MACK'S CRIMINAL LAW BULLETIN

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COMMON LAW POLICE POWERS: SEARCH INCIDENT TO ARREST (CELL PHONES)

1.0 – PREFACE

This issue reviews recent cases which have considered the exercise of common law police powers of search incident to arrest; in particular, this issue considers whether this power extends to the search of a cell phone seized incident to arrest.

2.0 – THE CASES REVIEWED IN THIS ISSUE

(i) *R. v. Manley*, 2011 CarswellOnt 803 (C.A.)

(ii) *R. v. Otchere-Badu*, CarswellOnt 648 (S.C.J.)

(iii) *R. v. Fearon*, 2010 CarswellOnt 10077 (C.J.)

2.1 – *MANLEY*[2]

Facts

On October 19, 2006 a man entered a Mr Sub in Trenton with his face partially covered, holding a gun and a knife. He robbed the restaurant and fled.

On November 11, 2005 a man entered a music store in Trenton; he was holding a sawed off shotgun. He robbed the store and fled.

The police received information from a confidential informant identifying Michael Manley as the suspect in the music store robbery. The informant also indicated that Manley had been using stolen cell phones and used stolen access cards with the phones.

On November 13, 2006 the police arrested Manley. During a search incident to arrest the police recovered a cell phone. The police examined the phone; while doing so the police found a picture of Manley holding a sawed off shotgun; the photo was taken the day after the music store robbery.

At trial Manley sought to exclude the picture based on his assertion that there had been a violation of his section 8 rights when the police examined the phone without a warrant. The trial judge found that the police had searched the phone for three reasons: (1) safety; (2) to check for ownership; and (3) to check for evidence and protect same from destruction [para 27]. The search involved an officer opening the phone and searching the stored data for something that would identify the owner. During this search the officer found the picture in question. Based on these findings, the trial judge found that the search did not constitute a violation of section 8. Manley was convicted and appealed.

Ruling

On appeal the court recognized that the police have the power to search incident to arrest; this power includes a search to secure and preserve evidence if there is "some reasonable prospect of securing evidence of the offence for which the accused is being arrest" [para 32]: see *R. v. Caslake*, 1998 CarswellMan 1 (S.C.C.).

With respect to the search in the present case, the court held that there had not been a section 8 violation. In doing so the court initially offers that "[o]wnership of the cell phone was relevant to the offences for which the appellant had been arrested" [para 37]. The court then emphasized that the "decision rests on two points" [para 38]. First, the police had a "legitimate interest in determining whether the cell phone had been stolen"; and second, the search was not done "for any other purpose" [para 38].

While not necessary, the court went on to consider the Crown's "second" submission that *R. v. Polius*, 2009 CarswellOnt 4213 (S.C.J.) had been wrongly decided. The court concluded as follows in this regard:

> ...it is neither necessary nor desirable to attempt to provide a comprehensive definition of the powers of the police to search the stored data in cell phones seized upon arrest. However, I

1 Assistant Crown Attorney, Ottawa. The views and opinions expressed herein are those of the author and do not represent those of the Attorney General or the Crown Attorney's office.

2 See also CRIMLNWS 2011-09.

> would observe it is apparent that the traditional rules defining the powers of the police to conduct a search incident to arrest *have to be interpreted and applied in a manner that takes into account the facts of modern technology*. While I would not apply *Polius* in the particular circumstances of this case, I am far from persuaded that *Polius* was wrongly decided or that it ought to be overruled. Cell phones and other similar handheld communication devices in common use have the capacity to store vast amounts of highly sensitive personal, private and confidential information — all manner of private voice, text and e-mail communications, detailed personal contact lists, agendas, diaries and personal photographs. *An open-ended power to search* without a warrant all the stored data in any cell phone found in the possession of any arrested person clearly raises the spectre of a serious and significant invasion of the Charter-protected privacy interests of arrested persons [para 39]; [emphasis added].

Comment

Before turning to the aspect of this case that relates to the subject of this issue – powers of police to search cell phones incident to arrest – a few preliminary points seem in order.

