Case Name:

R. v. Balendra

Between
Her Majesty the Queen, Respondent, and
Rajeev Henry Balendra, Appellant

[2019] O.J. No. 608

2019 ONCA 68

Docket: C62701

Ontario Court of Appeal

C.W. Hourigan, G.I. Pardu and A.L. Harvison Young JJ.A.

Heard: December 7, 2018.
Judgment: January 30, 2019.

(80 paras.)

Appeal From:

On appeal from the convictions entered on August 23, 2016 by Justice Susan E. Healey of the Superior Court of Justice, sitting with a jury, and from the sentence imposed on August 26, 2016.

Counsel:

Glen Henderson, for the appellant.

Michael Bernstein, for the respondent.

The judgment of the Court was delivered by

1 A.L. HARVISON YOUNG J.A.:-- The appellant appeals from his convictions on a number of

charges relating to the possession of fraudulent and forged credit cards and possession of identity information with intention to commit fraud. He also seeks leave to appeal from his sentence of four years' imprisonment.

2 The appellant argues that the trial judge erred in admitting evidence that should have been excluded pursuant to s. 8 and s. 24(2) of the *Canadian Charter of Rights and Freedoms* as the products of warrantless, unreasonable searches. The evidence consisted principally of lists of credit card numbers and an apparent template for a driver's licence on a USB key seized from the appellant, as well as other evidence found in the van he was driving, following his arrest for careless driving and possession of a stolen vehicle.

3 The appellant also submits that the trial judge erred in principle by failing to consider rehabilitation as a factor in the sentencing equation, focusing only on deterrence and denunciation. This error, the appellant says, led the trial judge to impose a demonstrably unfit sentence.

4 For the reasons that follow, I would dismiss the appeal from conviction, grant leave to appeal from sentence but dismiss the sentence appeal.

FACTUAL BACKGROUND

5 On March 13, 2013, two Ontario Provincial Police officers, Sergeant Humber and Constable Hitch, detected what they believed to be a stolen vehicle. The vehicle, a red Dodge Caravan, was travelling northbound in the center lane of Highway 400. Sgt. Humber believed the van was stolen based on information obtained from police databases that showed the vehicle on record with Toronto Police Services as a stolen vehicle.

6 Just prior to the Mapleview Drive exit, the van quickly swerved across the right-hand lane of traffic, across the bullnose, and onto the exit ramp. It was Sgt. Humber's impression, based on his belief that the vehicle was stolen, that this was an evasive maneuver to avoid police pursuit. Constable Hitch, who was driving, maneuvered the police vehicle in front of the van and brought it to a stop on the shoulder of the exit ramp, with a back-up vehicle arriving behind to block the van. Sgt. Humber exited the police vehicle and immediately drew his service revolver, pointing it at the passenger still inside the van.

7 Both occupants complied with police demands. Sgt. Humber arrested the passenger, Serhiy Pidliskovyy, at 3:09 p.m. for possession of stolen property in relation to the van. A wallet belonging to Mr. Pidliskovyy was searched at the roadside. Sgt. Humber found an Ontario driver's licence in the name of Matthew Spazza, bearing a photograph of Mr. Pidliskovyy, as well as a patient identification card from Mount Sinai Hospital bearing Mr. Pidliskovyy's photograph and name. Sgt. Humber testified that the discrepancy caused him to be suspicious about the driver's licence. Inquiries made by him later that day to the Ministry of Transportation showed that the licence number, name and address did not exist in their records.

8 At approximately the same time, the appellant, who had been driving the van, was arrested by Constable Hitch for possession of stolen property and careless driving. Both individuals were taken into custody at the OPP detachment office in Barrie. The van was removed by a towing company and secured in a compound within the City of Barrie.

9 Sgt. Humber arrived at the detachment office at approximately 3:25 p.m. He was not involved in processing either the appellant or Mr. Pidliskovyy, but instead continued with the investigation and preparation of the bail documents. He was able to confirm the identities of both individuals, and learned that the appellant was subject to a driver's licence suspension, which was imposed on him for driving a vehicle while under suspension.

