

SUPREME COURT OF QUEENSLAND

CITATION: *R v BXT* [2016] QSC 211

PARTIES: **R**
(respondent)
v
BXT
(applicant)

FILE NO/S: Indictment 259/16

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 15 September 2016

DELIVERED AT: Brisbane

HEARING DATE: 5 September 2016

JUDGE: Peter Lyons J

ORDER: **The application is dismissed.**

CATCHWORDS: CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED - where the applicant's car was searched by police – where illegal drugs and other items were located – where police have a power under ss 31 and 32 of the *Police Powers and Responsibilities Act 2000* (Qld) (“PPRA”) to search vehicles without a warrant if they have a reasonable suspicion that prescribed circumstances exist – where the applicant alleges that the police officer did not have reasonable grounds for the suspicion and the search was therefore unlawful – whether the evidence resulting from the search should be excluded on the basis that it was improperly obtained

Justices Act 1886 (Qld) s 110A(6C)(c)
Police Powers and Responsibilities Act 2000 (Qld) ss 31, 32, sch 6

Bunning v Cross (1978) 141 CLR 54, cited
R v P [2016] QSC 49, cited
R v Versac (2013) 227 HMR 569, cited

COUNSEL: M Copley QC for the applicant
J Robson for the respondent

SOLICITORS: Mulcahy Ryan Lawyers for the applicant

ODPP for the respondent

- [1] The applicant is charged on indictment¹ with unlawful possession of methylamphetamine in a quantity exceeding two grams, and other offences, on 8 July 2015.
- [2] The charge arises out of a search of a vehicle driven by the applicant, conducted on the date which appears in the indictment. The applicant has applied for the exclusion of evidence resulting from the search, on the ground that, it not being shown that the search was lawful, evidence resulting from it should be excluded in the exercise of the discretion referred to in *Bunning v Cross*².

Factual overview

- [3] At about 1.00 am on Wednesday, 8 July 2015 the applicant was driving a white Lexus sedan inbound on Ann Street, Fortitude Valley, in the vicinity of its intersection with Constance Street. A police vehicle driven by Constable Scott, in which Constable Peers was a passenger, was then stationary in Constance Street facing the traffic lights at the intersection. The police vehicle followed the Lexus, both vehicles turning into Ballow Street. Towards the end of the street, the Lexus stopped, and the applicant and his passenger got out of the vehicle.
- [4] Constable Scott asked the applicant for his driver's licence, which was not produced. At this point, they were on the footpath, to the passenger's side of the Lexus. Constable Peers had approached the driver's door of that vehicle and observed something on the floor. He summoned the applicant, who reached into the car and retrieved a wallet which contained his licence.
- [5] Shortly afterwards, Constable Peers searched the Lexus. He found an orange clutch or bag, containing white pills and a crystalline substance, as well as a glass pipe. He also found a wallet containing a large sum of Australian currency and a small book. I infer that what was found in the orange bag provides the basis for the charge in the indictment that the applicant had possession of methylamphetamine in a quantity exceeding two grams.
- [6] At some point during the course of these events, Constable Peers activated a digital recording device. The recording, and a transcript, became Exhibit 4.
- [7] Constable Peers prepared a statement relating to these events under s 110A(6C)(c) of the *Justices Act 1886* (Qld), on 23 October 2015 (*Statement 1*). In that statement, he said that he heard the applicant say to Constable Scott that he did not have his wallet or driver's licence with him. Constable Peers then noticed that there was a brown-coloured wallet and a white mobile phone on the floor of the driver's footwell in the Lexus. The applicant then walked to the driver's side of the vehicle and opened the door. Constable Peers observed that there were on the floor the small orange bag, another brown leather wallet, and a small book. He asked the applicant if the phone and the wallet were his, at which point the applicant leant into the car, and while picking up the wallet and phone, attempted

¹ Indictment 259/16.

² (1978) 141 CLR 54.

to conceal the small orange bag, the other wallet and the small book under the driver's seat.

[8] Statement 1 continues:

“Based on the defendant's behaviour, his body language and his attempt to conceal the items under the driver's seat I have form (sic) reasonable suspicion that the defendant had just conceal (sic) what I believed to be drugs in the motor vehicle.”

