

CITATION: R. v. Boateng Appiah, 2018 ONSC 6978  
COURT FILE NO.: CR-17-90000-447-0000  
DATE: 20181221

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

)  
)  
) *Julia De Filippis* for the Crown  
)  
)

- and -

JESSE BOATENG APPIAH

Applicant

)  
) *Jordana H. Goldlist* for the Applicant  
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) HEARD: November 19, 20 and 21, 2018

G. DOW, J.

REASONS FOR DECISION

[1] The applicant, Jesse Boateng Appiah pleads not guilty to having in his possession heroin (diacetylmorphine) for the purpose of trafficking contrary to Section 5(2) of the *Controlled Drugs and Substances Act*. He also pleads not guilty to possessing property, in this instance \$1,260.00 in cash obtained or derived as a result of committing an indictable offence as set out in Section 354(1)(a) of the *Criminal Code* thereby committing the offence set out in Section 355(b) of the *Criminal Code*. A blended *voir dire* and trial was held as part of Jesse Boateng Appiah's application to:

- a) exclude the evidence being 13.07 grams of heroin and \$1,260.00 of cash which was seized from Jesse Boateng Appiah during the course of his arrest and subsequent Level 3 search on December 12, 2015 on the basis that his search was unreasonable and contrary to Jesse Boateng Appiah's *Charter* rights under Section 8;

- b) similarly, exclude the 13.07 grams of heroin and \$1,260.00 of cash from use as evidence at his trial on the basis that he was arbitrarily detained or imprisoned contrary to his *Charter* rights under Section 9;
- c) exclude the 13.07 grams of heroin and the \$1,260.00 of cash as evidence at his trial on the basis that he was denied his right to be informed promptly of the reason of his arrest and to retain and instruct counsel contrary to his *Charter* rights under sections 10(a) and 10(b) of the *Charter*; and
- d) alternatively, have these charges stayed on the basis the admission into evidence of the 13.07 grams of heroin, the \$1,260.00 of cash and the other items seized would bring the administration of justice into disrepute in accordance with section 24(2) of the *Charter*.

[2] At the opening of this proceeding, the parties requested and I granted an order banning publication of this proceeding. I also ordered the witnesses excluded before giving their evidence except the accused and officer in charge. The accused conceded for the purpose of this proceeding that:

- a) the drugs found on his person were in his possession for the purpose of trafficking;
- b) the officers had lawful authority to be in 11 Catford Drive under the *Trespass to Property Act*, R.S.O. 1990, c. T.21;
- c) the drugs found in the possession of Jesse Boateng Appiah were heroin; and
- d) the Crown had properly maintained what was seized from the accused as part of determining it was heroin.

[3] In addition, the identity of the accused, the date and time of the alleged offence and jurisdiction were admitted. Finally, the application before me would be dispositive of the trial.

[4] The Certificate of Analysis was marked as Exhibit 1. Five photographs of what was seized and the accused's black sports compression shorts were marked as Exhibits 2A to 2E.

### **Background**

[5] Jesse Boateng Appiah testified in the application that he is currently working as a part-time general helper at Road 2 Glory Fitness. He is 23 years old. In December, 2015, he had completed secondary school at Monsignor Fraser College as of November, 2014. He had been unable to obtain work since graduating despite applying for jobs and was interested in working with children.

[6] On December 12, 2015, he testified he went to 11 Catford Road, a multi-story residential community housing building to meet his friend, DeMar Brown. Mr. Brown resided in Unit 402.

They contacted each other on social media, likely Snapchat, rather than by cell phone. They intended to eat at Willy's Jerk, a nearby restaurant. Mr. Boateng Appiah intended to proceed following that event to meet a friend, Jerome, whom he had known for four or five years but could not easily spell the surname. He also did not know this individual's cell phone number. Again, they contacted each other by Instagram or Snapchat. He intended to pay Jerome back money he had borrowed from him about six months earlier.

[7] Jesse Boateng Appiah was also carrying dime bags and additional heroin concealed in his undergarments along with two burner cell phones, a third cell phone for personal use, a spoon and cash in five, ten, twenty, fifty and one hundred dollar denominations totaling \$1,260.00.

