COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Fearon, 2013 ONCA 106
DATE: 20130220
DOCKET: C54387

MacPherson, Armstrong and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Kevin Fearon

Appellant

Sam Goldstein, for the appellant

Randy Schwartz, for the respondent

Susan M. Chapman and Jennifer Micallef, for the intervener, Criminal Lawyers' Association

Matthew Milne-Smith for the intervener, Canadian Civil Liberties Association

Kevin Wilson for the intervener, Public Prosecution Service of Canada

Heard: September 7, 2012

On appeal from the conviction entered on December 20, 2010 by Justice Diane I. Oleskiw of the Ontario Court of Justice.

Armstrong J.A.:

INTRODUCTION

[1] This court is asked to carve out a cell phone exception to the common law doctrine of search incident to arrest.

[2] The appellant, Kevin Fearon, was arrested for robbery while armed with a firearm. Upon his arrest, a police officer conducted a pat down search and located a cell phone on his person. The officer examined the contents of the phone and found photographs of a gun and cash as well as an incriminating text message. The appellant was brought to the police station and placed in an interview room. When the police returned after unintentionally leaving him alone for five hours, he gave a full videotaped confession. Throughout his confession he maintained that the firearm used in the commission of the robbery was an imitation handgun.

[3] At trial, the appellant sought to exclude the evidence that had been obtained from his cell phone upon his arrest. He claimed the search of the cell phone incident to arrest was a breach of his right to be free from unreasonable search and seizure protected by s. 8 of the *Charter of Rights and Freedoms*. The appellant also sought to exclude his confession, arguing that it was obtained in breach of his s. 10(b) *Charter* right to counsel and that it was involuntary.

[4] The trial judge found that there was no breach of s. 8 and admitted the evidence obtained from the cell phone. However, in the event she was wrong in her conclusion on the s. 8 issue, the trial judge turned her mind to the application of s. 24(2). She held that, if there had in fact been a breach of s. 8, to admit the evidence would not bring the administration of justice into disrepute.

[5] The trial judge also found that Mr. Fearon's confession given later at the police station was voluntary. Although she held that there was a technical breach of the appellant's s. 10(b) rights, she concluded his statements should be admitted pursuant to s. 24(2) of the *Charter*. In the result, Mr. Fearon was convicted of robbery and received a sentence of six years. He appeals his conviction on the grounds that the trial judge erred in her analysis of ss. 8, 10(b) and 24(2) of the *Charter*.

[6] The appellant contends that the warrantless search of the contents of a cell phone incident to arrest (except for a cursory examination to see if it contains evidence of the alleged crime) is prohibited by s. 8 of the *Charter* except in exigent circumstances. The appellant's position is supported by the intervener, the Criminal Lawyers' Association of Ontario. The Canadian Civil Liberties Association intervenes in support of the appellant and goes even further. They would not permit even a cursory examination of the contents of a cell phone seized during a search incident to arrest.

[7] The Public Prosecution Service of Canada intervenes in support of the respondent Crown's position that the warrantless search in this case was incidental to the arrest of the appellant and was therefore lawful.

[8] For the reasons that follow, I would dismiss the appeal.

THE FACTS

(a) The Robbery

[9] On July 26, 2009, Ms. Araksi Nar was operating a jewellery stall at a flea market in the Downsview area of Toronto. At the end of the day (about 6:15 p.m.) as Ms. Nar was packing her merchandise into her car, she was robbed by two men. One of the men pointed a handgun at her and ordered her to open the trunk of her car. The other man stood by. The two men then grabbed the jewellery and other objects and fled to a waiting car. The estimated value of the stolen jewellery was between $10,000 and $40,000.

[10] Ms. Nar described the gun as an inch and a half in diameter, mostly silver, but dark grey toward the handle. She said that the two men drove off in a black two-door automobile, which was located within 25 minutes of the robbery by virtue of a licence plate number given to the police by an eyewitness. The car was left less than a kilometre from the flea market. The car was registered to the appellant's co-accused, Junior Chapman.

[11] Eyewitnesses at the scene gave descriptions of the robbers, which included that the robber with the gun was wearing an oversized red "hoodie". When the car was located, the police observed a red sweater on the front passenger seat. The car was sealed in anticipation of obtaining a search warrant.

