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Rights, Camera, Action

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Case Commented On: *R v McCoy*, 2016 ABQB 240 (CanLII)

The series of police encounters that triggered the Black Lives Matter movement have raised many bitter and potentially unanswerable social questions about the relationship between law enforcement and the citizen. From the perspective of criminal procedure, however, they have also demonstrated the importance of video evidence in establishing the "true" story behind the inherently fraught, often violent, almost-always subjective situation of an arrest. In a context where a few words or gestures can make the difference between a colourable case of resisting arrest and an unwarranted exercise of police force, we have seen how eyewitness accounts can be flatly contradictory. As Justice Iaccobucci pointed out in *R v Oickle*, 2000 SCC 38, referring to video-recorded confessions, police notes may accurately record the content of what is said, but cannot capture tone or body language in a way that recording can (at para 46, citing J.J. Furedy and J. Liss, "Countering Confessions Induced by the Polygraph: Of Confessionals and Psychological Rubber Hoses" (1986), 29 *Crim LQ* 91, at 104). In light of this potentially important evidentiary function, the in-car digital video system (ICDVS, or "dash cam") has become an increasingly widely-used piece of police technology. RCMP officers are required to make use of dash cams in all cars equipped with them (see K Division Operational Manual at s 1.1).

In *R v McCoy*, 2016 ABQB 240, the Alberta Court of Queen's Bench ruled on the constitutional significance of the RCMP's policy on dash cams. The arresting officers had pulled the accused over at a check point and, upon smelling alcohol, attempted to administer a breathalyzer test. After the accused—intermittently claiming that medical problems made it difficult for him to breathe properly into the device—ultimately refused to do so, he was arrested for failing to provide a breath sample, a charge for which he was ultimately convicted (at paras 11-14). The arresting officer's car was equipped with a dash cam, but he did not turn it on until leaving the checkpoint for the RCMP station (at para 16).

On appeal of his conviction, McCoy argued that:

1. The trial judge erred in law in finding that the failure of the RCMP officer to activate his In-Car Digital Video System did not violate his sections 7 and 8 *Charter* rights;
2. The trial judge made several unreasonable findings of fact that were critical to McCoy's conviction and otherwise misapplied the law regarding a reasonable excuse to fail to provide a breath sample; and
3. The trial judge erred in law in his application of the test for assessing witness credibility required by *R v WD*, [1991] 1 SCR 742.

The Alberta case law on the *Charter* significance of whether police follow the policy requiring use of dash cams in the first place has been muddled. The cases suggest a range of potential standards, most of them turning on the subjective intentionality of the officers responsible for

operating the dash cam (at paras 34-44). Where Alberta courts have found a section 7 violation for the lack of dash cam use, there generally has been unusually objectionable conduct on the part of the officers (most amusingly, perhaps, in *R v Nabrotzky* (25 November 2014), Sherwood Park 141033977P1 (ABPC), where one officer failed to turn on the device because he did not like the sound of his voice recorded, and the conduct of all other involved officers collectively suggested a "pattern of indifference" as to following the rule (at para 41)).

By contrast, there is a clear rule governing the *loss* of already existing evidence which the Supreme Court of Canada has applied to misplaced or destroyed dash cam footage. In *R v La* [1997] 2 SCR 680 the Court held that a section 7 violation occurs where the police conduct resulting in the destruction of existing footage rises to the level of "unacceptable negligence" (at para 30). In *McCoy*, however, the ABQB held that—contrary to the arguments of the accused—the case law creates a distinction between situations where existing evidence is destroyed and situations where the police failed to obtain evidence in the first place (at para 47). According to the Court, "As there is no obligation on the Crown to create evidence, the failure to record is not an issue of full disclosure. A failure to create evidence cannot be equated with a failure to preserve or disclose evidence for the purpose of founding a *Charter* violation" (at para 47). The Court also noted that even in *Oickle*, with its *obiter* praising the use of video recording in the confession room, the Supreme Court declined to find that the absence of recording in and of itself constituted a *Charter* violation (at para 56).

On the policy front, the Court noted that the accused is entitled to a fair trial, not a perfect trial, and found that "[n]on-compliance with the RCMP policy must be considered in light of the possibility of human or technological error and the consequence to the public of such rigid requirements" (at para 67). The Court added that without the benefit of video recordings, courts will simply "perform the same function that they do in all other trials; they weigh the evidence and make credibility assessments on the evidence available" (at para 68). The bottom line on the constitutional question in *McCoy* appears to be that, because the Crown has no duty to create evidence (in contrast to its duty to disclose evidence, as implicated in cases involving *lost* footage), an officer's simple failure to record an interaction, even in violation of an RCMP policy, does not in and of itself constitute a *Charter* violation (at para 70).

