

ONTARIO COURT OF JUSTICE

HIS MAJESTY THE KING

v.

BENJAMIN SPICER

R U L I N G

BEFORE THE HONOURABLE JUSTICE T. LIPSON
on August 2, 2024 at OTTAWA, Ontario

APPEARANCES:

J. Wright

M. Grenier

Counsel for the Crown

Counsel for Benjamin Spicer

(i)
Table of Contents

ONTARIO COURT OF JUSTICE
T A B L E O F C O N T E N T S

5

Ruling

Page 1

10

15

20

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FRIDAY, AUGUST 2, 2024

R U L I N G

5 LIPSON, J. (Orally):

Benjamin Spicer, the applicant, entered pleas of not guilty to charges of mischief, obstruct peace officer, possession of a weapon, to wit: Capsaicin or pepper spray, for a purpose dangerous to the public peace, and carrying a concealed weapon without being authorized under the *Firearms Act*. All of these charges arose out of a Freedom Convoy demonstration in Ottawa on February 19, 2022.

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15 The applicant alleges s. 8, 9, and 10(b) *Charter* breaches and seeks exclusion of evidence pursuant to s. 24(2), including the pepper spray found in his possession incidental to arrest, as well as a recording of a conversation Mr. Spicer had with another individual in a police transport van following his arrest.

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25 I begin with the alleged s. 9 *Charter* breach issue.

30 Constable Mills, a Sudbury police officer, was one of many officers from across the country, assisting Ottawa Police Service officers to maintain order on February 19, 2022 at the Freedom Convoy protest taking place in Ottawa. Protesters were requested by police to leave the downtown core near Parliament Hill. The message to the

protesters was conveyed by means of a Long-Range Acoustic Device and it was to the effect that if they did not leave the area immediately, they would face arrest.

At approximately 7:20 p.m., officers with the Public Order Unit conducted a "push" operation against the demonstrators at the intersection of Bank and Sparks Street. Constable Mills was part of a "hand-off squad" for arrests being made by officers at the front of the police line closest to the demonstrators. Constable Mills testified that other officers were pulling people through the line who were not leaving or who were "causing a problem" at the front of the police line. Constable Mill's job was to take arrested parties and bring them to a zone behind the police line and hand off the parties to an Ottawa Police Service member for processing.

The evidence is that Constable Mills never saw Mr. Spicer commit a criminal offence. He never even saw Spicer being pulled through the police line. What he did see was Mr. Spicer on the ground, surrounded by other officers who were attempting to get Mr. Spicer's hands behind his back. Mr. Spicer was wearing a backpack at the time. Constable Mills said that officers around Spicer were "laying strikes on him". This meant that they were hitting the applicant. Mills saw at least two strikes administered to Spicer's mid-section. When one officer suggested they cut off

the applicant's backpack, Constable Mills told those officers there was no need for that and he and his partner, Constable Genoe, would take over the arrest of Mr. Spicer.

Constable Mills did not have any knowledge whether Mr. Spicer had committed any crime. He said that he was never provided with any information whatsoever about Mr. Spicer's alleged offences. Constable Mills assumed that the applicant had done something to earn being arrested. He assumed Mr. Spicer had not left the area when directed by other officers but he didn't know.

In cross-examination, the officer acknowledged that the first time he observed Mr. Spicer was when he was on the ground, surrounded by police who were striking the applicant. He did not see Mr. Spicer being pulled through the line by other officers. Constable Genoe arrested Mr. Spicer for obstruct police and mischief. A knife was located in one of the applicant's pockets. A search incidental to arrest resulted in the seizure of pepper spray and a mask from Mr. Spicer's backpack.

After the arrest, Mr. Spicer was taken to and placed inside a police van to await transport to a holding site for processing arrested demonstrators.

There is no controversy about the legal requirements for a lawful arrest. An arrest

without warrant is lawful if the police officer has reasonable and probable grounds to believe that the person arrested has committed an indictable offence. A warrantless arrest requires a subjective and objective component. The subjective component requires that the officer believes that he has reasonable grounds. The objective component requires that the belief be based on information that would lead a reasonable and cautious person in the position of the police to conclude that reasonable grounds existed for the arrest: see *R. v. Storrey*, [1990] 1 SCR 241 at para. 18.