10 Sometime later, Sgt. Humber became aware that Constable Hitch was in possession of a passport-sized photograph of Mr. Pidliskovyy that had been discovered during the search of the appellant, located in a pocket in the appellant's clothing. The photograph in question was an identical likeness to that on the driver's licence found in Mr. Pidliskovyy's possession. The other significant item found in the possession of the appellant was a USB key, which came to Sgt. Humber's attention later that day at 9:55 p.m.

The first search of the USB key

11 When presented with the USB key, Sgt. Humber proceeded to search it, approximately seven hours after the appellant's arrest. Sgt. Humber testified that he believed the USB key could hold valuable information to assist in facilitating the creation of the driver's licence found on Mr. Pidliskovyy. He testified that at that time in the evening of March 13, 2013, he was engaged in investigating a separate impersonation offence in relation to Mr. Pidliskovyy and the appellant.

12 Sgt. Humber looked at the contents of the USB key for approximately 10 to 30 minutes. He saw that it contained, among other things, multiple credit card numbers and what he believed to be a driver's licence template. At that time, he made only brief notes about what he looked at on the USB key, but no other notes about any further aspect of the process that he followed when accessing it. His notes stated that the search of the USB key was "incident to arrest". Accordingly, Sgt. Humber agreed that he understood that there was a privacy interest in relation to the USB key, and he had turned his mind to his right to engage in such search without a warrant.

13 Sgt. Humber confirmed that the appellant had been arrested at that point only in relation to the facts related to the stolen vehicle and careless driving. He confirmed that he did not search the USB key in relation to either of those offences, nor was there any indication that he might expect to find any information pertaining to those offences.

The search of the van

14 As a result of the information he obtained through the search of the USB key, Sgt. Humber decided to conduct a more thorough search of the van that the appellant had been driving. On March

14, 2013, he attended at the impound lot where the van was being held and proceeded to search it. He testified that he did not seek a warrant prior to this search because he understood that the vehicle was stolen, and further understood that there would be no expectation of privacy in a stolen vehicle. Sgt. Humber acknowledged that he wanted to perform the search of the van in part because of what he had found on the USB key, and that his intent was to further the investigation.

15 While searching the van, Sgt. Humber noticed a loose ceiling compartment, from which he extracted a concealed plastic bag containing what appeared to be a number of credit cards. At that time he noted that the name Matthew Spazza appeared on some of the cards, but he took no further steps to process the contents of the bag at the impound lot. Sgt. Humber took the bag, along with some other items found in the vehicle (including a rental agreement purportedly issued by SSS Rent-A-Car to an individual with the surname of Sookhoo), back to the detachment to be secured.

The second search of the USB key

16 Five days later, on March 19, 2013, Sgt. Humber again accessed the USB key in order to look at the information contained on it, and printed off numerous pages containing approximately 2,500 credit card numbers, the Ontario driver's licence that he believed to have been used as a template, and a photograph of an unidentified male. He testified that he observed the same information on that date that he had seen on March 13. No particular notes were made of the procedure used to access the information on March 19. Sgt. Humber testified that he made the decision to print off the credit card numbers in particular because he believed that another offence had been "stumbled across". Using the credit card information, he then contacted a number of banks and financial institutions for the purpose of obtaining information about whether those card numbers had been compromised for the purpose of fraud or theft. Eventually each of those institutions provided him with information on the status of the cards and their use, with an estimate of resultant financial loss.

17 Sgt. Humber testified that he did not seek a warrant before accessing the material on the USB key and printing it, because he felt that he was lawfully in possession of the information, having seen it on a prior occasion incident to the arrest of the appellant.

18 After printing the contents of the USB key on March 19, Sgt. Humber decided to apply for a search warrant for the purpose of carrying out a more probing search of the device. The warrant was issued on June 27, 2013, after which date the USB key was delivered to an officer in the e-crimes unit. The resulting search did not reveal any additional information beyond that which Sgt. Humber had already obtained.

