

[R. v. S.](#)

Ontario Judgments

Ontario Court of Justice

M. Greene J.

Heard: February 10, 2010.

Judgment: March 17, 2010.

[2010] O.J. No. 1596 | 2010 ONCJ 137

Between Her Majesty the Queen, and N.S.

(37 paras.)

**Case Summary**

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**Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Protection against unreasonable search and seizure — Remedies for denial of rights — Stay of proceedings — Where administration of justice brought into disrepute — Stay of proceedings against S. — S. was charged with driving with a blood alcohol level over the legal limit and possession of cocaine — After being transported to the police station following his roadside breath test, cocaine was found in S.'s wallet — He was then strip-searched in a room with the door left ajar and left fully naked during the search — S.'s rights under section 8 of the Charter were violated — No reasonable and probable grounds for the strip search — The manner of the strip search was particularly aggravating — Stay of proceedings warranted.**

**Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Protection against unreasonable search and seizure — Remedies for denial of rights — Where administration of justice brought into disrepute — Procedural remedies — Stay of proceedings — Stay of proceedings against S. — S. was charged with driving with a blood alcohol level over the legal limit and possession of cocaine — After being transported to the police station following his roadside breath test, cocaine was found in S.'s wallet — He was then strip-searched in a room with the door left ajar and left fully naked during the search — S.'s rights under section 8 of the Charter were**

**violated — No reasonable and probable grounds for the strip search — The manner of the strip search was particularly aggravating — Stay of proceedings warranted.**

Application for a stay of proceedings by S..S. was charged with driving with a blood alcohol level over the legal limit and possession of cocaine. S. was pulled over by police for driving without his headlights on. Upon questioning S., the police formed a reasonable suspicion that he had alcohol in his body. S. provided a roadside breath sample that registered a fail. After S. was transported to the police station, police found a small amount of cocaine in his wallet. S. was then strip-searched in a room with the door left slightly ajar. S. was left fully naked during the search.

HELD: Charges stayed.

The fact that S. had a small amount of cocaine in his wallet, coupled with his original denial that he was in possession of any drugs, did not form a sufficient basis to warrant a strip search. The police did not suspect S. was a drug dealer. It was not reasonable to conclude that S. had more drugs hidden on his person. There were not reasonable and probable grounds for the strip search. The manner of the search was inappropriate. S.'s rights under section 8 of the Charter were violated. The manner of the search was particularly aggravating. A stay of proceedings was warranted. The continued prosecution of S. would cause irreparable prejudice to the integrity of the judicial system.

**Statutes, Regulations and Rules Cited:**

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Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 10(b), s. 24(1)

**Counsel**

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J. Sandler, for the Crown.

M. Johal, for Mr. S..

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## **M. GREENE J.**

### **Introduction**

1 On September 12, 2008, Mr. S. was charged with driving while having a blood alcohol level of over 80 mg of alcohol in 100 ml of blood. He was also charged with possession of cocaine in relation to a small amount of cocaine located in Mr. S.'s wallet. After the cocaine was found, Mr. S. was subjected to a strip search. Mr. S. argued at trial that the charges against him should be stayed because he was unlawfully strip searched.

### **Facts**

2 On September 12, 2008, P.C. Johnson was at Dawes Road and Coleman Avenue waiting for a tow truck to tow away a vehicle that had been stopped. As he was waiting for the tow truck, he noticed a red ford Taurus driving eastbound on Coleman Avenue without its headlights on. As it was dark outside, P.C. Johnson pulled over the vehicle to determine why the lights were not on. The driver, Mr. S., advised the officer that the vehicle was not his and that he was driving it home for a friend who got into a fight earlier that night. Mr. S. then provided his driver's licence to the officer.