First, with respect, it is unfortunate that the court felt it was not "necessary [or] desirable to provide a comprehensive definition of the powers of the police to search" [para 39] cell phones incident to arrest. Given the uncertainty in the law and the undoubtedly common occurrence of this scenario it seems necessary *and* desirable to provide appellate authority which sets out a "comprehensive definition" of the powers of police to search.

Second, the guidance the court did offer (on the facts of the present case) is somewhat unclear. Keeping in mind that the trial judge found three lawful basis for the search, the Court of Appeal "emphasize[d]" that the lawfulness of the search was based on the legitimate purpose of determining the owner of the phone and that the search was *for no other purpose*. While it would appear the court was endorsing only one of those three lawful bases for the search, prior to this emphasis the court held that "[o]wnership of the cell phone *was relevant to the offences*". It is not at all clear how ownership of the phone was at all relevant to the offence. While it may have corroborated the tip, it appears to have had nothing to do with the robberies. The situation becomes even more unclear when the court later held that "in a case where there was no reason to doubt the arrested party's ownership of the phone *and* no link between ownership and the offence for which the person was arrested, a search of the stored data in the phone could not be justified *on the basis that the police were simply trying to determine who owned the phone*" [para 38]. Given that the court felt the phone in the present case was somehow "relevant to the offences", this comment about searches being permitted where there is a link between ownership and the offence creates further uncertainty about the ratio. Combined with the court's subsequent comment that it would "not apply *Polius* in the particular circumstances of this case" [para 39], the ratio of this ruling is peculiarly ambiguous.

Turning to the heart of the issue, it is perhaps helpful to start with *Caslake*.

> In this case, the Crown is relying on the common law power of search incident to arrest to provide the legal authority for the search. In *Cloutier v. Langlois*, my colleague L'Heureux-Dube (for a unanimous Court) discussed the power in detail. She held that it is an exception to the ordinary requirements of a reasonable search (articulated in *Hunter*[*v. Southam Inc.*, [1984] 2 S.C.R. 144] in that *it requires neither a warrant nor independent reasonable and probable grounds*. Rather, the right to search *arises from the fact of the arrest*. This is justifiable because the arrest itself requires reasonable and probable grounds (under s. 494 of the Code) or an arrest warrant (under s. 495) [para 13]; [citations omitted]; [*emphasis* added].

Later the Court added that a search incident to arrest does, however, require a "reasonable prospect of securing evidence" [para 22].

Based on *Caslake*, the police need not have grounds – although they need a "prospect" – to conduct a search absent those that existed to affect the arrest. Perhaps the concerns raised in *Manley*, that the scope and nature of the biographical core of information contained in a cell phone requires greater protection than this standard, can be answered in two ways.

First, in order to search a cell phone incident to arrest the police must have reasonable grounds to believe that the search will afford evidence in relation to the offence for which the accused has been arrested. This added requirement ensures that the police only intrude upon this biographical core of information when they have grounds to believe it will afford evidence of the offence in question.

Second, any search conducted must be reasonable – although this is of course a requirement of any search it seems to be completely ignored in *Manley* (and in *Polius*). The information contained on cell phones is not randomly spattered throughout the phone. The information is generally very well organized and identifiable – photos, call history, contacts, calendars. As such, there can be very effective limits placed on the power to search; limits which are reviewable. *R. v. Jones*, 2011 CarswellOnt 11405 (C.A.) provides a useful example.

In the end, the question is simple. Does the scope and nature of the biographical core of information contained on a cell phone require prior judicial authorization before it may be searched; or, can the police rely upon a modified common law power of search incident to arrest.

The issue is admittedly complex. Perhaps prior judicial authorization is the "prudent" course as suggested in *Manley*. However, the question is not what is prudent. The question is what is required. If prior judicial authorization is required the court should have clearly and unequivocally said so. Of course authorization will ensure greater protection. On the other hand, the requirement to obtain a warrant, the delay in obtaining same and delay in subsequent discovery of evidence may be an unnecessary imposition. Alternatively, perhaps imposing the extra onus to have reasonable grounds to believe that the search will afford evidence and require that the search be carried out in a reasonable manner is sufficient.

