Federal Court  Cour fédérale

Date: 20140627

Docket: T-1849-13

Citation: 2014 FC 624

Ottawa, Ontario, June 27, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

HARMANPAL SIDHU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 for judicial review of a decision of an Independent Chairperson [the ICP] of the Collins Bay Institution Disciplinary Tribunal, which found the applicant guilty of an offence (possession of contraband) under s. 40(i) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*Act*]. The applicant was found to have been in possession of a homemade weapon.

II. Background

[2] At the relevant time, the applicant was an inmate at the Collins Bay Institution in a single-occupant cell. On August 22, 2013, that cell was searched by Officer McKenna [Officer] of the Correctional Service of Canada [CSC]. This was an exceptional or "emergency" search authorized by the institutional head under s. 53 of the *Corrections and Conditional Release Regulations*, SOR/92-620, as distinct from the routine searches of cells that are conducted on a monthly basis. The Officer found a homemade weapon hidden in the top tracks of the window sill in the applicant's cell. This was a 5-inch piece of what appeared to be fibreglass sharpened to a point (a "shank"). The Officer saw the end of the shank while using a mirror to inspect the window sill, and used needle-nosed pliers to remove it.

[3] The applicant was charged and a hearing took place on October 9, 2013. At the hearing, the applicant testified that he had no knowledge of the shank or how it came to be hidden in the window sill of his cell. His counsel argued that the shank might have been placed there by the previous occupant of the cell or by another inmate during the periods of the day when the cells are open and the applicant was normally out in the yard.

[4] The applicant confirmed that his was a single cell which he had occupied for three to four months. He said there were routine searches every month, and may have been a previous emergency search during that time, but he was not sure. He testified that the routine searches were basic "in and out" searches that took two or three minutes, and he had not observed anyone previously searching the window.

[5] The applicant testified that there were parts of the day when the cells were open and he went to the yard during these times. He said others were often in his cell, and "[e]ven when I am not there people go by they grab stuff if they need something". On cross-examination, he stated that he allowed close friends to do this if they asked him, but maintained that "anyone is capable of going into my cell any time".

[6] The Officer testified that it was common practice for staff in the institution to check the windows during searches, and that both routine and emergency searches were thorough and intended to "find all the contraband possible". He stated that the shank was "hidden" but not "well hidden", and that he was able to just barely see the end of it when using the mirror to inspect the window. He was not aware of when previous searches were done or the applicant's specific movements, as he was not assigned to any specific range in the institution. He stated that the applicant's cell would have been open and accessible to other inmates for approximately four hours per day. He also testified that the hidden shank would not have prevented the applicant from using the window normally.

[7] An Institutional Advisor, Mr. Doering, was also present at the hearing. He questioned the applicant and the Officer and made submissions on behalf of the institution. He also intervened to provide information on several occasions. He stated that routine searches were probably "even more thorough" than emergency searches, that all searches, were to be "systematic and thorough", and that staff had been instructed to routinely check the window tracks as they were a common hiding place for weapons. Mr. Doering stated that emergency searches had been conducted in June and July of 2013.

[8] In reaching his decision, the ICP summarized the evidence and distinguished it from the facts in *Taylor v. Canada (A.G.)*, 2004 FC 1536 [*Taylor*]. Specifically, he noted that the weapon was hidden in the applicant's cell so that it could not have been tossed in by another inmate walking by. The ICP then stated:

> Now Mr. Sidhu indicated that his cell is opened on occasion during the day and the officer I think agrees and it is well known that the cells are not locked 24 hours a day. They would have to – and the other issue is that Mr. Sidhu says he allows people to go into his cell even when he is not there. I think once he allows people to go into his cell then he opens himself up perhaps for some difficulties to occur because he is giving permission to people who could very well do something to him, to enter his cell and perhaps put something there, although I would think that somebody would be noticed if they are planting a shank in the window sill. It is a time consuming or it takes time, some time, as opposed to the matter regarding Mr. Taylor where a knife can be thrown under the bed. This shank here is considerably different. This is not easily visible. In fact the officer had to use a mirror to locate it. So if Mr. Sidhu is going to allow people into his cell then I think he has to accept some responsibility if something occurs by giving them permission. Otherwise, he puts himself at risk.
>
> On all of the evidence before the court I am satisfied the shank was found as indicated where the officer said it was and I am satisfied that that shank belonged to Mr. Sidhu and that he placed it there, on this particular date and time that it was located by Officer McKenna, and, accordingly, there will be a finding of guilt.

[9] The applicant submits that the ICP wrongly based his finding of guilt on the fact that the applicant allowed people to enter his cell when it was not locked and he was not present.

[10] The applicant also submits that, based on the evidence, it was not open to the ICP to find, beyond a reasonable doubt (as required by s. 43(3) of the *Act*), that the applicant was aware of the weapon in question in his cell.

