POLICE ACADEMY
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IN SERVICE:10-8

JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

WE'RE ONLINE

"In Service: 10-8" is available online in PDF format. Check out our website at **www.jibc.bc.ca**. All past issues are posted in publication date order.

B&E REQUIRES CRIMINAL INTENT PRIOR TO ENTRY

R. v. McLellan, 2001 BCCA 98

The BCCA has ruled that the intent to commit an indictable offence must precede entry for the offence of break and enter to be made out. In this case the accused rented one bedroom of the ground floor of a house. Another person rented a second bedroom on the same floor. Both shared a common area that included a kitchen and living area but neither had any right of access to the other's bedroom. The accused, who had returned home with his girlfriend's young son, found he had been locked out of his house because he did not have his house keys. Finding his roommate's window slightly ajar, the accused opened it further and boosted his girlfriend's young son through the window to open the front door from inside. After obtaining some property from the common area, the accused entered his roommate's bedroom and took his roommate's leather jacket and Walkman cassette player. The accused was convicted of break and enter at trial. On appeal, the BCCA overturned the accused's conviction and substituted a conviction for the lesser-included offence of theft. The appellate court gave the accused the benefit of the doubt when he contended "that he entered the room only to close the window opened earlier and formed the intent to steal the objects only after he was inside [his roommates room]". The BCCA concluded, "if [the accused] entered the bedroom with the intent to close the window and decided to steal the items later, after he entered the room, …he lacked the necessary criminal intent at the point of entry".

Complete case available at www.courts.gov.bc.ca.

MENTAL ILLNESS AND POLICE INTERVENTION

Part 1 of 6

Mr. Richard Dolman

When police intervene in a psychiatric crisis, their primary role is to control immediate safety problems, to recognize mental disorder, and to decide whether medical attention is needed. It's a demanding role with a growing caseload. To enhance their performance of this role, officers need access to practical information. Many police officers are able to act effectively because they have extra knowledge and experience in handling mental health calls. Some interventions also involve psychiatric nurses and other trained front-line workers. Much can be learned from all these experienced people to reduce stress and danger for everyone concerned and to help police interventions become a more positive step in treatment.

The Justice Institute (JI) Police Academy is taking steps to help BC police and other front-line workers respond better to the challenges of psychiatric crisis. Practical advice and information drawn from many sources will appear in coming months in a new section of the JI website and will be open to the public.

The JI project is a response to growing demands on police to intervene more effectively in mental health emergencies. This is an expanding need in urban centers with our rising concentrations of troubled and alienated people. It's challenging everywhere. Mentally ill persons lose their grip on reality, become the subjects of interventions - and then they may cooperate and welcome hospitalization, or they may not. Police get called when endangerment becomes an issue. This can arise from psychiatric burdens like being unmedicated and unstable, unable to communicate effectively, or in a psychotic episode. The subject may be suicidal, intoxicated, or violent. Also safety can be undermined by the systemic problems of urban life and by imperfect and underfunded community supports, which generate revolving door cases - in and out of

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hospital or jail, vulnerable to alienation, stigma, drugs and alcohol or criminal influences.

Police work can be highly preventive by intervening to rescue such people from untreated mental disorders where they are more likely than the general population to become dangerous, violent, or commit offenses.

People with treated mental disorders are generally as harmless as anyone else, but they can be vulnerable to self-harm. Treatment failure or severe stress can cause them to decompensate. Or they may start feeling better, go off medications abruptly, and get worse very rapidly. Such cases often require sympathetic help from caseworkers or police to re-enter hospital, either voluntarily or involuntarily.

Whether their psychiatric disorders are treated or untreated, most people with serious mental illness also face other factors that can make symptoms disabling and unsafe: not being properly stabilized; inadequate transitional care after hospital discharge; medications that provide much-improved control of symptoms, usually with fewer side effects, but do not cure; confusing messages from civil rights advocates demonizing involuntary treatment; and a few voices opposed to psychiatry or pills in general.

When a crisis occurs, it is often police who get the first call for help. Therefore many police see mentally ill people only at their worst. A cold hard response is not the ideal answer. Intervention should be seen as an opportunity and a need to help these people toward recovery. Police can help to make the community a safer, more tolerant home for people with mental disorders. They can make care giving and management easier for others in the trenches: families, friends, front-line workers, and health professionals.

Information Project

To enhance police understanding of mental disorders and to promote safer and better interventions, an information feature is under development for the Justice Institute's internet website. It is expected to open later this year. The website project will focus on police work and related practical mental health topics. The information will also be open to the public so they can better understand the challenges when intervention is needed. Selected notes from the project will run as a series of articles in coming issues of the "In Service: 10-8" newsletter.

