POLICE ACADEMY
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JUSTICE INSTITUTE OF B.C.

A newsletter devoted to operational police officers across British Columbia.

Que.C.A. RE-AFFIRMS INFORMER PRIVILEGE

R. v. D'Aragon (2000) 150 CCC (3d) 272 (Que.C.A.)

The Quebec Court of Appeal again reaffirmed the "right to disclosure cannot prevail over informer privilege unless the accused demonstrates why it is necessary to waive privilege". In this case, a lower court had ordered a stay of proceedings when the Crown failed to provide access to "source meeting reports", which the accused argued were necessary to ensure full answer and defence (a Constitutional right protected under s.7 of the *Charter*). These reports were prepared by police officers and dealt with activities of an informer in other files containing information involving third party criminal transactions. In determining whether privileged information should be divulged to the accused and met "the innocence at stake" exception to informer privilege, the Court adopted a four-step procedure:

1. the accused has the burden of demonstrating that without the information requested their "innocence" would be at stake,

2. if it is successfully demonstrated that there are grounds to conclude that without the information the accused's innocence is at stake, the court will examine the information *ex parte* to determine if it is actually necessary for the accused to make full answer and defence,

3. if the court is satisfied that disclosure is necessary, only information that is essential to full answer and defence should be released, and

4. prior to disclosing the information the court must permit the Crown an opportunity to determine whether to allow the information to be released. If the Crown does not consent to the release of the information, the court will decide an appropriate remedy.

The Quebec Court of Appeal found the trial judge had not followed this procedure, quashed the stay of proceedings, and ordered a new trial.

POLICE AUTHORITY IN THE BC MENTAL HEALTH ACT

Part 2 of 6

Mr. Richard Dolman

The following notes are from an Internet website under development for the Justice Institute of BC to assist police in handling a psychiatric crisis and to improve understanding of mental illness. The project was initiated by the BC Association of Chiefs of Police Mental Health Committee, and was developed in conjunction with the BC Ministry of Health and the Inter-Ministry/Agency Working Committee for Care and Support of Persons with Mental Disorder. Comments and suggestions to the author are welcome at: almond@direct.ca

When does the *Mental Health Act* (*MHA*) enable police to apprehend? The *Act* in s.28(1) says police "may apprehend and immediately take a person to a physician for examination if satisfied from personal observations, or information received, that the person: a) is acting in a manner likely to endanger that person's own safety or the safety of others, *and* b) is apparently a person with a mental disorder." No Feeney warrant is required: the MHA is sufficient authority for entry and apprehension[1]. The MHA does not require any offence to be involved.

What is meant by "information received"? It means police may use collateral information (received from family, partner, friends, or observations by other independent witnesses, etc.) in deciding whether to intervene and apprehend the person. Collateral information is needed, for example, when subject has left the scene, is locked in a room, is deliberately masking symptoms, is not talking, or a mental state is obscured by intoxication, etc.

[1] See Volume 1 Issue 4 of this publication.

What is meant by "likely to endanger"? This does not require actual or attempted physical danger to self or others. It is sufficient for police to find that endangerment is likely to occur.

Does the MHA require police to arrest the person who meets s.28(1) criteria? No, not by itself. The Act provides authority to apprehend and transport in custody to a hospital for medical examination. If subject is unwilling, apprehension may include a technical arrest. If an offence is involved, police may have other powers to arrest the subject.

What if an offense is involved? Beyond the hospitalization authority of the *MHA*, police have other authority (e.g. *Criminal Code*, provincial statutes) to take a mentally disordered offender to police lockup, where he or she can have a psychiatric examination. The court has several options with several outcomes (detailed in Part 6). If a subject has committed a minor offence or engaged in low-risk nuisance behaviour, police have some alternatives to arresting the subject. These "diversion" alternatives include, for example, contacting the subject's family or caregivers or taking the subject to a hospital.

What is the police role at the hospital? Police need to attend at the hospital until authorized medical staff can take over custody officially and safely. If the subject is unruly while waiting at the hospital, police may need to remain in attendance and use statute or common law authority to preserve peace and assist hospital staff.

