

# In the Provincial Court of Alberta

Citation: R. v. T.W.L., 2016 ABPC 10

Date: 20160115  
Docket: 141487959Y101001  
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

T.W.L.

Defendant

2016 ABPC 10 (CanLII)

## Restriction on Publication

**Identification Ban** – See the *Youth Criminal Justice Act*, sections 110(1) and 111(1).

No one may publish any information that may identify a person as having been dealt with under the *Youth Criminal Justice Act*.

No one may publish any information that may identify a child or young person as being a victim or witness in connection with an offence alleged to have been committed by a young person.

**NOTE:** This judgment is intended to comply with the restrictions so that it may be published.

## Ruling on Voir Dire by the Honourable Judge G.B.N. Ho

### I INTRODUCTION

[1] T.W.L. (“the Young Person”) is a young person under the *Youth Criminal Justice Act* (“the YCJA”). The Young Person has been charged with the following offences:

Count 1: On or about the 28<sup>th</sup> day of December, 2015, at or near Edmonton, Alberta, did unlawfully possess a controlled substance, to wit: Cocaine for the purpose of trafficking, Contrary to Section 5(2) of the *Controlled Drugs and Substances Act*.

Count 2: On or about the 28<sup>th</sup> day of December, 2015, at or near Edmonton, Alberta, did unlawfully possess a controlled substance, to wit: Cannabis Marijuana in an amount not

exceeding three kilograms for the purpose of trafficking, contrary to Section 5(2) of the *Controlled Drugs and Substances Act*.

Count 3: On or about the 28<sup>th</sup> day of December, 2015, at or near Edmonton, Alberta, did unlawfully have in his possession property (or proceeds of property) Canadian currency of a value not exceeding five thousand dollars knowing that all (or part) of the property (or proceeds of the property) was obtained (or derived directly or indirectly by the Commission of Canada of an offence punishable by indictment, contrary to Section 355(B) of the *Criminal Code of Canada*.

[2] This is my decision on the *voir dire* held on October 21, 2015, to determine the admissibility of certain evidence introduced by the Crown. In particular, the *voir dire* related to the admissibility of illegal drugs, money, cell phones and text messages seized after a traffic stop by the police.

[3] The Defence has filed an application under s. 24(2) of the *Charter of Rights and Freedoms* asking for the exclusion of the seized items and any statements made by the Young Person. It is submitted by the Defence that the Young Person's rights guaranteed pursuant to sections 7, 8, 9 10(a) and 10(b) of the *Canadian Charter of Rights and Freedoms* have been infringed or denied.

## II BACKGROUND

[4] Constable Chris Yuskow and Constable Lee Martin were the only witnesses called at the *voir dire*. Both witnesses are members of the Edmonton Police Service ("EPS") and, on December 28, 2014, were so employed and assigned patrol duties.

[5] At approximately 8:48 p.m. on December 28, 2014, the officers were in a police vehicle being driven by Constable Yuskow westbound on 137<sup>th</sup> Avenue in the City of Edmonton in the Province of Alberta. Both constables testified that, as their vehicle approached 55<sup>th</sup> Street, they were one-half a car length behind a silver Pontiac Sunfire and could smell raw marijuana emanating from that vehicle. Constable Yuskow described the smell as strong. They checked the licence plate of the vehicle and found that it was registered in the name of a female. He had noted that the lone occupant of the vehicle was male.

[6] Constable Yuskow conducted a stop of the vehicle at 8:48 p.m. He testified that his reasons for doing so were the smell of marijuana emanating from the vehicle when the police vehicle was one-half a car length behind the vehicle, and his observation that the driver of the vehicle was male when a license plate query disclosed that the registered owner was female (subsequently determined to be the mother of the Young Person).

[7] Constable Yuskow did not, after initiating the traffic stop, advise the Young Person of the reason for the traffic stop.

