

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. DeYoung*, 2018 NSSC 39

Date: 2018-03-02

Docket: CRH466963

Registry: Halifax

Between:

Her Majesty the Queen

v.

Jason Kyle DeYoung

LIBRARY HEADING

***Voir Dire* Decision**

- Judge:** The Honourable Justice Michael J. Wood
- Heard:** February 21 and 22, 2018, in Halifax, Nova Scotia
- Written Decision:** March 2, 2018
- Subject:** Charter of Rights and Freedoms – s.8 – strip search upon arrest
- Summary:** Accused was arrested in apartment at time police executed search warrant for cocaine. One officer told arresting officers that there was source information indicating that accused kept cocaine on his person. Officers conducted strip search in accused's bedroom and found bag of cocaine in underwear.
- Issues:** Was the strip search of the accused unreasonable contrary to s.8 of the *Charter*?
- Result:** Court reviewed and applied guidelines for strip searches found in SCC decision in *R v Golden*. The decision to search and implementation done in 2-3 minutes and without consultation

with superior officers. No real opportunity for accused to voluntarily assist in search. Unreasonable force used.

Officers did not have reasonable and probable grounds to support necessity of decision to conduct strip search in the apartment. In addition, the manner of search was unreasonable. Evidence obtained was excluded from trial.

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Counsel: Stephen Lichti, for the Crown
Luke Craggs, for the Defendant

By the Court:

[1] Jason DeYoung has been charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, as well as possession of cannabis under s. 4(1) of the same legislation. The majority of the cocaine was seized as a result of a strip search carried out by police on February 5, 2016, while executing a search warrant at Mr. DeYoung's apartment.

[2] On February 21 and 22, 2018, I presided over Mr. DeYoung's 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. This is my decision on that issue.

[3] On February 5, 2016, police obtained a search warrant for Mr. DeYoung's apartment in relation to an allegation that he possessed cocaine for the purpose of trafficking. The warrant was executed at 18:40 on that same date. A briefing among the police officers who were going to be involved took place about an hour earlier. The officers were assigned various roles in relation to the pending search.

[4] At the appointed time, at least eight officers entered Mr. DeYoung's apartment without notice. Detective Constables Cross and Stanley were assigned the responsibility of arresting Mr. DeYoung and removing him from the premises. D/C Stanley had his police baton in hand when he entered the apartment.

[5] Mr. DeYoung was alone in the kitchen and quickly located by D/C Cross and D/C Stanley. They were yelling at him to show his hands. According to D/C Stanley, Mr. DeYoung appeared to be in shock and overwhelmed by the sudden police presence.

[6] D/C Stanley said he struck Mr. DeYoung in the leg with his baton, which caused him to go to the ground. He was laying on his stomach with his arms underneath him. The officers continued to yell at Mr. DeYoung to show his hands and were pulling at his arms in order to get them free. D/C Cross punched Mr. DeYoung in his side twice in order to get him to show his hands.

[7] The officers were able to get Mr. DeYoung's hands behind his back and he was handcuffed by a third officer, Cst. Graham. Mr. DeYoung was flipped onto his back and Cst. Graham conducted a pat down search. She removed some money found in his pocket.

[8] Mr. DeYoung was brought to this feet by D/C Cross and D/C Stanley and they began to walk him out of the apartment. The plan was to take him to the police station for booking. As they neared the apartment door Cst. Eric Manley spoke to D/C Cross. Cst. Manley had provided information which had been used to obtain the search warrant and was conducting surveillance on the apartment prior to the search. He was the last officer to enter and had not been assigned any particular role in relation to the search. Cst. Manley told D/C Cross that, according to a confidential source, Mr. DeYoung was known to keep cocaine on his person. Based upon this information D/C Cross had a brief discussion with D/C Stanley and they decided to conduct a further search of Mr. DeYoung before taking him to the station.

[9] Mr. DeYoung was taken into his bedroom and told that there was going to be a strip search. The door to the room was closed. His shirt was lifted and his pants and underwear were pulled down. D/C Cross punched Mr. DeYoung in the buttocks several times in order to “distract him” during this search.

[10] D/C Cross said that he noticed a plastic bag between Mr. DeYoung’s buttocks and ball sack, which he pulled out. The bag was seized. The contents were subsequently tested and determined to be crack cocaine.

[11] While D/C Cross, D/C Stanley and Mr. DeYoung were in the bedroom, another officer heard what he thought was a commotion in the room and he opened the door to see if there was any problem. At that time he said Mr. DeYoung had no shirt on and his pants and underwear were pulled down, although he did not see his genitals. Other police officers were at the door and could look into the room.

