R v Fearon: Can Police Search a Cellphone Upon Arrest?

Introduction

On February 20, 2013, the Ontario Court of Appeal released its decision on whether the police are required to obtain a warrant before searching cellphones that are seized from persons they have arrested. Based on the doctrine of 'search incident to arrest', the Court ruled that a warrant is not required if the cellphone is not password protected or locked in any other way.[1] The following article examines the Court's analysis on the scope and applicability of the doctrine of 'search incident to arrest' with respect to cellphones seized upon arrest.

Facts

On July 26, 2009, Mr. Fearon and two other men were arrested for robbing a jewelry merchant with a firearm. At the time of arrest, the police conducted a pat down search of the suspects and discovered a cellphone on Mr. Fearon. It was turned "on" and had no password restricting access. The cellphone contained photographs of a gun, identical to the one used for the robbery, and cash. The phone also contained an incriminating text message. At the police station, other officers further searched the cellphone.

Mr. Fearon asked to speak to a lawyer, but was unintentionally left alone at the station for five hours without being able to contact a lawyer. When the officers returned, Mr. Fearon voluntarily confessed his involvement in the robbery before speaking to a lawyer.

Mr. Fearon challenged the admissibility of the cellphone's content as evidence, based on his *Charter* right to be secure against unreasonable search and seizure (section 8 of the *Charter*).[2] He also argued that his confession should be excluded from evidence because the delay between his arrest and being able to contact a lawyer breached his *Charter* right to counsel (section 10(b) of the *Charter*).[3]

Procedural History

On December 23, 2010, the Ontario Court of Justice found that the police search of Mr. Fearon's cellphone did not breach section 8 of the *Charter*.[4] The Court stated that the arresting officer had a reasonable belief that the cellphone might contain evidence relevant to the robbery. This meant that the common law doctrine of 'search incident to arrest' applied.[5] Hence, the search did not require a warrant. The fact that the cellphone was not password-protected reduced the strength of Mr. Fearon's expectation of privacy argument and thus his argument for *Charter* protection. As for the right to counsel, the Court found

that there was a breach, but it was not serious enough to exclude Mr. Fearon's confession from being used as evidence.[6]

Mr. Fearon appealed the trial decision to the Ontario Court of Appeal. He asserted that the search of his cellphone content at the time of arrest violated his *Charter* right to be secure against unreasonable search or seizure.[7] Mr. Fearon also argued that the breach of his right to counsel was serious enough for the Court to exclude his confession from evidence.[8]

Issues

1. Did the search of Mr. Fearon's cellphone violate his section 8 *Charter* right to be secure against unreasonable search or seizure?[9]

i) When is the common law doctrine of 'search incident to arrest' justified?[10]

ii) Does the common law doctrine of 'search incident to arrest' apply to the cellphone search in this case?

iii) Should cellphones be an exception to the common law doctrine of 'search incident to arrest'?

iv) If Mr. Fearon's *Charter* right to be secure against unreasonable search or seizure was violated, what is the legal remedy?[11]

2. Was Mr. Fearon's right to counsel under section 10(b) of the *Charter* breached? If so, is Mr. Fearon entitled to a legal remedy?[12]

Decision

The Ontario Court of Appeal upheld the trial court decision and found no breach of section 8 or of section 10(b) of the *Charter*.[13] The Court ruled that the absence of a password or any other security barrier on a cellphone permits the police to search upon arrest without a warrant. Hence, the common law doctrine of 'search incident to arrest' applies to the cellphone search in Mr. Fearon's case.

Court's Analysis

1. Did the search of Mr. Fearon's cellphone violate his *Charter* right to be secure against unreasonable search or seizure?

i) When is the common law doctrine of 'search incident to arrest' justified?

a. Concept and purpose of 'search incident to arrest' doctrine under common law

As a general rule, the police must obtain a warrant before searching a person or a place to investigate crimes.[14] However, an exception to this rule is known as the doctrine of 'search incident to arrest'.[15] To ensure proper administration of justice, this doctrine

allows the police making a lawful arrest to conduct a brief and limited search of a person or place without a warrant. Such search is considered to be part of the normal procedure of making an arrest, hence, not in breach of the *Charter*.[16]

b. What is the justified scope of the 'search incident to arrest' doctrine?