[8] As Constable Yuskow approached the vehicle, he could smell a strong odour of marijuana coming from the driver's side of the vehicle. Constable Yuskow arrested the Young Person for possession of marijuana, handcuffed him and asked if there was anything else in the car.

[9] Constable Martin testified that, after the Young Person was arrested for possession of marijuana, he too asked the Young Person if there was anything in the vehicle and that Young Person responded that there was something in his bag (transcript, p.27 lines 4-5).

[10] Constable Martin observed a gray duffel bag in the rear seat of the vehicle. He seized the duffel bag. He also seized 2 cell phones and a black nylon pouch, both of which he obtained from the centre console of the vehicle.

[11] Marijuana was contained in 2 Ziplock bags found in the duffel bag. There were 21.4 grams of marijuana in the large Ziplock bag and 2.3 grams of marijuana in a sandwich sized Ziplock bag, (transcript, pp. 27-28).

[12] Constable Yuskow conducted a pat down search of the Young Person and found \$570 in the right pocket of the Young Person's pants.

[13] Constable Yuskow arrested the Young Person for drug trafficking and, at that point, chartered and cautioned him for the first time.

[14] The Constables also requested the assistance of a sniffer dog to attempt to locate further drugs.

[15] After being chartered and cautioned, the Young Person stated that he wanted to obtain legal counsel.

[16] The Young Person was transported to the Edmonton Police Service North Division police station where Constable Yuskow conducted a further pat down search of the Young Person, and together with two other officers, conducted a strip search of the Young Person. Towards the end of the strip search, the Young Person was in a complete state of undress. Nothing further was found.

### **III ISSUES**

- [17] 1. Was the initial detention of the Young Person lawful?
2. Was the search of the Young Person's vehicle lawful?
3. Were the arrests of the Young Person lawful?
4. Was the strip search of the Young Person lawful?
5. Would the admission of the evidence bring the administration of justice into disrepute?

### **IV Was the Initial Detention of the Young Person Lawful?**

[18] The Supreme Court of Canada set out the test for lawful detention by the police in *R. v. Mann*, 2004 SCC 52 at para. 34:

“...The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the

officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.”

[19] In order for the detention to have been lawful,

- (a) Constable Yuskow must have had a suspicion that the Young Person was involved in criminal activity and
- (b) Any suspicion must have been objectively reasonable.

In *R. v. Harding*, 2010 ABCA 180, the Alberta Court of Appeal held that the smell of raw marijuana alone could be sufficient to conclude that the accused was in possession of marijuana, at para. 29:

“This present case is clearly distinguishable from *Janvier*. Here, Sgt. Topham smelled the very strong odour of raw marijuana, not burnt marijuana. The smell of raw marijuana, given Sgt. Topham's experience with marijuana, constituted the observation that a crime, namely, possession of marijuana, was being committed. No inference was necessary. The possession of marijuana was not a past event and the officer did not need to infer that he could find more marijuana by searching the appellant or his vehicle. The smell of raw marijuana alone was sufficient to conclude that the appellant was at that time in possession of marijuana.”

The following is of note in the *Harding* decision:

- (a) It was conceded by the Defence that the initial traffic stop was not arbitrary because of an obscured licence plate.
- (b) The Court noted at paragraph 17, that the officer's training and experience must be considered. The Court noted the officer's considerable experience. The officer had many opportunities to seize and destroy marijuana over a 14 year period, (at para. 3).
- (c) The officer noted the strong and overpowering smell of raw marijuana when he opened the rear door to the vehicle, leading to the discovery of 2 hockey bags containing approximately 56 pounds of raw marijuana.

[20] The distinction between raw and burnt marijuana is crucial. In *R. v. Evers*, 2008 ABQB 592, Burrows J. stated at paragraph 25:

“It has been held that the smell of burned marihuana cannot support a reasonable belief that the offence of possessing marihuana is being committed at the time the smell is perceived. This is because the smell of burned marihuana is at best an indication that marihuana was possessed in the past.”