[12] Based on the description provided by Ms. Nar to police, P.C. Reynolds suspected that the appellant, who lived in the area, may have been involved in the robbery. The officer was also advised that the owner of the getaway car had previously been arrested with the appellant.

(b) **The Arrest**

[13] P.C. Reynolds drove to the apartment building where the appellant lived. When he entered the lobby of the building, he saw the appellant and Mr. Chapman leave. P.C. Reynolds then detained the appellant and Mr. Chapman. The appellant initially lied about his identity. He was arrested for obstructing justice. When Sergeant Hicks and another officer from the holdup squad arrived, the appellant and Mr. Chapman were arrested for robbery with a firearm. The appellant and Mr. Chapman were cautioned and advised of their rights to counsel.

(c) **Search and Seizure of the Cell Phone**

[14] A pat down search of the appellant followed. This resulted in the discovery of the cell phone containing the photographs of a gun and cash as well as the incriminating text message. The text message read: “We did it were the jewlery at nigga burrrrrrrrr”.

[15] In order to access the photographs and the text message in the cell phone, Sergeant Hicks had to operate the keyboard on the phone. The cell phone was

turned “on” and there is no evidence that it was password protected or otherwise “locked” to users other than the appellant. The photographs and the text message were not in plain view and it was necessary to manipulate the key pad in order to move the phone into its different modes.

[16] When Sergeant Hicks returned to the police station, he gave the phone to another officer who attempted to determine whether the incriminating text message had been sent to anyone. The officer determined that the message was a draft and therefore had not yet been sent to anyone. He hit the “save” button in order not to lose the text message. After about two minutes, the phone was returned to Sergeant Hicks who was told to look through it for recent calls or contacts. In the course of the night and next morning, as the investigation progressed, officers made additional checks of the phone. At trial, however, the only data from the phone relied upon by the Crown were the photos and the text message.

[17] The police officers involved in the examination of the contents of the cell phone believed that they were entitled to proceed without obtaining a search warrant. Detective Nicol, in particular, testified that all inspections of the cell phone were done at his direction or with his approval. From his experience, cell phones found in circumstances such as the appellant’s contain text messages sent between co-accused that will assist police in recovering stolen property and

apprehending suspects. His evidence at trial underscored the importance of acting quickly following the robbery.

[18] Many months later, one of the police officers involved in the investigation believed that there was a court case that held a search warrant was required to download the contents of a cell phone. He therefore applied for a warrant. He included in the information to obtain the warrant the fact that the cell phone had been previously examined. The search warrant was issued and the phone was re-examined and the photos and text message entered into evidence. Counsel for the appellant at trial did not challenge the issuance of the search warrant.

(d) **The Right to Counsel**

[19] On his way to the police station, the appellant indicated that he wished to consult counsel. At the police station, he was again read his right to counsel by the booking officer, who was told by the arresting officer that the appellant wished to speak to his lawyer. The booking officer told the appellant that he would have access to a telephone. The appellant was taken to an interview room in the police station at about 9:35 p.m. where he was searched again and then left alone while the arresting officer left to do his paperwork.

[20] In the meantime, the getaway car was searched and the police located a gun hidden under the front passenger seat where the red sweater was found. The gun was a .22 calibre handgun with its serial number removed. It was

loaded with two rounds of ammunition. The gun matched the photograph of the gun in the appellant's cell phone.

[21] In a back pack found on the rear seat of the car, the police found two bandanas and a neoprene mask. The DNA of Junior Chapman, the appellant's co-accused, was discovered on one of the bandanas.

[22] The appellant was left alone in the interview room until about 2:50 a.m. when two of the investigating officers entered the room. During the time that the appellant was left alone, the police officers were engaged in various duties related to this investigation and other unrelated responsibilities. They apparently did not think to assign someone to deal with the appellant's request to speak to a lawyer until several hours had passed.

[23] When the two officers entered the interview room at 2:50 a.m., they apparently woke him up. After introducing himself and another officer, Detective Nicol again advised the appellant that he was charged with robbery while armed with a firearm. The appellant responded, "No, it wasn't a real thing". Detective Nicol then told him the victim thought it was the real thing. Then the following conversation between the appellant and Detective Nicol took place:

> Nicol: Do you understand your rights to counsel?
>
> Fearon: Yeah.