[12] The strip search lasted one to two minutes and Mr. DeYoung was dressed and removed from the apartment while the search of those premises continued.

[13] The period of time from police entry to seizure of the bag of cocaine was recorded as being five minutes.

Legal Principles

[14] An unreasonable search violates s. 8 of the *Canadian Charter of Rights and Freedoms*. Where a person is lawfully arrested police have the power to conduct an incidental search as part of that process. This authority does not extend to strip searches which much be justified on additional grounds. The burden is on the crown to establish those grounds on a balance of probabilities.

[15] The leading case on strip searches is *R. v. Golden*, 2001 SCC 83. In that decision the Supreme Court of Canada struck a balance between the interests of citizens to be free from unjustified, excessive and humiliating strip searches, and the interests of society and police in ensuring that persons who are arrested are not armed and that relevant evidence is found and preserved. The Court was extremely critical of strip searches which were based upon general policy and indicated that each search must be justified on the individual circumstances present.

[16] The Supreme Court of Canada (at para. 82 of *Golden*) point out that strip searches have the following attributes:

- They represent a significant invasion of privacy;
- They are often a humiliating, degrading and traumatic experience; and
- Even the most sensitively conducted strip search is highly intrusive.

[17] When the purpose of the search is to preserve evidence there needs to be an objective assessment of the risk of disposal. On this issue the Supreme Court said the following:

93 The reasonableness of a search for evidence is governed by the need to preserve the evidence and to prevent its disposal by the arrestee. Where arresting officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in the circumstances. For instance, in the present case, it was suggested that the appellant might have dropped the drugs on the sidewalk or in the police cruiser on the way to the station and that it was therefore necessary to search him in the field. As we discuss below, however, the risk of his disposing of the evidence on the way to the police station was low and, had the evidence been dropped in the police cruiser on the way to the station, circumstantial evidence could easily link it back to the accused.

[18] In order to meet its burden of justification the crown is required to show that the search is necessary based upon reasonable and probable grounds. Not only must the police believe that they have sufficient justification, there must be an objective basis to support that conclusion. This is indicated by the following passage from *Golden*:

98 The fact that the police have reasonable and probable grounds to carry out an arrest does not confer upon them the automatic authority to carry out a strip search, even where the strip search meets the definition of being "incident to lawful arrest" as discussed above. Rather, additional grounds pertaining to the purpose of the strip

search are required. In *Cloutier, supra*, this Court concluded that a common law search incident to arrest does not require additional grounds beyond the reasonable and probable grounds necessary to justify the lawfulness of the arrest itself: *Cloutier, supra*, at pp. 185-86. However, this conclusion was reached in the context of a "frisk" search, which involved a minimal invasion of the detainee's privacy and personal integrity. In contrast, a strip search is a much more intrusive search and, accordingly, a higher degree of justification is required in order to support the higher degree of interference with individual freedom and dignity. 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.

99 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. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. 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*.

[19] Canadian Courts have recognized the importance of preventing unconstitutional searches. This philosophy can be seen in the following comments of Watt JA. in *R. v. Muller*, 2014 ONCA 780, at para. 55:

55 Section 8 of the *Charter* has as its purpose the protection of individuals from unjustified state intrusions on their privacy. It follows that we must have some means of preventing unjustified searches before they occur, rather than simply determining after the fact whether the search should have occurred in the first place: *Golden*, at para. 89; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160. The importance of preventing unjustified searches before they occur is especially acute for strip searches. They involve a significant and direct interference with personal privacy and can be humiliating, embarrassing and degrading for those subjected to them: *Golden*, at para. 89.

[20] The best way to prevent unreasonable searches is to provide clear direction to police officers. To this end, the Supreme Court in *Golden* adopted a framework to assist police in evaluating the necessity and conduct of strip searches incident to arrest. These well known guidelines are found in para. 101:

101 In this connection, we find the guidelines contained in the English legislation, P.A.C.E. concerning the conduct of strip searches to be in accordance

with the constitutional requirements of s. 8 of the *Charter*. The following questions, which draw upon the common law principles as well as the statutory requirements set out in the English legislation, provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*:

1. Can the strip search be conducted at the police station and, if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. 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?
8. 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?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. 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?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[21] These same guidelines are used by Courts in evaluating the reasonableness of police strip searches. By encouraging police to ask themselves these questions, Courts can ensure that such searches will only be carried out after some degree of consideration. This should include assessment of the necessity for the search and exploration of ways in which the infringement on personal dignity and integrity may be minimized or avoided.