[21] In the present case, I do not believe that Constable Yuskow had a genuine subjective suspicion, at the time of the initial detention, that the smell of raw marijuana was being emitted from the Young Person's vehicle:

1. The claim by Constable Yuskow that he could smell a strong smell of marijuana from the Young Person's vehicle when one-half a car length behind that vehicle is difficult to believe.

2. The marijuana was contained in 2 sealed plastic pouches, which were themselves inside a duffle bag.
3. The amount of marijuana eventually found i.e. 23 grams, pales in comparison to the 56 pounds found in *Harding*. Yet the officers in both this case and *Harding* testified to a strong smell.
4. There is no evidence that the windows of the Young Person's vehicle were open when Constable Yuskow claimed that he could smell a strong smell of raw marijuana one-half a car length behind the Young Person's vehicle.
5. Constable Yuskow testified that his window was halfway down despite the winter conditions because "with all our uniform and gear on and the heater on, for my personal preference I have the window down a little bit, just halfway or a quarter (transcript p. 18, lines 12-14).

Constable Yuskow's concern about having his window down because it was too hot does not accord with Constable Martin's testimony. Constable Martin stated he does crack his window down a bit when with Constable Yuskow because Constable Yuskow likes "blasting the heat" so much that Constable Martin gets too hot (transcript, p. 45).

[22] There is no air of reality in Constable Yuskow's claim that he smelled raw marijuana from the Young Person's vehicle and that he initiated a vehicle stop based on that suspicion.

[23] Furthermore, the detention was not reasonable on an objective basis, having regard to the relative inexperience of Constable Yuskow in dealing with seizures of marijuana. Constable Yuskow had been on patrol for less than 3 years on the date in question responding to calls and conducting traffic enforcement. He had no special training in relation to marijuana enforcement.

[24] Constable Yuskow's other reason for detaining the Young Person was that a search of the vehicle showed it was registered to a female and the lone occupant was a male. The vehicle was registered to the Young Person's mother. Many teenagers and young adults drive their parent's vehicle. This has no reasonable connection with the commission of a criminal offence.

[25] The detention of the Young Person by means of a traffic stop was arbitrary and thus, unlawful.

[26] Upon being detained by Constable Yuskow at a traffic stop, the Young Person had an immediate right under s. 10(a) of the *Charter* to be informed of the reasons for detention, and the right under section 10(b) to be informed of the right to counsel, *R. v. Suberu*, (2009) SCC 33 at paragraph 37. The Alberta Court of Appeal, in *R. v. Luong*, 2000 ABCA 301, stated "The informational duty is to inform the detainee of the right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel" (para. 12).

## **V Were the Searches and Arrests Lawful?**

[27] Constable Yuskow stated that, after initiating the traffic stop, he could smell the strong odour of marijuana from the driver's side as he spoke with the lone occupant of the vehicle. He placed the Young Person under arrest for possession of marijuana and so advised the Young Person. He also asked the Young Person if there was anything else in the vehicle and the Young Person pointed to a duffle bag. At this point, Constable Martin searched the duffle bag and found the illegal drugs and cell phones. The Young Person had not been advised of his *Charter*

rights at this point, including the right to retain counsel. This is a breach of s.10(a) and (b) of the *Charter*. Furthermore, in being asked to incriminate himself, the Young Person's right to remain silent under s. 7 of the *Charter* was violated.

[28] Moreover, any search conducted after the arrest of the Young Person for unlawful possession of marijuana was tainted by the unlawful detention.

[29] The following comments of the Alberta Court of Appeal regarding the use of sniffer dogs in *R. v. Pearson*, 2012 ABCA 239 established general principles regarding searches that are applicable to this case (at paragraphs 80 – 82):

“...This leads to a fundamental question: can evidence obtained during breaches of *Charter* rights (in particular, the odour of marijuana) be used to provide the basis of a reasonable suspicion so as to justify the use of a sniffer dog? If the answer is no, the search by the sniffer dog was unreasonable as was the ensuing search of the rental car once the dog indicated the presence of contraband.