Which mental disorders does the *MHA* cover? Diagnostic details do not appear in the Act. The main criteria appear in the definitions of the Act. "Mental disorder" is defined as *"a disorder of the mind that requires treatment and seriously impairs the person's ability a) to react appropriately to the person's environment, or b) to associate with others."* (Treatment is defined as psychiatric treatment. Therefore the Act aims at psychiatric disorders. These disorders are controlled by psychiatric medications. Examples are schizophrenia, bipolar, major depression, or serious anxiety disorders). General experience and instinct often help police decide if subject's behaviour is well beyond the normal range. If police believe the main criteria indicate mental illness (see underlined italics) but are not sure about the type of disorder, they should transport the subject to hospital and leave the diagnostic decisions to the physician.

What are the criteria used by the hospital physician? The subject can be committed to involuntary hospital treatment by a physician (and only by a physician), based on the main criteria (underlined above), and in s.22(3): to prevent the subject's substantial mental or physical deterioration, or for the protection of the subject or others.

What are the other police roles under the *MHA*? In addition to authorizing police apprehension as described above, the *Act* authorizes police to apprehend on medical certificates or by warrants. A hospital can issue a Director's Warrant (Form 21) or a physician can issue a Medical Certificate (Form 4). Anyone can apply (on Form 9) for a Judicial Warrant (Form 10). Form 9 appears on pages 62-63 of the Guide to the BC Mental Health Act. Copies can be used.

What about safety and conduct when intervening? Being apprehended by uniformed police can be unduly traumatic and counter-productive for a person in a mental crisis. In low-risk calls, officers can try to attend in plainclothes or in an unmarked car. However, in high-risk cases, the police uniform and firmness may help.

The best strategies include:

- Safety first. Keep calm. Separate the subject from anything dangerous. Get help and plan an escape route if needed.
- De-escalate the situation. Use an ERT negotiator via phone if appropriate. In a direct-contact case, speak slowly. Move slowly. Don't crowd the subject; be ready to step back and allow time to calm down.
- Use normal eye contact but don't stare. Sit side by side, or astride a chair turned backward.
- Don't take rudeness personally. Be patient - the subject may be having trouble understanding you and processing answers. Be understanding of issues even when you don't necessarily agree.

Intervention should be respectful of the person's humanity. The subject did not ask to be mentally ill, and may be finding communication very difficult. Be as empathetic and supportive as circumstances permit. If subject is depressed, offer to get help and encourage realistic hopes (not false hopes). Be firm and reassuring. Don't argue or be judgmental about

symptoms etc. Promote a positive attitude toward treatment. This will help prevent relapse.

NEXUS BETWEEN PROBATION CONDITION & OFFENCE/ ACCUSED'S HISTORY NOT REQUIRED

R. v. Kootenay 2000 ABCA 289

The accused plead guilty to a theft of vehicle over $5000 and break and enter of a retail clothing store where property valued between $15,000 to $20,000 was taken. As a result the accused was sentenced to two months consecutive to a sentence the accused was already serving and placed on probation for a period of 18 months. The accused appealed the following condition of the probation order:

> "abstain absolutely from the use, possession, and consumption of alcohol or any drugs forbidden under the *Controlled Drugs and Substances Act*"

The accused's appeal was based on the premise that the consumption of alcohol or drugs neither played any part in the commission of the offence nor was their any evidence that the accused had or has problems with alcohol or drugs. In dismissing the appeal, Alberta's highest court recognized that rehabilitation and reintegration, the principle focus of probation, are "forward looking purposes" designed "to influence the offender's future conduct" and "the conditions of a probation order should not be limited or constrained by requiring a nexus to the circumstances of the offence or the offender's past behaviour". The probation condition thus stands.

Complete case available at www.albertacourts.ab.ca.

UNDERCOVER OFFICER ENTRAPS YOUTH AT ROCK CONCERT

R. v. J.S. (2001) 152 CCC (3d) 317 (OntCA)

The accused, a 14 year old young offender at the time, had driven with some friends to attend the Marilyn Manson concert in Hamilton at Copps Coliseum. The accused was in possession of $30 worth of marihuana he had purchased, intending to smoke it at the concert. Two undercover police officers, dressed in Marilyn Manson concert attire (white face makeup, black wigs) approached the accused who was standing outside a Harvey's restaurant. One officer approached the accused, made a comment that he was unable to find any drugs in Hamilton, and asked if anyone knew where he could "score some weed". The accused asked how much the officer was looking to which the officer replied, "for a few joints…a dime". While discussing with his friends whether he should sell any marihuana, "the officer continued to press for the sale". The accused told the officer to meet him in the washroom of Harvey's, sold the marihuana, and was arrested by police. At the trial the accused testified he was hungry and wanted to buy some food but did not have any money. The accused's application for a stay of proceedings on the basis of abuse of process by entrapment was dismissed and the accused was given a conditional discharge. The accused appealed and the Ontario Court of Appeal set aside the conviction and entered a stay of proceedings.