3 P.C. Johnson testified that he smelled alcohol on Mr. S.'s breath and asked if he had been drinking. Mr. S. admitted that he had consumed two or three beers. The officer formed the reasonable suspicion that Mr. S. had alcohol in his body and made the demand for a breath sample. Mr. S. complied with the demand and blew a failure. As a result, P.C. Johnson arrested him for driving with over 80 mg of alcohol in 100 ml of blood and made the second demand. Mr. S. was subjected to a pat down search and asked if he had any drugs on him. He denied having any drugs on him. P.C. Johnson did not find any drugs on him during the pat down search but he did seize Mr. S.'s wallet.

4 Mr.S. was then taken to the police station and after a short wait in the sally-port, he was paraded before the Staff Sergeant who also reviewed his 10(b) *Charter* rights with him. Mr. S. was again asked if he had any drugs on him. He again said no, but when the officers went to pick up Mr. S.'s wallet, he told the officers that they would find some cocaine in his wallet. Mr. S. then directed the officers to where the cocaine was. It was a small amount of cocaine and the officers concluded that it was for personal use. Mr. S. was charged with possession of cocaine.

**5** While in front of the Staff Sergeant, Mr. S. also admitted to having consumed a small amount of cocaine earlier that evening. The officers then asked Mr. S. a number of questions about his cocaine use. According to the officers, they wanted to satisfy themselves that he was not in any danger of having a reaction to the cocaine he had consumed earlier that night. He was then subjected to another more extensive pat down search which did not yield any further narcotics.

**6** The Staff Sergeant then directed that a level three search occur in order to confirm that there was no more cocaine on Mr. S.. While Mr. S. was not going to be placed with other detained persons, the officers were concerned about his safety and the risk that Mr. S. would consume more narcotics while in police custody.

**7** According to P.C. Johnson, he conducted the level three search with P.C. Sullivan in a nearby room. The door to the room was left slightly ajar, but P.C. Johnson testified that it was open less than an inch and that no one passed by during the search. Moreover, one officer stood by the door to ensure the door did not fly open. According to P.C. Johnson, only one article of clothing was removed at a time, and Mr. S. was never completely naked for the search. Mr. S. was told to remove his shirt first and then put it back on before he was asked to remove his pants and underwear. The officers then asked him to lift his testicles to make sure nothing was hidden underneath. The officers also asked him to bend down, open his bum cheeks and squat a couple of times. The search lasted approximately three minutes. P.C. Sullivan did not testify at trial.

**8** After the search, Mr. S. was advised of the additional charge of possession of cocaine and re-advised of his right to counsel. He then was given an opportunity to speak to duty counsel. He spoke to duty counsel from 4:49 to 4:50am. At 5:02am he was then taken to the breath technician so as to provide his first breath sample. At 5:07am he blew 140 mg in 100 ml of blood. At 5:29am he blew 130 mg of alcohol in 100 ml of blood. At 6:55am Mr. S. was served with the documents and released.

**9** Mr.S. testified on the *voir dire*. According to Mr. S., the door to the room where he was being strip searched was left open approximately six to ten inches during the entire strip search. Mr. S. was able to see the feet of people walking outside the doorway. He also testified that he was not permitted to keep some clothing on during the search, but that all his clothing was removed and he was forced to stand completely naked in front of the police officers. While naked, he had to turn

around, bend down and squat three times for the officers. He also had to cup his testicles in his hand so the police could search around that area. Only then was Mr. S. permitted to put his clothing back on.

## ISSUES

**10** The issues that arise in the case at bar are as follows:

- a) Did the police violate the Applicant's rights as guaranteed by section 8 of the *Charter* by unlawfully conducting a strip search?
- b) Did the police violate the Applicants' rights as guaranteed by section 8 of the *Charter* by conducting a search in an unreasonable manner?
- c) If the Applicant's rights were violated, is a stay of proceedings the appropriate remedy under s. 24(1) of the *Charter of Rights and Freedoms*?

### **A. Did the police have the necessary grounds to conduct a strip search?**

**11** It is the position of the Crown that the search was lawful because it was conducted incident to the arrest of Mr. S.. The Crown argued that the police had the necessary grounds to conduct the search in light of the cocaine found in Mr. S.'s wallet and because Mr. S. had lied to the police when initially asked whether he had drugs on him.

