a result of this incident. Constable Reeves was off work until January 8<sup>th</sup> when he returned to light duties. His injuries consisted of a swollen right cheek, a scratch to the outside of the right eye and some lower back pain for which he received physiotherapy.

[26] The accused suffered a serious eye injury to his right eye which left him blind in that eye.

[27] The evidence of Constable Reeves and that of Mr. Meredith was that Constable Reeves suffered repeated and heavy blows to the head and facial areas. Constable Reeves believed that he was struck in the head with the flashlight. The evidence of Constable Reeves and Mr. Meredith in this respect is not supported by the medical reports, Exhibits 1, 3 and 5 or the photographs of Constable Reeves in Exhibit 7.

[28] Exhibit 1, a report of Dr. Bood notes abrasions to the scalp, right cheek and below the right eye. This report contains no reference by Constable Reeves to the attending physician of being struck with an object such as a flashlight. Exhibit 1 was prepared shortly after the incident when Constable Reeves was taken to the Cobequid Medical Centre.

[29] Exhibit 3, a report by Dr. Tan the ophthalmologist who saw Constable Reeves the next day on December 16<sup>th</sup> notes that Constable Reeves told him "the individual punching him might have been holding a flashlight although he is unsure if he was struck with the flashlight". An examination of Constable Reeves' head and neck by Dr. Tan revealed mild abrasions just under the right lid. These abrasions were described as superficial in nature. No follow-up by Dr. Tan was required.

[30] A report prepared by Dr. Croskerry on December 16<sup>th</sup> and attached to Exhibit 5 notes Constable Reeves as telling this physician that he was struck in the head with a flashlight.

[31] Photographs of the scene of this incident contained in Exhibit 7 are not very helpful in arriving at a conclusion as to what occurred that evening. The photographs are acknowledged as not being an accurate depiction of the scene as it appeared at the time of the incident. This is because these photographs were taken almost two hours after the incident and after the scene, more particularly the police vehicle, had been tampered with by various witnesses.

[32] Sergeant Poirier who arrived at the scene within five minutes of its occurrence testified that he could not say if the police vehicle driven by Constable Reeves and found in the church parking lot had its doors open or closed when he first saw the vehicle. The photographs in Exhibit 7, those photographs of Constable Reeves' vehicle, show it with the doors closed. Mr. and Mrs. Pottie, who saw Constable Reeves and the accused outside the vehicle, testified that both driver's side doors were open. Mr. Curran also noted the open doors when he stopped his vehicle. Sergeant Poirier also stated that Mr. Pottie gave him a bag of Oreo cookies and an MP3 player which he, Sergeant Poirier, eventually placed in the rear seat of Constable Reeves' vehicle and this is depicted in photograph 11 of Exhibit 7.

[33] Mr. Pottie's evidence was that he went to the area of Constable Reeves' vehicle, picked up some items that he found on the ground near the vehicle. He turned these items over to Sergeant Poirier.

[34] Mr. Curran was travelling home that evening when he came upon the incident. His vehicle was the first to stop. Mr. Curran noted the police vehicle in the church parking lot with its doors open. Constable Reeves and the accused were on the ground with their arms wrapped around each other close to the Bedford Highway. Mr. Curran stopped to assist. He did not see any punches being thrown nor did he see either the accused or Constable Reeves with a flashlight in hand. He described Constable Reeves as dazed, worked up and out of breath. Mr. Curran testified that he heard the flashlight hit the ground. Mr. Curran was unsure about whether the accused had handcuffs on when he first saw him. In direct examination he testified that the handcuffs were placed on the accused after the accused had calmed down. However, in cross-examination he indicated that he did

not know whether the accused had cuffs on before that. His evidence was also that what he witnessed happened so fast. Mr. Curran was a credible witness who testified only about what he saw. He impressed as being unbiased.

[35] Mrs. Fontaine, a nurse, came upon the scene and saw two men on the ground tumbling around in front of Mr. Curran's Aliant truck which was stopped on the Bedford Highway. She called 911 and waited in her vehicle watching the incident about which she testified. Her evidence was that she saw Constable Reeves on top of the accused with two other men holding the accused down. The accused was in handcuffs with his hands in front of his body. She noticed blood coming from the accused's eye and a scratch under Constable Reeves' right eye. She did not notice Mr. Meredith until she got out of her vehicle to offer assistance. Mrs. Fontaine was a candid and observant witness.

[36] Mr. Meredith's evidence was biased and exaggerated. Where his evidence differs from that of Mr. Pottie, Mr. Curran or Mrs. Fontaine, I accept that of the latter.

[37] Mr. Meredith testified to witnessing repeated overhead and heavy blows being struck by the accused to the head and face of Constable Reeves and no blows whatsoever being struck by Constable Reeves. He described these blows as hammering blows. In fact he re-enacted them while testifying.