[8] Officer Juan Carlos Valencia, a member of the Toronto Police Services for more than 10 years, had received information from a confidential informant that drug activity was being conducted on the fourth and fifth floor at 11 Catford Road. He and his escort, Officer Andrew Haworth, also with the Toronto Police Services for more than 10 years, attended in uniform travelling to the location in a marked police cruiser.

[9] The officers gave evidence of having personally made notes shortly after the events they testified about, and had brought their original notes with them. The notes were without any additions, deletions or alterations. Each requested they be permitted to refer to their notes to refresh their independent recollection of events. Both also testified, in cross-examination on the use of their notes, having not shown or consulted each other with regard to the content of their notes. To that end, the request was not opposed and I ordered that each officer be permitted to refer to their notes as required.

[10] The officers entered the building from an east side entrance with a stairwell. The building has two rectangular portions, the east portion being off-set to the west portion while the elevator lobby to both portions is in the middle of what was described as a "Z" shape. Toronto Police Services also had written authorization from building management to enter the property for the purpose of enforcing the *Trespass to Property Act, supra*. The officers' notes indicate that they arrived at 6:11 pm and each testified proceeding to the fourth floor where upon they began walking westbound towards the elevator lobby.

[11] Jesse Boateng Appiah admitted in his evidence sitting on the ledge of a radiator cover near the elevator when he observed the police officers entering the elevator lobby area. Mr. Boateng Appiah also testified that the two burner phones in his possession were on the radiator ledge. However, he denied having any cash or a dime bag of heroin or any cell phones in his hands. This contradicts the evidence of Officer Valencia who testified first observing Mr. Boateng Appiah sitting on the ledge as he rounded the corner to the elevator lobby shuffling cash between his hands with the two cell phones beside him on the ledge. Officer Haworth recalled or noted observing Mr. Boateng Appiah with cash and cell phones and moments later a dime bag of heroin being in his hands as they approached.

[12] The dime bag of heroin was estimated to be 1 inch by 1 to 1 ½ inches of clear plastic with inked green leaves on it and white powder visible inside.

[13] Jesse Boateng Appiah testified when he saw the police officers that he knew they would come over to him so he stood up. He was asked if he lived in the building and replied "No". He was asked if he had identification and provided his driver's license from his pocket. He was advised he was being arrested for trespassing. As Officer Haworth remained facing Mr. Boateng Appiah, Officer Valencia moved to Mr. Boateng Appiah's left as part of the handcuffing process him such that Mr. Boateng Appiah's hands were behind his back. Officer Valencia also began patting him down and pulled out the waistline of Mr. Boateng Appiah's jeans which he was wearing below his waist. Underneath the jeans were black, sports compression shorts (photo of same marked as Exhibit 2C), the waistband of which was at his waist or above the waistband of the jeans. Mr. Boateng Appiah testified that Officer Valencia reached inside his inner red spandex underwear that he was wearing to conceal a larger clear plastic bag containing multiple dime bags of heroin. Officer Valencia retrieved that bag.

[14] The patting down by Officer Valencia continued around and towards his crotch area at the front at which time Mr. Boateng Appiah protested that he "can't do that here" to which one officer said "let's take this guy".

[15] At this point, Mr. Boateng Appiah acknowledged being told of his right not to speak and to consult with counsel which he requested he be permitted to do. His speaking with counsel did not occur until he was at the police station.

[16] Jesse Boateng Appiah testified the pat down search made him feel violated and embarrassed. It was "weird" to him. He admitted that there was no one else walking around the elevator lobby to see what the officers were doing. He testified he wanted someone to see what was going on so that the officer would stop.

[17] Jesse Boateng Appiah confirmed being taken to the police station where a Level 3 or strip search was conducted by the same two officers. It was done in an interview room and he was treated "properly". That is, the search was done in private. His clothing was removed one item at a time and returned to him such that he was never fully naked. The search resulted in the police finding and removing additional heroin in gray plastic film located in his crotch area.

[18] Officer Valencia's evidence was he first saw Jesse Boateng Appiah sitting on the radiator ledge as he and Officer Haworth rounded the corner into the elevator lobby. Mr. Boateng Appiah was hunched forward, very focused, and shuffling cash between his hands as if counting it. There were two cell phones also on the radiator ledge which Mr. Boateng Appiah admitted in his cross-examination were there and burner phones. They were also periodically ringing.