**12** Counsel for Mr. S. argued that the police did not have the necessary grounds to conduct a strip search in light of Mr. S.'s overall behaviour and the small amount of cocaine located in his wallet.

### **The Applicable Legal Principles**

**13** Pursuant to section 8 of the *Charter*, all persons have a right to be secure against unreasonable search and seizure. It has been well recognized by Canadian Courts that police may search persons incident to arrest and that in certain cases, a strip search will be justified (see *R. v. Caslake* [\(1998\), 121 C.C.C. \(3d\) 97](#) (S.C.C.) and *R. v. Golden* [\[2001\] 3 S.C.R. 679](#)).

**14** Having said that, in *R. v. Golden, supra*, the majority of the Supreme Court of Canada held that a higher degree of justification is required when the police conduct a strip search. This is because strip searches "represent a significant

invasion of privacy and are often humiliating, degrading and traumatic experiences for individuals subject to them" (p. 83). Because the strip search is inherently humiliating and degrading for detainees, the Court held at p. 90 that strip searches "cannot be carried out simply as a matter of routine policy". In *R. v. Golden, supra*, at p. 94 Iacobucci and Arbour J.J. stated "whether searching for evidence or for weapons, **the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search.**" [emphasis added]. The police must establish that "they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest" (see *R. v. Golden, supra*, at p. 98). The burden lies with the Crown to justify the search on a balance of probabilities.

**15** The majority of the Court in the Supreme Court of Canada, in *R. v. Golden*, appears to have drawn a distinction between a strip search conducted incident to an arrest and searches related to safety issues in a custodial setting. Iacobucci and Arbour J.J., stated at p. 96:

It may be useful to distinguish between strip searches immediately incidental to arrest, and searches related to safety issues in a custodial setting. We acknowledge the reality that where individuals are going to be entering the prison population, there is a greater need to ensure that they are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment.

## **Analysis**

**16** In the case at bar the officers testified that Mr. S. was searched for his own safety because there was concern that Mr. S. had more drugs on him than the small amount of cocaine found in the wallet. When asked specifically about why he ordered a strip search, Detective Eckland testified that he had reasonable and probable grounds to believe that Mr. S. had more drugs on him. Detective Eckland explained that he reached this conclusion because Mr. S. had cocaine in his wallet and he had originally lied about having this cocaine on him. Detective Eckland further testified that had seen situations where others had concealed drugs in their underarms, genitalia and rectum. Detective Eckland conceded, however, that at the time he ordered the search he had no reason to believe that Mr. S. was a drug trafficker and did not even suspect this. Moreover, at the time the search was ordered there was no risk that Mr. S. was going to enter the general population. He was not going to be held for a show cause hearing.

**17** The question I must consider is whether the fact that a small amount of cocaine is in one's wallet, coupled with Mr. S.'s original denial that he was in possession of any narcotics a sufficient basis to warrant a strip search. That is, does the fact that a person has a small amount of cocaine in his wallet lead to reasonable grounds that this same person has hidden drugs between the cheeks of his buttocks, under his genitals or his underarm? I find that given all the circumstances of the case at bar, it does not.

**18** In the case at bar, the police did not suspect Mr. S. to be a drug dealer. They believed that the cocaine found on him was for personal use only. Mr. S. was stopped by the police as he was driving a friend's car home. He had no reason to hide his drugs under his clothing. He was cooperative with the police, the police had no intention of holding him for a show cause hearing and, while Mr. S. originally denied having any narcotics on him, he did eventually volunteer that he had cocaine in his wallet and that he had consumed cocaine earlier that evening.