19 Based on the information obtained through the searches, the appellant was charged with eight fraud-related offences. He pleaded not guilty and elected to be tried before a judge and jury.

20 Prior to trial, the appellant brought an application to exclude the evidence under s. 24(2), arguing that his s. 8 *Charter* rights had been infringed by the following three searches:

a. The first search of the USB key on March 13, 2013;

b. The search of the impounded van on March 14, 2013;

c. The second search of the USB key on March 19, 2013.

DECISION BELOW

21 The trial judge dismissed the *Charter* application: see *R. v. Balendra*, 2016 ONSC 5143. She found that the appellant's s. 8 rights had not been infringed by any of the searches.

22 With respect to the search of the USB key on March 13, the trial judge recognized that the appellant had a reasonable expectation of privacy in the USB key. She also recognized that because the search was conducted without a warrant, the Crown had the burden of establishing that it was reasonable. The trial judge found that the Crown met its burden by showing that the search was a valid search incident to arrest, in that it was founded on the appellant's lawful arrest, and was conducted truly incident to the arrest in a reasonable manner.

23 With respect to the search of the van on March 14, the trial judge determined that the appellant had no reasonable expectation of privacy in the van, and thus did not have standing to advance a s. 8 claim. The trial judge's conclusion was based in part on Sgt. Humber's evidence on the *voir dire* that the van was stolen, and his evidence that the appellant had no lawful status to operate the van because his driver's license was suspended.

24 Finally, the trial judge found that the search of the USB key on March 19 was not a new search, but rather an extension of the search conducted on March 13. As the search on March 13 was reasonable, the trial judge reasoned that the search on March 19 was also reasonable.

25 Given the trial judge's finding that there was no s. 8 infringement, the evidence obtained through the searches was admitted at trial. The appellant was convicted of four fraud-related offences and sentenced to four years' imprisonment.

THE ISSUES ON APPEAL

26 On appeal, the appellant submits that the trial judge erred in her analysis of s. 8 with respect to each of the searches conducted by Sgt. Humber. If this court concludes that the searches were unreasonable, the appellant submits that the evidence should have been excluded under s. 24(2), and that an order vacating his conviction and entering an acquittal in its place should follow.

27 The appellant further submits that the trial judge erred in imposing a demonstrably unfit sentence of four years' imprisonment. If the appeal from conviction is dismissed, he seeks a reduction of his sentence.

28 The respondent submits that the trial judge did not err in dismissing the s. 8 application, and that even if she did, any infringement of s. 8 would not have justified excluding the evidence under s. 24(2). The respondent also notes that a warrant to search the USB key was obtained by Sgt. Humber on June 27, 2013. This warrant, the respondent argues, would have issued even if the fruits of the warrantless searches of the USB key and van were excised from the ITO, such that the evidence would have been admissible on this alternative basis.

29 With respect to the sentence appeal, the respondent submits that the trial judge did not fail to consider relevant factors, and that the ultimate sentence imposed was not excessive or otherwise demonstrably unfit.

ANALYSIS

30 I begin with the standard of review to apply to the issues on this appeal. Whether the trial judge erred in determining that the searches of the USB key and van did not infringe the appellant's s. 8 rights is a question of mixed fact and law. While deference is owed to the trial judge's factual findings, her legal conclusions are reviewable on the correctness standard: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20.

31 For the reasons that follow, I find that the trial judge correctly determined that the appellant lacked a reasonable expectation of privacy in the stolen van. However, I conclude that she erred in her analysis of s. 8 with respect to the two warrantless searches of the USB key. These searches were not truly incident to arrest and therefore infringed the appellant's s. 8 rights. Nevertheless, I would decline to exclude the evidence under s. 24(2).

32 With respect to the sentence appeal, I find that the sentencing judge did not err in principle and that the sentence was not demonstrably unfit.

