

Case Name:
R. v. Burns

Between
Her Majesty the Queen, and
Stanley Burns and William Massey

[2003] O.J. No. 6323

Nos. 1911-998-020548 and 1911-998-020549

Ontario Court of Justice
Brockville, Ontario

P. Griffiths J.

April 22, 2003.

(29 paras.)

Counsel:

C. Wilhelm, Counsel for the Crown.

S. Edgley, Counsel for the Accused - S. Burns.

J. Johnston, Counsel for the Accused - W. Massey.

REASONS FOR JUDGMENT

1 P. GRIFFITHS J. (orally):-- Stanley Burns and William Massey are charged under Section 446(1)(c) of the Criminal Code, of having the custody or control of domestic animals, "to wit: 77 dogs" and willfully failing to provide suitable and adequate shelter and care for those dogs.

2 At the outset of the their trial on that charge and before the hearing of any evidence on the substantive charge an application was brought on behalf of both of the defendants for a finding by the court that a search warrant was issued in this case in breach of Section 8 of the Canadian Charter of Rights and Freedoms.

3 Further, the application pleads that if a breach is found the evidence obtained as a result of the execution of the search warrant should be excluded under Section 24(2) of the Charter.

4 The facts in this case are that on September 5, 2001 Tanya Firmage, an Inspector with the Ontario Society for the Prevention of Cruelty to Animals for Leeds and Grenville received a telephone call from a Mr. Powell alleging that dogs on the property of the defendants were in distress.

5 Ms. Firmage was familiar with the defendants and their animals, and with the property that she knew to be their home, as she had executed search warrants there on two prior occasions in April 1999 and January 2001.

6 On each prior occasion orders were issued relating to the care of dogs on the property and on each occasion those orders were complied with. No animals were seized and no charges were laid as a result of the execution of those earlier warrants.

7 As a result of the phone call and informed by her prior experience the inspector sought and obtained a search warrant for the defendants property under s. 12 of the O.S.P.C.A. Act, which reads as follows:

Section 12(1)

"Where a Justice of the Peace is satisfied by information on oath that there are reasonable grounds for believing that there is in any building or place, other than a public place, an animal that is in distress, he or she may at any time issue a warrant authorizing an inspector or an agent of the Society named therein to enter therein, either alone or accompanied by a veterinarian and inspect the building or place and all animals found therein for the purpose of ascertaining whether there is therein any animal in distress."

8 The information placed before the Justice of the Peace was brief and is reproduced here in its entirety.

"Appendix A, September 11, 2001. My name is Tanya Firmage. I am an Inspector with the Ontario Society for the Prevention of Cruelty to Animals and work out of the Leeds and Grenville branch located on Centennial Road in Brockville, Ontario. I have been doing investigations since 1995. The following are my grounds for believing that there are animals in distress at 4365 Lords Mills Road in the Township of Augusta and therefore request a warrant to enter the property.

On September 5, 2001 I received a telephone call from Mr. Powell of Brockville, Ontario. He stated that he used to reside in the same home as Mr. Stan Burns and Mr. Bill Massey on Lords Mills Road. Mr. Powell said that he had seen the news coverage regarding the recent removal of approximately 230 dogs from the puppy mill in Vaughan, Ontario and he believes that the same thing is going on with Mr. Burns and Massey.

Mr. Powell said that he thinks that there are at least 80 dogs on the property. Thirty inside the house and the rest outside in a barn type structure. Mr. Powell said that he does not think that the animals are getting proper food, water or any veterinary care and states that they are in bad condition. When I asked Mr. Powell if he knew why type of dogs they were he said that there were too many different kinds to remember.

Mr. Powell also said he witness Mr. Burns punching a poodle type dogs which subsequently died the day after that incident.

I have had to conduct investigations at this address on numerous occasions. Each time there were

animals in distress and as a result there were orders issued on the affected animals. On previous attempts to view the animals I have always had to obtain a warrant as the property owners will not willingly grant us access to view any animals. It is therefore my hope that on these grounds a warrant will be issued.