Nicol: You told the other officers you wanted to call a lawyer, who is your lawyer and do you have their number?

Fearon: I don't want to call a lawyer. I want to go to sleep. I want to plead guilty in the morning but not to no firearm charge.

Nicol: So you don't want to call a lawyer?

Fearon: No.

Nicol: You understand you're being charged with robbery with a firearm. You're not obligated to say anything and if you choose to do so, it may be used in evidence. Do you understand?

Feron: Yeah.

Nicol: If anyone in authority or anyone else has said anything to you or made you any promises to provide a statement disregard those statements and only provide a statement if you freely choose to do so. Do you understand?

Fearon: [Nodded yes.]

Nicol: Do you want to tell us what happened tonight?

Fearon: Not really. I did some stupid thing and I'll do what I got to do.

Nicol: Are you sorry for what you've done?

Fearon: Yeah, I fucked up and I'll deal with it.

Nicol: Are you sorry you got caught or sorry you scared that lady?

Fearon: I'm sorry I scared her. I didn't hurt her.

> Nicol: What about your family, how are they going to take the news?
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> Fearon: Not well. My mum's a good lady and my brother's never been in trouble, just me again.
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> Nicol: Are they going to want to bail you out or visit you in jail?
>
> Fearon: [Now crying.] No, I'm a fuck up and embarrassment. My brother is getting a running scholarship and I'm going to jail.

[24] The discussion between Detective Nicol and the appellant continued. Detective Nicol asked the appellant if he wished to apologize to the victim. The appellant, in reply, asked whether such an apology could be put before the judge in the morning. The appellant then provided a videotaped statement in which he admitted his involvement in the robbery although he continued to assert that the handgun was fake and had been discarded in a garbage can.

THE RULING ON THE CELL PHONE SEARCHES

[25] The trial judge defined the issue concerning the cell phone searches at para. 36 of her reasons:

> In this case, there is no issue regarding the lawfulness of the Applicant's arrest. The real issue here is whether the searches of the contents of Mr. Fearon's cell phone during the early stages of the investigation on July 26 and 27, 2009, and prior to obtaining the warrant on February 9, 2010, were truly incidental to his arrest on July 26, 2009.

[26] The trial judge further defined the task at para. 41 of her reasons:

> In my view, the searches requiring examination by this Court are: First, Sgt. Hicks' cursory inspection of the contents of the phone at the scene of the arrest; and second, the intermittent searches of the contents of the phone from 10:48 p.m. on July 26th until the early morning hours of July 27th at the direction of the detectives.

(e) **The Search at the Scene of the Arrest**

[27] It was conceded at trial that there were reasonable and probable grounds to arrest the appellant. The trial judge concluded, at para. 42 of her reasons, that Sergeant Hicks had a right to search the appellant and to take from him "any property that he reasonably believed may constitute relevant evidence".

[28] The trial judge concluded at paras. 44 and 45 of her reasons:

> In these circumstances, I find that there was a reasonable prospect of securing evidence of the offence for which the accused was being arrested in searching the contents of the cell phone. In particular, it was reasonable for Sgt. Hicks to believe that the arrestee, Mr. Fearon, may have had communications through the cell phone before, during or after the robbery with other perpetrators or with third parties. His search of the phone at the arrest scene was brief and cursory. There is no suggestion that this was an expansive or abusive search.
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> …
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> This case is distinguishable from the arrest in *R. v. Polius*, [2009] O.J. No. 3074. In that case Trafford J. found that the arresting officer seized the accused's cell phone during a search incident to arrest without any regard for its evidentiary value in connection with an arrest that he did not and could not particularize. The arresting officer in that case did not have a reasonable

> basis to believe that the cell phone may have been evidence of the alleged murder when he arrested the accused.

(f) **The Searches at the Police Station**

[29] The trial judge concluded that the searches of the cell phone during the night and early morning hours of the next day were lawful searches incident to arrest. She found that although considerable time and distance had passed from the search at the scene, it was not significant because the searches of the cell phone at the station were closely connected to the search at the scene. The searches at the station were essentially an extension of the search at the scene.

(g) **Are cell phones excluded from the common law power to search incident to arrest?**

[30] At trial, Counsel for Mr. Fearon submitted that the police exceeded their power when they retrieved the photographs and the text message from the cell phone. This argument was premised on the theory that the expectation of privacy in the contents of a cell phone is so high that a warrant is required before the contents are examined.