The first USB key search on March 13, 2013

33 The appellant argues that he had a reasonable expectation of privacy in the USB key, and that its search on the evening of March 13 did not constitute a valid search incident to his arrest. The search therefore infringed his s. 8 right to be free from unreasonable search and seizure.

34 The respondent submits that the appellant did not have a reasonable expectation of privacy in the USB key, but that even if he did, the search was reasonable as a valid search incident to arrest.

(1) Did the appellant have a reasonable expectation of privacy in the USB key?

35 I agree with the appellant that it is clear, since the decision of this Court in *R. v. Tuduce*, 2014 ONCA 547, 314 C.C.C. (3d) 429, that he had a reasonable expectation of privacy in the contents of the USB key found in his pocket.

36 The respondent submits that the trial judge erred in treating the USB key as though it were a

computer or a cell phone. In her ruling on the s. 8 *voir dire*, the trial judge recognized, at para. 42, the appellant's reasonable expectation of privacy in the USB key in the following manner:

> [O]n balance, given that a USB drive is quite capable of holding and revealing extensive personal information about a person in the same way as a computer, I find that the applicant has established that he had a reasonable expectation of privacy in relation to the USB drive.

37 In *Tuduce*, at paras. 71-75, Gillese J.A. considered the privacy interests implicated in USB keys found in a person's possession:

> First, a USB key can store a significant amount of data. USB keys commonly hold anywhere from one to ten gigabytes of data, and USB keys with a storage capacity of over one terabyte exist. It seems likely that their storage capacities will only increase over time.
>
> Second, data can be left on a USB key without a user's knowledge. This data includes information about the date and time a file was created or modified and information about the user who created or modified that file.
>
> Third, a user does not have complete control over which files an investigator will be able to find on a USB key. Data can be salvaged from a USB key through forensic analysis even after a user has deleted or "saved over" it.
>
> It is true that a USB key is not a home computer or a cell phone. Thus, it may not always contain personal information, like a list of contacts, the contents of past communications, and information about an individual's web searching habits.
>
> On the other hand, however, a person's personal USB key arguably engages more serious privacy interests than a work computer. The two key reasons why individuals have a somewhat diminished reasonable expectation of privacy in a work computer are that a work computer is not actually owned by the employee who uses it, and the employee's use of the work computer is often subject to terms and conditions imposed by the employer: *R. v. Cole*, 2012 SCC 53 (CanLII), [2012] 3 S.C.R. 34, at paras. 49-52 and 92. Neither of these considerations apply to personal digital storage devices like USB key.

38 Here, the USB key was found in the appellant's pocket. That fact, combined with the potential personal contents of such a device, is sufficient to establish that the appellant had a reasonable

expectation of privacy in the USB key: *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 56. It is not necessary for the purposes of this appeal to define the level or intensity of that interest relative to other such devices with any further precision.

(2) Was the search of the USB key reasonable?

39 Having found that the appellant did have a reasonable expectation of privacy in the contents of the USB key, I turn now to the question of whether Sgt. Humber's search of the key on the evening of the appellant's arrest was reasonable as a search incident to arrest.

40 The Supreme Court of Canada reviewed the law applicable to the scope of searches incident to arrest in the context of cell phones in *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621. Cromwell J., writing for the majority, wrote of the need to recognize, on the one hand, the high potential invasion of privacy inherent in the search of a cell phone, and, on the other, the importance that cell phones may play with respect to law enforcement objectives. At para. 83, Cromwell J. set out four conditions with which a search of a cell phone incident to arrest should comply in order to be lawful:

1. The arrest itself must be lawful;

2. The search must be "truly" incidental to arrest, and have a valid law enforcement purpose in (a) protecting the police, the accused or the public; (b) preserving evidence; or (c) discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest;

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 have examined on the device and how it was searched.

41 The three valid law enforcement purposes identified by Cromwell J. are drawn from the Supreme Court's previous decisions in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, and *R. v. Caslake*, [1998] 1 S.C.R. 51. In *Caslake*, the Court clarified, with respect to the "discovering evidence" purpose, that "if the justification for the search is to find evidence, there must be some reasonable prospect of securing evidence <u>of the offence for which the accused is being arrested</u>": at para. 22 (emphasis in original).