The project was initiated by the Mental Health Committee of the BC Association of Chiefs of Police, chaired by RCMP Chief Superintendent Jamie Graham (Surrey). Project editor Richard Dolman is a founding member of Supt. Graham's committee, a researcher/writer on mental health issues, and a provincial director of the BC Schizophrenia Society. The project is supported by a Ministry of Health development grant and by the Justice Institute Police Academy. It is coordinated by an inter-agency editorial committee chaired by Norm Brown of the Ministry of Attorney General - Police Services. The JI is represented on this group by Steve Watt, Director of the JI Police Academy.

CROOKS WHO FORCE ENTRY TO ESCAPE PURSUERS DO NOT COMMIT B&E

R. v. Schizgal, 2001 BCCA 238

The accused was charged with 2 counts of break and enter and commit mischief. The accused testified that he and a friend were selling stolen property to persons who were unknown to the accused. Something went wrong and 3-4 males began to chase the accused and his friend. The accused testified he was afraid and concerned about being caught by his pursuers. The accused knocked on the sliding patio door of an apartment, asked to be let in, told the occupant he was being chased, but was refused entry. The accused left and went to another apartment where he forced in the locked front door causing damage to the surrounding door frame ($400). The accused walked through the apartment, unlocked the patio door, went out onto the balcony, looked into the courtyard, and turned around to retrace his steps back to the front door. As he passed the female occupant, the accused made a gesture that he was not going to hurt her. A second apartment was entered when the accused forced the door, splintering the frame ($800). The accused entered saying "Somebody's chasing me". The female occupant told the accused to leave the apartment. The accused ran into the living room, went to the patio doors, looked out, and waved his arms frantically. When the occupant picked up the phone to call the police, the accused ran out the door and down the stairs.

Police were dispatched to the area and arrested the accused. At trial, the accused admitted to damaging the doors of the apartments but testified "his purpose was to attract attention and look into the courtyard to see what was going on". In overturning the accused's conviction, the BCCA found that the accused broke and entered the apartments but break and enter in itself does not amount to an offence under s.348(1)(b) *Criminal Code*:

> The [accused] did not break and enter the premises and commit an indictable offence therein, namely, mischief. His actions confirm that his intent was to break into the premises in question, but not for the purpose of committing an indictable offence. He was afraid and attempting to escape his pursuers. He is not guilty of the offence as charged.

The Court substituted a guilty verdict of mischief (damage at point of entry) on both break and enter counts. Interestingly enough, the Court was of the opinion that the evidence would support a charge of forcible entry under s.72(1) *Criminal Code* however, the wording of the charges (B&E) did not embrace s.72(1) as an included offence.

Complete case available at www.courts.gov.bc.ca.

ODOUR SEARCH UNREASONABLE

R. v. Richardson, 2001 BCCA 260

At approximately 1:30 am the accused and two passengers were stopped in a traffic roadblock to detect impaired drivers and persons driving without licences or insurance. During the stop the police detected a strong odour of marihuana emanating from the vehicle. As a result of this olfactory observation, police requested the occupants exit the vehicle and advised them police intended on searching their persons. The accused (driver) produced a small metal box from his pocket containing a small amount of marihuana, a vial of hashish oil, and another unknown substance. Police then searched the interior of the vehicle in an effort to find the source of the odour but nothing of significance was located.

Because of the continued strong odour of marihuana, police asked the accused to open the trunk. The accused complied and police located a large green gym bag and a knapsack. The accused told the officer he did not give police permission to look into the bags. The officer told the accused police were legally entitled to open the bags and when the accused continued to object, the officer handcuffed the accused on the basis he was obstructing the search and placed him in the rear of a police cruiser. The officer located 11 plastic oven bags of marihuana and $6,000 in cash in the gym bag. After finding the items, the officer arrested the accused for possession of a narcotic for the purpose of trafficking. At trial, the Court ruled the search to be unreasonable because the officer lacked reasonable grounds for the search. The Court cited the opinion of the Ontario Court of Appeal in *R. v. Polashek*[1] where that Court held:

> The presence of odour alone did not provide reasonable grounds to believe that the occupant was committing an offence. The sense of smell is highly subjective, and to authorize an arrest solely on that basis puts an unreviewable discretion in the hands of the officer. By their nature, smells are transitory and thus largely incapable of objective verification.

