

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

*In the matter of an application for an order excluding evidence pursuant to
section 24(2) of the Canadian Charter of Rights and Freedoms*

BETWEEN:

HER MAJESTY THE QUEEN

-and-

GATES WESLEY ROBERT JEN

REASONS FOR RULING

of the

HONOURABLE JUDGE CHRISTINE GAGNON

Heard at: Yellowknife, Northwest Territories
November 18-22, 2013

Date of Decision: January 27, 2014

Counsel for the Crown: Jennifer Bond

Counsel for the Accused: Caroline Wawzonek

[Sections 5(1) and 5(2) of the *Controlled Drugs and Substances Act*]

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INTRODUCTION

[1] Mr. Gates Jen is charged with trafficking in cocaine and of having possessed cocaine for the purpose of trafficking. This is a ruling on an application made pursuant to section 24(2) of the *Canadian Charter of Rights and Freedoms* for the exclusion of evidence obtained by the police. The application alleges violations to sections 7, 8 and 9 of the *Charter*.

[2] In the Notice of Application dated October 30, 2013, the accused seeks an order to exclude the evidence of cocaine seized on April 12-13, 2012, a statement obtained from him, and medical records. In a factum filed November 21st, 2013, counsel for the accused seeks an order excluding his “self-incriminating identification, any cell phone seized from the cab or the defendant’s person, drug evidence seized from the body samples of the defendant and the defendant’s medical records”, and alleges violations to sections 7, 8, 9 and 10b) of the *Charter*. Counsel asked that I rely on the latter Factum rather than on the grounds alleged in the Notice of Application.

[3] I heard no evidence that medical records were seized and no application by the Crown to tender such evidence. I will therefore not rule on this part of the Application. The Defense did not ask that I rule on the admissibility of a water bottle and Canadian currency although these items were seized at the same time as the cell phone and I heard evidence about this. I find therefore that it would be logical to include these items in the analysis.

[4] More specifically, I am asked to determine if the police had reasonable grounds to believe that a taxi, driving in and around Bowling Alley in Yellowknife, Northwest Territories, was carrying the person with whom a member of the Royal Canadian Mounted Police had been exchanging text messages in view of conducting a drug transaction.

[5] Whether or not the police had a right to arrest this passenger shall determine if they had a right to seize a cell phone, Canadian currency, a water bottle and ultimately, drugs. The timing of the arrest in relation to when the police gave the passenger his right to counsel will determine whether they had the right to ask him for his name.

[6] In assessing whether the police had reasonable grounds to believe that the passenger had committed a criminal offence, I must consider what information they had *before* they made the decision to arrest him, and I must determine at what point in the investigation this decision was made.

[7] Because the police did not have a warrant to arrest the suspect or to search the taxi in which he was traveling, any search is presumed to be unreasonable unless they can demonstrate that

a) the arrest of the suspect was based on reasonable grounds to believe that he had committed or was about to commit an indictable offence, and

b) the search was justified at common law as being incidental to a lawful arrest or was otherwise lawful as a warrantless search justified by exigent circumstances making it impracticable for the police to obtain a warrant.

PART I : THE ARREST

A) The decision to arrest

[8] The following evidence is not contradicted and I find that the operation was conducted by five police officers: Cst Keith Kowalchuk, Cst Jonathan White, Cst Paul Mounsey, Cst Scott Newberry and Cpl Dave Williams.

[9] On April 5, 2012, Cst Kowalchuk received a tip. The target was a person named Gates, native or Asian, aged 17-18, selling crack and powder cocaine through a cell phone using the number: 867 445-0088. On April 12, 2012, he decided to investigate the tip and found personal information connecting the tip to Gates Jen.

[10] Cst White was tasked with communicating with the target. He established a rapport with him and he made an agreement about a purchase of drug. He and Cst Kowalchuk travelled in an unmarked police vehicle to the meeting place, where they took a strategic position. Cst Kowalchuk was sitting in the driver's seat and Cst White was on the front passenger seat, sending and receiving text messages. Cst White informed Cst Kowalchuk of the incoming messages as he received them. They were connected by radio with the other members of this operation.

