

Citation: *R. v. Corporal Wolfe*, 2005CM48

Docket: C200548

**STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
4TH AIR DEFENCE REGIMENT MONCTON**

Date: 26 August 2005

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

CORPORAL WOLFE

(Accused)

**DECISION RESPECTING A PRETRIAL APPLICATION PRESENTED UNDER
SECTION 24(2) OF THE *CANADIAN CHARTER OF RIGHTS AND FREE-
DOMS*.**

(Rendered orally)

[1] The accused, Bombardier Wolfe, is charged with one offence contrary to section 130 of the *National Defence Act* of possession of an explosive substance contrary to section 82(1) of the *Criminal Code*, which is said to have occurred on or about 19 October 2003.

[2] By way of pretrial application, he seeks the exclusion of evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms* as a remedy for claimed violations of his right to be secure from unreasonable search and seizure, guaranteed by section 8, and his right not to be arbitrarily detained, guaranteed by section 9.

[3] The evidence sought to be excluded is described as a Simulator Projectile Ground Burst, an explosive device seized from Bombardier Wolfe by Constable Durling of the Fredericton Police Force in circumstances I will more fully describe.

[4] The Agreed Statement of Facts, exhibited on an earlier application under section 11(b) of the *Charter* as Exhibit M1-2, is properly before me on the present application by the agreement of counsel. It reads, in part, as follows:

1. Bombadier [sic] T.B. Wolfe is a [R]eserve Air Defence Artilleryman who was tasked on Class B employment to, and was serving with, Land Forces Atlantic Area Training Centre, a unit of the [R]egular [F]orce, at Canadian Forces Base Gagetown, New Brunswick from 26 August 2003 to 29 October 2003 as a driver/storesman for Soldier Qualification course 0320.
2. At 0357 hours, on 19 October 2003, Constable Durling of the Fredericton City Police responded to a complaint that a blue Saturn car was driving by Sobeys in the Fredericton Mall parking lot located at 1120 Prospect Street, Fredericton, New Brunswick and that someone in the car was throwing eggs at the building. Upon arrival, Constable Durling observed a blue 2002 Saturn SL 4-door sedan vehicle New Brunswick plate number GGO722 travelling in the parking lot of the Fredericton Mall. The vehicle was stopped and a strong smell of liquor was detected from the inside of the vehicle. Constable Durling asked the occupants to exit the vehicle. Constable Durling seized three cans of Coors Light beer from the vehicle. Bombadier [sic] T.B. Wolfe claimed possession of the three cans of Coors Light beer. Constable Durling arrested Bombardier Wolfe for possessing liquor, contrary to section 133 of New-Brunswick's *Liquor Control Act*. Constable Durling cautioned Bombadier [IsicI] Wolfe and performed a patdown search of Bombadier [sic] Wolfe's person before placing him in the police vehicle. Constable Durling felt something hard in Bombadier [sic] Wolfe's front pocket and asked him what it was. He then asked Bombadier [sic] Wolfe to empty his pockets. Bombadier [sic] Wolfe was found to be in possession of an egg and admitted to throwing eggs at the Fredericton Mall.
3. During the search of Bombadier [sic] Wolfe's person, Constable Durling also found two pyrotechnic devices in his possession. These devices were later identified as one Simulator Projectile Ground Burst and one Grenade Hand Smoke C8 Violet. Bombadier [sic] Wolfe explained to Constable Durling that he was in the military and obtained them during the course of his duties as a storesman during Soldier Qualification Course 0320 in Gagetown, New Brunswick. He was placed in the police vehicle where he was again advised of his *Charter* rights and cautioned. He was also advised that he was now also under arrest for possession of explosives.

In addition to the agreed facts, the applicant called two witnesses, Michael Jewett and Dustin Besaw, who testified that they were in the blue Saturn car at the time it was stopped by Constable Durling.

[5] The prosecution called Constable Durling on the application. He testified that he was called to the Sobeys store at 1120 Prospect Street, at 0357 hours, on 19 October 2003, concerning a complaint of mischief involving the throwing of eggs from a vehicle. He obtained a vehicle description including a licence number. He stopped the blue Saturn in the

parking lot of 1120 Prospect Street and approached the driver, Mr Jewett. He dealt with him for his failure to produce registration and insurance documents. In reply to Constable Durling, Mr Jewett denied being involved in the throwing of eggs.