In this case, the officers who originally detained and/or arrested Mr. Spencer are not known. There is no evidence that the two Sudbury officers had subjective grounds for the arrest that were objectively reasonable. I agree with the position of the defence that the hand-off officers Mills and Genoe simply continued the arrest of Mr. Spicer. The Sudbury officers first saw Mr. Spicer when he was on the ground being surrounded by several officers. Mills saw Spicer being struck twice in his mid-section while he was on the ground. There is no evidence that Mr. Spicer did anything in violation of any law that warranted him being detained on the ground and being subjected to physical force.

Constables Mills and Genoe never saw Mr. Spicer commit an offence, nor were they advised by other

5 officers that Mr. Spencer committed an offence, nor is there any video evidence of Mr. Spencer committing an offence or of his arrest. If such a video was available and put into evidence, this court might have come to the same conclusion as did Justice Boxall in the unreported decision, April 14, 2023, of *R. v. Shepherd*, or as did Justice Brown in the unreported decision, June 1, 2023, of *R. v. Fisher*, that reasonable grounds existed, despite the arresting officer not being called as a witness for the Crown. In *Fisher*, the accused took a video of himself participating in the protest and obstructing police.

15 In sum, there is a complete absence of evidence affording a foundation in fact or law for Mr. Spicer's arrest and physical restraint by police. I am persuaded that Mr. Spicer's s. 9 *Charter* right to be free from arbitrary detention was breached on the record before me.

20 The resulting search incident to arrest was therefore unlawful as well.

25 The alleged s. 8 *Charter* breach

This issue here is whether the interception of the conversation between Mr. Spicer and a protester in the police transport van amounts to a s. 8 *Charter* violation.

30 The Crown introduced video and audio evidence of a surreptitiously recorded conversation between Mr. Spicer and an unidentified alleged protester in a

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police van following Spicer's arrest. Much of the conversation is inaudible because of the poor acoustics. There are some discernable comments made by Mr. Spicer where he expresses sympathy and support for the Freedom Convoy protesters and provides the other party with some personal information.

It is conceded that there was no signage within the police van that any conversation would be recorded. It is also that no officer indicated to the accused that he was being audio or video surveillance while in the van. I have viewed the video, I've observed the demeanour of Mr. Spicer and the other individual. I have no doubt that Mr. Spicer was unaware that his conversation with the protester was being recorded. He did not appear alive to the fact that he was being recorded. The two men spoke freely to one another.

To claim protection under s. 8 of the *Charter*, Mr. Spicer must show a subjectively held and objectively reasonable expectation of privacy in the subject matter of the search. Whether he had a reasonable expectation of privacy must be assessed in "the totality of the circumstances." See *R. v. Marakah*, 2017 SCC 59, at para. 11.

In considering the totality of the circumstances, these four inquiries guide the court's analysis:

a) What was the subject matter of the alleged

search?

b) Did the claimant have a direct interest in the subject matter?

c) Did the claimant have a subjective expectation of privacy in the subject matter?

d) If so, was the claimant's subjective expectation of privacy objectively reasonable? See *Marakah*, at para. 11, and also *R. v. Spencer*, 2014 SCC 43 (CanLII), at para. 18.

There is no dispute that the subject matter of the alleged search are the utterances made by Mr. Spicer to the other individual in the police transport van, nor is it in dispute that Mr. Spicer had a direct interest in the subject matter.

I have viewed the video and listened to the conversation between Mr. Spicer and the other person in the van. From what I could make out from the conversation, there was an exchange of personal information between the two of them, as well as opinions concerning the protest and the police actions at the protest. As I indicated earlier, it appeared to me that neither individual was aware that they were being video and audio recorded. This is apparent from their discernible comments and demeanour. I am satisfied that Mr. Spicer had a subjective expectation of privacy.

The central issue in this analysis is whether Mr.

Spicer had an objectively reasonable expectation of privacy.