The test for entrapment involves a two branch enquiry:

1. Did the police act on a reasonable suspicion that an offence was occurring when the police targeted the area or individual?

2. Did the police go beyond providing an opportunity to commit the crime and actually induce the commission of an offence?

Each branch stands alone and a finding of entrapment can be sustained on the basis of either enquiry. In this case the Court only felt it necessary to deal with the second branch. In finding that the accused was entrapped, the Court relied on the reasons of the trial judge where she found:

- the accused would not have sold marihuana without the police approaching and importuning him
- the accused was naive
- the sale was not made for profit
- the accused was uncertain how to respond to the officer's as evidenced by his conferring with his friends
- the accused's concern for his safety because the officers were much bigger, stronger, heavier, and older than himself

LIFE SENTENCE UNFIT FOR BRUTAL STABBING

R. v. Brown (2001) 152 CCC (3d) 26 (NfldCA)

The accused plead guilty to attempted murder after having broke into the victim's residence armed with a knife and stabbing her repeatedly. The victim received 22 stab wounds to the body and extensive trauma to her facial and head area. She underwent surgery to repair her liver, bowels, bladder and her spleen was removed. The accused, who was 20 years old at the time with no previous criminal record, and the victim had been involved in a 3 year relationship and were separated just before the birth of their daughter. The trial judge imposed a life sentence and the accused appealed that sentence.

The Newfoundland Court of Appeal found the life sentence too severe and instead substituted a 14-year sentence. In their reasoning the Court found a life sentence is generally justified only in cases of "stark horror" or in cases where the offender has a record of violent behaviour showing no signs of remorse and a likelihood of future violence. In assessing whether this was a circumstance of "stark horror" the Court recognized "stark horror cases usually involve exceptional acts of brutality or cruelty and are considered more serious when premeditated and the acts needlessly repeated". Although the trial judge accurately described the accused's act as "horrendous", the Appeal Court found there was an absence of "an intent or attempt to inflict pain, fright or panic-suffering tantamount to torture-solely for his or her gratification or for some other perverse reason". Steele J.A. for a unanimous Court, at p.47:

> Without a doubt the commission of the offence by the [accused] in this case was shocking, but it is not at that rare level that cries out for the maximum punishment of life imprisonment. Simply expressed, the circumstances of the offence are not such as to explain or vindicate a sentence of life imprisonment.

And further at p.55:

> In summary, while recognizing that the commission of the offence was cold-blooded and merciless, nevertheless, it falls short of inclusion in the most notorious group that is characterized as cases of stark horror-"unusual features of brutality or cruelty"-that clearly indicate a disturbed personality and a continuing danger.

On the second branch, whether the accused was a future danger, the Court found there was an absence of "cogent evidence" as to the future dangerousness of the accused and therefore a life sentence was not proper on this ground either.

COLLECTING DEBT THROUGH CRIMINAL PROCESS RESULTS IN STAY

R. v. Thore, 2001 BCSC 507

The victim of a mischief filed a complaint with the police alleging that the accused broke the windshield of the victim's van by banging on it. The following day the accused spoke to the victim, asked her not to contact the police, and explained he would pay to replace the windshield. The cost for the repair however, exceeded what was anticipated. The victim told the police investigator that as long as the windshield was repaired she would not press charges. Furthermore, the police officer contacted the accused and advised him that the accused should come to an agreement with the victim or the accused would be charged. The officer also advised the victim to continue pressuring the accused to pay for the damage, but accused was unable to acquire the necessary funds to pay the $1500 repair. The Court concluded, based on the police officer's actions and the testimony of the victim, "that restitution was really the only goal of the prosecution". Where the collection of a civil debt is the sole purpose of a criminal prosecution, a court may find that charges are an abuse of process. In ordering a judicial stay of proceedings, Justice Melnick recognized the societal interest is ensuring a vandal is punished does not outweigh the societal interest in ensuring that the criminal process is not used as a means to collect private debts.

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

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