Under the doctrine of 'search incident to arrest', the police power to search without warrant is a limited one with a number of preconditions. First, the officer must provide a valid reason for the warrantless search related to the arrest – one that a reasonable person in the same situation as the officer would have.[17] The search must also be brief. Unless there is contradicting evidence, the warrantless search will be considered to be part of the normal procedure of making an arrest.

To date, the Supreme Court of Canada has permitted only two exceptions to the common law doctrine of 'search incident to arrest' in relation to section 8 of the *Charter*.[18] The first exception concerns the police seizure of a suspect's bodily samples (bodily substances such as blood, urine or saliva collected for forensic DNA analysis). The second exception involves the searching of homes during an arrest. The police must obtain a warrant in these two circumstances because they require a high level of privacy protection.[19]

ii) Does the common law doctrine of 'search incident to arrest' apply to the cellphone search in this case?

The Court found that the search of Mr. Fearon's cellphone at the time of arrest and the search at the police station fell within the justified range of 'search incident to arrest'. At the time of arrest, the officer had reason to believe that Mr. Fearon may have communicated via cellphone with the two other suspects. The officer also knew that suspects sometimes take photos of the robbery which gave him reason to believe that there might be incriminating photos on the cellphone. This knowledge amounted to reasonable belief that the search of the cellphone content would yield relevant evidence. The further search conducted by other officers at the station pushed the limits of a brief search incident to arrest. However, the Court upheld the trial decision that it was an extension of the search at the site of arrest.[20]

iii) Should cellphones be an exception to the common law doctrine of 'search incident to arrest'?

The Court confirmed that if a cellphone discovered upon arrest is not locked in any manner, making the contents readily available to other users, and if the officer has a reasonable belief that the cellphone contains evidence relevant to the arrest, a warrantless search is justified as 'search incident to arrest'.[21]

However, the Court found it impossible to generalize or to create a rule regarding the need for warrants to search cellphones upon arrest. While the Court recognized the private nature of information on cellphones, the ability of the police to search a cellphone upon arrest may vary depending on the capacities and functions of the device. For example, a

cellphone with simple and limited functions such as making calls and taking pictures may require a different search procedure from a phone that can store confidential documents, videos, voice recordings, and other forms of data. In effect, the Court did not provide a general rule that limits or expands police power to search and seize cellphones upon arrest.[22]

iv) If Mr. Fearon's *Charter* right to be secure against unreasonable search or seizure was violated, what is the legal remedy?

Under section 24(2) of the *Charter,* if the police search of Mr. Fearon's cellphone violated his *Charter* right to be secure against unreasonable search or seizure, the Court must exclude the cellphone content from being used against Mr. Fearon at trial.[23] However, in this case, the Court found that there was no violation of Mr. Fearon's *Charter* right because the cellphone search fell within the justified scope of 'search incident to arrest'.[24]

2. Was Mr. Fearon's right to counsel under section 10(b) of the *Charter* breached? If so, was Mr. Fearon entitled to a legal remedy?[25]

Mr. Fearon's confession was voluntary and the police fully informed him of the consequences of making statements that might be used against him as evidence in court proceedings. The Court ruled that the delay in allowing Mr. Fearon to contact a lawyer breached section 10(b), but that the breach was not serious enough to grant him a legal remedy.[26]

Significance of the Ruling

Based on the facts of this case, the police can search non-locked cellphones for information related to the crime at the time of arrest. Doing so without a warrant does not breach the *Charter* right.[27] This widens the variety of evidence admissible in criminal proceedings. At the same time, it limits one's expectation of privacy with respect to information contained on cellphones. As such, the Ontario Court of Appeal did not recognize that the information on cellphones requires the same high level of privacy protection as a person's bodily sample or a person's home upon search or seizure.