[11] Cst Mounsey was tasked to get a visual on the target. He took a position on the roof of a highrise building near the meeting place and observed the surroundings with binoculars. He relayed information by radio to Constables Kowalchuk and White as events unfolded.

[12] Cst Newberry was parked in the vicinity of the meeting point and he was part of the arrest team.

[13] Based on information provided by Cst White and Cst Mounsey, Cst Kowalchuk made the decision that he had enough information to initiate a stop from the moment he became convinced that the target was no longer willing to conclude the transaction, which was reinforced by Cst Mounsey's message that the target was moving away from the area of Bowling Alley.

[14] The evidence is contradictory with respect to the actual arrest following the interception of the taxi.

[15] The accused, Gates Jen, said that he is 21 years old. He does not have a criminal record. He was in a cab on April 12, 2012, which was pulled over by the police. He said that a police officer came up to the rear passenger side, with a gun pointed at him. He says that the police officer told him right away that he was under arrest and then that he asked him for his name. He is sure that this officer was Cst Kowalchuk.

[16] The taxi driver, Khokon Nasir-Uddin, said that he drives a cab for City Cabs. On April 12, 2012 he picked up in Yellowknife's Range Lake area a client who wanted to go downtown. He confirmed that the accused sitting in court, Gates Jen, was the person he picked up. He said his client directed him to where he wanted to go. His cab was pulled over by the police. He said that one police officer spoke to him from the front passenger side, through the window. He said his name was "Keith". He did not mention any firearm being drawn.

[17] Cst Kowalchuk said that he approached the cab from the driver's side and spoke to the driver while Cst White spoke to the passenger seated at the back. They both opened the rear vehicle door and looked at the passenger. He denies that guns were drawn, while adding that it would however not be unusual. He said that Cst White did the talking and that he first detained the passenger for a drug-trafficking investigation. He said in cross-examination that the plan was to identify the passenger and that they had no intention to buy drugs because of operational requirements which could not be met.

[18] Cst White said that he ran to the passenger side of the cab while Cst Kowalchuk dealt with the driver. He opened the door and looked inside. He told the passenger that he was detaining him for an investigation under the *Controlled Drugs and Substances Act*. He said that he then asked the passenger for his name. The passenger said: "Gates Jen". Constable White then placed him under arrest. In cross-examination, he said that without this name they had no grounds to arrest the passenger.

[19] The cross-examination of the accused did not reveal anything that would cause me to reject his testimony. In contrast, the Crown's witnesses gave

conflicting versions of the interception and arrest. Although the accused contradicts the versions of the other witnesses, I cannot say that his version is improbable. I note that although Cst Kowalchuk said that their intention was to identify the passenger, neither he nor Cst White testified that they had discussed the fact that they would ask the passenger for his name before going any further. This is further contradicted by Cst Newberry who says he noted in his notebook: “19:20 - Radio call – Target City Cab 23 – apply arrest to subject – back seat.” This version tends to confirm the testimony of the accused, and I accept the accused’s evidence that Cst Kowalchuk placed him under arrest upon opening the back door.

[20] This scenario suggests that Cst Kowalchuk had *already* decided to arrest the passenger by the time he got to the cab. It would make sense, therefore, to infer that the decision to arrest was made *prior* to the interception of the cab. Had the police truly not been sure of the identity of the suspect, they would not have intercepted the vehicle at that place and at that time. Based on the nature of their investigation and their belief that the passenger was in possession of drugs, part of their reasoning would have included the need to ensure that the passenger did not destroy or dispose of the evidence.

[21] In light of this, I am satisfied that Cst Kowalchuk subjectively believed he had enough information to consider the subject arrestable at the point where Cst White received the text message “Im walking bak home ur stupid”, combined with the information from Cst Mounsey that the cab was leaving the target area.

B) Whether the grounds advanced by Cst Kowalchuk to arrest the passenger of the cab are reasonable

[22] The starting point of the investigation was the tip from the informer which is hearsay, and by nature, of questionable reliability and weight. The Supreme Court of Canada in their decision of *R. v. Debot*¹ decided that:

There are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the

¹ [1989] 2 S.C.R. 1140

commission of a criminal offence compelling? Second, where that information was based on a “tip” originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.’s view that the “totality of the circumstances” must meet the standard of reasonableness. Weakness in one area may, to some extent, be compensated by strengths in the other two.