Although finding a violation, the evidence was nonetheless admitted as its inclusion would not bring the administration of justice into disrepute. The accused appealed the conviction and in a 2-1 decision the BCCA upheld the admissibility of the evidence, albeit obtained from a *Charter* infringement. Two justices held the trial judge did not make an unreasonable finding in admitting the evidence, noting that the judge may have decided either way on whether to admit the evidence or not:

> This matter is one where the aggressive decision of the officer to search the appellant upon smelling marihuana, and handcuffing him in the course of a road check could have led the trial judge to exclude the evidence.
>
> On the other hand, the strong smell of marihuana from the vehicle was enough to put the officer on his enquiry and he might have at least detained the vehicle while applying for a warrant. The production by the [accused] of a quantity of hashish oil understandably and quite naturally led the officer to think that this was a case that should be investigated further. The officer obviously made a bad choice in proceeding as he did without seeking a warrant but the events within this incident flowed naturally from the wrong decision to search the [accused] to the ultimate discovery of a large quantity of cash and marijuana in the bag that was in the trunk of the [accused's] vehicle.

[1] (1999) 134 *C.C.C.* (3d) 187 (Ont.C.A.)

Justice Hall, in dissent, although holding the evidence from the trunk should have been excluded, made the following comments:

> …[I]n this case, the police officer proposed to search the trunk area of the vehicle. Such a search could have been appropriate as a search incidental to arrest…However, that was not the basis upon which the officer was proceeding. (references omitted & emphasis added)

Complete case available at www.courts.gov.bc.ca.

S.10 VIOLATION RESULTS IN EXCLUSION OF REFUSAL TO PROVIDE BREATH SAMPLE

R. v. Russell (2000) 150 CCC (3d) 243 (NBCA)

The accused was stopped by police and was requested to provide a breath sample into a roadside-screening device. The accused failed the test, was arrested, informed of his right to counsel, and given the breath demand to provide samples at the police station for analysis. After expressing his desire to contact counsel the accused was afforded an opportunity at the police station. The accused was provided a list of lawyers (with telephone numbers) and access to a private telephone. The accused asked the officer to place the telephone calls on accused's behalf. The officer attempted to contact two lawyers picked by the accused but was unsuccessful. The accused then asked the arresting officer and the breathalyzer technician for advice on whether he should comply with the demand. On three occasions the officers advised the accused police would not provide legal advice and that the accused should continue his attempts in contacting counsel. Although not expressly waiving his right to counsel, the accused did not heed the officer's advice to make further attempts to contact counsel and he advised the arresting officer that he would not comply with the demand. The accused was not informed that he had a reasonable opportunity to contact counsel or that the officer would not renew the demand during the time the accused attempted to contact counsel. Instead, the arresting officer told the accused he would be charged with refusal. Following a final demand for breath samples, the accused refused. The accused argued that the police had violated his s.10(b) right to counsel and that the refusal to comply with the demand should be excluded as a result of that violation.

In overturning the accused's conviction and entering an acquittal, the New Brunswick Court of Appeal found the accused's s.10(b) right to counsel had been violated when the accused (who had clearly and unequivocally expressed a desire to contact counsel at the time of arrest) was not informed that police were obligated to "hold off" from eliciting evidence until the accused had been provided a reasonable opportunity to exercise his right, at p.248:

> The [police] duty to hold off until the detainee has had a reasonable opportunity to exercise his or her right to counsel means that the [police] must refrain from compelling the detainee to make a decision or participate in a process which would ultimately have an adverse effect in the conduct of an eventual trial….This would include an obligation to hold off from acting upon any statement of intention with respect to any breathalyser demand until the advice required by *Prosper*[2] is provided and the detainee chooses not to pursue the exercise of the right to counsel.

In this case, the Court found the accused asserted a desire to contact counsel and was duly diligent in exercising that right. This being the case, the burden of establishing waiver rested with the Crown. Where an accused changes their mind and no longer wishes to contact counsel, the police are obligated to remind the accused of their reasonable opportunity to contact counsel. The Court held the accused (when he informed the arresting officer that he was refusing to provide a sample) was suggesting he had changed his mind and no longer wished to speak to counsel. The police failed in their duty by not again advising the accused of his right to a reasonable opportunity.

Note-able Quote

We are firm in our conviction that the law enforcement officers of this country ought to have the support of the courts. If they do not get support from that quarter, I do not know whence it will come[3].Ont.C.A. C.J.O. Gale.

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Past issues available online at www.jibc.bc.ca.

[2] (1994) 92 *C.C.C.* (3d) 353 (*S.C.C.*)
[3] R. v. Dilivio [1970] O.J. No. 928 (*Ont.C.A.*)