***R v. Fearon*, 2013 ONCA 106**

Facts:

The appellant was arrested for robbery of a jewellery vendor while armed with a firearm. Upon his arrest, a police officer conducted a pat down search and located a cell phone. The cell phone was "on" and there was no evidence that it was password protected. The officer examined the contents of the phone and found photographs of a gun and cash as well as an incriminating text message in "draft" form. The photos and text message were not in plain view. Police officers made many checks of the cell phone over that night and the next day, although the photos and the text message uncovered at the scene was the only data from the phone entered at trial.

At trial, *Fearon* brought a s. 8 challenge to the search of his cell phone, a s. 10(b) challenge and an application to exclude Fearon's confession under s. 24(2). The trial judge found that while there was a technical breach of the appellant's s. 10(b) rights, the delay by the police was an honest mistake and therefore the confession should be included under s. 24(2) of the *Charter*. The Court of Appeal agreed. The Supreme Court did not grant leave to appeal on this issue.

Procedural history:

Oleskiw J. found that the cell phone search did not violate s. 8 of the *Charter* and admitted the evidence. The search fell under the category of search incidental to arrest, as there was a reasonable prospect that a search of the cell phone would secure evidence of the offence for which the appellant was arrested. The trial judge concluded that the searches of the cell phone at the police station were essentially extensions of the search incident to arrest. She held that while a cell phone objectively commands a measure of privacy, it is a level of privacy "more akin to what might be disclosed by searching a purse, a wallet, a notebook or briefcase found in the same circumstances." (*R v. Fearon* 2010 ONCJ 645) Oleskiw J. went on to perform a s. 24(2) analysis and held that even if there was a breach of s. 8, the evidence would be admitted.

Interveners at the Court of Appeal:

Criminal Lawyers' Association: Supports the appellant, contends that the warrantless search of the contents of a cell phone incident to arrest (except for exigent circumstances) is prohibited by s. 8 of the *Charter*.

Canadian Civil Liberties Association: Supports the appellant, contends that even a cursory examination of the contents of a cell phone seized during a search incident to arrest violates s. 8.

Public Prosecutions Service of Canada: Supports the Crown's position that the warrantless search in this case was incidental to the arrest of the appellant and was therefore lawful.

Issues:

Was the search of the appellant's cell phone covered by the common law doctrine of search incidental to arrest, or was the search of a cell phone an unreasonable search and seizure and therefore contrary to s. 8 of the *Charter*?

Should the court carve out a cell phone exception to the doctrine of search incidental to arrest?

Held:

The appeal was dismissed. The seizure of this cell phone properly fell under the common law doctrine of search incidental to arrest, and therefore the Court did not decide on the cell phone exception.

Ratio:

The Cell Phone Search in This Case

The test for a search incidental from arrest comes from the Supreme Court in *R v Caslake*, 1998 1 SCR 51. Upon lawful arrest, the arresting officer can perform a search of the suspect and the surrounding area for a valid law enforcement related purpose. This purpose must be objectively reasonable, and the search cannot be carried out in an abusive manner. There is no appellate authority on whether the search of a cell phone is encompassed in the common law doctrine of search incidental to arrest. The Court of Appeal identified two issues: the reasonableness of the officers' belief that an examination of the cell phone would lead evidence of the robbery and the outer limits of a valid search incidental to arrest.

There was no palpable and overriding error in the trial judge's conclusion that the police reasonably believed that an examination of the contents of the cell phone would yield relevant evidence. The police had information that three people were involved in the robbery, and believed that there could be communication between the three parties. The police knew from experience that robbers often take pictures of the stolen property.

The appellant relied on *R v. Polius* [2009] OJ no. 3074 (ON SC) for the proposition that the police were only entitled to a cursory examination of the cell phone. Trafford J. in *Polius* held that once a cell phone is found at the time of the arrest and there is a reasonable basis to believe that it may contain evidence of a crime, it can be seized for the purpose of preserving its evidentiary value, pending the search of its contents under a search warrant. (*Poluis* at para 57) In that case, the search and seizure of the cell phone required a warrant. The Court followed *R. v. Manley*, 2011 ONCA 128, and held that the original examination of the phone was covered under the doctrine of search incidental to arrest, as the police officers had a reasonable belief that the cell phone contained evidence, and were entitled to a cursory look.