[31] The trial judge observed that there were conflicting trial judgments on this issue and no appellate authority to resolve the controversy.[1]

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[1] I note that the release of the trial judge's reasons in respect of the cell phone search pre-dated this court's decision in *R. v. Manley,* 2011 ONCA 128, 269 C.C.C. (3d) 40 by almost two months. Since it was not argued before the trial judge, I will defer my comments on *Manley* until my analysis of the issues on appeal.

[32] The trial judge held at paras. 49 and 51 of her reasons:

> While there is no doubt that cell phones can contain significant amounts of personal information, the evidence in this case does not lead to the conclusion that Mr. Fearon had an extraordinarily high expectation of privacy in this phone. Mr. Fearon did not testify on the *voir dire* and there was very little evidence as to the device's capabilities. There is no evidence that the phone was password protected or subject to any security barriers. Nor is there any evidence that it had "mini-computer" capabilities like the Treo in *R. v. Little*, 2009 O.N.S.C. 41212.
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> ...
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> 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.

(h) **Section 24(2) of the *Charter***

[33] Although it was not necessary to consider s. 24(2) of the *Charter*, the trial judge did so in the event that her analysis in respect of the cell phone searches proved to be wrong.

[34] The trial judge applied the analysis set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 in considering whether the court ought to admit evidence in spite of the fact that it was obtained in breach of the appellant's *Charter* rights.

[35] The trial judge found that the police acted in good faith and that the officers believed they were acting within their powers of search incident to arrest at the time they looked at the contents of the cell phone. She observed that Detective Nicol applied for and obtained a warrant after learning about a case which held that warrants would be required for the Technological Crime lab search and downloads of information from cell phones. The trial judge noted that the warrant was not challenged on the *Charter* application and held that, although there was a six-month delay in obtaining a warrant, it did mitigate the seriousness of the search's impact on the appellant's *Charter*-protected interests. She found that the evidence obtained from the warrantless search in any event constituted cogent evidence of a very serious crime. In the result, the trial judge concluded that even if she had found a breach of s. 8, the cell phone evidence would not bring the administration of justice into disrepute.

THE RULING ON THE ADMISSIBILITY OF THE APPELLANT'S STATEMENTS TO THE POLICE

[36] The trial judge reviewed the circumstances surrounding the making of the appellant's statements and concluded that there was no atmosphere of

oppression or anything in the conduct of the police that affected their voluntariness. There was no evidence that the appellant did not fully understand what he was saying or that his statements could be used against him.

[37] In respect of s. 10(b), the trial judge concluded that the significant delay in providing him with the opportunity to consult a lawyer constituted a breach of his right to counsel. However, in her s. 24(2) analysis, the trial judge concluded that the breach was not serious. She found that the police fully complied with the informational component of s. 10(b) by advising the appellant of his right to speak to a lawyer.

[38] Regarding the implementational component of s. 10(b), the trial judge found that the delay in providing the opportunity to contact a lawyer was not intentional. There was no attempt to thwart his exercising his right to counsel. The delay on the part of the police was an honest mistake with no harm done. The trial judge concluded: “I am satisfied that Fearon knew exactly what he was giving up when he declined access to counsel to the detectives.”

THE POSITION OF THE PARTIES ON APPEAL

(a) **The Appellant**

[39] The appellant advances two principal arguments on appeal. First, he submits that the trial judge erred in holding that the search of the cell phone was a lawful search incident to arrest and that the search did not infringe his s. 8

rights. The appellant contends that this court should carve out a cell phone exception to the doctrine of search incident to arrest. Second, he argues that the trial judge erred by concluding that the appellant's statements to the police were voluntary and did not infringe his *Charter*-protected s. 10(b) right to counsel. In addition, the appellant submits that the trial judge erred by admitting both the incriminating text and picture produced from the cell phone search and the appellant's statements to the police. This evidence should have been excluded under s. 24(2) of the *Charter*.