[6] Constable Durling then arrested the passengers in the vehicle, including the accused, for the offence of mischief, and warned them about saying anything. After observing unopened cans of beer in the back seat area of the car, Constable Durling also arrested all the occupants for the New Brunswick provincial offence of carrying open liquor in a vehicle. The other persons thereupon looked at the accused who promptly claimed ownership of the liquor. After making this statement, the accused produced an egg from his pocket and gave it to Constable Durling. Constable Durling took the accused to his police vehicle, told him again he was under arrest for mischief and a liquor violation, and told the accused he would be searched.

[7] I agree with the submission of defence counsel that the search of the person of Bombardier Wolfe was without a warrant, and that therefore the burden shifts to prosecution to show, if they can, that the search was authorized by a reasonable law and carried out in a reasonable manner.

[8] The evidence of Mr Jewett and Mr Besaw is replete with inconsistencies between them, but they do agree that nobody was arrested for mischief.

[9] I accept the evidence of Constable Durling that he did, in fact, arrest Bombardier Wolfe for the offence of mischief. Bombardier Wolfe was arrested with the other occupants of the vehicle, except the driver, Mr Jewett, whom Constable Durling had already checked by means of a pat-down search looking for eggs. There is no dispute that, objectively speaking, there were indeed reasonable grounds to arrest Bombardier Wolfe for the offence of mischief, and Constable Durling testified as to his honest belief in the existence of reasonable grounds to arrest. Considering all the circumstances including the time of night; the fact he was working alone and dealing with a number of individuals, although back-up assistance was available to him; and the smell of alcohol from the vehicle, an arrest of all the passengers for the offence of mischief was the prudent course of action for Constable Durling to take.

[10] I do not accept the evidence of Mr Jewett and Mr Besaw that there was no arrest for the offence of mischief. There were, as I stated, many inconsistencies in their evidence and I find them troubling. They undermine the confidence the court can have in the accuracy of their evidence. In addition, there were many inconsistencies between their evidence and that of Constable Durling, apart from the issue of whether or not there was an arrest for the offence of mischief. Mr Besaw conceded that his recollection of events, that

morning, is impaired by reason of the lapse of time since they occurred. Mr Jewett, I find, was untruthful in his dealings with Constable Durling.

[11] The evidence of the witnesses called by the applicant does not cause me to doubt the accuracy of the evidence of Constable Durling when he states that he arrested Bombardier Wolfe for mischief.

[12] I have also considered the fact that Constable Durling made no note or memorandum of any description with respect to the arrest of any of the occupants of the vehicle for the offence of mischief. Nevertheless, on all the evidence I am satisfied on a balance of probabilities, and I find that Bombardier Wolfe was, in fact, arrested for the offence of mischief contrary to section 430 of the *Criminal Code*. The existence of reasonable grounds to effect the arrest of the accused is conceded, and there is no other ground of attack made upon the arrest. It follows that the arrest of Bombardier Wolfe for mischief was lawful.

[13] Constable Durling stated that he searched the accused, Bombardier Wolfe, as an incident of arrest because he was concerned about the safety of himself and others. He described the search as a pat-down search. He patted down the outer clothing of the accused. He noticed the left and right front jacket pockets were bulging, and he could feel that there was something in the pockets. He asked the accused to remove what was in the pockets and the accused complied. The accused produced what Constable Durling thought was a grenade. When asked what it was, the accused described the item as a simulator grenade for training and stated that it would not explode. Constable Durling took the item from the accused's hand.

[14] I find the search was carried out in a reasonable manner that was not unduly intrusive. The intrusiveness of the search was proportionate to the valid reasons for which it was conducted. Indeed, the defence makes no complaint of the manner in which the search was carried out. The search was lawfully conducted as incident to a lawful arrest for the offence of mischief.

[15] In view of this finding, it is not necessary to consider further whether the search of Bombardier Wolfe, in this case, was incident to a lawful arrest for the New-Brunswick *Liquor Control Act* violation to which Bombardier Wolfe pleaded guilty.

[16] As the search was lawful, there was no violation of section 8 of the *Charter*.

[17] It also follows that the detention, in this case, was not arbitrary. It was rather the result of a lawful arrest that was not otherwise abusive. There was, therefore, no violation of section 9 of the *Charter*.

[18] Since I have concluded that there was no violation of the *Charter*, it is not necessary to consider whether the evidence should be excluded under section 24(2) of the *Charter*.

[19] For these reasons, the application is dismissed.

COMMANDER P.J. LAMONT, M.J.

Counsel:

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