**19** The Crown argued that this admission was not one that deserves a lot of consideration as the admission was made only when the police had the wallet in hand and were about to search the wallet. I agree that the video shows the admission was made once the police had the wallet in their hands, but the officers had not started to go through the wallet nor had they indicated to Mr. S. that it was their intention to search the wallet. I am uncertain as to whether Mr. S. admitted to possessing the cocaine because the police were about to search his wallet, or if he chose to confess for other reasons.

**20** In any event, I do not agree that merely because Mr. S. had a very small amount of cocaine in his wallet it was reasonable to conclude that he had more on him, hidden in personal areas like under his testicles or between the cheeks of his buttocks. I note that Mr. S. was not a drug dealer and it was not reasonable to conclude that he had had more drugs concealed on him in these particular areas. By the time the strip search was ordered, Mr. S. had already been subjected to a second, more thorough and intrusive pat down search which yielded nothing.

**21** In *R. v. Wong* [2006] B.C.W.L.D. 718 (B.C. Prov. Ct.), Mr. Wong was arrested for possession of a controlled substance for the purpose of trafficking. The police had lawful grounds to make the arrest. Mr. Wong was lawfully subjected to a pat down search, incident to his arrest. The police felt something in his groin area, so the officer pulled on the waistband of the accused's pants and saw a bag. Mr. Wong was then taken to the police station and subjected to a strip search because

the officer thought it was "possible" that Mr. Wong had more narcotics on him. At the outset of this search, the accused willingly handed over the bag from his underwear. The bag had drugs in it. The officer continued to strip search the accused after being handed the bag, despite protestations from the accused. At trial, Judge held that the belief that the accused had 'more' drugs on him was not a sufficient basis to permit a strip search. The trial Judge's reasons were based on the officer's admission that he only thought it possible that Mr. Wong had more drugs on him. He did not avert to whether he had reasonable and probable grounds. The trial Judge found a section 8 violation but did not exclude the evidence under s. 24(2) of the *Charter*.

**22** In the case at bar, while Detective Eckland testified that he had reasonable grounds for the search, I find that objectively, looking at all the facts, while there was a slight possibility of more drugs on Mr. S., there was not reasonable and probable grounds that drugs were on him. The fact that a small amount of cocaine was located in Mr. S.'s wallet provided the basis to conduct a more thorough and invasive pat down search. When this yielded nothing, given that Mr. S. was not suspected of being a drug trafficker, there was no basis to believe on reasonable and probable grounds that more narcotics would be found on Mr. S.. While it was a possibility, it did not reach the standard of reasonable and probable grounds.

## **B. The manner in which the strip search was conducted**

**23** In *R. v. Golden, supra*, the Supreme Court of Canada reiterated that strip searches are very intrusive. The Court further stated that while "the negative effects of a strip search can be minimized by the way in which it is carried out ... even the most sensitively conducted strip search is highly intrusive" (see p. 83).

**24** In the case at bar, Officer Johnson testified that the strip search occurred in a private room, though he admitted the door to the room was left slightly ajar. He further testified that the search was done respectfully and that Mr. S. was at no point in time left completely naked.

**25** Mr.S. testified to the contrary. He testified that the door was left more than a little open, in fact it was open 6-10 inches and that he could see the feet of people as they walked by the room. He further testified that he was told to remove all his clothing, squat three times, bend over and lift up his testicles. The whole event was humiliating.

**26** I accept Mr. S.'s evidence about how he was searched. I found him to be



forthright in his evidence, he did not over-exaggerate, did not express animus to the police officers who conducted the search, and did not overstate the harm caused to him by the strip search. He also candidly admitted that he lied to the police about the drugs on him. Officer Johnson was also an honest witness, but I find that he was mistaken about the process during the search and mistaken about how much the door was open. Officer Johnson took no notes of how the search was conducted and was likely mistaken about these facts.

**27** I find it particularly troubling that Mr. S. was stripped searched in a room where the door was left slightly ajar. I note that the Toronto Police Protocol (exhibit 2) directs that strip searches are to be conducted in private. P.C. Johnson provided absolutely no explanation for why the door was kept open.