[9] At that point, he detained the applicant and his passenger under the *Police Powers and Responsibilities Act 2000 (Qld)* (“PPRA”) for the purposes of a search of both themselves and the Lexus. It was at about this time that he activated his recording device, having placed the orange bag “back on the seat”. Statement 1 makes no reference to knowledge of any information relating to the applicant, resulting from checks carried out by Constable Scott.

[10] Constable Peers provided another statement under the same provision of the *Justices Act*, dated 14 January 2016 (*Statement 2*). In that statement he said that while he was standing next to the applicant at the driver's door of the Lexus, about the time he asked about the wallet and phone on the floor of the car, he saw Constable Scott standing at the rear of the vehicle, completing “name checks against the defendant”. Constable Scott then informed him, “The defendant has cautions on the system for being in possession of a shotgun and being a methyl amphetamine (sic) dealer”.

Power to search

[11] The following provisions of the *PPRA* were relied upon by the respondent as authorising the search of the Lexus:-

“31 Searching vehicles without warrant

(1) A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist may, without warrant, do any of the following—

- (a) stop a vehicle;
- (b) detain a vehicle and the occupants of the vehicle;
- (c) search a vehicle and anything in it for anything relevant to the circumstances for which the vehicle and its occupants are detained.

32 Prescribed circumstances for searching vehicle without warrant

The prescribed circumstances for searching a vehicle without a warrant are that the vehicle is being used by, or is in the possession of, a participant in a criminal organisation or there is something in the vehicle that —

- (c) may be an unlawful dangerous drug.”

[12] Schedule 6 of the *PPRA* includes the following:

“*reasonably suspects* means suspects on grounds that are reasonable in the circumstances.”

Contentions

- [13] For the applicant, it was accepted that if the evidence of Constable Peers were accepted, then reasonable grounds existed for Constable Peers to suspect that drugs were present in the vehicle prior to the search. (No issue arose as to whether the vehicle had been detained.)³ However, it was submitted that the evidence of Constable Peers should not be accepted. It was extremely unlikely that the applicant would have made an attempt to conceal items located on the floor of the car, in plain sight of Constable Peers. The evidence of the Constable strains credulity. Moreover, the configuration of the front seat of the Lexus⁴ made it impossible for the applicant to have concealed the orange bag (as well as the notebook and wallet) under the front seat of the Lexus.
- [14] The grounds which the Constable had in mind prior to his suspicion as to the presence of drugs were identified by him early in the audio recording. They were that the applicant appeared extremely nervous and agitated, and had shaky hands. The applicant stated he did not have his licence with him, but it was present in the wallet on the floor of the car. When the applicant reached for the wallet and phone, he concealed the orange bag and the other wallet. Constable Peers made no mention of the checks by Constable Scott. His evidence relating to the information resulting from such checks should be rejected. His evidence was contrived to provide a proper basis for the suspicion as to the presence of drugs.
- [15] If the evidence of Constable Peers as to the attempts to conceal the orange bag and the wallet was not accepted, the remaining grounds were the apparent nervous state of the applicant, and his statement that he did not have his driver's licence. They did not provide a reasonable basis for the relevant suspicion, so that the search was illegal. The evidence of the search and its results should then be excluded on discretionary grounds. Particular emphasis was placed on the alleged contrived evidence relating to the checks by Constable Scott.
- [16] For the respondent, reliance was placed on the audio recording. At the commencement of the recording, Constable Peers recorded the matters on which he relied. They included his observations of the attempt by the applicant to conceal the orange bag. If Constable Peers was not giving honest evidence about this matter, his dishonesty commenced at about the time he activated his recording device. The submission drew attention to the fact that, in the cross-examination of Constable Peers, it was put to him that if the applicant had moved the orange bag, he did so accidentally.
- [17] The evidence showed that the applicant had made attempts to distance himself from the orange bag, as soon as he stopped the Lexus. He jumped out of the car and moved quickly to the footpath. He said that he had no licence, even though it was in his wallet in the car. The fact that he would make these clumsy attempts to avoid detection of the bag was consistent with his making an attempt to hide the bag, notwithstanding the proximity of Constable Peers.

³ See *R v Versac* (2013) 227 HMR 569; *R v P* [2016] QSC 49.

