

R. v. Fearon, 2014 SCC 77 – search and seizure – cellphones

Facts:

In July of 2009, a merchant was loading jewelry into her car when she was robbed by two men. One of the men had a gun. The men took several bags and fled in a black vehicle. The police quickly focused on two suspects, Kevin Fearon and Junior Chapman, and arrested both men. They located the getaway vehicle and secured it while they applied for a warrant to search it. They did not locate any of the stolen jewelry or the gun at this time.

When Fearon was arrested, the officer patted him down and found a cellphone in his pocket. It was not password protected. The police searched the phone right after it was found, and found an unsent text message starting with the words “we did it”, and a photo of a gun. The police searched the phone again several times over the next couple of hours.

When the warrant for the vehicle was granted, police searched it and found the gun that was shown in the photograph. The police got an additional warrant to search the phone, but no new evidence was found.

At trial, Fearon argued that the warrantless search of his cellphone violated his right to be free from unreasonable search and seizure, under section 8 of the *Charter*. He asked the text message and photograph to be excluded from evidence. The trial judge found that the pat down search that had located the cellphone was a valid search incidental to arrest. Fearon was convicted. The conviction was upheld by the Court of Appeal. Fearon appealed to the Supreme Court.

The Decision:

The Court found that the cellphone search violated Fearon’s *Charter* rights.

Police generally need a warrant to search people or property, but there are certain situations where the police are allowed to search without a warrant. One of these situations is when police search someone when arresting them, which is called a “search incident to arrest”. A search incident to arrest allows police to continue with their investigation quickly, which can help preserve evidence and, in some cases, can prevent danger to the public. These searches also help ensure officer safety (for example, by making sure the arrested person does not have a weapon or an escape tool).

The Court felt that the framework for such searches needed to be revised as it applied to electronic devices like cellphones, and modified the test. In order for a search incident to arrest involving an electronic device to be lawful:

1. The arrest itself must be lawful;
2. The search must be truly incident to the arrest;

Discussion Questions:

1) Do you agree with the majority decision to allow the text message and photograph into evidence? Why or why not?

2) Why do you think the Court felt the law on searches incident to arrest had to be modified? Why do cellphone searches pose a particular threat to privacy rights?

Relevant Law:

The Canadian Charter of Rights and Freedoms, sections 8 and 24.

Resources:

You can read the entire case at:

<https://www.canlii.org/en/ca/scc/doc/2014/2014scc77/2014scc77.html>

You can find the *Canadian Charter of Rights and Freedoms* at:

<https://laws-lois.justice.gc.ca/eng/const/page-15.html>

3. The nature and extent of the search must be tailored to the purpose of the search; and
4. The police must take detailed notes of what they find on the device and how it was found.

The Court found that Fearon's arrest was lawful, as the police had reason to believe he was involved in a robbery.

They also found that the search of the cellphone was incident to the arrest. The police found the cellphone in Fearon's pocket while arresting him, and first searched it at that time. Further searches of the phone took place over the next few hours, when the officers learned that other relevant information might be on the phone—for example, the phone number of a third suspect. The search of the cellphone was directed at public safety (locating the gun), avoiding the loss of evidence (the stolen jewelry), and obtaining evidence (linking Fearon to the crime and uncovering other accomplices). In all of the circumstances, the search was incident to the arrest.

However, the Court did not believe the search of the cellphone was reasonable overall. The officers testified they "had a look" through the phone, but could not give specific details about what was searched, how it was searched, and why.

Although the Court unanimously found a *Charter* breach, the justices were split 4-3 on whether to allow the text message and photograph to be admitted into evidence. The majority ruled to admit it, and upheld Fearon's conviction.

Relevant Law:

The Canadian Charter of Rights and Freedoms:

8. Everyone has the right to be secure against unreasonable search or seizure.

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, 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.