[23] With respect to the tip itself, in the subsequent decision of *R. v. Garofoli*², the Supreme Court refined their analysis by adding:

(i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.

(ii) The reliability of the tip is to be assessed by recourse to “the totality of the circumstances”. There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

(a) the degree of detail of the “tip”;

(b) the informer’s source of knowledge;

(c) the indicia of the informer’s reliability such as past performance or confirmation from other investigative sources.

(iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

[24] In *R. v. Goodine*³, the New Brunswick Court of Appeal said that these guidelines apply to the determination of reasonable grounds to arrest a suspect. Ultimately, the purpose of the analysis is to determine whether there exists “credible circumstantial guarantees as to the trustworthiness of the informer’s disclosure.”

1. The tip:

[25] The informer told Cst Kowalchuk: “Gates sells hard & soft; his phone number is 445-0088; he’s Native or Asian, aged 17-18”.

² [1990] 2 S.C.R. 1421 at page 1457

³ 2006 NBCA 109 at par. 23 *in fine*

a) Is the tip compelling:

i) the degree of detail:

There is a partial name, a phone number and a generic physical description. The witnesses explained that “hard and soft” is jargon and that hard refers to crack cocaine, while soft refers to powder cocaine. The informer did not predict the commission of a crime, but he gave information about an on-going activity. The fact that a cellular telephone number was provided shows, according to the police, that the target conducts “dial-a-dope” transactions, meaning that clients call the seller using a dedicated cellular phone number, and they use code words to order drugs, which the seller delivers at a place mutually agreed upon.

ii) the source of knowledge:

Cst Kowalchuk said that his informer had first-hand knowledge of the information.

I find that the tip is compelling because it is specific and based on direct knowledge.

b) Is the informer reliable:

i) Cst Kowalchuk was the informer’s handler. He has known him for about three years. He is sure of the accuracy of his source-debriefing report. He said in cross-examination that he asked the informer if this was first-hand information, because he needed to satisfy himself that this was more than a rumor.

ii) He said that he performed arrests in the past, based on tips from his source and charges were laid as a result.

iii) He said that his source has a criminal record, but he declined to provide further information about him on the ground that this may

jeopardize the source's safety. He said that the source was paid for the information.

iv) The source was "tried" in the past and although he was paid for this information, there appears to be no reason why the source would provide information for an improper motive.

I find that the source is reliable.

2. Corroboration of the information:

[26] In the decision of *R. v. Debot*⁴, the majority of the Supreme Court of Canada stated that:

It should not be necessary for the police to confirm each detail in an informant's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence.

a) Cst Kowalchuk found one Gates Jen, born September 5, 2012 and living at 6236 Finlayson Drive in Yellowknife. His telephone number was not 867 445-0088. Cst Kowalchuk searched directories for this cell phone number however it was not linked to any name. The police had no picture of this individual.

b) The police found that no criminal record was associated with this name; further searches produced only one police database entry with respect to a 2010 drug investigation at a Yellowknife high school. Gates Jen was not the suspect. Constable Mounsey shared intelligence from 2011 suggesting that Gates Jen hung out with "Token", a youth known for past drug-dealing activities. Based on this information, Cst Mounsey determined that the target was likely 20 years old.

c) Constables Kowalchuk, White and Mounsey decided to conduct their own "dial-a-dope" operation by sending text messages to 445-0088, posing as "April" and wanting to buy cocaine. Cst White made the initial contact and got the target to agree to sell him cocaine. They agreed to meet at Bowling

⁴ 1989 CanLII 13 at p. 22

Alley, a lane located between 51st and 50th Streets and 51st and 52nd Avenues, in Yellowknife's downtown core area (Exhibit 5, the first 24 images of Cst White's cellphone showing messages exchanged between 6:21 and 6:55 pm).