⁴ See Exhibit 5.

- [18] The respondent's submissions also pointed out that the applicant's evidence could provide no explanation for the presence of the orange bag. It was apparent from the audio recording that it was discovered before the vehicle had been searched, and at a time when Constable Peers had only had access to the front of the vehicle. The applicant's suggestion that it was placed under the seat, but from the rear, could not be correct.
- [19] Properly understood, Constable Peers' evidence was that the information resulting from the checks by Constable Scott, became available after Constable Peers decided to conduct the search. He had included a reference to it, as a result of a request from the investigating officer.

Information from the checks by Constable Scott

- [20] At the hearing, two statements by Constable Scott were tendered as Exhibit 6. The first (dated 3 August 2015) made no reference to Constable Scott obtaining information as a result of checks he carried out, apparently on the QLite system used by the police force. In the second statement (dated 14 January 2016), Constable Scott provided some additional information. It included his asking the applicant whether he had a licence, and the applicant's reply, "I don't have one". Shortly afterwards, Constable Scott administered a random breath test, which recorded no alcohol content in the applicant's breath. Constable Scott again asked the applicant to provide his licence, and received the response, "I don't have one". The statement then continues:

"I proceeded to the rear of the Lexus to perform checks on the person in the vehicle. After receiving theses (sic) checks, I informed Constable PEERS that (the applicant) may be in possession of a dangerous drug."

- [21] In the course of the evidence-in-chief of Constable Peers the following occurred. Constable Peers was asked to identify the basis on which he undertook the search. He replied:

"Utilising the observations of the defendant and the passenger at the time of the intercept and the way they acted, the way they were towards police. Subsequent checks were done against the driver's name, which had alert or cautions against his name in regards to drugs and firearms. That further then built my suspicions, based on his behaviour, that there was drugs in the vehicle."

- [22] Constable Peers was then asked whether that information appeared in his statements, to which he responded, "I believe so, yes".⁵
- [23] Shortly afterwards he was asked what he suspected a search would find. He was then asked whether his suspicion was one that was developing or evolving as further information came to him, a proposition with which he agreed.
- [24] He was then asked what he expected would be in the car to which he replied, "Some type of drugs, based on the behavioural observations I made in regards to indicia", the drugs subsequently being identified as ice or methylamphetamine.

⁵ See T 1-53.

- [25] In cross-examination, Constable Peers was asked to list the factors that caused him to make the decision to carry out the search. They were that the driver and passenger exited the vehicle quite quickly; they appeared nervous; the passenger dropped a \$50 note and walked over it without stopping; the applicant was evasive and not making eye contact in his conversation with Constable Scott; and Constable Peers had noticed the items in the front footwell of the car. He said these things started to form his reasonable suspicion. It was not until a name check had been carried out that he felt he had a reasonable suspicion, making it lawful for him to search the motor vehicle for drugs.⁶
- [26] Constable Peers was asked why information from the police computer system had not appeared in his first statement. He replied that he believed he had enough grounds set out in that statement for the reasonable suspicion. He denied that a reference to that information was included in the second statement because he considered the grounds set out in the first statement were “a little bit flimsy or skinny”.⁷
- [27] In re-examination, Constable Peers said the addendum statement was prepared before he learnt of the present application.⁸
- [28] Constable Scott’s second statement does not identify the nature of the checks which he carried out at the rear of the Lexus on 8 July 2015. The only evidence of the nature of these checks came from Constable Peers, which, from the cross-examination, appear to have been carried out by accessing the police computer system.⁹ There being no suggestion of some other possible check, it seems to me appropriate to accept the evidence of Constable Scott as referring to such a check.
- [29] Constable Scott was not required for cross-examination. There is no reason to reject his evidence that he performed the check; nor his evidence that he informed Constable Peers of the result. These things appear to have occurred at about the time that Constable Peers was in the vicinity of the driver’s door of the Lexus. The communication from Constable Scott to Constable Peers about the check is not apparent on the audio-recording. It would follow, and I find, that it was made before Constable Peers commenced to search the vehicle, the recording commencing at about the time of the search.
- [30] The precise content of the communication from Constable Scott is unclear. According to Constable Scott,¹⁰ he informed Constable Peers that the applicant might be in possession of a dangerous drug. According to Constable Peers¹¹, Constable Scott said that the applicant “has cautions on the system for being in possession of a shotgun and being a methyl amphetamine dealer”. Relevant parts of his oral evidence relating to this question have been referred to earlier. The differences in the evidence do not appear to me to be material. It is relatively clear, and I find, that the communication from Constable Scott conveyed to Constable Peers that the applicant had some association with illegal drugs.
- [31] It was submitted for the applicant that I should find the evidence of Constable Peers that the grounds for the suspicion which led to the search included information from the police computer system was untruthful. The submission was based in part on the fact that there