(b) **The Respondent**

[40] The respondent submits that the examinations of the cell phone made by police fall properly within the ambit of the common law power of search incident to arrest. The respondent opposes the position taken by the appellant that an "exception" for cell phones ought to be carved out of the search incident to arrest doctrine. The respondent also submits that the statements made by the appellant to the police were voluntary and admissible and that the trial judge was correct to conclude that the breach of the appellant's s. 10(b) rights was not serious. Lastly, the respondent argues that the trial judge's s. 24(2) analysis is supportable and entitled to deference from this court.

(c) The Interveners

[41] The Canadian Civil Liberties Association requests the court to recognize that a warrantless search of an electronic device that has already been seized incident to arrest is unlawful, absent exigent circumstances. The Criminal Lawyers' Association takes a similar position but would permit the police to do a cursory examination of a cell phone to determine if it contained relevant evidence.

[42] The Director of Public Prosecutions of Canada submits that there should be no cell phone exception to the common law search incident to arrest. Such an exception is unwarranted and would complicate the law for the worse.

ANALYSIS

(a) The Cell Phone

(i) When is a warrantless search incident to arrest justified?

[43] Counsel for the appellant makes two submissions for excluding the cell phone evidence. First, he submits that the examination of the contents of the cell phone did not satisfy the criteria for a search incident to arrest because the police did not have a reasonable belief that they would discover evidence in support of the robbery and, in any event, the search went well beyond the kind of examination required to determine if such evidence existed. The second argument is not specific to the appellant's case and invites this court to carve out

an exception to the common law doctrine of search incident to arrest for cell phones.

[44] Before addressing these submissions, I turn to the Supreme Court's decision in *R. v. Caslake*, [1998] 1 S.C.R. 51. In *Caslake*, Lamer C.J., writing for a majority of the court, summarized the necessary limits of the common law doctrine of search incident to arrest. The Chief Justice stressed that its limits must be respected. He explained at para. 25 that:

> [T]he police must be able to explain, within the purposes articulated in *Cloutier, supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

[45] I now return to the issues raised by the appellant.

(ii) Did the cell phone search in this case satisfy the criteria for the application of the common law doctrine of search incident to arrest?

[46] The appellant does not take issue with the legality of his arrest or the authority of the police to conduct a pat down search. As a result, there are only two points in issue in this branch of his argument. First, was the belief of the police that an examination of the cell phone would yield evidence of the robbery

reasonable? Second, did the search of the contents of the cell phone go beyond the permissible limits of a search incident to arrest?

[47] The trial judge concluded that the police reasonably believed that an examination of the contents of the cell phone would yield relevant evidence. Absent palpable and overriding error, such a finding is entitled to deference. I discern no such error. The appellant was arrested about three hours after the robbery. The police had information that the appellant had acted with a second person and that a third person was involved in the stashing of the stolen jewellery. There was therefore a potential for communication among the three suspected participants. In addition, the police had a legitimate concern about the location of the gun and the stolen jewellery. Any communication among the three suspects could lead to the discovery of one or both. In respect of the photographs found in the cell phone, the police knew from experience that robbers will sometimes take photos of the stolen property and even of themselves with the loot.

[48] The remaining question on this issue is whether the search went beyond the permissible limits of a search incident to arrest. The position of the appellant is that the police were entitled to no more than a “cursory” examination of the contents of the cell phone and that they should have proceeded by way of an application for a search warrant after the pat down search produced the phone or, at least, after they discovered the photos and text message. The appellant

relies on two cases for this submission: *R. v. Polius*, [2009] O.J. No. 3074 (S.C.); and this court's decision in *Manley.*

[49] In *Polius*, the defendant was charged with counselling first-degree murder. At the time of arrest, the police seized a cell phone from the accused. The phone was examined without a warrant. This search led the police to the accused's cell phone number, which they used to obtain the production of his cell phone records. The records were then tendered by the Crown in evidence. Trafford J. concluded that there was a s. 8 breach but admitted the records pursuant to s. 24(2) of the *Charter*.

[50] Trafford J. discussed the notion of a "cursory" inspection of an item seized as incident to arrest, at para. 41 of his reasons:

> In my view, the power to SITA [i.e., search incident to arrest] includes a power to conduct a cursory inspection of an item to determine whether there is a reasonable basis to believe it may be evidence of the crime for which the arrest was made. However, any examination of an item beyond a cursory examination of it is not within the scope of the power to SITA. Using other words, the evidentiary value of the item must be reasonably apparent on its face, in the context of all of the information known by the arresting officer. Where the purpose of a SITA is to find evidence of the crime, the standard governing the manner and scope of the search is a "... reasonable prospect of securing evidence ...". See *R. v. Caslake, supra*, at para. 21. The police "... must be in a position to assess the circumstances of the case so as to determine whether a search meets the underlying objectives ..." of the SITA. See *Cloutier v. Langlois, supra*, at paras. 60-62.