Sincerely, Tanya Firmage, O.S.P.C.A. Inspector, Badge #597"

9 That Appendix A was sworn to as part of the Information to Obtain a Warrant.

10 The relief sought of the Justice of the Peace was for a warrant permitting the inspector and a veterinarian to attend on the property to determine if there were animals in distress.

11 The warrant was signed on September 11, 2001 and was executed on September 12, 2001.

12 Following the execution of the warrant the Criminal Code charge under Section 446(1)(c) was laid alleging the mistreatment of 77 dogs. No other evidence was called on the application providing any particulars as to the condition of the dogs or the nature of the mistreatment.

13 On the Charter application the defendant Stanley Burns testified. His uncontradicted testimony was that the informant Powell had lived with the two defendants from March 2000 to July 27, 2000. He testified Powell had not been back to the property since July 2000 - 15 months before calling the Society for the Prevention of Cruelty to animals.

14 Further, Mr. Burns testified that Mr. Powell had not departed on good terms. He had sued Mr. Burns and Mr. Massey in Small Claims Court and they had counter-sued - the suit and counter-suit were contested and both were dismissed in May 2001. Burns testified that Powell had made several phone calls of a threatening nature to Burns in the months before the S.P.C.A. was called.

15 I find that the information of Ms. Firmage is grossly deficient and could not support the issuance of a search warrant. She obtained no information from Powell as to the nature of the mistreatment complained of or of the timing of that mistreatment. She made no secondary inquiries into the reliability of her informant or his information.

16 A search warrant could not possibly have issued based on a bald, unparticularized allegation of mistreatment from 15 months in the past.

17 Of particular note is the fact that an S.P.C.A. Act search warrant was issued and executed in January 2001 - over five months after the currency of Powell's complaint. That warrant resulted in no charges and the removal of no animals.

18 I find that the stale dating of the information, its lack of particulars, and the failure to make any inquiry in to the reliability of the informant or his information constitute together and individually a gross breach of the right to be secure from unreasonable search and seizure under s. 8 of the Charter.

19 The answer to the first question is that there has been a breach of the s. 8 right to be secure from unreasonable search and seizure.

20 Turning to the second issue, what remedy, if any, should flow from the breach?

21 To answer this question I am directed by the Supreme Court in Collins and the Queen, [1987] 1 S.C.R. 265, to conduct a three stage inquiry to determine if the applicant has satisfied me on a balance of probabilities that the evidence should be excluded.

- 1) Would the admission of the evidence affect the fairness of the trial?
- 2) How serious was the breach?
- 3) Would the exclusion of the evidence bring the administration of justice into disrepute.

22 Counsel for the defendants and the Crown concede that trial fairness is not an issue in this case as the evidence is non-conscriptive.

23 As to the seriousness of the breach, I find that this was a breach that was quite serious. The inviolability of an individual's home from improper searches by agents of the state is one of the oldest principles of our law dating back to the Magna Carta. It is a principle that has been reinforced and re-emphasized repeatedly in recent years by the Supreme Court of Canada. A breach of the right to be secure from an unreasonable search of a home is a breach of the highest order.

24 This is not a technical breach of small importance. If the full facts as to the date of the informant's information were before the Justice of the Peace she could not possibly issue a warrant.

25 The breach then is neither minimal nor technical. I do not hold an inspector for the Society for the Prevention of Cruelty to Animals to the same high standard for search warrant drafting as I would a peace officer. If I did, I would find that the inadequacies of the information in Appendix A are so many and so obvious that only bad faith could explain them.

26 The final test goes to whether the administration of justice would be brought into disrepute by the exclusion of the evidence illegally obtained. In my view, the breach is so serious that it must be said on a balance of probabilities that the evidence ought to be excluded.

27 In the result all evidence obtained as a result of the execution of the search warrant will be excluded.

28 MS. WILHELM: The Crown has no evidence to call Your Honour.

29 THE COURT: The Crown calling no evidence the charges against Mr. Burns and Mr. Massey are dismissed.

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