d) Cst Kowalchuk relied on the contents of these text messages received by Cst White as an indication of the sender's actions and movements. The text messages were exchanged over a period of about 40 minutes. He also relied on information sent by Cst Mounsey over the radio.

e) Between 6:55 and 7:24, the police became aware of a cab circulating in the target area in a peculiar pattern.

f) The exchange of text messages becomes the most important feature of the investigation, because the content of the messages and their synchronization with the movements of the cab gave the investigator the conviction that they were dealing with "Gates", and that he was about to conclude with them a drug transaction.

g) From his point of observation, Cst Mounsey saw a white cab, which he knows to belong to the City Cabs taxi company. It circled a few times around the block where Bowling Alley is located.

h) Cst Mounsey saw no other vehicle in motion in Bowling Alley at the same time. I give little weight to the discrepancy in the police testimonies about the cab number, whether it was 20 or 23, because ultimately, there was only one cab observed.

i) The text messages and the information from Cst Mounsey

TIME	SENDER	TEXT MESSAGE	TIME	CALLER	MESSAGE
6:55	4450088	Meet me in the front of bowling alley in fifteen		White to Mounsey	Meeting set at "bowling alley"
6:56	WHITE	K sik jaket			

		color of hat?			
7:04	4450088	Ill see U			
7:05	WHITE	What u meen			
7:05	4450088	Make sure ur standing out side the front in like five mins.			
7:06	WHITE	Ok ok			
7:08	4450088	Front of bowling alley			
7:09	WHITE	U there			
7:09	WHITE	U in cab			
7:11	4450088	No im walking wait in the front not the alley	7:11	MOUNSEY	Don't see anything in the alley
7:13	4450088	You will see me... just wait in front			
7:13	White	Kk			
7:12	White	What u wearin			
7:17	4450088	Where are u			
7:18	White	U there			
7:18	4450088	Stand outside.....			
7:19	White	Where u			
7:19	4450088	Where are u WTF			
7:21	White	Cant c u			
7:21	4450088	Stand across the fuckin road of the bowling alley hurry up			
7:22	White	Where u cant see ya			
7:22	4450088	Like walk across the road			

		and stand there. Ill come over when I see u hurry before i leave			
7:23	White	Alley behind			
7:23	White	Phone dyin			
7:24	White	Freezin ass I alley where r u			
7:24	4450088	U ain't in the Fuckin alley	7:24	White	"Taxi passing in alley"
				Mounsey	"Cab 20"
7:25	White	U in taxi come to front I there			
7:26	4450088			
7:29	4450088	Im walking bak home ur stupid	7:29	White	Nobody on road
				Mounsey	Cab leaving the area

j) The taxi driver said that his client told him to go downtown and to drive around. He drove by the Yellowknife Inn. He was then told to go towards Rockridge Apartment on 54th Avenue; then to Matonabe Apartments, then to Bowling Alley. He did not stop on the way and his passenger did not get off. Then he heard sirens. The passenger told him to go to Sunridge apartments and then the police intercepted them. This information was not known to the police, but this testimony confirms to some extent what Cst Mounsey said he observed and it adds credibility to the testimony of the police.

3. Subjective belief:

[27] Cst Kowalchuk was convinced that whoever was communicating with Cst White was interested in concluding a drug transaction. He was expecting this

person to be in the area of Bowling Alley and to be in possession of powder cocaine. I infer that he believed this person to be Gates Jen.

[28] He believed that this person was traveling in a cab, and that this cab had passed his surveillance vehicle in Bowling Alley. He also believed that his cover had been blown and that the target was disengaging from the transaction by moving away from the area of Bowling Alley.

4. Objective grounds:

[29] The use of an unlisted cell phone is consistent with a pattern of drug trafficking through a dial-a-dope operation.

[30] The name Gates is unusual and narrows down the possibility of a coincidence.

[31] The police found that the name Gates Jen was associated with the name of another youth, known for drug trafficking.

[32] The initial responses from 445-0088 to Cst White posing as “April”, between 6:21 and 6:43 were consistent with someone wanting to ensure that the person making contact is who she says she is before he agrees to sell drugs.

[33] The response from 445-0088 that he wants “320” shows that the sender understood the coded language used by Cst White when he asked to be hooked up for 2 units.