42 This restrictive approach to the "discovering evidence" purpose was affirmed by Cromwell J.

in *Fearon*, though he added three additional restrictions in the context of cell phone searches. First, where the purpose of the search is to discover evidence, it will only be lawful if the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest. The rationale for this restriction is that it strikes the proper balance between law enforcement objectives and privacy interests, in light of the nature and vast range of personal information that a cell phone might hold. Second, where a search is conducted for any valid purpose, both the nature and extent of the search must be tailored to that purpose. Finally, officers must take detailed notes of what they have examined on a cell phone, in order to help them focus their search and to permit effective after-the-fact judicial review. See *R. v. Tsekouras*, 2017 ONCA 290, 353 C.C.C. (3d) 349, at paras. 89-94.

43 The appellant argues that the March 13 search was not truly incidental to arrest, and that the trial judge erred in stating that the test was met because in searching for evidence, albeit relating to the impersonation investigation, the police were acting for a valid purpose "connected" to the arrest. The trial judge found that the Crown had established that the warrantless search was reasonable because it was, in all the circumstances, incident to the appellant's arrest, and that a more restrictive interpretation of "truly incidental" would unduly affect law enforcement.

44 With respect, I agree with the appellant that the trial judge erred on this point. It is clear from *Caslake* and *Fearon* that the requirement that the search be "truly incidental" to the charge for which an accused has been arrested is to be strictly interpreted. At para. 76 of *Fearon*, Cromwell J., having stated that the requirement that the search of a cell phone be truly incidental to arrest should be "strictly applied", continued:

> ...it is not enough that a cell phone search in general terms is truly incidental to the arrest. Both the nature and the extent of the search performed on the cell phone must be truly incidental to the <u>particular</u> arrest for the <u>particular</u> offence. [Emphasis added.]

45 Here, Sgt. Humber candidly acknowledged in his evidence on the *voir dire* that he looked at the USB key because he thought that it could have evidence relating to the developing impersonation investigation, and not because he expected to find any evidence in relation to the careless driving or possession of stolen property charges that had been laid. The appellant had not been charged with anything relating to credit card fraud or impersonation at that point.

46 The test for determining whether a search is incidental to arrest has both a subjective and an objective component. While Sgt. Humber subjectively believed his look at the USB key was incident to the appellant's arrest, this belief was not objectively reasonable because the officer was not looking for information relating to the stolen van charge but rather to the investigation that was superseding it with respect to which no charges had yet been laid. Put another way, he was not (subjectively) aware that the initial arrest did not (objectively) authorize him to look at the USB key in order to find evidence of impersonation or fraud.

47 This is very similar to the facts in *Caslake*. In that case, the officer would objectively have had a lawful basis for a search incident to arrest that led to the discovery of a nine-pound bag of marijuana in the appellant's car. However, subjectively, the officer had not been searching for evidence incident to the arrest, but rather was doing so in compliance with an RCMP policy requiring that the contents of an impounded car be inventoried. As a result, the Supreme Court found that the search did not fall within the bounds of a search incident to arrest, although it admitted the evidence pursuant to s. 24(2) of the *Charter*.

48 The other issue with the search conducted by Sgt. Humber on March 13 is that there was no evidence that the investigation would be "stymied or significantly hampered absent the ability to search" the USB key incident to arrest. To the contrary, both the appellant and Mr. Pidliskovyy had been arrested and placed in police custody. The USB key and the van had also been seized and secured. In contrast to computers and cell phones, there was no risk of the USB key being accessed or otherwise tampered with remotely. As Cromwell J. put it in *Fearon*, at para. 80, if "all suspects are in custody and any firearms and stolen property have been recovered, it is hard to see how police could show that the prompt search of a suspect's cell phone could be considered truly incidental to the arrest as it serves no immediate investigative purpose." The same reasoning applies to the search of the USB key in this case.

