Citation: *R.* v. *Blake*, 2006 YKTC 113

Date: 20061023
Docket: T.C. 06-00272A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

REGINA

v.

RAYMOND THOMAS BLAKE

Appearances:

Jennifer Grandy	Counsel for Crown
Malcolm Campbell	Counsel for Defence

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): In this case, Raymond Thomas Blake is charged with breaking and entering into a commercial premise here in Whitehorse, said to have occurred in April of this year. A couple of days after that particular occurrence, Mr. Blake was arrested in connection with another breaking and entering, or at least a property offence of some kind, it was not made clear to me, at the Yukon Inn. There is no suggestion that that particular arrest was in any way unlawful or improper.

[2] As an incident of that arrest, certain items of clothing and various other effects were seized from Mr. Blake. As is standard police practice, amongst the items taken from Mr. Blake were his shoes, prior to his being placed in cells.

[3] What happened then was that the constable who was involved in booking Mr. Blake in, Constable Fradette, took the shoes in his hand and, looking at the soles of them, realized that they might be related to an e-mail with an attached photograph he had recently viewed. This photograph was from the identification section of the Royal Canadian Mounted Police in Whitehorse and was a photo of some footwear impressions obtained, as I understand it, at the scene of the breaking and entering at Hillbilly Computers, with which Mr. Blake is now charged.

[4] Constable Fradette made a comparison of the photograph and the shoes and, to quote him, "I didn't have a doubt with the naked eye they were the same." He thereupon, in effect, re-seized the shoes because, rather than leaving them with Mr. Blake's effects, they were taken and put into an exhibit locker where they would be amenable to examination by the identification section, which, I gather, has subsequently occurred.

[5] The present application by Mr. Blake is to exclude the evidence relating to these shoes on the basis that the seizure of the shoes from him was in violation of his rights under s. 8 of the *Charter*. In support of that application, I was referred to the seemingly similar case of *R.* v*. S.W.S.*, [2006] YKYC 1, a recent decision of Judge McGivern of this court. I will return to the consideration of that particular case and how it may impinge on the case at bar.

[6] Clearly, the initial seizure in this case was a seizure incident to arrest and would not support the use that was subsequently made of the shoes. However, when Constable Fradette reseized the shoes, in my view, that seizure was based on

reasonable grounds that the shoes afforded evidence of commission of an offence, since he had not simply formed a hunch, but had, in fact, made a comparison of a kind to the extent that he as a non-expert was able to do so, between the photograph and the shoes. So there was, in my view, at least a reasonably-based probability that the shoes were evidence of the commission of an offence.

[7] In that sense, this case is not on all fours with *R.* v*. S.W.S.,* where Judge McGivern clearly found that the officer had no reasonable grounds and had at best, only a hunch that there might be some connection between the shoes and a crime that he had been told about by other officers.

[8] Now, given that Constable Fradette had grounds to seize the shoes, it follows that he, in all probability, could have obtained a search warrant to seize these shoes. Of course, he did not do so because, in his view, owing to the suspect's diminished expectation of privacy in the shoes and what he referred to as the plain view doctrine, such a step would be unnecessary. I will return to that issue.

[9] It goes without saying that if a warrant was required but was not obtained, then, absent circumstances which are clearly not present in this case, the search would be deemed unreasonable on the basis of the *Hunter* v. *Southam* doctrine, [1984] 2 S.C.R. 145. But, as I say, the Constable felt, and, indeed, the Crown argued, that the plain view doctrine applied. The Crown, in argument, did not press the point that the Constable was able to seize them on the basis of a diminished expectation of privacy and probably chose that course of action wisely.

[10] The argument with respect to the plain view doctrine arises from the purported authority contained in s. 489(2)(c) of the *Criminal Code* , which is quite wide in its terms, and says that:

> Every peace officer…who is…present in a place pursuant to a warrant or --

And this is the important part:

> -- otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds will afford evidence in respect to an offence….

"Otherwise in the execution of duties" would clearly include the arrest of prisoners and the booking of them into cells.

[11] I must say I found the argument interesting, and it struck me at once as surprising that the section had not been the subject, apparently, of any judicial comment. There are no annotations whatever in *Martin's Code* with respect to this particular section, at least no annotations of case law. I must confess to being, as I sit here, unsure of the scope of this section, especially in relation to persons detained by police and how this power, if it exists, co-exists with the power to search incident to arrest, and, of course, leaving aside the question of whether a plain view doctrine might extend to the soles of one's shoes, but it is clear to me there must be some additional powers beyond the scope of those incident to arrest.

[12] As Ms. Grandy indicated, drugs found on a person might well be admissible, even assuming that the finding of them had not been strictly incident to arrest. I think even more clearly, one could think of cases where, for example, someone was arrested for a bloody murder and was going to be put into cells, and similarly, as here, the shirt

would not normally be taken from the prisoner but the shirt happened to be drenched in blood. I am not sure that the police would have to go get a warrant to seize that shirt. So there probably is some scope to this power.

[13] I feel, myself, as I sit here, on the basis of the argument that I heard, ill-equipped to attempt some definitive analysis of the extent and scope of that power. I think I am going to assume, for the purpose of the decision in this case, but without deciding, that it would not extend to the present seizure from Mr. Blake, and proceed in that fashion.

[14] It follows that the search must be held to be unreasonable, and I assume it to be for the purpose of decision, given that no warrant was obtained.

[15] That being the case, I am, however, clearly of the view that the evidence ought not to be excluded.

[16] This was a case where Mr. Blake was already in lawful custody. His shoes had already been seized, and while I appreciate that a diminished expectation of privacy is not a basis for a search, nonetheless, the egregiousness of the breach, I think, can be measured in some respect by the fact that the shoes already were seized, and there would be a diminished expectation of privacy with respect to matters already in the hands of the police, but that is a minor point.

[17] Of more importance here is that the officer was acting, in my view, in good faith and certainly on reasonable grounds. The evidence obtained was real evidence of significant importance in the case at bar.

[18] So in the result, the application to exclude the evidence is dismissed.

[19] Just to be clear, although Mr. Campbell argued that *S.W.S.* and the present case were identical, they are identical in the sense that both involve seizures of shoes from prisoners, but they are dissimilar in that, as I have earlier indicated, Judge McGivern found that there were no reasonable grounds whatever for the seizure of the shoes in that case. He also found of course that *S.W.S.* was not a suspect. In this case, given that Constable Fradette had made the comparison of the shoes, it follows that, unlike *S.W.S.*, Mr. Blake was, indeed, a suspect at the time that the shoes were seized.

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FAULKNER C.J.T.C.