

CANADA / JUDGMENT

Mason v. Turner

2016 BCCA 58

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 58 Mason v. Turner COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Mason v. Turner, 2016 BCCA 58 Date: 20160128 Docket: CA41910 Between: Charity R. Mason Appellant (Plaintiff) And Const. Drew Turner and the Corporation of the City of Nelson Respondents (Defendants) Before: The Honourable Mr. Justice Donald The Honourable Madam Justice A. MacKenzie The Honourable Mr. Justice Willcock On appeal from: an order of the Supreme Court of British Columbia, dated February 11, 2014 (Mason v. Turner, 2014 BCSC 211, Nelson Registry No. 15226) Oral Reasons for Judgment Appellant appearing In Person: Counsel for the Respondent, Const. D. Turner: E.E. Vanderburgh and T. Hoogstraten Place and Date of Hearing: Vancouver, British Columbia January 28, 2016 Place and Date of Judgment: Vancouver, British Columbia January 28, 2016 Summary: Appeal from the dismissal of claims for declarations that the appellant's Charter rights as protected by ss. 7, 8, 9 and 10(a) were violated and from the dismissal of claims for sexual assault, assault, battery, false imprisonment, unlawful detention and negligence, and appeal from an award of damages of \$500 against the City of Nelson for a breach of Ms. Mason's rights under s. 10(b) of the Charter. Ms. Mason asserted the appropriate damages for the s. 10(b) breach was in the range of \$25,000. Her claims arose from a pat-down or "frisk" search by Constable Turner in Nelson, British Columbia, after he pulled over a truck in which she was a passenger in response to reports of a traffic violation. On approaching the truck, Constable Turner smelled vegetative marihuana and told the occupants he would search them personally as well as the truck. As a result of the search, he found \$7,420 in Ms. Mason's purse, but no drugs. Constable Turner released the occupants after the searches. He did not advise them they had the right to retain and instruct counsel. The central issue was whether there were reasonable grounds for the de facto arrest of Ms. Mason to make the warrantless search incidental to a lawful arrest. The trial judge found there were such grounds and the search was reasonably conducted. It did not constitute a sexual or physical assault. Held: Appeal dismissed. The trial judge made findings of credibility and fact that were open to him on the record. He applied the governing authorities and provided cogent reasons. Ms. Mason failed to identify any reviewable error.

[1] A. MACKENZIE J.A.: Charity Mason appeals the order of Mr. Justice Voith made February 11, 2014, in the following terms: THIS COURT ORDERS that:

1. The Plaintiff's claim for declarations that her rights, as guaranteed by ss. 7, 8, 9 and 10(a) of the Canadian Charter of Rights and Freedom[s] were violated, is dismissed;
 2. The Plaintiff's claim for a declaration that her rights, as guaranteed by s. 10(b) of the Canadian Charter of Rights and Freedom[s] is allowed, and the plaintiff is awarded \$500.00 damages against the Defendant, the Corporation of the City of Nelson.
 3. All other claims against the Defendants, Cst. Drew Turner and the Corporation of the City of Nelson, including the Plaintiff's claims for sexual assault, assault, battery, false imprisonment, unlawful detention and negligence are dismissed.
 4. Costs to be determined by further order of the Court, if necessary. She appeals both the dismissal of her claims and the award of \$500 in damages for breach of s. 10(b) of the Charter, pursuant to s. 24(1) of the Charter, asserting the appropriate amount is in the range of \$25,000.
- [2] Ms. Mason's claims arose from a pat-down or "frisk" search by Constable Drew Turner on June 26, 2009, in Nelson, British Columbia, after he pulled over a truck in which she was a passenger in response to reports of a traffic violation.
- [3] On approaching the truck, Constable Turner smelled vegetative marihuana and told the occupants he would search them personally as well as the truck. As a result of the search, he found \$7,420 in Ms. Mason's purse, but no drugs. Constable Turner released the occupants, including Ms. Mason, after the searches. Constable Turner did not advise any of the truck's three occupants that they had the right to retain and instruct counsel.
- [4] Although Chief Constable Maluta and Constable Holland attended at the scene to support Constable Turner, and gave evidence as to detecting the smell of vegetative marihuana in the truck, they did not participate in the search.
- [5] Ms. Mason represented herself at trial, as she does on appeal. The judge's reasons, indexed at 2014 BCSC 211, contain a detailed analysis of the evidence, comprehensive findings of fact, and a thorough review of the governing law. An overview of the case is sufficient for the purposes of this appeal.
- [6] The trial judge set out the issues at para. 53 of his reasons, as follows:
1. Was the plaintiff lawfully detained?
 2. Was the plaintiff lawfully arrested or de facto arrested?
 3. Was the search of the plaintiff authorized by law?
 4. Was the search carried out in a reasonable manner?
 5. Was there a violation of ss. 7, 8, or 9 of the Charter?
 6. Was there a violation of ss. 10(a) or 10(b) of the Charter?