49 In short, I find that the first search of the USB key was not objectively reasonable because it was not conducted to find evidence of the particular offences for which the appellant had been arrested. Had it been related to those offences, the search would still not be justified because the investigation would not have been stymied or significantly hampered absent the search incident to arrest.

50 The fact that the search was not objectively incidental to arrest is sufficient to address its reasonableness on those grounds. However, I disagree with the appellant's argument that the search could not have been valid because it was conducted a number of hours after his arrest. While there are temporal limits to a search incident to arrest, there is no "firm deadline" that defines this limit. Rather, as Lamer C.J. stated in *Caslake*, at para. 24:

> As a general rule, searches that are truly incidental to arrest will usually occur within a reasonable period of time after that arrest. A substantial delay does not mean that the search is automatically unlawful, but it may cause the court to draw an inference that the search is not sufficiently connected to the arrest.

51 Here, Sgt. Humber inserted the USB key into a computer later during the same day, and during the same shift. This was within a reasonable period of time after the arrest. There was no problem with the temporal nexus to the arrest in itself in the circumstances of this case.

52 I would also not attach great weight in the circumstances of this case to Sgt. Humber's failure to take detailed notes when he first looked at the contents of the USB key on March 13. He spent about 10-30 minutes looking at it and determined that it contained a long list of credit card numbers,

a driver's licence template, and the image of a driver's license with a photograph of an unidentified person. In these circumstances, the need for detailed notes does not appear to be as strong as was the case of the cell phone at issue in *Fearon*. Cell phones frequently have many apps and icons, and one may see a great deal of categories of information whose contents range across a wide number of subjects. In this case, the USB key contents were narrower in range and it is clear that while Sgt. Humber did not take notes, he remembered the nature of what he saw.

The search of the van on March 14, 2013

53 The appellant argues that he had a reasonable expectation of privacy in the van because he had "care and control" of the van by virtue of driving it. I disagree.

54 Sgt. Humber searched the van which the appellant had been driving and found, among other things, a bag containing 16 credit cards hidden behind a loose ceiling compartment. The trial judge found that the appellant had not established a reasonable expectation of privacy in the van, noting that this was not a case, such as *R. v. Belnavis*, [1997] 3 S.C.R. 341, where the driver had the apparent consent of the owner to operate the vehicle. Here, Sgt. Humber testified that the van had been registered as a stolen vehicle. The appellant offered no contradictory evidence regarding his ownership of the van, or regarding any authorization given by the registered owner to operate the vehicle. In short, as the trial judge found, there was no evidence to establish that the appellant had any ability to regulate access to the van or any legitimate privacy interest with respect to it.

55 As a result, the trial judge found that s. 8 was not engaged by Sgt. Humber's search of the van. I see no basis to interfere with this finding. The credit cards found inside the van were thus properly admitted into evidence at trial.

The second USB key search on March 19, 2013

56 On March 19, 2013, Sgt. Humber took another look at the USB key. His evidence was that he did not seek a warrant before he did so and that he merely printed the material he had seen the first time. This consisted of a list of about 2500 credit card numbers, the Ontario driver's licence that he believed to have been used as a template, and a driver's license with a photograph of an unidentified male. He did not seek a warrant because he believed he was lawfully in possession of the USB key, having already reviewed its contents on March 13. The trial judge held that this second look at the USB key was essentially a continuation of the first search and was therefore reasonable as a search incident to arrest.

57 The appellant submits that this second search was also unreasonable and a violation of his s. 8 rights. First, he submits that even if the March 13 search was reasonable as incident to the arrest, this one was not, especially because it failed the "temporal connection" test from *Caslake* as it took place six days after the arrest. In addition, he argues that the officer's failure to take detailed notes, which Cromwell J. emphasized should be done as a "constitutional imperative", should determine this issue. As Sgt. Humber testified, he conducted the second search in order to print out what he

had seen the first time.