[19] Officer Valencia increased his pace of walking as he approached and observed Jesse Boateng Appiah looking shocked, very surprised, and appeared frozen upon seeing the officers. By this point, Officer Valencia had also seen a dime bag pinched between Mr. Boateng Appiah's baby finger and base of his thumb. From Officer Valencia's training and experience, he believed the bag contained narcotics. This combination of cell phones, cash and the dime bag was almost "unbelievable" when this was suggested to the officer in cross-examination. There was no effort to conceal the dime bag.

[20] At this point, Officer Valencia testified he formed the grounds to arrest Jesse Boateng Appiah. Before he could do so, Officer Haworth placed Jesse Boateng Appiah under arrest and requested that Officer Valencia handcuff the accused using the phrase "link him up".

[21] Jesse Boateng Appiah was compliant and co-operative as he was arrested and handcuffed. Following this, Officer Valencia proceeded with his pat down search, the purpose of which was to ensure officer and accused safety. In cross-examination, Officer Valencia did not waiver from testifying that he felt a bulge at the back of Mr. Boateng Appiah's waistline, above the top of the jeans he was wearing and under the black sports compression shorts. The waistband of the shorts were pinched and a larger bag containing multiple dime bags was extracted from between the black sports compression shorts and Mr. Boateng Appiah's inner red spandex underwear which covered his buttocks.

[22] Officer Valencia opened one of the dime bags and smelled the substance. It smelled like vinegar which Officer Valencia testified he had learned could be heroin and differs from, for example, the smell of cocaine. The dime bag was resealed and also placed in his cargo pocket.

[23] Jesse Boateng Appiah's pockets were searched and other items were found such as more cash. This was left in place given it posed no safety issue and the manner in which it was folded could be important to show how a drug dealer maintained his or her operation.

[24] Officer Valencia testified after processing the heroin found on Jesse Boateng Appiah, it weighed 13.07 grams in total.

[25] Officer Haworth's evidence differs from his escort and Mr. Boateng Appiah in the following manner:

- a) when he arrives at the elevator lobby, he observes Jesse Boateng Appiah sitting on the ledge with cell phones and cash in his hands;
- b) when asked if Mr. Boateng Appiah lived in the building, the reply was "No" and that Mr. Boateng Appiah was waiting for his dad;
- c) Officer Haworth then also observes the dime bag in the palm area of Mr. Boateng Appiah's hands;
- d) the combination of these observations formed his grounds to place Jesse Boateng Appiah under arrest and requested Officer Valencia handcuff Mr. Boateng Appiah's hands behind his body;
- e) Mr. Boateng Appiah is advised of the reason for the arrest, his right to counsel and he was cautioned him about saying anything he may wish to say;
- f) while Officer Valencia patted down Mr. Boateng Appiah, there was no seizure of any additional items;

- g) his approach and initial questions to Mr. Boateng Appiah were intended to be and would have enforced an investigative detention which lasted about 10 to 15 seconds before the arrest occurred; and
- h) the investigative detention was done without informing Mr. Boateng Appiah of the reason for the detention or the right to retain counsel.

[26] After arresting and advising Mr. Boateng Appiah of the reason for the arrest and his right to retain and instruct counsel (to which Mr. Boateng Appiah responded he wished to do so), Mr. Boateng Appiah was asked what kind of powder was in the dime bag.

[27] Officer Haworth admitted the question of what was in the dime bag was done with knowledge that it was a breach of Mr. Boateng Appiah's *Charter* rights and for the purpose of the safety of both the officers and the accused.

### Analysis

[28] Counsel for Jesse Boateng Appiah sought to exclude the evidence obtained on the basis his section 8 *Charter* right not to be unreasonably searched was breached. In addition, counsel submitted a section 9 *Charter* breach of being arbitrarily detained had occurred based on Jesse Boateng Appiah's evidence of how he was apprehended at 11 Catford Drive. The evidence of Officer Haworth gave rise to the submission that section 10(a) and section 10(b) of the *Charter* were breached. Finally, it was submitted the cumulative effect of the various breaches resulted in the application of section 24(2) of the *Charter* to exclude the evidence seized as assessed in accordance with *R. v. Grant*, 2009 SCC 32. That is, to proceed would bring the administration of justice into disrepute.

[29] The Crown submitted that the above analysis was subject to a favourable analysis of the facts under Section 24(2) of the *Charter*. This refers to the three part test set out in *R. v. Grant*, *supra*.