⁶ T 1-66.

⁷ T 1-67.

⁸ T 1-74.

⁹ T 1-67.

¹⁰ See para 10 of his second statement.

¹¹ See para 6 of his second statement.

was no reference to that information in the early part of the audio-recording, where bases for the belief were set out; and nor was there such a reference in the first statement of Constable Peers. There is some force in that submission. Since I have found that the check was carried out and results were communicated to Constable Peers at about the time that he commenced the search, it seems to me to be somewhat improbable that he did not take it into account in forming the relevant suspicion. Constable Peers' first statement was prepared some months after these events. The omission of a reference to the communication from Constable Scott can only be explained as an oversight, in light of my findings. I did not detect, when Constable Peers was giving evidence, any reason to disbelieve what he said about the role which that communication played in the formation of his suspicion.

- [32] Accordingly, I find that one of the bases on which the suspicion of Constable Peers was formed was the communication from Constable Scott.

Movement of the orange bag

- [33] In his first statement, Constable Peers identified as a basis for his suspicion under s 31 of the PPRA, the attempt by the applicant to conceal a wallet, the notebook, and the orange bag under the driver's seat of the Lexus. It was submitted that I should reject this evidence for a number of reasons. One was that it was contrary to the sworn testimony of the applicant. The second was that it strained credulity that a person would try to conceal objects in plain sight of a police officer. A third was that doubt was cast on the credit of Constable Peers, because of his late reference to information from the police computer system. It was submitted that the applicant's evidence was supported by the photograph (Exhibit 5) which indicated that it was not possible to hide the relevant objects under the front seat of the Lexus.
- [34] I have already set out my reasons for accepting the evidence of Constable Peers as to the communication from Constable Scott of information from the police computer system.
- [35] At the commencement of the audio recording, Constable Peers said that the applicant had opened the car door, removed his wallet, and concealed an orange bag and brown wallet underneath the front seat of the car. This statement was made in the presence of the applicant. Shortly after, Constable Peers is recorded as saying to the applicant that the applicant "concealed or moved ah a number of items which I have ah done. So I said that this has caused and raised suspicions --", to which the applicant has responded, "Yeah".
- [36] I consider the recording to be of some significance. If the evidence that the applicant attempted to conceal the orange bag were manufactured, then the manufacturing of evidence commenced at a very early stage in the sequence of events which followed the interception of the Lexus. Moreover, whatever significance might attach to the applicant's response set out in the transcript of the recording, it is of considerable significance that he did not contradict the statement of Constable Peers, made twice, that the applicant had concealed the orange bag.
- [37] In the course of the cross-examination of Constable Peers, it was suggested to him that the applicant's "hand or hands may have come into contact with the clutch",¹² a reference to the orange bag. Shortly afterwards, it was suggested to him that if he did move "any

¹² T 1-63.

of those objects” (a reference to the orange bag, the second wallet and the notebook), “it was simply coincidental or (which perhaps should be ‘he’) touched them. It was coincidental to getting the two objects that he took out of the car. Okay?”¹³ It is apparent from these questions that the applicant’s instructions were consistent with the presence of the orange bag on the floor of the Lexus at the time the applicant removed his wallet and mobile phone.