[11] Moreover, the applicant argues that there was no evidence to support any inference by the ICP that (i) it was, in fact, a person who had permission to be in his cell who placed the weapon there; or (ii) somebody would be noticed if they were planting a shank in the window sill.

[12] The applicant asks that the Court quash the decision of the ICP, which found him guilty of the offence, and enter a finding of not guilty in its place.

[13] The respondent argues that, while the ICP referred to and was critical of the applicant's practice of allowing others in his cell while he is not present, that was not the basis of his finding of guilt. In finding the applicant guilty, the respondent asserts, the ICP rejected possible scenarios suggested by the applicant at the hearing that the weapon was left by a previous occupant of the applicant's cell or by another inmate who entered the cell while it was unlocked and the applicant was absent.

III. Issues

[14] The issues in this proceeding, while differently stated by the parties, can be summarized as follows:

a. What is the appropriate standard or standards of review?

b. Did the ICP apply the proper test for possession of contraband under s. 40(i) of the *Act*?

c. Did the ICP reach unreasonable conclusions based on the evidence?

IV. Standard of review

[15] The parties are agreed that the standard of review on the legal test for possession to support a conviction in this case is correctness. However, the parties are also in agreement that possession requires actual knowledge by the applicant of the presence of the weapon; it is not sufficient to show that the applicant should have known of or was wilfully blind to the presence of the weapon [constructive knowledge]. Because there will usually be no direct evidence on the point, knowledge can be established by inference. However, the inference must establish actual knowledge and not merely constructive knowledge: *Taylor*, at paras 10-11. Because there is no dispute on the legal test for possession, the standard of review of that legal test is not relevant.

[16] The real dispute between the parties is whether the ICP relied on constructive knowledge in reaching his conclusion of guilt. The ICP's application of the legal test to the evidence and his conclusion on whether the evidence establishes guilt are questions of mixed fact and law that are reviewable on the reasonableness standard *(Bowden v Canada (Attorney General)*, 2008 FC 580 at para 9; *Smith v Canada (Attorney General)*, 2005 FC 1436 at para 29). The parties are essentially on agreement on this standard of review as well.

V. Analysis

[17] On the facts, there is no dispute that the weapon in question was found in the applicant's single cell, hidden in the window sill. There is also no dispute that the applicant's cell is left unlocked several times per day and that the applicant is often not present during these times.

[18] It appears that there were several searches of the applicant's cell, including both routine and emergency searches, during the period that he occupied the cell. It also appears that officers are trained to look for weapons hidden in window sills. However, I am mindful of the statement by the ICP that there was no evidence that any searches of the applicant's cell prior to finding the weapon included the window sill: page 26 of the transcript of the discipline hearing.

[19] The ICP makes no reference to any inference that could be the basis for concluding that the applicant's window sill was searched during his time in the cell. Mr. Doering made representations to the ICP at the hearing concerning searches of the applicant's cell, but the ICP indicated clearly that he did not consider such representations to be evidence or to be particularly relevant: page 24 of the transcript. Though the ICP had considerable discretion to consider such representations in the context of the discipline hearing, it seems clear that he did not find Mr. Doering's representations in this regard to be helpful.

[20] Based on his finding that there was no evidence of a prior search of the window sill, and the fact that the weapon was hidden, the applicant argues that the ICP should have acknowledged the reasonable possibility that the weapon had been left in the window sill by a prior occupant. The ICP provided no discussion or explanation as to why this scenario was not reasonable. The respondent offers no suggestion as to why the ICP was silent on this subject. In my view, the ICP had no basis for dismissing this possibility.

[21] I turn now to the submission by the applicant that the ICP wrongly based his finding of guilt on the applicant's responsibility for allowing other inmates to go into his cell while he was

not present. The respondent argues that, though the ICP made several comments in his reasons about the potential risks of allowing other inmates to enter the applicant's cell, he did not go so far as to conclude that these risks were sufficient to satisfy the knowledge element of the test for possession. It is true that the ICP did not explicitly characterize the test for possession in these terms. However, it seems clear that the applicant's practice of allowing other inmates to enter his cell contributed to the finding of guilt. Discussion of this issue was the main point leading up to the ICP's finding. The use of the words "[o]n all of the evidence before the court" does not alter that fact.

[22] Immediately before concluding that the weapon belonged to the applicant, the ICP said "So if Mr. Sidhu is going to allow people into his cell then I think he has to accept some responsibility if something occurs by giving them permission. Otherwise, he puts himself at risk". It is difficult to imagine why the ICP would have made this statement except to indicate that the applicant was "responsible" for the "risk" that someone else would place a weapon in his cell. The respondent suggested no alternative to this view. Moreover, the quoted statement also appears to acknowledge the possibility (the "risk") that the weapon was, in fact, placed in his cell by another inmate. Therefore, this is another possible scenario that suggests that the applicant may not have known of the presence of the weapon in his cell, which should have led to a not guilty finding.