[51] At para. 57, Trafford J. expressed his view that once a cell phone is found at the time of the arrest and "there is a reasonable basis to believe it may contain evidence of a crime, it can be seized for the purpose of preserving its evidentiary value, pending the search of its contents under a search warrant".

[52] I shall return to *Polius* during my analysis of whether this court should carve out a cell phone exception to the common law doctrine of search incident to arrest.

[53] In this court's recent decision in *Manley*, the appellant was arrested for a number of offences related to the robbery of two retail stores in Trenton. The police seized a cell phone from the appellant on his arrest. The police opened the cell phone and examined its contents. They found a photograph of the appellant holding a sawed-off shot gun taken the day after the second robbery. A warrant was later obtained to search the contents of the phone. At trial, the appellant objected to the admissibility of the photograph on the ground that the original search was unlawful and, as a result, the search warrant was tainted. The trial judge ruled the search was reasonable and the search warrant was valid.

[54] In *Manley*, the police had information that the appellant had stolen cell phones in the past. The trial judge found that the first police officer who opened the cell phone did so to determine its owner. Ownership of the phone was

relevant to the offences for which the appellant was arrested. Sharpe J.A., writing for the court, said at paras. 37 and 38 of his reasons:

> In my view, this combination of circumstances provided the police with a lawful basis for conducting a cursory search of the cell phone to determine whether it had been stolen. As I can see no basis to interfere with the trial judge's factual finding that the first officer came upon the photograph while conducting a search of the cell phone to determine its ownership, I would uphold the trial judge's determination that the cursory search of the cell phone was lawful.
>
> I wish to emphasize, however that my decision rests on two points. First, that the police had a legitimate interest in determining whether the cell phone had been stolen and second, that the police did not search the stored data in the cell phone for any other purpose. According to the testimony on the *voir dire* that was accepted by the trial judge, the cell phone's telephone number was identified after the discovery of the photograph. A telephone number is sufficient information from which the ownership of a phone may be determined. Had the examination of the phone continued after the telephone number had been found, this would be a different case. If the telephone number had been written or inscribed on the exterior of the cell phone or visible or easily found when the phone was opened, any further search obviously could not be justified as a cursory inspection to determine ownership. Likewise, 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.

[55] Sharpe J.A., at para. 39 of his reasons, concluded that it was "neither necessary nor desirable [in this case] to attempt to provide a comprehensive

definition of the powers of the police to search the stored data in cell phones seized upon arrest".

[56] Sharpe J.A. declined to apply *Polius* in *Manley*. However, he observed that he was not persuaded that *Polius* was wrongly decided.

[57] This case is not significantly different from *Manley*. I cannot conclude, in the circumstances of this case, that the original examination of the contents of the cell phone fell outside the ambit of the common law doctrine of search incident to arrest. Apparently, the cell phone was turned "on" and it was not password protected or otherwise "locked" to users other than the appellant. The police officers had a reasonable belief that they might find photographs and text messages relevant to the robbery. The initial search at the time of the arrest involved a cursory look through the contents of the cell phone to ascertain if it contained such evidence.

[58] The subsequent examinations of the contents of the cell phone at the police station are more difficult to analyze. Arguably, those examinations went beyond the limits for a search incident to arrest. See *Caslake*, at para. 25. In my view, the proper course for the police was to stop the examination of the contents of the cell phone when they took the appellant to the police station and then proceed to obtain a search warrant. Detective Abdel-Malik agreed that there was no urgency to search through the cell phone. There is no evidence that it would

have been impracticable to appear before a justice to obtain a search warrant in the usual manner. If it was impracticable for an officer to appear before a justice to obtain a search warrant, the police could have proceeded to obtain a telewarrant under s. 487.1 of the *Criminal Code*. That said, the trial judge concluded that the examination of the contents of the cell phone at the police station were connected to the search at the scene of the arrest. Although some time and distance had passed from the arrest, the trial judge found that the police were still looking for evidence of the location of the jewellery and the gun as well as for contacts among the parties to the offences. These were findings of fact made by the trial judge. While I would have come to a different conclusion, I cannot say that these factual findings reflect palpable and overriding error.