[22] The Supreme Court was strongly of the view that strip searches should rarely take place in the field. The burden of justifying such a search was described in *Golden* as follows:

102 Strip searches should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported to the police station. Such exigent circumstances will only be established where the police have reasonable and probable grounds to believe that it is necessary to conduct the search in the field rather than at the police station. Strip searches conducted in the field could only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals. The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field. Strip searches conducted in the field represent a much greater invasion of privacy and pose a greater threat to the detainee's bodily integrity and, for this reason, field strip searches can only be justified in exigent circumstances.

[23] In assessing the reasonableness of a strip search, there are two questions which must be considered. The first is whether the crown has established reasonable and probable grounds for the search, and the second is whether the search was conducted in a reasonable manner. When a search takes place in the field the assessment of reasonable grounds must include consideration of whether a search outside the police station was necessary (see para. 112-113 of *Golden*).

[24] In this case I would describe the questions to be answered on the *voir dire* as follows:

1. Did D/C Cross and D/C Stanley have reasonable and probable grounds to believe that it was necessary to strip search Mr. DeYoung in his apartment?
2. Was the manner in which D/C Cross and D/C Stanley conducted the strip search of Mr. DeYoung reasonable?

Analysis

Did D/C Cross and D/C Stanley have reasonable and probable grounds to believe that it was necessary to strip search Mr. DeYoung in his apartment?

[25] The decision to conduct the strip search was made by D/C Cross and D/C Stanley without consultation with any other officer. They entered the apartment as

part of a search team with the assigned task of arresting Mr. DeYoung and removing him from the premises. The search warrant related to an allegation of trafficking in cocaine.

[26] When they entered the kitchen, the officers saw Mr. DeYoung standing near a table and believed he might have been processing marijuana. Following his arrest a pat down search disclosed some money in Mr. DeYoung's pocket but no other evidence relevant to the charges.

[27] There was no plan to conduct a strip search of Mr. DeYoung, however that changed based upon comments made by Cst. Manley to D/C Cross. As they were preparing to remove Mr. DeYoung from the apartment Cst. Manley said he had information from a confidential source with respect to Mr. DeYoung. There was no further discussion about the reliability of the information or the source.

[28] None of the officers made notes about this conversation and each gave slightly different versions of what was said. D/C Cross recalled that Cst. Manley told him that Mr. DeYoung kept his dope in his ass. In cross-examination he said the comment might have been that he kept dope in his ass cheeks.

[29] D/C Stanley said he was told by D/C Cross that Cst. Manley had indicated that Mr. DeYoung kept his drugs in his underwear. In cross-examination he indicated that D/C Cross may have said something along the lines that Mr. DeYoung kept drugs in his underwear or butt cheeks, but not in his anus. In his mind they did not have any information that the cocaine might be inside Mr. DeYoung's body, but only that it might be in his underwear or butt crack.

[30] Cst. Manley testified that he told D/C Cross that Mr. DeYoung kept his cocaine on his person, around his anus, and that this came from source information. In cross-examination he confirmed that he could not remember the exact words he used, but that he told D/C Cross that Mr. DeYoung kept his cocaine in or around his anus and could move freely with the cocaine in that location. Shortly before trial, Cst. Manley provided a supplemental can-say statement about the information provided to him by the confidential source. This indicated that the source told him Mr. DeYoung kept crack in his underwear and could move freely about with crack in his ass.

[31] When I consider the evidence of all three of the officers, it is apparent that the information provided by Cst. Manley was that Mr. DeYoung was known to keep cocaine in his butt crack or underwear, but not inside his rectum.

[32] Once D/C Cross had this information and disclosed it to D/C Stanley they very quickly decided to conduct an immediate strip search. Both testified that this was primarily because of concerns for Mr. DeYoung's health if there were drugs in a bag that had burst. A secondary reason for the search was the desire to preserve evidence related to the drug charges including a risk that he might insert the drugs in his rectum during the trip to the station.

[33] Neither officer provided any justification for the apparent belief that there might be a health risk to Mr. DeYoung. They did not testify about any personal experience or training to the effect that crack cocaine in a person's underwear or butt crack was a health hazard. Presence of the bag in a body cavity might well be a different situation.

[34] At the time of the decision to conduct the strip search the only information which D/C Cross and D/C Stanley had which was relevant to the issue, was the comment from Cst. Manley and the fact that a search warrant was issued in relation to alleged trafficking in cocaine. Neither officer testified that they had seen any evidence in support of those allegations during the arrest of Mr. DeYoung.

