COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Blake***
2007 YKCA 5

Date: 20070531
Docket: 06-YU574

Between:

Regina

Respondent

And

Raymond Thomas Blake

Appellant

ORAL REASONS FOR JUDGMENT

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

D. McWhinnie — Counsel for the Respondent

E. Hill — Counsel for the Appellant

Place and Date of Judgment: Whitehorse, Yukon
May 31, 2007

Oral Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Chief Justice Finch:

[1] Mr. Blake appeals his conviction in Territorial Court on 22 November 2006, on one count of breaking and entering and committing the indictable offence of theft at a business premises, Hillbilly Computers in Whitehorse, contrary to s. 348(1)(b) of the *Criminal Code*.

[2] The sole ground of appeal is that the learned trial judge erred in admitting the evidence of footwear impressions of shoes alleged to be worn by Blake at the time of the offence on 26 April 2006.

[3] Blake was later taken into custody in connection with another offence at the Yukon Inn. Prior to placing him in cells, Constable Fradette seized certain items of clothing, including Mr. Blake's shoes. The learned trial judge described, in his reasons on the *voir dire,* what happened when Constable Fradettte took the shoes:

> [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.
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> [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.

[4] The appellant opposed the admission of the evidence relating to the shoes Constable Fradette seized as obtained in breach of his rights under s. 8 of the *Charter*, to be secure against unreasonable search and seizure. The trial judge agreed that the "search" was unreasonable, but he held that the evidence should be admitted in any event. He said:

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

[5] On this appeal, the appellant contends that the judge erred in admitting the contested evidence under s. 24(2) of the *Charter*. He contends that Constable Fradette was not acting in "good faith," because in turning the shoes over to look at their soles, he was engaging in a "fishing expedition". He contends the soles of the shoes were not "in plain view,",and that any evidence they might provide could only be obtained through an "investigation". In the written submission it is said that the breach of the appellant's s. 8 rights was "deliberate, wilful and flagrant" and therefore serious.

[6] Counsel for the appellant relies on the decision of the Youth Court of the Yukon in *R*. v. *S.W.S*., S.C. 2002, C.1 YKYC 1 pronounced on 20 October 2006.

[7] So counsel for the appellant contends that the admission of the impugned evidence would bring the administration of justice into disrepute and the evidence should therefore have been excluded.

[8] Crown counsel says in the written submission filed that the Constable's examination of the soles of the appellant's shoes was not a "search" for the purposes of s. 8. The Crown says the shoes were otherwise lawfully in possession of the police and that the visual observation and comparison of the soles of the shoes to a photograph previously sent to the police by another police officer was non-conscriptive and non-instrusive conduct which did not engage s. 8 of the *Charter*.

[9] The Crown says further that the officer's conduct was analogous to the visual observation of a lawfully arrested person, or photograph taken of a lawfully arrested person, and then comparing the person or photo to a "wanted" poster. The Crown says that not every examination by a state agent amounts to a search within the meaning of s. 8; it is only when a reasonable expectation of privacy is intruded upon that s. 8 is engaged.

[10] The Crown submits that a person in lawful custody has little or no expectation of privacy concerning his effects which come into the control of the state when he is arrested.

[11] In my respectful view, the learned trial judge erred in holding there to have been a breach of the appellant's rights under s. 8 of the *Charter*. In reaching that conclusion, the judge relied upon the Yukon Youth Court decision in *S.W.S.* It does not appear that the learned Youth Court Judge had his attention directed to *R.* v. *Copan*, [1994] B.C.J. No. 188 (B.C.C.A). Nor did the trial judge in the case at bar have his attention directed to *Copan*.

[12] In *Copan*, the accused was arrested and items in his possession were seized by the police, including marked bills that had been stolen from a hotel. A police officer broke the seal of the envelope in which the marked bills had been placed, and these were later proffered as circumstantial evidence.

[13] In holding that the evidence was admissible, the British Columbia Court of Appeal said:

> [7] The issue is one of control and whether it can be said the appellant had a reasonable expectation of privacy. The trial judge concluded the appellant had no control over these articles and that leads to the conclusion that he could not have had a reasonable expectation of privacy. I agree with the conclusion of the trial judge on this issue. With respect, I do not see how it could be said on these facts that the appellant had a reasonable expectation of privacy, the envelope and its contents being properly (search and seizure on arrest) in control of the police.
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> [8] It is a significant fact here that it was open to the police to look closely at the property seized on arrest and had they done so they would have seen the marked five dollar bill, the ten dollar bill and the bag of coins. Even if it could be said there was technically a breach of s. 8 of the Charter I think these items would properly have been admitted into evidence under s. 24(2) of the Charter.

[14] In my opinion, the appellant here had no reasonable expectation of privacy in the tread on the sole of his shoes. Counsel for the appellant clearly conceded that Constable Fradette had lawful authority to require the appellant to remove his shoes in the interests of his own safety. Blake was wearing the shoes in public at the time of his arrest in relation to the Yukon Inn offence. Constable Fradette's examination of the shoes, after they had been removed from the accused, did not affect the appellant’s bodily integrity, nor the autonomy or dignity of his person. Once removed, the shoes were out of his control. As he had no reasonable expectation of privacy in the soles of his shoes, s. 8 was not engaged.

[15] I would expect that if the learned trial judge had had his attention drawn to *Copan*, he would have reached the same conclusion.

[16] Ms. Hill has said everything that could reasonably said in supporting the trial judge's conclusion that there was a breach of s. 8.

[17] However, I would dismiss the appeal from conviction, although for somewhat different reasons than those given by the trial judge.

[18] HUDDART J.A.: I agree.

[19] LOW J.A.: I agree.

[20] FINCH C.J.Y.T.: The appeal is dismissed.

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The Honourable Chief Justice Finch