[34] A specific meeting place was agreed upon; a specific transaction was agreed upon, and a timeline for the meeting was set.

[35] Once the police were in position at the time and place agreed upon, a white City Cab car drove in the Bowling Alley once and continued to drive around the area. The taxi was not observed picking up or dropping off a client during this observation.

[36] As 445-0088 had asked “April” to “be in front of the alley” and the police stayed in their parked vehicle, the text messages sent by 445-0088 between 7:17

and 7:24 show that the sender was in the area of Bowling Alley and that he was looking for “April”.

[37] The police did not observe any one on foot in Bowling Alley, making it likely that the person texting Cst White was in the taxi.

[38] The taxi stopped its circling pattern when 445-0088 texted that he was leaving. The police had an uninterrupted chain of observation of the cab, leading up to its interception.

[39] I find that there were objective grounds to justify Cst Kowalchuk’s belief that the passenger in the taxi which he intercepted was in possession of drugs for the purpose of trafficking.

[40] The totality of the evidence satisfies me that this was not a random stop, and that the arrest was not arbitrary and I find that there was no breach of section 9 of the *Canadian Charter of Rights and Freedoms*. However, the analysis does not stop here.

PART II: The consequences of this arrest

A) The question to the accused about his name

[41] According to the accused, Cst Kowalchuk opened the cab door and told him that he was under arrest and then he asked him his name. The accused said: “I figured I had no choice, I thought it’d help if I gave my name.”

[42] Cst Kowalchuk and Cst White said that Cst White told the accused he was being detained for a drug-trafficking investigation and that he told him of his right to counsel and gave him the police caution at 19:30. Cst White said he asked the accused if he understood and that he seemed frozen. He recorded in his notes that the accused did not respond to his question. I note that he did not say if he asked the accused whether he wished to call a lawyer after he was Chartered and cautioned. Cst White then asked the accused for his name and the accused said “Gates Jen”.

[43] Whether or not the police gave the accused his right to counsel at the time they said they detained or arrested him is not material, because they clearly asked the accused for his name *before* he was given the opportunity to call a lawyer, which results in a breach of section 10 of the *Canadian Charter of Rights and Freedoms*. What is more important here is the impact of this question in the broader context of the police investigation.

[44] The police sent text messages to a telephone number. The messages they received from that phone number gave no hint from which they could identify the sender. The purpose of asking the passenger in the taxi for his name was to connect this passenger to the informer's tip, and ultimately to the telephone number.

[45] As the Ontario Court of Appeal stated in the matter of *R. v. Lewis*⁵:

A person under police detention who is being asked to incriminate himself has more than a reasonable expectation of privacy with respect to the answers to any questions that are put to him by the police. That person has a right to silence unless he or she makes an informed decision to waive that right and provide the requested information to the police.

[46] The Ontario Court of Appeal decided that this was an unreasonable search and therefore a breach of section 8 of the *Charter*. I find that this is rather a breach of a person's right to silence contrary to section 7 of the *Charter*. Since the accused was not given the opportunity to call a lawyer, he was not able to make an informed decision about whether or not to give his name to the police. His lack of response to the question from the police as to whether he understood the right to counsel is not a waiver of this right. I find that the police also breached the accused's rights under section 10b) of the *Charter*.

[47] This breach is serious. The police deliberately asked the accused for his name, knowing that the answer would serve to incriminate him, and without providing the accused with an opportunity to speak to a lawyer. As a result of the breach, the accused incriminated himself by providing his name to the police, so the impact on him is serious. Although society has a clear interest in having this matter determined on its merits, the seriousness of the breach and of the impact on the accused clearly outweighs this interest.

⁵ [2011] O.J. 981 at par. 40

[48] I therefore declare that the evidence of the question “What’s your name?” and the answer to that question is inadmissible and that it should be excluded pursuant to section 24(2) of the *Charter*.