[38] Mr. Meredith testified that he grabbed the accused's hand and the flashlight went flying. He stated that he then picked it up, gave it to Constable Reeves and told him to hit the accused with it. He described the accused as a crack head because the accused had facial piercings. Mr. Meredith's evidence is not supported by that of more impartial witnesses. For example, Mr. Curran who was first on the scene and in the same position as Mr. Meredith when viewing the event, did not witness repeated hammering blows nor did he witness the accused wielding a flashlight; Sergeant Poirier's evidence was that he received the flashlight from Mr. Pottie and not Constable Reeves or Mr. Meredith; and Mrs. Fontaine's evidence that she witnessed no punches even though she viewed the incident for the same amount of time, if not longer, than did Mr. Meredith.

[39] I attach little if any weight to the evidence of Mr. Meredith.



[40] The evidence of Sergeant Poirier is of little assistance in determining what occurred that evening. As stated previously, Sergeant Poirier arrived within minutes of the occurrence. Other officers had already arrived on the scene. He did not take any statements from any witnesses nor did he speak with the accused, yet his testimony was that he determined at the scene that Constable Reeves had been struck with a flashlight which he, Sergeant Poirier, received from Mr. Pottie. Mr. Pottie's evidence was that he picked up the flashlight and gave it to Constable Reeves who did not appear to know where it came from. Mr. Pottie stated that Constable Reeves put the flashlight back on his service belt.

[41] Sergeant Poirier's conclusion, that Constable Reeves had been struck with a flashlight, was reached before the flashlight had even been fingerprinted.

[42] The evidence shows that standard practice, according to Sergeant Poirier, is to have the police vehicle number, in this case W11, engraved on the flashlight assigned to that vehicle. Exhibit 9, the flashlight, which was supposedly in Constable Reeves' vehicle does not have a police vehicle number engraved on it. This, coupled with the fact that no fingerprints belonging to either Constable Reeves or the accused were found on it, raises a substantial doubt as to whether or not this is even the same flashlight that was in Constable Reeves' vehicle the night of this incident let alone that it was the one that was allegedly wielded by the accused.

[43] Detective Constable Shannon testified that while at the hospital with the accused, Mr. Brown vomited five or six tablets. This occurred at least two and a half hours after the incident. The pills were not seized and obviously not analysed. Given Constable Reeves' evidence that the reason he pulled his police vehicle into the church parking lot was to search the accused because he had seen him take pills, it is surprising that the pills the accused allegedly vomited were not seized, especially in light of Sergeant Poirier's evidence that he determined at the scene what had occurred.

[44] I attach no weight to the evidence of Constable Sheppard regarding a statement allegedly made by the accused in Constable Sheppard's presence while at the hospital. Constable Sheppard made no notes contemporaneous with the alleged making of the statement. It was not until some nine hours after the alleged making of this statement that Constable Sheppard wrote out a "Can Say" statement in which he described the accused as saying that he wished he had bashed the

officer's face in because then he, the officer, would know the pain that he, Mr. Brown, was suffering. If the accused did make this statement Constable Sheppard agreed that the inference which could be drawn from such a statement was that the accused had not bashed the officer's face in.

[45] Constable Reeves' evidence is problematic. Constable Reeves searched the accused and found, amongst other things, prescription pills in the accused's name. These were not taken from the accused prior to him being placed in the police vehicle despite the fact that Constable Reeves had, according to his evidence, earlier on either heard about or seen the accused taking a pill or pills in the security office at the mall.

[46] Constable Reeves' evidence was inconsistent within itself. In direct examination he stated that he was told by security personnel that the accused had taken a pill while in the security office. In cross-examination, however, he testified that he personally saw the accused take a pill and that the accused's hands were in the front of his body when he took the pill. This was despite the fact that in direct examination Constable Reeves testified that he handcuffed the accused with his hands behind his back before taking him to the security office. There is no evidence from him that he removed those cuffs while in the security office. He did not testify, as I said, that he removed or changed the position of the handcuffs at any time while in the mall security office.

[47] The evidence shows that Constable Reeves and Constable Young were both in the security office together with members of the Bedford Place Mall security staff. It is difficult to accept that the accused could manoeuvre to switch his handcuffed hands from his back to the front, take pills from somewhere on his person, remove the bottle cap and take a pill in the security office with police officers and security staff around without being seen contorting to move the handcuffs from behind his back to the front of his body.

[48] It is also difficult to accept that having seen this, Constable Reeves would not have taken the pill bottle away from the accused. Constable Reeves' evidence was that when he saw the accused take a pill in the security office he asked the accused to put his hands behind his back again and that the accused did so while standing up. This evidence is suspect and difficult to accept as credible.

[49] No prescription pill bottle was found either at the scene on the Bedford Highway or in Constable Reeves' police vehicle.