[59] There is also another observation to make about the search of the cell phone at the police station. No additional evidence appears to have been discovered by the police and none was tendered in evidence from that search. Even if the search at the police station went beyond the limits of *Caslake* s. 24(2) is not engaged.

[60] In the result, I conclude that the trial judge did not err in her finding that the examination of the contents of the cell phone at the time and place of arrest and later at the police station were within the ambit of the common law doctrine of search incident to arrest.

(iii) Should this court carve out a cell phone exception to the common law doctrine of search incident to arrest?

[61] The appellant argues that until the Superior Court's decision in *Polius*, the paradigm for analyzing the warrantless search and seizure of cellular devices incident to arrest was the briefcase and analogous containers such as wallets and purses. The point is made that cell phones are sophisticated devices which have a capacity for storing an infinite variety and amount of personal information in which there is a high expectation of privacy by the owner. The contents of a briefcase, purse or wallet are finite while the contents of a cell phone and other electronic devices are potentially infinite. A cell phone can continue to provide incriminating evidence after it has been seized because of its transmitting ability.

[62] Trafford J. in para. 47 of his reasons in *Polius* observed that a warrant is required to search a locked briefcase and that "[a] cell phone is the functional equivalent of a locked briefcase in today's technologically sophisticated world."[2]

[63] The appellant also relies on observations made by Fuerst J. in *R. v. Little*, [2009] O.J. No. 3278 (S.C.) concerning the distinction between briefcases and cell phones. It is important to note that in *Little*, the judge concluded at para. 147 that the cell phone in issue "functioned as a mini-computer", the contents of

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[2] Counsel for the Director of Public Prosecutions challenges this as an inaccurate statement of the law. Trafford J. referred to *R. v. Mohamad* (2004), O.R. 3(d) 481 (C.A.) where the court held in the particular circumstances of the case that an unlocked briefcase could be searched as incident to arrest. It was suggested by counsel that Trafford J. simply concluded that a locked briefcase required a search warrant.

which “were not immediately visible to the eye” and were “extracted by a police officer with specialized skills using specialized equipment.”

[64] Counsel for the intervener, the Canadian Civil Liberties Association, submits that cell phones should be excluded from warrantless searches incident to arrest except in exigent circumstances. The Civil Liberties Association would not permit even a cursory examination of the contents of cell phones.

[65] Counsel for the intervener, the Criminal Lawyers’ Association of Ontario, takes the position that a cursory examination is acceptable for the limited purpose of determining whether there is evidence relevant to the alleged crime. However, after the cursory look, the examination should cease and a search warrant obtained.

[66] Counsel for the respondent supported by counsel for the Director of Public Prosecutions submits that the law in respect of search incident to arrest does not require a paradigm shift in the thinking of the court or a carve out of a cell phone exception to the police power to search incident to arrest.

[67] The respondent argues that placing cell phones in the exceptional category is “overly simplistic and illogical”. The nature of information that may be stored in a cell phone is no different than the kind of information that people carry in tangible form in briefcases, purses or other similar containers. In all of these cases, the potential for discovering highly personal information exists. The fact

that there may be more such information in a cell phone ought not to justify the creation of a cell phone exception. The respondent relies on the British Columbia decision in *R. v. Giles*, [2007] B.C.J. No. 2918 (S.C.) in support of this position.

[68] Counsel for the respondent further submits that the Supreme Court of Canada has never defined the scope of search incident to arrest by the kind of item searched. Counsel argues that the Supreme Court has limited search incident to arrest in two cases: the first situation is when personal body integrity is the subject of a search: see *R. v. Stillman*, [1997] 1 S.C.R. 607 and *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679. The second situation is the search of a person's home: see *R. v. Golub* (1997), 34 O.R. (3d) 743, (C.A.) and *R. v. Feeney*, [1997] 2 S.C.R. 13.

(iv) Conclusion on the proposed cell phone exception

[69] Much of the argument in this case, both here and in the court below, focused on *Polius*. The appellant argued that the reasoning in *Polius* should apply in this case. Counsel for the respondent distinguished *Polius* from the case at bar. The Director of Public Prosecutions, on the other hand, took the position that *Polius* was wrongly decided.

