



Case Summary – R v Fearon¹

Kevin Fearon was arrested in connection with the armed robbery of a jewellery vendor. A police officer conducted a pat down search and found a cell phone in Mr. Fearon’s pocket. The cell phone was not password-protected or locked. The officer examined the contents of the cell phone and found photographs of a gun and cash as well as an incriminating text message. The cell phone was searched again without a warrant at the police station to determine to whom the text message was sent. The examination showed that it was only a draft that had not been sent to anyone. Months later a warrant was obtained and another search conducted, but this yielded no new evidence.

Factors necessary for a lawful cell phone search incident to arrest:

- i. **The arrest is lawful.** [This can be a fairly complex analysis, depending on the circumstances of the arrest.]
- ii. **The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable [aka someone else in the officer’s position would also find it reasonable]. The valid law enforcement purposes in this context are:**
 1. Protecting the police, the accused, or the public;
 2. Preserving evidence; or
 3. Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest;
- iii. **The nature and the extent of the search are tailored to the purpose of the search** [That is, the “nature and extent” of the search must be *truly incidental* to the particular arrest for the particular offence. In practice, this will mean that, generally, only recently sent or drafted emails, texts, and photos, and the call log may be searched. However, this is not a hard and fast rule – the test is whether the nature and extent of the search are tailored to the search’s purpose]; and
- iv. **The police take detailed notes of what they have examined on the device and how it was searched.**

¹ Case Summary Courtesy of Ontario Justice Education Network, 2016