The Crown submits that because he was in the custody of the police, Mr. Spicer did not have a reasonable expectation of privacy. Crown counsel, Mr. Wright submitted that a conversation in the back of police transport vehicle is "inherently denuded of privacy". I agree that while there is a reduced expectation of privacy for an individual in police custody, such expectation does not disappear once that individual is in custody. In this respect, I agree with the observation made by Justice Boswell in *R. v. Mok*, 2014 ONSC 64 at para. 66, where Justice Boswell stated,

[...] it remains reasonable for detainees to expect a least some minimal level of privacy, notwithstanding being taken into custody, particularly when the presumption of innocence remains in place.

I repeat that there was no clear signage indicating that a detainee may be recorded in the police transport van. It is apparent that Mr. Spicer and the other individual were not aware of any cameras in the van. They were speaking freely. Personal information was exchanged between the two.

I agree with the position of the defence that the recorded conversation in question amounted to an

5 intercept which required prior judicial
authorization under Part VI of the *Criminal Code*.
Without a warrant, the recording was unlawfully
obtained. The conversation was intercepted
without Mr. Spicer's knowledge or consent. The
10 Crown has not demonstrated any exigency that
warranted an unauthorized interception of this
communication. Given the absence of exigency, I
am satisfied that the intercept violated Mr.
Spicer's rights under s. 8 of the *Charter*.

I now turn to the alleged s. 10(b) *Charter* breach.

15 The defence submits that the implementational
obligation of the police to provide Mr. Spicer
with a reasonable opportunity to obtain legal
advice was not met.

20 Constable Mills said that his partner, Constable
Genoe, read the accused his right to counsel at
7:20 p.m. Constable Mills did not recall whether
Mr. Spicer made a verbal response as to whether he
understood his right to counsel or whether he
wished to speak to counsel. It is common ground
that at no time did Mr. Spicer waive his right to
25 counsel. I infer, from the evidence, that Mr.
Spicer did wish to speak to counsel because of the
evidence of Constable McCormack, who later took
custody of Mr. Spicer, and was concerned that Mr.
Spicer's right to a timely call with a lawyer was
30 not being respected.

The evidence is that Mr. Spicer was not afforded

5 the opportunity to speak to counsel for a period
of over two hours after the time of his arrest.
Constable Mills had turned Mr. Spicer over to
Constable McCormack at 7:25 p.m. Mr. Spicer was
detained in that officer's cruiser from 7:30 p.m.
to 8:10 p.m. He was not provided with a phone to
contact counsel, nor did Constable McCormack
inquire whether Mr. Spicer had to his own phone to
contact a lawyer. Constable McCormack told the
10 court that he appreciated that other officers were
busy with other individuals but he was also
concerned about the delay with respect to
implementing Mr. Spicer's right to counsel.
Constable McCormack testified, "I've been a police
15 officer for 20 years, and I understand the
importance of getting someone in touch with
counsel immediately." The officer could not get
an answer from other officers, telling the court,

20 Essentially, I'm in a holding pattern, in
line with everybody else until the
prisoner van gets there and they can be
loaded on and then processed by the means
of release or not.

25 Constable McCormack turned Mr. Spicer over to the
transport van at 8:11 pm where he was stayed until
his arrival at the temporary processing site.
Constable Poulton took custody of the accused at
approximately 9:21 p.m. and took him to the
30 holding facility, arriving five minutes later.

The evidence is not clear when Mr. Spicer was able

to contact counsel.

5 I appreciate that in the circumstances of the Freedom Convoy demonstration, the police were dealing with the detention, arrest, transporting, and processing of many individuals at the time of Mr. Spicer's arrest and detention. However, it was never explained in the evidence why Constable McCormack could not have put the applicant in touch with counsel. The officer himself was concerned about the delay in this respect, and he testified that he never got a satisfactory answer as to the reason for the delay in Mr. Spicer's case. Section 10(b) is clear and it provides an arrestee the right to retain and instruct counsel without delay. As Justice Doherty said in *R. v. Rover*, 2018 ONCA 745 at para. 45:

20 The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

30 Here the police failed to fulfill their constitutional obligation. I am persuaded that that Mr. Spicer's s. 10 (b) right to retain and instruct counsel without delay was violated.

I turn now to the he s. 24 *Grant* analysis.