58 I agree with the appellant that the trial judge erred in treating the March 19 search as a continuation of the March 13 search. The two searches were factually and temporally distinct. In addition, the officer conducted the March 19 search with two purposes in mind which had crystallized since the first search.

59 First, he testified that he was intending to communicate with banks to determine whether the cards listed had been compromised, which he did do. Second, he testified that he was preparing an ITO so that a more thorough search could be performed on the USB key such as the retrieval of deleted items and procedures requiring more technical skills. As I have already mentioned, however, there was no exigency because the USB key had been seized and its contents, unlike those of a cell phone or computer, could not have been remotely affected. In addition, it would appear that Sgt. Humber would already have had ample grounds, on the basis of what had been lawfully found on the appellant and Mr. Pidliskovyy, along with the fruits of the search of the van and the results of the investigation, to obtain a warrant for the search of the USB key, which was ultimately obtained. No additional evidence was found on the key. As with the first search of the USB key, this second search was not reasonable as it was not truly incidental to the appellant's arrest for possession of stolen property.

60 In conclusion, the two searches of the USB key were unreasonable. The fact that Sgt. Humber honestly believed that he was entitled to view the contents of the key incident to the appellant's arrest is, as I will discuss below, a consideration that may bear on whether the evidence should be excluded, but it is not one which bears on the question of whether the appellant's s. 8 rights were breached to begin with.

Should the evidence found on the USB key be excluded?

61 Section 24(2) of the *Charter* provides that evidence obtained in a manner that infringes the accused's rights "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". This requires courts to assess and balance the effect of admitting the evidence in light of three factors: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71. The party seeking to have the evidence excluded bears the burden of proving its exclusion is required.

62 Because the trial judge did not find any breach of the appellant's rights under s. 8, she did not conduct an analysis under s. 24(2). However, the application record is sufficient to permit this court to conduct a fresh s. 24(2) analysis on appeal: *R. v. Herta*, 2018 ONCA 927. I provide that analysis below.

(1) The seriousness of the breach

63 The first factor to consider is the seriousness of the *Charter*-infringing state conduct in issue.

The question is whether "admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts...effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct": *Grant*, at para. 72.

64 Here, in my view, the police conduct lies along the middle to more serious end of the spectrum. Sgt. Humber testified that he searched the USB key to find evidence of impersonation. Yet as Sgt. Humber was aware, the appellant had not been arrested for impersonation. The search thus infringed the clear legal rule established in *Caslake*, which holds that where a search incident to arrest is conducted to find evidence, it must be for evidence of the offence for which the person was arrested: *Caslake*, at para. 22.

65 The fact that the search infringed a clear legal standard renders the breach more serious than it might otherwise have been. In *Grant*, at para. 75, the Supreme Court cautioned that ignorance of *Charter* standards on the part of the police must not be encouraged or rewarded by treating such breaches as less serious. Even where a breach is not deliberate, it may still be reckless, and therefore serious, if the police show insufficient regard for *Charter* rights: *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 24. Indeed, as the Supreme Court observed in *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 44, in some cases the exclusion of evidence may be warranted solely on the basis of "clear violations of well-established rules governing state conduct".

66 This is not to suggest that Sgt. Humber blithely or recklessly disregarded the appellant's *Charter* rights, as was the case with the officer in *Harrison*. To the contrary, Sgt. Humber testified that he genuinely believed that he could search the USB key on the night of the arrest, as part of an evolving criminal investigation that was still in its early stages. There is no reason to doubt his sincerity on this point, particularly in light of the trial judge's finding that Sgt. Humber presented as a candid, credible witness.

67 However, the fact that Sgt. Humber believed his search of the USB key was *Charter*-compliant does not necessarily diminish the seriousness of the breach. In *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59, the Supreme Court held that an "officer's subjective belief that the appellant's rights were not affected does not make the violation less serious, unless his belief was reasonable". *Buhay* was applied by this court in *R. v. Davidson*, 2017 ONCA 257, 352 C.C.C. (3d) 420, where Laskin J.A. noted, at para. 48, that a finding of good faith police conduct was unavailable "when the police's breach of s. 8 was committed in ignorance of the scope of their constitutional authority."