The Court of Appeal found that the police should have obtained a warrant when they searched through the phone at the police station, as there was no urgency to search through the phone and no indication it would have been difficult to obtain a warrant. However, the trial judge found that the police were still looking for evidence of the location of the jewellery and the gun as well as for contact between the parties. While the Court of Appeal would have come to a different conclusion, the trial judge's findings did not contain a palpable and overriding error. No additional evidence came from the examinations at the police station and therefore s. 24(2) was not engaged.

The Cell Phone Exception

The appellant's argument for the cell phone exception is based on *Poluis*. Until *Polius*, a cell phone was analogized to a briefcase. There is a level of privacy associated with a cell phone; however police could open both a cellphone and a briefcase in a search incidental to arrest. Trafford J. in *Poluis* recognized that cell phones are sophisticated and have the potential to store infinite amounts of information, and can continue to provide incriminating evidence after it has been seized. In *Poluis* at para 47, Trafford J stated that a cell phone is functionally equivalent to a locked briefcase, for which a warrant is required.

The Court finds that this case is distinguishable from *Polius*. There, the officer who seized the phone was not briefed on the reasons for arrest. The officer had no instructions to seize the phone and therefore had no reason to believe it would contain incriminating evidence. Unlike *R. v. Little*, 2009 CanLII 41212 (ON SC), there was no suggestion that Fearon's phone was a "mini-computer" (a smartphone). Fearon's phone's content was limited, as it only had basic functions like text messaging and a camera. There is an implication here that if this phone had been a smartphone, there may have been a higher expectation of privacy. The Court of Appeal holds that if the cell phone had been password protected or locked, it would not have been appropriate to open the cell phone and examine its contents without obtaining a warrant, as this would indicate a higher expectation of privacy. As the case could be decided on the common law power of search incidental to arrest, the Court declined to decide on the proposed cell phone exception.

Subsequent treatment:

The Nova Scotia Court of Appeal held in *R v Hiscoe,* 2013 NSCA 48 that a complete download of a cell phone's contents (in that case a smartphone) was beyond the scope of a search incidental to arrest. It also affirmed the heightened expectation of privacy in smart phones, due to the amount of personal material and information a smart phone holds. The Court analogized the case to those involving computers, such as personal computers in *R v Morelli,* 2010 SCC 8. In *obiter,* the Court stated that while the presence or absence of a password might be relevant to determining the lawfulness of a search incidental to arrest, it should not be determinative.

The Ontario Superior Court of Justice endorsed *Fearon* in *R v Khan*, 2013 ONSC 1570, where the accused applied to exclude evidence following an arrest and unauthorized search of his Blackberry. Although the search of the Blackberry was found to violate s. 8, the judge held that it would bring the administration of justice into a state of disrepute to exclude the evidence. The arresting officer mistakenly thought the warrant authorized him to examine the Blackberry, and he did not proceed as if it was a search incidental to arrest. If it was a search incidental to arrest, Cornell J. stated the ratio in *Fearon* would apply and the examination would have been lawful.

Various trial level courts have taken the view that *Fearon* stands for the proposition that a warrant is required for a "locked" cell phone. The British Columbia Provincial Court in *R v Melchior*, 2013 BCPC 0082, held that a warrantless search of a locked Blackberry uncovered during an arrest for customs violations was admissible. Quantz J. was urged to follow *Fearon* and hold the contents inadmissible, but he felt he was bound by British Columbia trial level authority, which held that locked cell phones were covered by the common law power of search incidental to arrest. The Saskatchewan Court of Queens Bench in *R v Larose*, 2013 SKQB 226, reproduced the portion in *Fearon* dealing with unlocked phones, and ultimately held that the warrantless search of an unlocked cell phone at the police station was covered under the doctrine of search incidental to arrest. The Ontario Superior Court in *R v Akintunde*, 2013 ONSC 2522 held that a search warrant for a house in a drug trafficking case was sufficient to cover the search of the unlocked cell phone found at the scene. K.M. van Rensburg J. cited *Fearon, inter alia*, for the growing awareness in the jurisprudence of the expectation of privacy in cell phones. K.M. van Rensburg J. stated that in this circumstance, the warrant was sufficient, but declined to accede to the Crown's argument that in all circumstances search warrants of locations cover the data on phones.