The Court briefly considered whether the officers' conduct in this particular case evinced the sort of "outrageously cavalier" or "indifferent" behavior as to the dash cam policy that had been found to constitute a section 7 violation in other cases. No evidence supported such a contention in this case, due, among other reasons, to the officer's reasonable explanation that had he turned the dash cam on it would have failed to record any of the stop due to the location of the accused's vehicle ten feet away and out of range (at para 76).

As to section 8, McCoy tried to argue that the officers' administration of the breathalyzer test without following the RCMP's recording policy constituted an unreasonable search (at para 87). He attempted to reason by analogy to the constitutional standards for the reasonableness of bodily strip searches, which have been informed, in the case law, by reference to authorities such as police training manuals (at para 89). The ABQB made short work of this argument, noting that the cases on bodily searches deal with "deliberate unexplained conduct on the part of the police" and, perhaps more to the point, deal with the manner of a search rather than the evidentiary record of it (at para 92). Thus, they do not govern the dash cam question and section 8 was not implicated by the facts of this case.

While the majority of the Court's reasons focus on the appellant's *Charter* arguments, it also considered McCoy's contention that the trial court had inappropriately discounted inconsistencies in the arresting officer's testimony in making its credibility determination (at para 99). Specifically, McCoy pointed to the officer's admitted exaggeration of a seizure McCoy sustained at the police station, and his inaccurate claim that he had recorded the seizure in his notes (at para 101). The ABQB noted the relative inconsequence of these inconsistences (particularly the fact that the officer *had* reported the seizure in his General Report, though not specifically in his notes), and found them insufficient to override the deference due to the trial court in findings of fact (at paras 103-104). The Court likewise rejected McCoy's contentions that the trial court inappropriately discounted his own testimony due to his faulty recollection of various events in the evening, which he claimed related to his ongoing medical problems (at para 105). In reality the trial court had in fact accepted that McCoy had medical problems, but merely rejected his account of the actual interaction with the officer, which he in fact claimed to remember (at para 107). Furthermore, the Court noted that McCoy's arguments were of particularly little avail due to the substance of the charged offence, which places a burden on the *accused* to provide a reasonable excuse for refusing to provide a breath sample (at para 115). As the *mens rea* and *actus reus* did not appear to be in dispute, the defence turned on the existence of reasonable excuse which the accused failed to meet.

Finally, the Court addressed the trial court's application of the famously confusing test in *R v. WD* for evaluating the credibility of competing witness accounts. The *WD* test provides the following direction to a factfinder:

> First, if you believe the evidence of the accused you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused (at para 118).

This test is widely criticized in the scholarly literature for creating a number of logical paradoxes (particularly the ostensible proposition at the second prong, that disbelieved testimony by the accused can itself create reasonable doubt), but remains the law on the issue. The Court summarized the trial court's findings of fact as to the first and second prongs of *WD*, much of which turned on the gaps in the accused's recollection affecting his credibility. The Court stated that the trial court did NOT conclude "I prefer the testimony of the officer over the testimony of the Appellant," which would not have been enough to overcome the reasonable doubt standard under *WD*, but that "instead, he is explaining why the evidence of the Appellant does not leave him with a reasonable doubt, including due to credibility issues" (at para 122). At that point, the trial court turned, as was appropriate, to the third prong of *WD*, and concluded that the rest of the Crown's evidence did support a finding of guilt beyond a reasonable doubt.

In holding that the trial court had appropriately weighed the credibility of the conflicting accounts, the ABQB noted, as has been accepted since the unfavorable reception of *WD*, that it was not necessary for it to have explicitly articulated the three steps of the test. *WD* is not, the Court emphasized, a "magic incantation" (at para 125). This decision is consistent with the weight of the authority since *WD* was decided, which emphasizes that it was primarily intended to prevent fact finders from distorting the Crown's burden of proof in cases of conflicting testimony by simply picking the account of the Crown's witness over that of the accused in cases where the former is *more* convincing yet reasonable doubt remains.

Another point is worth noting about *McCoy* in conclusion. While the Court did not mention it explicitly, had McCoy's *Charter* argument prevailed it might have had a perverse effect on police practices. Dash cams are valuable sources of evidence, useful both to successfully prosecuting the guilty and holding police officers accountable for their behavior while conducting stops. It is therefore a good thing for substantive justice for the RCMP to mandate dash cam use wherever feasible. Yet should courts come to treat internal police policies as creating fixed *Charter* standards, the logical reaction on the part of law enforcement would be to loosen their standards for self-regulation so as to avoid widespread exclusion of evidence. Any attempt by courts to constitutionalize all aspects of police procedure—particularly in the absence of judicial expertise as to the physical and financial constraints on police departments—risks creating such a double bind. Should all failures to follow the dash cam policy constitute automatic section 7 violations, it seems unlikely the policy itself would last for long. As dash cam technology becomes more commonplace and cost-efficient, however, it is not unreasonable to suspect that courts might revisit its constitutional role in the future.