However, the Court refrained from establishing a standard rule for cellphones with respect to search incident to arrest. It was determined that a case-by-case approach is more suitable. In its ruling, the Court of Appeal quoted the reasons of Justice Sharpe from the Court of Justice decision:

"[It is] neither necessary nor desirable to attempt to provide a comprehensive definition of the powers of the police to search the stored data in cellphones seized upon arrest. It may be that some future case will produce a factual matrix that will lead the court to carve out a cellphone exception to the law as articulated in *Caslake*. This is not that case."[28]

In effect, the decision left open the issue of whether a warrant is required to search sophisticated cellphones like smartphones that can store more confidential and diverse information. It also left open the question of whether the police can search password-

protected cellphones without a warrant as opposed to the non-locked cellphone dealt with in *R v Fearon*. Lastly, the applicability of the decision to other portable electronic devices such as tablets, which include functions similar to cellphones, may raise debate on the extent to which the administration of justice outweighs one's privacy interests and section 8 *Charter* rights.[29]

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[1]*R v Fearon*, 2013 ONCA 106 <http://canlii.ca/en/on/onca/doc/2013/2013onca106/2013onca106.html> ; Search incident to arrest is a common law rule where the arresting officer can search for evidence without a warrant if there was an objective reason related to the arrest. Common law is the law developed by the judges through court decisions as opposed to civil law which is set out in legislations and regulations .

[2]*Fearon*, *supra* note 1 at para 39; *Canadian Charter of Rights and Freedoms,* s 8, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 <http://laws-lois.justice.gc.ca/eng/const/page-15.html> ("Everyone has the right to be secure against unreasonable search or seizure," s 8)).

[3]*Canadian Charter of Rights and Freedoms,* s 10(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 <http://laws-lois.justice.gc.ca/eng/const/page-15.html> ("[e]veryone has the right on arrest or detention (b) to retain and instruct counsel without delay and to be informed of that right," s 10(b)).

[4]*R v Fearon*, 2010 ONCJ 645 <http://canlii.ca/en/on/oncj/doc/2010/2010oncj645/2010oncj645.html>;*Charter,* supra note 2, s 8.

[5]*Search incident to arrest, Supra* note 1.

[6]*Fearon*, *supra* note 1.

[7]*Charter*, *supra* note 2.

[8]*Charter*, *supra* note 3.

[9]*Charter*, *supra* note 2.

[10]*Cloutier v Langlois,* [1990] 1 SCR 158 at para 61, 53 CCC (3d) 316 <http://www.canlii.org/en/ca/scc/doc/1990/1990canlii122/1990canlii122.html>.

[11]*Charter*, *supra* note 2.

[12]*Charter*, *supra* note 3.

[13]*Ibid.*

[14]*R v Wong*, [1990] 3 SCR 36 <http://www.canlii.org/en/ca/scc/doc/1990/1990canlii56/1990canlii56.html>.

[15]*Search incident to arrest, Supra* note 1.

[16]*Cloutier, supra* note 10.

[17]*R v Caslake*, [1998] 1 SCR 51, 155 DLR (4th) 19 <http://www.canlii.org/en/ca/scc/doc/1998/1998canlii838/1998canlii838.html> (reasons to be within the purposes of protecting the police, protecting the evidence, discovering evidence).

[18]*Fearon, supra* note 1 at para 68.

[19]*Ibid.*

[20]*Fearon, supra* note 1.

[21]*Ibid.*

[22]*Ibid.*

[23]*Canadian Charter of Rights and Freedoms*, s 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 <http://laws-lois.justice.gc.ca/eng/const/page-15.html> ("[w]here, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute", s 24(2)).

[24]*Fearon, supra* note 1.

[25]*Charter, supra* note 3.

[26]*Fearon*, supra note 1 at para 80.

[27]*Charter, supra* note 2.

[28]*R v Fearon, supra* note 1 at para 76-77.

[29]*Charter, supra* note 2.