B) The seizure of the cell phone and money

[49] Constable Mounsey arrived on the scene and asked Cst Kowalchuk if he had tried calling the dial-a-dope number. Cst Kowalchuk dialed 445-0088 and he heard the sound of a telephone ringing from within the cab. Constable White said he removed the accused from the passenger seat and that he searched him. He found a cell phone on his person, as well as an Ipod. He gave these items to Cst Kowalchuk. The search also produced nine 20-dollar bills, which he seized and gave to Cst Kowalchuk.

[50] The cellular telephone and the money were found as a result of a search incidental to a lawful arrest. I find that there was no breach of section 8 of the *Charter* and I declare that this evidence is admissible at trial.

C) The seizure of the water bottle

[51] Constable Mounsey said that when he approached the taxi, he saw a water bottle on the rear passenger seat. Constable White said that he seized a partially-consumed water bottle from somewhere in the back of the vehicle. This bottle was in plain view. It was also located in the immediate surroundings of the accused. The police had the power to seize it under the common law, as a search incident to a lawful arrest. I find that there was no breach of section 8 of the *Charter* and I declare that this evidence is admissible at trial.

D) The seizure of drugs

[52] Other than the argument based on the arbitrariness of the detention and arrest rendering the warrantless seizure of the drugs unreasonable, the accused did

not raise any particular issue with respect to his post-arrest detention and what the jurisprudence refers to as the “bedpan vigil”.

[53] According to *R. v. Oluwa*⁶ and *R. v. Grossman*⁷, the police are justified to detain an accused post-arrest (provided that the arrest is lawful) in order to wait for him to have a bowel movement, which would enable them to seize drugs from his feces.

[54] The police found nine 20-dollar bills on the accused and a cell phone. They found no drugs on his person. They found a small quantity of drugs between seats, but the Crown conceded that they cannot connect the drugs to the accused. Based on the further observation that there was a partially-consumed water bottle near the accused, Constable Mounsey formed the belief that the accused could have swallowed drugs. The police believed that the passenger was in possession of drugs based on text messages sent earlier, which confirmed that he agreed to sell drugs to Cst White posing as “April”.

[55] While the police were still by the taxi, Cst Mounsey told the accused about the danger of swallowing cocaine.

[56] The police brought the accused to the RCMP detachment and placed him in a dry cell, meaning that it contained no toilet or sink. They planned to detain him until he passed the drugs in a bowel movement. At some point while he was in cells, the accused asked to go to the hospital. He eventually had successive bowel movements into a bedpan and Cst Newberry retrieved plastic bags containing a white substance, which was later analyzed and determined to be cocaine.

[57] The police did not seek and did not obtain a warrant to seize the drugs. They had sufficient time to do this and cannot rely on the saving provision of section 11(7) of the *Controlled Drugs and Substances Act* to justify not seeking judicial authorization for the seizure.

[58] I find however that the police could reasonably suspect that the accused had swallowed drugs because:

a) the accused did not have drugs on his person

⁶ (1996) 107 C.C.C. (3d) 236

⁷ (1998) B.C.J. No. 62

- b) the police did not find drugs inside the vehicle that they could tie to the accused
- c) the accused had a cell phone, which rang when the police dialed 445-0088
- d) the accused had agreed to sell cocaine for 320\$
- e) the last message sent by 445-0088 suggests that the sender felt that “April” was not who she pretended to be within seconds of his disengaging from the transaction
- f) he would have been aware that a police vehicle intercepted the taxi and that the police officers were approaching
- g) a partly-consumed bottle of water near the accused suggests that he used the water to swallow drugs

[59] I find that the police would have drawn that conclusion *at the time of the search* incidental to arrest, and that therefore the subsequent steps taken to obtain and retrieve the drugs are an extension of that search.

[60] I conclude that the drugs were seized as a result of a search incidental to a lawful arrest and detention. I find that the continued detention of the accused until he passed the drugs was reasonable. I declare this evidence to be admissible at trial under the common law.

DATED AT YELLOWKNIFE, NORTHWEST TERRITORIES,
THIS 27th DAY OF JANUARY, 2014

CHRISTINE GAGNON, JUDGE
OF THE TERRITORIAL COURT

R. v. Gates Wesley Robert Jen, 2014NWTTC 06

Date: 2014 01 27
File: T-1-CR-2012-001819

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