[30] The first part of the test is to address the seriousness of the *Charter* infringing conduct (starting at paragraph 72 of *R. v. Grant*, *supra*). As stated at paragraph 74 "inadvertent or minor violations of the *Charter*" may not significantly reduce the public's confidence in the need to obey the law. At the other end of the spectrum is willful or reckless disregard of *Charter* rights. Officer Haworth's frank admission of his failure to comply with an individual's *Charter* rights is troubling. Ten years ago, the Court of Appeal, in *R. v. Nguyen*, 2008 ONCA 49, stated that "promptly" in Section 10(a) of the *Charter* equated to immediately. While Jesse Boateng Appiah admitted that he knew that he was being detained from the moment the two police officers approached him, the failure by Officer Haworth to add "we are investigating someone selling illegal drugs" is problematic. It would have been simple and easy to do. As the Supreme Court of Canada noted in *R. v. Grant*, *supra* (at paragraph 75) "deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence". Were this the only consideration, I would conclude the evidence must be excluded.

[31] The second consideration is the seriousness of the impact of the *Charter* breach. To paraphrase the Supreme Court of Canada in *R. v. Grant, supra* at paragraph 78, an unreasonable search undermines the right to privacy “and more broadly, human dignity”. The more private the area searched, the more serious the breach. In this case, there is conflicting evidence whether the larger bag containing multiple dime bags was located between the black sports compression shorts and Mr. Boateng Appiah’s red spandex underwear or under the red spandex underwear. The visibility of the compression shorts above the waistline of the jeans and the need to ensure the area where Jesse Boateng Appiah’s hands were being restrained by handcuffs necessitated a search to ensure the absence of any weapon or substance that could endanger the officer or the person detained. This reduced what is always “profoundly intrusive” *R. v. Grant, supra* (at paragraph 76). In addition, I do not accept Mr. Boateng Appiah’s evidence of being “violated” or “embarrassed” given the circumstances. Were this the only consideration, I would conclude the conduct did not bring the administration of justice into disrepute.

[32] The third consideration is the impact excluding the evidence would have on society’s interest in the matter being adjudicated on its merits. As stated in *R. v. Grant, supra* (at paragraph 81) “public interest in truth finding remains a relevant consideration under the s.24(2) analysis. The reliability of the evidence is an important factor of this line of inquiry”. The admittedly serious breach of not advising Jesse Boateng Appiah why he was being detained at the outset and the conducting of a brief, intrusive public strip search must be weighed against the discovery of reliable evidence of a significant amount of a pernicious drug. Mr. Boateng Appiah testified it was conducted in the presence of no other individuals. In fact, Mr. Boateng Appiah testified, despite it feeling “weird”, he wanted someone to see what was going on. This favours admission of the evidence as the danger of bringing the administration of justice into disrepute is low.

[33] In balancing these three considerations, I appreciate it is not a “mathematical” exercise in accordance with *R. v. Grant, supra* (at paragraph 86). Were this the only analysis required, I would admit the evidence and convict Mr. Boateng Appiah.

[34] Regarding whether the search was unreasonable, counsel for Jesse Boateng Appiah relied on his evidence that he was initially questioned and arrested as a trespasser which made the pat down and search improper. I do not accept Mr. Boateng Appiah’s evidence of what he says occurred in this regard. Were this the only ground to the application, I would dismiss it.

[35] Regarding the nature and extent of the search by Officer Valencia and particularly the removal of multiple dime bags of heroin from either between Jesse Boateng Appiah’s sports compression shorts and red spandex underwear or inside the red spandex underwear, I was directed to the decision of *R. v. Golden, 2001 SCC 83*. This sets out the proper analysis, beginning at paragraph 44. This case defines a strip search, at paragraph 47, which I would paraphrase to adapt to the evidence at hand, to include rearrangement of an individual’s clothing to permit a visual inspection of his or her buttocks.