There does not appear to be any jurisprudence specifically on this point. It seems counter-intuitive to permit evidence obtained during *Charter* breaches to provide the foundation for further police activity that-without information obtained from earlier *Charter* breaches-would clearly have breached other *Charter* rights. Such an approach would simply encourage the police to breach *Charter* rights in the hopes of finding something to justify their behaviour that, without the first *Charter* breaches, would otherwise be illegal. That is hardly the promise of the *Charter*.

... A chain of events perspective suggests it would be inappropriate to use the smell of marijuana to provide reasonable suspicion for justifying the sniffer dog search, since the earlier breaches permitted detection of the odour. In other words, one thing led inexorably to another.”

[30] The arrests of the Young Person for illegal possession of marijuana and trafficking in drugs arose from the unlawful detention of the Young Person. Applying a chain of events perspective, these arrests and the searches of the Young Person's duffle bag and vehicle were also unlawful.

[31] Once a person has been arrested, the police have an obligation to read the accused, his or her *Charter* rights and caution the accused regarding the consequences of making any statements. In the present case, when the Young Person was arrested for possession of marijuana, not only was the Young Person not advised about his *Charter* rights and cautioned about the right to remain silent, Constable Yuskow and Constable Martin each asked a question inviting the Young Person to incriminate himself.

## **VI Was the Strip Search of the Young Person Lawful?**

[32] In as much as the arrests of the Young Person were unlawful, the strip search also was unlawful. However, the strip search did not lead to the discovery of evidence and there is no temporal connection between the strip search and the items seized from the Young Person's vehicle.

## **VII Section 24(2) Analysis – Would the Admission of the Seized Items as Evidence bring the Administration of Justice into Disrepute**

[33] In *R. v. Grant*, 2009 SCC 32, the Supreme Court set out the proper approach under section 24(2) of the *Charter* to determine if evidence obtained in a manner that infringed or denied any rights guaranteed by the *Charter* is to be excluded because its admission would bring the administration of justice into disrepute.

[34] The Supreme Court set out 3 lines of inquiry which must be conducted in performing a s.24(2) analysis:

1. The seriousness of the *Charter* infringing state conduct;
2. The impact of the breach on the *Charter* protected interests of the accused;
3. Society's interest in the adjudication of the case on its merits.

### **1. Seriousness of the *Charter* – infringing state conduct.**

[35] The *Charter* infringing state conduct was serious. The detention, arrests and searches were all unlawful. Constable Yuskow was dogged in his pursuit of evidence in disregard of *Charter* rights until illegal drugs were discovered.

[36] The comments of the Supreme Court in *R. v. Harrison*, 2009 SCC 34 at paragraph 24 are appropriate in this case:

“...While the violations may not have been "deliberate", in the sense of setting out to breach the *Charter*, they were reckless and showed an insufficient regard for *Charter* rights. Exacerbating the situation, the departure from *Charter* standards was major in degree, since reasonable grounds for the initial stop were entirely non-existent.”

[37] The testimony of the officer who conducted the traffic stop was unreliable. In this regard, I adopt the Supreme Court's statement at paragraph 27 of *Harrison*:

“In sum, the conduct of the police that led to the *Charter* breaches in this case represented a blatant disregard for *Charter* rights. This disregard for *Charter* rights was aggravated by the officer's misleading testimony at trial. The police conduct was serious, and not lightly to be condoned.”

### **2. Impact of the *Charter* – Protected Interests of the Young Person**

[38] In this regard, I adopt paragraphs 31 and 43 of *Harrison*:

“This said, being stopped and subjected to a search by the police without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial. As Iacobucci J. observed in *Mann*, the relatively non-intrusive nature of the detention and search ‘must be weighed against the absence of any reasonable basis for justification” (para. 56 (emphasis in original)). A person in the appellant's position has every expectation of being left alone - subject, as already noted, to valid highway traffic stops.’

