



THE UPDATE

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CHARTER - 8 - ODOUR OF MARIHUANA - VEHICLE

R. v. J.J.W. - Oct. 3, 2008 ABPC 275 per Lipton, PCJ:

Trial on charge of possession of marihuana. Vehicle stop. Accused was seated in front passenger seat. "Very strong" odour of fresh marihuana noted. Plant like material seen in glove box. All of the vehicle occupants were arrested. After arrest accused volunteered that he had marihuana hidden in the crotch of his pants.

Held: s. 8 breach, evidence excluded.

Objective reasonable grounds did not exist to arrest all of the occupants of the vehicle. "I respectfully disagree with the conclusions reached by the appellate judge in *Brown* 89 CRR (2d) 352 (Sask QB) ... that because the accused was merely a passenger and not the driver, their was no expectation of privacy as to their person." Serious violation. "The breach ... was deliberate, potentially obtrusive had the accused not cooperated, and not merely technical." Authorities reviewed.

I. McNish - Defence Counsel

CHARTER - 10(B) - ACCESS TO CALGARY PHONE BOOKS

R. v. Niedergesaess - Oct. 10, 2008 ABCA 343 per McFadyen, JA:

Application for leave to appeal from conviction under s. 253(b). Alleged 10(b) breach. Accused arrested in Banff and at the detachment he was provided with a Banff telephone directory and the Legal Aid 1-866 #. The Calgary telephone books and duty counsel list were not provided. The accused contacted a lawyer, received advice and then blew. Trial judge found no 10(b) breach.

Held: Leave to appeal denied.

Accused did not express any concerns regarding the 10(b) information provided to him by police, he made no requests for other information, and spoke to a lawyer. No arguable merit to the appeal.

I. Savage - Defence Counsel

SENTENCE - EXCESSIVE FORCE - CHARTER RELIEF

R. v. Towpich - Oct. 10, 2008 ABQB 634 per Moen, J:

Accused convicted by a jury of offences including assaulting a police officer. Defence application for either a stay or a reduced sentence on the basis of excessive police force. In the course of arresting the accused a knee stun was used by police, resulting in two broken ribs.

Held: Application denied.

"The test is whether the application of force was objectively reasonable, having regard to the circumstances and dangers in which the officer found himself or herself":

Nasogaluak 2007 ABCA 339.

Accused was extremely combative and violent with police. Police use of force did not violate ss. 7 or 12 of the Charter.

L. Trach - Defence Counsel

SENTENCE - THEFT - BREACH OF TRUST

R. v. deKock - Oct. 3, 2008 208 ABPC 279 per Ayotte, PCJ:

Accused found guilty following trial of 21 counts of fraud, theft and false pretences. 11 victims, multiple incidents with approximately \$175,000 stolen. Defence application for a conditional sentence.

Held: 2 years less one day jail.

Breach of trust. Present state of the law set out in *Cremer* 2007 ABQB 544, “absent exceptional circumstances, an accused in a position of trust who committed a large theft or fraud faces incarceration and in many cases a substantial penitentiary term.” No exceptional circumstances present. No illness, addiction, emotional or psychological problem which impelled the commission of the offence. Authorities reviewed.

C. Milsap - Defence Counsel

SENTENCE - SEXUAL ASSAULT - CHILD VICTIM - CSO

R. v. J.A.G. - Oct. 2, 2008 ABPC 267 per Bascom, PCJ:

Accused pled guilty to sexual assault. “Accused sexually assaulted his stepdaughter, aged 12, four to eight times by simulated ‘sexual intercourse’, where the accused had rubbed his penis against the vaginal lips of the victim and then thrust his penis back and forth between her legs until he ejaculated ... There was no actual penetration. There was also a few instances in which the accused touched the victim’s vagina with his fingers. There was no actual digital penetration.”

Held: 2 years less 1 day CSO.

Conditional sentences “will rarely be able to express society’s condemnation” for sexual offences against children: *G(JA)* (2008), 232 CCC (3d) 401 (Man CA). Positive PSR. 4 year starting point applicable, but not precluding a conditional sentence. Authorities reviewed.

S. Wojcik - Defence Counsel

SENTENCE - UTTERING THREATS - 1 YEAR JAIL

R. v. Kovacs - Oct. 14, 2008 ABCA 337 per Watson, Bensler, Park, JA - T. Judge: Delong, PCJ:

Defence appeal from 1 year jail sentence imposed following accused’s guilty plea to a charge of uttering threats. Accused was in custody at the time of the calls to his mother and stepfather, threatening to kill them upon his release from jail. 87 prior convictions, including a 2001 conviction for uttering threats for which he received a 3 month jail term.

Held: Appeal dismissed.

No error in principle. The sentencing judge was cognizant of the accused’s early guilty plea and acceptance of responsibility. “The custodial portion of the sentence was fit.”

A. Sanders - Defence Counsel

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