[70] I agree that *Polius* is distinguishable from this case. In *Polius*, the arresting officer received his instructions from a senior officer who did not brief

him on the circumstances of the alleged offence. When the cell phone was seized on arrest, the arresting officer had no instructions to seize it and no reason to believe that it would contain relevant evidence.

[71] The cell phone in *Polius* was turned over the next day to a technician of the Toronto Police Service who conducted an examination of the phone over two or three days without obtaining a search warrant. The technician prepared a 15 page report that included an appendix of over 200 pages of the information in the defendant's cell phone. Given the facts of *Polius*, it is not surprising that Trafford J. concluded it was a case that called for a search warrant.

[72] The problem I have with the appellant's position and, in particular, the position of the Canadian Civil Liberties Association, is that it would appear to mark a significant departure from the existing state of the law on the basis of a record that does not suggest it is necessary. While I appreciate the highly personal and sensitive nature of the contents of a cell phone and the high expectation of privacy that they may attract, I am of the view that it is difficult to generalize and create an exception based on the facts of this case. The facts of this case, with the correct application of the existing law, suggest that the search and seizure of the cell phone at the scene of the arrest were carried out appropriately and within the limits of the law articulated by the Supreme Court in *Caslake*.

[73] In this case, it is significant that the cell phone was apparently not password protected or otherwise "locked" to users other than the appellant when it was seized. Furthermore, the police had a reasonable belief that it would contain relevant evidence. The police, in my view, were within the limits of *Caslake* to examine the contents of the cell phone in a cursory fashion to ascertain if it contained evidence relevant to the alleged crime. If a cursory examination did not reveal any such evidence, then at that point the search incident to arrest should have ceased.

[74] The appellant directed this court to statements made by the trial judge in *Little*, where she concluded at para. 147 that the cell phone in issue "functioned as a mini-computer". Furthermore, the court in *Little* found that the contents of the cell phone "were not immediately visible to the eye" and were "extracted by a police officer with specialized skills using specialized equipment." There was no suggestion in this case that this particular cell phone functioned as a "mini-computer" nor that its contents were not "immediately visible to the eye". Rather, because the phone was not password protected, the photos and the text message were readily available to other users.

[75] If the cell phone had been password protected or otherwise "locked" to users other than the appellant, it would not have been appropriate to take steps to open the cell phone and examine its contents without first obtaining a search warrant.

[76] In short, I find myself in the same position as this court found itself in *Manley*. To quote from the reasons of Sharpe J.A. again, 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."

[77] It may be that some future case will produce a factual matrix that will lead the court to carve out a cell phone exception to the law as articulated in *Caslake*. This is not that case. To put it in the modern vernacular: "If it ain't broke, don't fix it."

(v) The application of s. 24(2) of the *Charter*

[78] In the event that I am found to be in error concerning the s. 8 analysis, I agree with the trial judge's s. 24(2) conclusion. I see no error in her application of the principles articulated in *Grant* and I agree that the admission of the evidence from the cell phone would not bring the administration of justice into disrepute.

(b) **The Admissibility of the Appellant's Statements to Police**

[79] I see no basis to interfere with the trial judge's finding that the appellant's statements to the police were voluntary. I agree with her finding that there was no atmosphere of oppression while he was detained in an interview room for several hours. It appears, for at least part of that time, he was asleep. While he waited in the interview room, the appellant decided that he wanted to plead guilty

as soon as possible the next day. There certainly was no pressure to force him to come to that conclusion.

[80] It was unfortunate that the appellant was denied his s. 10(b) rights during the period of delay. However, the trial judge found that the denial was not intentional. Accordingly, it did not affect the voluntariness of his statement.

[81] In deciding to admit the evidence of the police statements, in spite of the breach of s. 10(b), the trial judge undertook the appropriate s. 24(2) analysis in accordance with *Grant* and concluded that the evidence would not bring the administration of justice into disrepute. I agree with her conclusion.

CONCLUSION

[82] In the result, I would dismiss the appeal.

Released:

"RPA"
"FEB 20 2013"

"Robert P. Armstrong J.A."
"I agree J.C. MacPherson J.A."
"I agree David Watt J.A."