I conclude that the deprivation of liberty and privacy represented by the unconstitutional detention and search was therefore a significant, although not egregious, intrusion on the appellant's *Charter*-protected interests.”

[39] Although the unlawful strip search does not, in my view, constitute an independent basis for the exclusion of the seized evidence, this does not mean that the Court must ignore the strip search and the circumstances under which it was conducted. In my view, those matters must be considered in the s. 24(2) analysis as part of the totality of circumstances to be considered. The Young Person was subjected to an unlawful strip search and was exposed, though briefly, in a state of complete undress contrary to the guidelines approved by the Supreme Court in *R. v. Golden*, 2001 SCC 83 at paragraph 98, which included the following guidelines:

“Will the strip search being conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?”

[40] The circumstances of the strip search inform the scope and the severity of the *Charter* breaches that occurred leading to the discovery of evidence, and the magnitude of the invasion of the Young Person's liberty and privacy interests.

[41] The seriousness of the breaches is even more concerning when one considers that the person whose rights were breached was a young person under the YCJA, and that Constable Yuskow would have been aware of this early in their encounter. Both constables knew or ought to have known that the Young Person was entitled to enhanced procedural protection under the principles applicable to the YCJA (s. 3(1)(b)(iii)):

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.

[42] Section 146 of the YCJA renders statements made by a young person to a person in authority on the arrest or detention of the young person inadmissible unless the young person's rights under s. 146 were explained to the young person, including the right to consult a parent or counsel. Although the Crown has not sought to admit any statement made by the Young Person, the breach of the Young Person's rights under s. 146 is one further factor which needs to be considered in the constellation of circumstances pertinent to a s. 24(2) analysis.

### **3. Society's Interest in on Adjudication on the Merits**

[43] The comments of the Supreme Court in *Harrison* on this issue at paragraphs 33 and 34 are also applicable here:

“At this stage, the court considers factors such as the reliability of the evidence and its importance to the Crown's case.

The evidence of the drugs obtained as a consequence of the *Charter* breaches was highly reliable. It was critical evidence, virtually conclusive of guilt on the offence charged. The evidence cannot be said to operate unfairly having regard to the truth-seeking function of the trial. While the charged offence is serious, this factor must not take on disproportionate significance. As noted in *Grant*, while the public has a heightened



interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high. With that caveat in mind, the third line of inquiry under the s. 24(2) analysis favours the admission of the evidence as to do so would promote the public's interest in having the case adjudicated on its merits.”

#### 4. Balancing the Factors

[44] With regard to this line of inquiry, the Supreme Court in *Harrison* noted at paragraph 36:

“The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.”

[45] Courts do not lightly or casually exclude physical evidence such as illegal drugs. The truth seeking function of the Courts is far too important for that to occur. However, there will be circumstances when it is necessary to exclude physical evidence to ensure that the reputation of the administration of justice, from a long-term perspective, is not brought into disrepute

[46] State authorities enforce the *Criminal Code* and drug legislation to maintain the Rule of Law. Those same state authorities must comply with the *Charter* because the Rule of Law applies equally to them.

[47] The powers of detention, arrest, and search and seizure, without a warrant, are extraordinary powers vested in the police, based on public trust and an expectation that those powers will be exercised according to law.

[48] In the present case, there was a pattern of *Charter* breaches that displayed a relentless search for evidence, on a hunch, with a total deliberate or reckless disregard for the *Charter* rights of the Young Person. I find that, on the balance, the reputation of the administration of justice would be brought in to disrepute if the seized items were admitted into evidence in these circumstances.

#### VII CONCLUSION

[49] The property seized from the Young Person by the police shall be excluded pursuant to s. 24(2) of the *Charter*.

Heard on the 21<sup>st</sup> day of October, 2015.

Dated at the City of Edmonton, Alberta this 15<sup>th</sup> day of January, 2016.

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G.B.N. Ho  
A Judge of the Provincial Court of Alberta

**Appearances:**

M. Williams  
for the Crown

N. Cush  
for the Defendant