2.2 – OTCHERE-BADU

Facts

Peel Regional Police received a tip that a man named "Steve" was dealing drugs and had a phone number of 647-999-8361. Through investigation the police concluded that "Steve" was actually Frank Otchere-Badu. The police subsequently set up a buy with "Steve". Otchere-Badu showed up and after identifying him as matching

the description of and responding to the name of "Steve" he was arrested.

During a search incident to arrest the police recovered a cell phone. The police then searched the internal records of the phone to confirm that the phone was the 647-999-8361 phone and reviewed the call history.

Ruling

At trial the accused sought to exclude the evidence obtained from the search of the cell phone based on an assertion that the search violated his section 8 rights.

In considering the motion Bielby J noted that the search by the police had been done close in time to the arrest [para 79]. Bielby J, citing *R. v. Caslake*, 1998 CarswellMan 1 (S.C.C.), held that a lawful basis to search incident to arrest is for the "discovery of evidenced to be used at trial" [para 82]. In so noting, Bielby J held that to be "incidental, the Police must be attempting to achieve some valid purpose connected to the arrest" [para 82].

Bielby J concluded that there was no section 8 breach: "the search of the memory aspect of the cell phone was *incidental to the arrest*, and was conducted *a short time after the arrest*, and was for the *purpose of discovering evidence* to be used at trial" [para 83]; [*emphasis* added].

Comment

As with any section 8 allegation, there are three issues that need to be considered. **First**, was the search authorized by law; **second**, is the law reasonable; and **third**, was the search carried out in a reasonable manner.

With respect to the **first issue**, the accused was lawfully arrested and searched. The police lawfully seized the cell phone during the search. The police had reasonable grounds to believe that a search of the phone could afford evidence of the offence. Based on the principles of Caslake, the search of the phone could be justified as a lawful search incident to arrest.

With respect to the **second issues**, the reasonableness of the law is not at issue here.

With respect to the **third issue**, the search was carried out in a reasonable manner. The police focused their search on discovering the number for the phone and the call history – evidence which was directly linked to the offence for which the accused was charged.

The point made in *Manley* and *Polius* – that the level of privacy interest is elevated and therefore reliance on search incident to arrest is insufficient – is a valid one to consider. However, the facts and ruling in *Otchere-Badu* suggest that perhaps the answer is not that there need be prior judicial authorization; rather, the elevated privacy concerns can best be dealt with by appropriately defining the reasonableness of the search. In other words, the limits that should be placed on such searches due to the increased privacy interests may be reflected in the limits imposed on the reasonableness of the search and not by imposing a requirement for prior judicial authorization.

Here, the search was focused and purposeful. It was aimed at discovering evidence believed to exist. This was not an "open-ended" search (which the court in *Manley* at para 39 was concerned with); this was a focused, purposeful and reasonable search.

2.3 – *FEARON*

Facts

On July 26, 2009 Araksi Nar was loading jewellery into a car at the end of a sales day at Downsview Park Merchant Market. She was approached by two young adult males, one of whom appeared to have a handgun. When she did not immediately comply with their demands one of the men pointed a gun at her. Eventually the men grabbed her bags of jewellery and fled the scene in a car.

A police investigation commenced immediately. Shortly thereafter the investigation led the police to suspect that Fearon was one of the robbers. Officers went to Fearon's apartment and happened upon him. After a brief exchange Fearon was arrested for the robbery.

After Fearon was arrested the arresting officer escorted him to a cruiser. Once at the cruiser the officer conducted a pat down search and located a Telus cell phone [para 19]. The officer then "had a look through the cell phone, saw some things in that cell phone, and seized it at that point in time as evidence in relation to the investigation" [para 20]. The officer testified that he looked through the phone "to see if there was any evidence that might be on there, so he could take it under control…[as] there are things on that phone that may be related to their ongoing investigation" [para 21]. The trial judge noted that there was no evidence that any of the phone or its various folders or areas were password protected.