**28** I also find it troubling that Mr. S. was left fully naked and not permitted to put his shirt on before his pants and underwear were removed. The police protocol clearly allow for this where appropriate. There was nothing about this case that would make that process inappropriate.

**29** Moreover, the policy for strip searches issued by the Toronto Police Services, (Exhibit 2) clearly indicates that "full details of all searches shall be recorded in the memorandum book including the grounds for the level of search conducted". In the case at bar, Office Johnson took no notes about how he conducted the search of Mr. S.. I find that his failure to do so runs contrary to police policy. In general, the manner in which the strip search of Mr. S. was conducted runs contrary to the guidelines outlined in *R. v. Golden, supra*.

**30** I find the absence of reasonable and probable grounds to conduct the search, and the manner in which the search was conducted to have been a violation of MrS.'s rights as guaranteed by section 8 of the *Charter*.

## **REMEDY**

### **24(1) of the *Charter***

**31** Mr.S. seeks a stay of proceedings as a result of the section 8 violation. He argues that this is the only remedy that properly addresses the police conduct in the case at bar. The Crown argues that the police did not act in bad faith and that a stay of proceedings is not warranted.

**32** A stay of proceedings should only be granted in the clearest of cases. The test is a stringent one and can only be met where there would be irreparable prejudice to the integrity of the administration of justice if the proceedings were to continue. It is a remedy of last resort.

**33** There are a number of factors that favour not staying the proceedings. Firstly, I find that Detective Eckland, in ordering the strip search, was not acting in bad faith. I am satisfied that he was acting out of concern for Mr. S.'s safety. Secondly, the strip search does not affect the fairness of the proceedings. The intoxilizer readings and the cocaine would have been placed in evidence regardless of the strip search.

**34** Having said that, there are a number of factors that favour a stay of proceedings. Firstly, while Detective Eckland was not acting in bad faith, I find that he did not turn his mind to all the relevant factors when deciding that a strip search was necessary. He had already formed the opinion that Mr. S. was not a drug trafficker and the cocaine located in the wallet was for personal use. He failed to consider why he thought there would be drugs under Mr. S.'s clothes.

**35** More aggravating, however, was the manner of the search. The Supreme Court of Canada clearly articulated in *R. v. Golden* how humiliating strip searches are to all persons. I find it inconceivable that years after this case has come out, years after the Toronto Police Services have issued protocols on how to conduct strip searches, Mr. S. was strip searched while the door was left open. There was no explanation provided for why the door was left open. Moreover, I also rejected the officer's evidence that Mr. S. was only partly undressed. No explanation was given as to why Mr. S. had to be left fully naked during the strip search. I find that in leaving the door open, Officer Johnson showed a complete disregard for Mr. S.'s rights and showed a complete lack of understanding of how serious and humiliating a strip search is.

**36** Had the breach been limited to the strip search without proper grounds, I would not have granted the stay. As previously stated, I believe that Detective Eckland was acting in good faith and that while the breach is serious, had the search been conducted in a respectful fashion with a full understanding of the gravity of the search, it would not have been one of the clearest of cases and would not have warranted a stay of proceedings. When I take into consideration Officer Johnson's blatant disregard for the Toronto Police Services policies in relation to strip searches and his disregard for Mr. S.'s privacy and dignity by

conducting the strip search in a room with the door partially open I find that a stay of proceedings is warranted. As was stated in *R. v. Golden, supra* at para89, strip searches can be "humiliating, embarrassing and degrading for those who are subject to them and any post facto remedies for unjustified strip searches cannot erase the arrestee's experience of being strip searched". The lack of regard by P.C. Johnson to the impact of a strip search on a detainee coupled with the absence of grounds to conduct the strip search warrants the most serious remedy our Courts can offer. In my view, the continued prosecution of Mr. S., in light of the violation that occurred, would cause irreparable prejudice to the integrity of the judicial system.

**37** In light of these reasons, I order the proceedings against Mr. S. be stayed.

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