[50] Constable Reeves' evidence was that the accused when sitting in the rear of the police vehicle at the mall did not have handcuffs on. He did not testify to taking the handcuffs off or when he would have done so and why, especially since the police protocol requires that persons under arrest be handcuffed with their hands behind their back. Constable Reeves described himself as a "by the book" police officer who trains other officers, yet he appeared to not have been following "the book" or protocol when he put the accused, who was under arrest, in the rear of the police vehicle without handcuffs being on the accused.

[51] Constable Reeves' evidence was inconsistent even within his same answer to a question about whether the window in the silent partner was open or closed when he got out of the vehicle to speak with security personnel at the mall. His initial answer was that he closed the window before getting out of the vehicle, however he stated in the same breath that he did not close the window. His explanation was that he knew the window was open because he had conversation with the accused when he returned to the vehicle.

[52] Other inconsistencies in Constable Reeves' evidence relate to hearing a metallic object, his flashlight, hit the ground. In direct examination he testified about his struggle with the accused and rolling around on the ground with the accused. He described how both were punching each other and how when the accused was on top of him he, Constable Reeves, thought that the accused was going to get his gun, that is Constable Reeves' gun. No mention was made of hearing a clanging metallic sound. In cross-examination, however, Constable Reeves testified that while the accused was on top of him, he heard a clanging sound like a metallic object hitting the ground and that is when he believed or thought about the accused going for his, Constable Reeves', gun.

[53] Constable Reeves' evidence that he would drive Mr. Brown back to Bedford, if the warrant was not in relation to Mr. Brown, is difficult to accept given the hour of his departure from the mall and the fact that he had to appear in night court at 7:00 p.m. that evening in Halifax.

[54] The accused testified. As previously, stated his evidence in large part mirrors that of Constable Reeves with respect to what occurred at the mall and during the second search in the church parking lot. The accused denied assaulting the officer and denied having a flashlight as a weapon. He denied trying to escape custody. He testified that he was handcuffed with his hands in front of his body when he was in the police vehicle. His evidence was that he stumbled when being pulled out of the police vehicle, was struck in the face and stumbled again down the incline of the driveway where he was tackled. He testified that he had no recollection of what occurred after that.

[55] In arriving at a decision, I bear in mind Cory J's instruction in **R. v. W.D.** - if I believe the accused I must acquit. If I do not believe the accused but his evidence raises a reasonable doubt I must acquit. Even if I do not believe the accused and his evidence does not raise a reasonable doubt I must still go on to consider whether on the evidence which I do accept the Crown has proven the guilt of the accused beyond a reasonable doubt.

[56] The accused's evidence regarding what transpired after he came to be out of the vehicle in the church parking lot is difficult to assess because of his alleged lack of recall of anything after being tackled by Constable Reeves. While I do not believe the accused entirely, his evidence as a whole raises a reasonable doubt. Even if the accused's evidence had not raised a reasonable doubt I would still not be satisfied beyond a reasonable doubt on the evidence which I do accept that the Crown has proven its case beyond a reasonable doubt.

[57] As stated previously, Constable Reeves' evidence was inconsistent within itself and with the other evidence. Some of his evidence, particularly that of the blows that he allegedly received, I found to be aggrandized and not supported by the medical evidence.

[58] The lack of any fingerprints on Exhibit 9, the flashlight, is unusual given the evidence of Constable Reeves that the accused had the flashlight in his hands and the evidence of Mr. Pottie that he picked up the flashlight and gave it to Constable Reeves who then put it on his belt. There is, as well, Mr. Meredith's evidence, which I do not accept, but which if true would have meant that his fingerprints would also have been on that item.

[59] The fact that the flashlight in police vehicles normally has the police car number engraved on it and that Exhibit 9, the flashlight in this case, did not have any engraving on it adds to the doubt that I have. The fact that the scene was not in its original condition when photographed, that the pill bottle so central to Constable Reeves' evidence was never recovered or put into evidence despite the Constable's evidence that it was not taken from the accused when he was initially searched at the mall. I am not sure that that pill bottle was in fact put on the ledge in the store security office. This, coupled with the non-seizure and analysis of pills allegedly vomited by the accused, has also added to the doubt that I have.

[60] The evidence of Mr. Curran, Mrs. Fontaine and to some degree that of Mrs. Pottie also strengthens the doubt that I have about what really occurred that evening.

[61] The Crown has conceded that the charge of aggravated assault has not been proven. I therefore acquit Mr. Brown on that count.

[62] The defence conceded that Mr. Brown breached his recognizance and therefore I would find him guilty of breach of recognizance.

[63] Mr. Morris, for the Crown, acknowledged that the second and third breaches are surplusage and in fact would attract the Kienapple principle. They are accordingly dismissed.

[64] On the totality of the evidence which I do accept I am not satisfied beyond a reasonable doubt of the accused's guilt. I find that it would be unsafe to convict on the evidence presented. Accordingly, save for the count of breaching a recognizance, I find the accused not guilty on all of the other counts.

[65] The sentence with respect to the charge of breaching his recognizance is one day in jail considered time served.