Later the phone was again opened and officers discovered a text message: "We did it were the jewelry at nigga burrrrrrrrrrr" [para 24]. One of the Detectives involved in the investigation and looking at the phone offered the following explanation for doing so – indicating that he did not believe he needed a warrant:

> It's still an investigation where I'm looking for jewellery, I'm looking for outstanding suspects, I'm looking for the gun that's outstanding, and *I have concerns that those items might go missing, destroyed and then I have the chance to recover those items*, that I'm able to look through that phone and ensure that there's anything there to assist my investigation at the time, I can use that information…
>
> …it's property that they can move very quickly, be sold very quickly, hidden, any number of things that can happen to it and you have to act quickly in order to recover it. [*Emphasis* added].

At trial Fearon brought an application to exclude the evidence discovered in the cell phone arguing that the search of the phone violated section 8.

Ruling

The court began its consideration of this issue with a review of the law. In doing so the court noted the standard for search incident to arrest as set out in *Caslake* [paras 34-40].

Turning to the facts, the court noted that cell phones can indeed "contain significant amounts of personal information", however, the court held "the evidence in this case does not lead to the conclusion that Mr. Fearon had an extraordinarily high expectation of privacy in this phone" [para 49]. In support of this finding the court noted that Fearon did not testify, there was no evidence about the capabilities of the phone and no evidence of password protection [para 49].

Based on the law reviewed and the facts, the court concluded as follows:

> In my view, an ordinary cell phone objectively commands a measure of privacy in its contents. However, the expectation of privacy in the information contained in the cell phone *is more akin to what might be disclosed by searching a purse, a wallet, a notebook or briefcase found in the same circumstances*. The evidence in this case is that the LG cell phone appears to have had the functions of cell phone operation, text messaging, photographs and contact lists. While certainly private, the information stored is not so connected to the dignity of the person that this court should create an exception to the police ability to search for evidence when truly incidental to arrest and carried out in a reasonable manner [para 51]; [*emphasis* added].

Comment

In *Fearon* the court makes an important and often overlooked distinction between cell phones, smart phones and computers. Often overlooked in these cases is the type of phone, its capabilities and the impact this has on the level of one's expectation of privacy. The court also notes the lack of a password as being a relevant consideration.

Fearon makes an important point. Not all phones are equally. Even smart phones – despite their ever increasing capacity and capabilities – are different than a computer in one's home. Any consideration of a search must take into account these differences.

3.0 – EPILOGUE

There is no dispute that people have a reasonable expectation of privacy in their cell phones. This expectation of privacy may not be the same for all phones or for all people. Depending on the phones capabilities and manner in which it is used and managed (password protection for example) that expectation may vary. Nonetheless, it may often be the case that where there is evidence that the phone has the capability to store data which would attract a significant degree or privacy one's expectation of privacy will be elevated; given the scope and nature of the biographical core of information contained in such phones something more than the *Caslake* standard may be required.

The question is whether that "something more" is prior judicial authorization. The answer must be considered in light of several factors: (i) there is a long standing and well recognized power of the police to search incident to arrest; (ii) this common law power permits search based on the reasonable grounds relied upon for the arrest and a prospect of discovering evidence (see *Caslake*); (iii) this power has been recognized to extend to motor vehicles and bags/backpacks in possession of a person at the time of arrest; and (iv) that the degree of expectation of privacy may be increased or decreased based on many circumstances including the type of phone and use of a password.

Depending on these factors, even where that expectation is at its height, where the police have lawfully seized a cell phone incident to arrest and have reasonable grounds to believe that there may be evidence related to the offence for which the person was arrested contained therein, a focused and purposeful search of the phone would not seem to be unreasonable. The imposition of a requirement to obtain judicial authorization in all cases – even in those cases where such privacy interests are at their height – could hinder police investigation and result in the loss of evidence. Cell phones can be wiped remotely; after a delay they can automatically lock; other evidence that could be discovered may be lost; other people who may be at risk may be harmed.

It is true that the law must recognize changes in our modern world; however, where the police have lawfully arrested someone and have reasonable grounds to believe they have chosen to use their cell phones to commit or further their criminal activities, any expectation of privacy they had therein must be considered accordingly. A purposeful and focused search based on reasonable grounds to believe same will afford evidence is a sufficient level of protection of that expectation of privacy.

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