[36] To that end, what Officer Valencia says he did, being less intrusive than what Jesse Boateng Appiah says occurred, would still constitute a strip search. For the strip search to be lawful, the arrest must be lawful. I am prepared to accept the evidence of the officers to the extent:

- a) they were at the premises to look for illegal drug activity on the fourth or fifth floor arising from information from a confidential informant;
- b) they each observed and Jesse Boateng Appiah admitted sitting on the radiator ledge with cash and cell phones either in his hands or on the ledge of the radiator;
- c) the officers' presence in the building was lawful given the prior written authorization from the building manager to enter the premises for the purpose of enforcing the *Trespass to Property Act, supra*;
- d) Jesse Boateng Appiah was arrested by Officer Haworth and handcuffed with his hands behind his back by Officer Valencia; and
- e) As part of arresting and handcuffing Jesse Boateng Appiah, a pat down occurred to ensure officer and accused safety.

[37] Following submissions on November 21, 2018, counsel and I became aware of the Court of Appeal's decision in *R. v. Pilon*, 2018 ONCA 959 released November 29, 2018. On December 5, I requested counsel provide me with additional written submissions they wished to make on or before December 14, 2018. Both counsel dealt with the comments and analysis of field strip searches and exigent circumstances. The decision leaves open the possibility that the need to preserve evidence can constitute exigent circumstances that justify a field strip search.

[38] It is already known that exigent circumstances can arise where safety concerns are present. Here, the officers gave evidence of a concern for a weapon and that the white powder may have contained Fentanyl which could have harmed either the accused or themselves. Presuming the arrest was lawful, I would conclude the pat down search for weapons or anything that could undermine the safety of the officers or the accused was lawful.

[39] The test for whether the arrest was lawful is well stated at paragraph 16 of *R. v. Storrey*, [1990] 1 S.C.R. 241 that "a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest". The concern here is Mr. Boateng Appiah's presence in the fourth floor elevator lobby was clearly insufficient to meet this test. His presence holding cash in his hands and with cell phones on the radiator ledge or in his hands was lawful. While it may have raised suspicions which warranted additional investigation, these items on their own were insufficient to meet the aforesaid test. It is the presence of the dime bag which both officers testified seeing and that Jesse Boateng Appiah denies occurred which clearly gave the officers reasonable and probable grounds. I have concluded the dime bag was not visible on the hands of Jesse Boateng Appiah as the police approached because:

- a) it defies logic that Mr. Boateng Appiah would have the dime bag visible in such a manner. It is well known that transfers from the seller to the buyer usually takes place in a subtle and concealed manner, particularly given this location and time of day;

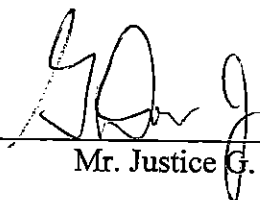


- b) the absence of any evidence that any individual was approaching or leaving the elevator lobby as a potential buyer which could form a basis for the dime bag being in Jesse Boateng Appiah's hand; and
- c) the inconsistency in the evidence of the police officers about the strip search conducted by Officer Valencia locating more dime bags including his opening a dime bag to smell it, neither of which Officer Haworth testified that he observed or recalled or made a note occurred. To the contrary, one would have expected Officer Valencia to show, if not brandish, the larger bag of drugs to Officer Haworth upon its discovery as well as verbally describe what he says he smelled when he opened the dime bag.

[40] As a result, the arrest lacked the reasonable and probable grounds necessary to proceed with the search. As stated by Justice B.A. Allen in *R. v. Zakarie*, 2018 ONSC 2905, to which I was referred, at paragraph 133 "the police are not entitled to arrest first and then determine whether the person arrested is connected to the offences under investigation". Given the manner of the arrest was unlawful, the subsequent search became unlawful.

[41] I am reinforced in this conclusion by the admitted violation of Jesse Boateng Appiah's Sections 10(a) and 10(b) rights by Officer Haworth and that officer's investigative detention which occurred without advising Jesse Boateng Appiah of the reason for the detention and right to consult counsel before answering police questions. It was compounded by Officer Haworth's question about what was in the dime bag after Mr. Boateng Appiah had positively exercised his right to consult counsel.

[42] As a result, I must conclude the evidence, being the 13.07 grams of heroin and the \$1,260 in cash seized by the officers were not obtained in accordance with Mr. Boateng Appiah's *Charter* rights, principally section 9, and is excluded. Having excluded this evidence, there is no evidence admissible to support the indictments and both counts are hereby dismissed.

  
Mr. Justice G. Dow

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**REASONS FOR DECISION**

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**Mr. Justice G. Dow**