[35] There was no real explanation for the apparent urgency in deciding whether to search Mr. DeYoung and where to do so. The entire process of decision and implementation took 2 – 3 minutes. It wasn't because of an urgent health concern or the decision should have been to call emergency medical services rather than conduct a strip search. It could have been due to the desire to clear the apartment so it could be searched. If so, that is no justification for ignoring the guidelines for police found in *Golden*.

[36] Cst. Manley did not say why he thought it was important to mention his source information to D/C Cross as he took Mr. DeYoung towards the apartment door but not raise it at the pre-search briefing. If he had done so, the issue of a potential strip search could have been discussed fully and a plan developed. Obviously that did not happen and D/C Cross and D/C Stanley were left to deal with Mr. DeYoung without the benefit of a reasoned assessment of all of the circumstances.

[37] Whether there might ultimately be sufficient information to justify a strip search at the police station, D/C Cross and D/C Stanley did not have reasonable and probable grounds to conclude that such a search at Mr. DeYoung's apartment was necessary. For this reason I conclude that the search was unreasonable and in violation of s. 8 of the *Charter*.

Was the manner in which Det./Cst. Cross and Det./Cst. Stanley conducted the strip search of Mr. DeYoung reasonable?

[38] Despite my conclusion on the first question, I want to provide my analysis with respect to the manner of search. The search itself took place over a couple of minutes in Mr. DeYoung's bedroom. He was in shock and overwhelmed, had been hit by a baton and punched, and given no realistic opportunity to participate voluntarily. During the search D/C Stanley described him as being non-cooperative but not resisting.

[39] When in the bedroom Mr. DeYoung had the handcuffs moved to the front of his body, allegedly so he could assist in removing his clothes and any contraband. In the brief period of the search he did not voluntarily remove any item of clothing and when his hands moved towards his underwear he was told to stop. His pants and underwear were pulled down and he was struck several times by D/C Cross.

[40] When I consider the police guidelines set out in *Golden*, it is obvious that the manner of Mr. DeYoung's search was unreasonable. There was no consultation with superior officers, or anyone else, and the search did not take place in a police station. There was no realistic opportunity for Mr. DeYoung to voluntarily remove his clothes or produce the contraband. Unnecessary physical force was used by D/C Cross.

[41] Because the strip search was taking place in the middle of the execution of a search warrant the atmosphere in the apartment was highly charged and it is not surprising that other officers entered after hearing sounds from the room. This unnecessarily exposed a naked Mr. DeYoung to other eyes.

[42] The officers' notes did not record any of the reasons for the search, nor the discussion with Cst. Manley. There was some information in D/C Cross' notes about the manner of search, but it did not include all the details necessary in order to assess the reasonableness.

[43] D/C Cross suggested that a search in Mr. DeYoung's bedroom might have created a greater sense of privacy than if it took place in a police station. That is a very subjective opinion and does not recognize the highly intrusive nature of a strip search by police in one's dwelling. In addition to a violation of personal integrity, there has been a serious invasion of the sanctity of Mr. DeYoung's home. A search conducted in a police station may well be far preferable for most people.

[44] If the officers in this case had taken the time to consult with superiors, evaluate the reliability of the source information from Cst. Manley, assess the results of the search of the apartment, and consider what other options might be available, they may well have concluded that a strip search was not necessary. If one was required, it could have taken place at the police station in a planned fashion with no possibility of interruption. There could have been a discussion with Mr. DeYoung about what was going to happen in an effort to obtain his consent and cooperation.

[45] I am satisfied that the manner in which the search was conducted is also unreasonable and a violation of s. 8 of the *Charter*.

Conclusion

[46] For these reasons I have found that both the decision to conduct the strip search of Mr. DeYoung at his apartment and the manner in which it was carried out are unreasonable. The crown has not provided sufficient justification for the police actions. I therefore find that the strip search was done in violation of s. 8 of the *Charter*.

[47] In reaching my conclusion that the search was unreasonable I am not suggesting that officers Cross and Stanley were acting capriciously or in bad faith. The evidence suggests a lack of understanding of the care that must be taken before any strip search is undertaken. Expediency is not part of the equation. If the words of the courts in *Golden* and *Muller* are to have any practical impact police must adhere to these recommended practices to the extent possible. That is the best way to protect the right of individuals to be free from intrusive and unreasonable strip searches by police.

[48] The crown has conceded that if there is a violation of s. 8 the evidence ought to be excluded under s. 24(2) of the *Charter* and I agree with their assessment.

[49] As a result of my decision I will exclude from evidence on the trial the crack cocaine which was found during the strip search of Mr. DeYoung.