7. Was there a sexual assault, a physical assault, or a false arrest or imprisonment?
 8. Was there negligence on the part of Chief Constable Maluta for which the City is liable?
 9. If there was an intentional tort, what are the appropriate damages?
 10. If there was a Charter breach, what is the appropriate remedy?
- [7] The judge dismissed the claim against Chief Constable Maluta on a no- evidence motion. Ms. Mason's claim that he had a duty to supervise and direct Constable Turner, and failed to properly exercise his duty of care to supervise the officers under his command and to prevent breaches of the law by those officers, was treated by the parties and the court as a claim of negligent supervision. Ms. Mason led no evidence as to the applicable standard of care or as to whether his conduct could form the basis for negligence or any other intentional tort. On October 8, 2014, although Mr. Justice Harris extended the time for filing the notice of appeal of the dismissal of the claims against Constable Turner and the City, he dismissed Ms. Mason's application for an extension of time with respect to the claim against Chief Constable Maluta and amended the style of proceedings to remove him as a respondent.
- [8] After a review of the evidence and an assessment of the credibility of the witnesses, the trial judge found that although the occupants of the truck were never explicitly arrested, there was an objective basis to support the de facto arrest of the three occupants and, in light of all the evidence, the searches of the truck and of Ms. Mason's purse incidental to the de facto arrest were also lawful. [paras. 81-82; 90] The judge then considered the search of Ms. Mason and found it was conducted reasonably without constituting a sexual or physical assault. [paras. 92, 104] The s. 7 Charter claim was not pursued in submissions, however, the trial judge proceeded on the basis it was a generic or overarching claim representing the pleaded violations of her ss. 8, 9 and 10 Charter rights. Having regard to the facts of the detention, the de facto arrest and the search, the judge found there was no breach of Ms. Mason's rights under ss. 8 or 9 of the Charter. [paras. 95-96]
- [9] In considering s. 10(a) of the Charter, the judge was satisfied Ms. Mason understood why she had been detained, de facto arrested and searched. [para. 97] However, the judge found Constable Turner violated Ms. Mason's rights under s. 10(b) of the Charter by failing to inform her of her right to retain and instruct counsel when the focus of the detention shifted from a traffic stop to a drug offence. Pursuant to s. 24(1) of the Charter, and applying the framework for Charter damages set out in *Vancouver (City) v. Ward*, 2010 SCC 27, the judge awarded Ms. Mason \$500 in damages payable by the City of Nelson. As recognized in *Ward*, such damages are payable by, and should be sought against, the state, rather than by private individuals.

- [10] I will first address the grounds for which no appeal can lie. In her factum, Ms. Mason begins her argument this way: [AF p. 5] The judge erred in applying: the Charter of Rights and Freedoms, section 7: life, liberty and security of the person, 8: search or seizure, 9: arrest or detention, 12: treatment or punishment, 15: equality before and under the law, equal protection and benefit of law.
- [11] Ms. Mason's appeal centers on the lawfulness of the detention and search which engage ss. 8, 9 and 10 of the Charter. At trial, she neither pleaded nor argued violations of ss. 12 or 15. There is no basis on the record for an appeal based on those sections of the Charter, for which Ms. Mason presents no argument in any event. This is not one of those rare circumstances in which this Court, in balancing the interests of justice to all parties, should grant leave to advance a new Charter issue on appeal: *R. v. Lilgert*, 2014 BCCA 493 at paras. 14, 17.
- [12] Nor does Ms. Mason have a viable appeal regarding the dismissal of the claim in negligence against Chief Constable Maluta because as noted, her application for an extension of time to file an appeal of the dismissal order was unsuccessful. Furthermore, the order she seeks on appeal "that any costs awarded to Chief Constable Maluta be paid by the remaining defendants" cannot lie as the trial judge has not yet made an order for costs.
- [13] The remaining issues on appeal can be framed as being whether the trial judge erred:
1. in finding Ms. Mason was lawfully arrested;
 2. in finding Ms. Mason's ss. 8 and 9 Charter rights were not violated;
 3. in assessing her damages;
 4. in dismissing Ms. Mason's claim for damages as against the individual police officers.
- [15] The trial judge made findings of credibility and fact that were open to him on the record. He applied the governing authorities and provided cogent reasons. In my opinion, an application of the narrow standard of review in this Court disposes of this appeal. Appellate interference is warranted only for palpable and overriding errors of fact or any error of law: *Housen v. Nikolaisen*, 2002 SCC 33. Ms. Mason has failed to identify any such error. This Court cannot simply retry the case to reach a different outcome.
- [16] Ms. Mason's arguments are based on her sense of having been caught up in an incident that had nothing to do with her. She suffered the physical intrusion of a search as a result. The trial judge largely accepted her evidence. But his task was to determine what damages she incurred from the limited breach of her Charter rights. He performed this task.

Conclusion

- [17] It follows that substantially for the reasons of the trial judge, I would dismiss the appeal.
- [14] DONALD J.A.: I agree.

[15] WILLCOCK J.A.: I agree.

[16] DONALD J.A.: The appeal is dismissed. "The Honourable Madam Justice A. MacKenzie"

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