The *Grant* test provides the framework for determining whether admitting evidence which was obtained in a manner that includes violations of *Charter* rights will bring the administration of justice into disrepute.

When faced with an application for exclusion under s. 24(2), the court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct),

(2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and

(3) society's interest in the adjudication of the case on its merits.

The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

I have found that Mr. Spicer's s. 8, 9 and 10 (b) *Charter* rights were violated. There is no evidence sought to be excluded as a result of the

5 s. 10(b) breach. The issue to be determined is whether the evidence obtained as a result of s. 8 and 9 breaches should be excluded. That evidence consists of the knife located in Mr. Spicer's pocket, the pepper spray, and mask located in his backpack, and the recorded conversation in the police transport van.

10 Let me first turn to the seriousness of the breaches.

I have found that there were multiple breaches of Mr. Spicer's *Charter* rights, and each breach is, in my view, serious.

15 The Crown has failed to establish grounds for the arrest of Mr. Spicer. His detention and arrest amounted to arbitrary detention on the record before me, which is obviously a serious breach of s. 9 of the *Charter*. There is a total vacuum in the evidence as to what criminal activity, if any, Mr. Spicer engaged in. On the record before me, I conclude that Mr. Spicer's arrest was unlawful, as was the search incidental to his unlawful arrest.

25 The s. 8 breach with respect to the surreptitious recording of Mr. Spicer's conversation in the back of the police van is also serious because of the police failure to obtain prior authorization. This was a deliberate decision by the police to intercept the accused's communications without authorization in the absence of any genuine exigency.

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The s. 10(b) breach did not result in evidence sought to be admitted by the Crown. Nevertheless, I view this violation of Mr. Spencer's right to contact a lawyer immediately as a serious one.

The above analysis of the first prong of the *Grant* test favours exclusion.

I turn now to the second prong of the *Grant* test, the impact on the *Charter* protected interests of the accused.

I should say this case bears some similarity to the decision by the case decided by Justice Perkins- McVeigh in *R. v. Beukert*, dated March 19, 2024. This is a case bearing some similarity to the case at bar. There the court found multiple breaches of Mr. Beukert's *Charter* rights which rendered the impact of the breaches more severe. The same applies here.

On the evidence adduced during this application, Mr. Spicer was deprived of his liberty without any explanation provided in the evidence. Further, there is uncontradicted evidence from Constable Mills that the police used physical force on Mr. Spicer to gain control of him. He was handcuffed, searched and detained in a public street. I agree with the position of counsel for the applicant that the interference with the physical integrity of Mr. Spicer was significant and impact and intrusion on his *Charter*-protected rights were serious.

5 This prong of the analysis asks whether the admission of the evidence may send the message that individual rights count for little. There were multiple breaches of Mr. Spicer's *Charter* rights, which when viewed together or in isolation, weigh in favour of exclusion.

I'm finally turning to society's interest in the adjudication of the case on its merits.

10 Society has a strong interest in the adjudication of the case on its merits. The exclusion of the pepper spray evidence would gut the Crown's case on the charges related to the seizure of the spray. No evidence has been adduced thus far in the trial that the accused committed mischief or obstructed police. I am satisfied that the first 15 two *Grant* factors provide a compelling basis for exclusion. The third factor will seldom tip the balance in favour of exclusion. However, it is also the case that Canadian society supports the 20 upholding of individual *Charter* rights as well the long-term interests of the repute of the administration of justice. If this prong of the *Grant* test favours inclusion, it is not by very 25 much.

30 On a balancing of all of the *Grant* factors, the evidence obtained as a result of the *Charter* breaches, including the pepper spray and the surreptitiously recorded conversation is excluded.

...END OF RULING

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Certification

FORM 3

Electronic Certificate of Transcript

Evidence Act, subsection 5(2)

I, Helena Tsapoitis-Barbesin, certify that this document is a true and accurate transcript of the recording of Rex v. Benjamin Spicer in the Ontario Court of Justice, held at 161 Elgin Street, Ottawa, Ontario, taken from Recording No. 0411_CR12_20240802_085251__6_LIPSONT.dcr, dated August 2, 2024 which has been certified in Form 1 by Daniel Loughead.

August 2, 2024



Date

(Authorized Transcriptionist)

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