[23] At paragraph 16 of its Memorandum of Fact and Law, the respondent argues that the ICP:

> rejected the inference that another inmate left the shank in the cell because the Applicant changed his evidence about whom and on what conditions he allows others into his cell and because of the time it would take to place the shank in the window sill.

[24] I disagree that the applicant changed his evidence on the point. On cross-examination, he merely clarified that the inmates he allowed to enter his cell to take things were limited to close friends who ask. Moreover, I see no indication that the ICP perceived any change in the applicant's evidence either. I note that, at the hearing of this judicial review, the respondent's counsel did not press this point.

[25] With regard to the issue of the time it would take to place the shank in the window sill, the ICP did indeed refer to this in reaching his decision. At pages 28-29, he stated: "…I would think that somebody would be noticed if they are planting a shank in the window sill. It is a time consuming or it takes time, some time". But there was no evidence before the ICP on which he could reach any conclusion that placing the weapon would take any amount of time. He may have been convinced of this by the fact that the weapon was hidden. However, the explicit evidence of the Officer was that it took no amount of time to remove the weapon from the window sill:

> ICP MR. Romain: And how long did it take you to get it out once you got the pliers? Did it come out immediately?
>
> OFFICER MCKENNA: Yes. Within finding it and going to grab pliers I had it out within two minutes, from finding it, to going to get pliers, to pulling it out.
>
> ICP MR. Romain: Okay.
>
> OFFICER MCKENNA: And that was going to the post and back.

[26] There is no basis for concluding that hiding the weapon would take longer than retrieving it. Therefore, there was no basis for any conclusion that "somebody would be noticed if they are planting a shank in the window sill". Moreover, even if somebody were noticed doing such a

thing, it is entirely possible that the incident would not have been reported either to the applicant or to prison officials.

[27] Another problem with the ICP's comments concerning the applicant's responsibility for something that is placed in his cell by another inmate is that it assumes that the weapon was placed in his cell by someone with permission to be there. Another reasonable possibility is that it was placed in his cell, while it was unlocked and the applicant was absent, by someone who did not have permission to be there.

[28] The parties referred to the cases of *Séguin v. Canada (A.G.)*, 2009 FC 551 [*Séguin*], *Ewonde v. Canada (A.G.)*, 2005 FC 1688 [*Ewonde*], and *Williams v. Canada (A.G.)*, 2006 FC 153 [*Williams*], in support of their respective arguments. In each of these cases, the finding of possession of contraband was upheld. In my view, each of these cases can be distinguished from the present case on their facts.

[29] In *Séguin*, contraband drugs were found inside a Tylenol container and a bottle of vitamins that were found in the applicant's single cell. The applicant admitted owning the vitamin bottle, but not the contraband drugs found in it. The applicant denied knowledge of the Tylenol bottle. The ICP did not believe the applicant and the Judge of the Federal Court did not interfere with this decision.

[30] In *Ewonde*, a contraband drug was found in the applicant's segregation cell in an envelope which also contained the applicant's personal photos. The ICP concluded that the drug belonged to the applicant and the Court maintained that decision.

[31] In *Williams*, the applicant was double-bunked in a cell with another inmate when a contraband cell phone was found stuffed in a sock under the pillow of his bunk. The ICP did not believe that the cell phone could have belonged to the other inmate, and found the applicant's claim that he was unaware of the presence of the cell phone in his bed to be "outrageous". The Federal Court dismissed the judicial review.

[32] In each of these cases, the contraband in question was tied to the applicant by something personal: a pill bottle, personal photos and a pillow. No similar personal connection of the weapon with the applicant exists in the present case.

VI. Conclusion

[33] Based on the foregoing, I have concluded that this application for judicial review should be granted, and that the finding of guilty should be set aside.

[34] Also, a finding of not guilty should be entered because the ICP accepted facts sufficient to raise a reasonable doubt as to whether the applicant had legal possession of the weapon in question. Here, I refer specifically to (i) the finding that there was no evidence that the window sill where the weapon was hidden had been searched since the applicant had moved into the cell; and (ii) the finding that there was a risk that someone could place the weapon in the cell without

the applicant's knowledge. Therefore, based on the evidence accepted by the ICP, it is reasonably possible that the weapon had been left in the cell without the applicant's knowledge either by a prior occupant, or by someone who entered the cell, either with or without permission, when it was unlocked and the applicant was not present.

[35] At the hearing, the applicant proposed an amount of $2000 for costs. The respondent made no submission on costs. I find the applicant's request reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted. The finding of guilty by the ICP is set aside and a finding of not guilty is to be entered. Costs in the amount of $2000 are awarded to the applicant.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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