- [38] However, in his evidence-in-chief the applicant said that prior to being intercepted, he was not aware that the orange bag was on the floor of the Lexus.¹⁴ He also said, in the course of his cross-examination, that he had not seen the orange bag until the police pulled it out from the car.¹⁵ His only explanation for the presence of the orange bag was that it had been put under the seat from the rear compartment.¹⁶ He elsewhere gave evidence that, of the three objects referred to by Constable Peers, the book alone might have fitted under the front seat.¹⁷ On that evidence, it would not have been possible for the orange bag, if placed under the rear of the front seat, to have been retrieved from the front compartment, by putting it under the seat. This evidence seems to have been designed to show that the orange bag was not in the footwell in the front of the car, at the time the applicant retrieved his wallet and licence.
- [39] There was no suggestion that the rear compartment of the Lexus was accessed, before the orange bag was found by Constable Peers. The applicant’s evidence does not identify a plausible explanation for the presence of the orange bag, other than that it was on the floor of the footwell in the front of the car when he went to retrieve his wallet and licence. That is consistent with the instructions on which the cross-examination of Constable Peers appeared to have been based. Accordingly I find that the orange bag was on the floor in the front of the car at the time when the applicant went to retrieve his wallet and licence.
- [40] I accept that there is a significant degree of improbability as to the applicant attempting to conceal the orange bag in full view of Constable Peers. People do not always behave rationally in dealing with police officers. The instructions on which the cross-examination of Constable Peers was based accepted the presence of the orange bag, and the possibility that the applicant touched it. In my view, the evidence of Constable Peers that he observed the applicant doing things which appeared to be an attempt to hide the orange bag should be accepted.
- [41] Constable Peers gave evidence that in fact the orange bag could be placed under the driver’s seat from the front; and it was there when he commenced the search. While the photograph which is Exhibit 5 would seem inconsistent with that, it does not seem to me to be sufficiently clear to demonstrate that the evidence is wrong. The applicant gave evidence to the effect that nothing bigger than a CD cover would fit under the seat¹⁸. However, it will become apparent that I consider that there are difficulties with his evidence, and I am not prepared to reject the evidence of Constable Peers on the basis of it. Accordingly, I accept this evidence from Constable Peers. In any event, I do not consider the finding to be critical. My finding that Constable Peers saw the applicant

¹³ T 1-63.

¹⁴ T 1-81; see also T 1-84.

¹⁵ T 1-86; see also T 1-89.

¹⁶ See T 1-89.

¹⁷ T 1-80.

¹⁸ T 1-80.

doing things which had the appearance of an attempt to hide the orange bag would be sufficient to establish the grounds required by s 31.

- [42] The oral submissions for the applicant came close to accepting that, if the evidence of Constable Peers on this issue were accepted, then the grounds for the relevant suspicion were reasonable in the circumstances. Certainly, the contrary was not urged. In my view, the evidence establishes grounds which would, in the circumstances, provide a reasonable basis for the suspicion referred to in s 31 of the PPRA. It is a sufficient basis to dismiss the application.

Other matters

- [43] I have already accepted the evidence of Constable Peers that he also took into account the information from the police computer system. That, too, would provide a reasonable ground for the relevant suspicion. The other matters on which Constable Peers relied, when taken in isolation, do not amount to matters of great weight. Nevertheless they seem to me to add some additional colour to the more significant features of the applicant's attempt to conceal the orange bag, and the information obtained through Constable Scott. They confirm my earlier finding.
- [44] Had I found that Constable Peers had manufactured the evidence about the information from the police computer system, and rejected his evidence that the applicant had attempted to conceal the orange bag, I would still have found that the orange and notebook were visible on the floor of the Lexus. It seems to me that those facts, together with the other observations referred to by Constable Peers, would have been sufficient to establish grounds which were reasonable in the circumstances for the relevant suspicion.
- [45] Had it become necessary to consider the discretion in *Bunning v Cross*, that would have been as a consequence of the rejection of the evidence of Constable Peers about the presence of the orange bag, and the attempts by the applicant to conceal it; and on the basis that he had contrived evidence about information from the police computer system. It seems to me that such conduct, if it were found, should be regarded as a serious impropriety, strongly favouring the exercise of a discretion by excluding evidence resulting from a search.

Conclusion

- [46] I am satisfied Constable Peers had grounds which were reasonable in the circumstances for suspecting that drugs were in the Lexus when it was intercepted on 8 July 2015. It follows that the search of the Lexus conducted on that date was lawful, and that the evidence resulting from it was obtained lawfully.
- [47] I dismiss the application.