68 In my view, the principle in *Buhay* applies to this case. Sgt. Humber searched the USB key to find evidence of impersonation, 15 years after *Caslake* made it clear that he could not have done so without a warrant. The search thus fell squarely outside the scope of a valid search incident to arrest. In these circumstances, Sgt. Humber's belief that the search was *Charter*-compliant was unreasonable. It follows that the breach was serious.

69 As a result, I find that this factor weighs in favour of excluding the evidence.

(2) The impact of the breach on the appellant

70 The second factor to consider is the impact of the *Charter* breach on the *Charter*-protected interests of the appellant. The court should consider whether "admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute": *Grant*, at para. 76.

71 As Cromwell J. observed in *Fearon*, at para. 96, any search of a cell phone has the potential to be a very significant invasion of a person's informational privacy interests. However, there, the actual infringement of the appellant's rights were found not to have been particularly grave. In the circumstances, as in the present appeal, the appellant had not challenged the search warrant that had ultimately issued, which strongly suggested that, even if the findings of the unreasonable search had been excised from the ITO, reasonable and probable grounds would still have been made out.

72 On the facts of this case, while the contents of a USB key clearly have the potential to contain a great deal of personal information, this USB key contained only data relating to other people. The appellant's privacy interest was diminished for that reason: see *R. v Jarvis*, 2017 ONCA 778, 139 O.R. (3d) 754, at paras. 77-78, appeal as of right to S.C.C. heard and reserved April 20, 2018.

73 While there were, as I have found, two unreasonable searches of the USB key rather than one, I would not find that this exacerbated the impact on the appellant's rights because no new evidence was sought or obtained.

74 On balance, I conclude that this factor weighs in favour of admitting the evidence.

(3) Society's interest in the adjudication of the case on its merits

75 The third factor to consider, society's adjudication of the case on its merits, requires the court to consider "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": *Grant*, at para. 79.

76 This factor strongly favours admission of the evidence. The evidence found was reliable and cogent. Credit card fraud and related offences are serious and can have devastating effects on their victims. Society had a strong interest in the adjudication of this case on its merits.

77 Balancing the three *Grant* factors, I conclude that the evidence found on the USB key should not have been excluded as the appellant argues it should have been. Though Sgt. Humber's search constituted a serious breach of the appellant's s. 8 rights, the actual impact of the breach on the appellant was minimal, given both the content of the information found on the USB key and the fact that a warrant was ultimately obtained which authorized its search. The evidence was, moreover,

wholly reliable and central to the Crown's case. For these reasons, I conclude that the admission of the evidence at trial would not bring the administration of justice into disrepute.

The appeal from sentence

78 In seeking a reduction of his sentence of four years' imprisonment, the appellant argues that the trial judge erred in principle by failing to consider rehabilitation as a relevant factor. I disagree. The trial judge expressly considered rehabilitation as a factor, but placed greater weight on the objectives of deterrence and denunciation in light of the appellant's lengthy criminal record. That record dated back to 2001 and encompassed multiple prior convictions, including one conviction in 2009 for possession of a forged credit card, for which the appellant was sentenced to 15 months in jail. As the trial judge stated, "based on [the appellant's] criminal record...the focus of the sentence cannot be on rehabilitation. Both the record and his recent convictions require a penitentiary sentence in order to meet the overriding objectives of specific and general deterrence and denunciation." It was open to the trial judge on the record before her to take this approach.

79 Given the gravity of the offences and the appellant's lengthy criminal record, I find that the sentence of 4 years' imprisonment, while on the high end of the range, was not demonstrably unfit.

CONCLUSION

80 For the foregoing reasons, I would dismiss the appeal from conviction, grant leave to appeal from sentence but dismiss the sentence appeal.

A.L. HARVISON YOUNG J.A.
C.W. HOURIGAN J.A.:-- I agree.
G.I. PARDU J.A.:-- I agree.