

2008 ONCJ 143  
Ontario Court of Justice

R. v. Barry

2008 CarswellOnt 1702, 2008 ONCJ 143, 77 W.C.B. (2d) 210

**Her Majesty the Queen and Kathleen Barry,  
Bryan Brathwaite and Gregory Barry Gittens**

J.D. Karswick J.

Heard: July 4, 2007-January 2, 2008

Judgment: February 27, 2008

Docket: Orangeville 07-84

Counsel: Richard Schwarzl, Marie Balogh for Crown

David Midanik for Accused, Kathleen Barry

S. Johnson for Accused, Bryan Brathwaite

Subject: Criminal; Property

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Criminal law --- Offences — Theft and related offences — Theft — Elements — General principles**

**Table of Authorities**

**Statutes considered:**

*Criminal Code*, R.S.C. 1985, c. C-46

s. 322(1) — considered

s. 322(2) — considered

s. 334(b) — referred to

**J.D. Karswick J.:**

1 The Information upon which the trial proceeded charges Kathleen Barry, Bryan Brathwaite and Gregory Barry Gittens that on July 23, 2005 they did steal a large quantity of merchandise belonging to Wal Mart of a value not exceeding five thousand dollars, contrary to section 334(b) of the *Criminal Code of Canada* and that further Kathleen Barry and Gregory Barry Gittens on or about July 10, 2005 did steal a large quantity of merchandise belonging to Wal Mart of a value not exceeding five thousand dollars, contrary to section 334(b) of the *Criminal Code of Canada*.

2 The accused Gregory Barry Gittens failed to attend on the date scheduled for trial. Accordingly, a warrant for his arrest was issued and at the request of his counsel, an order was made removing counsel from the record.

3 The trial proceeded with respect to the charges against Kathleen Barry and Bryan Brathwaite.

4 Part way through the trial, the Crown moved for a directed verdict as against the accused Kathleen Barry with respect to the offence which allegedly occurred on July 10, 2005. With the consent of defence counsel, that motion was granted and the trial continued with respect to the remaining charge.

5 On July 23, 2005, at about 4:30 p.m., several police officers responded to a radio dispatch advising that a shoplifting was in progress at the Wal Mart store at Bolton.

6 P.C. Heidi Gastmeir arrived at about 4:41 p.m. when at least one other police officer was present. The officer spoke to Jamie Lee Kolarsky, a Wal Mart security officer, and upon the information received concluded that there were reasonable and probable grounds to arrest the accused Gregory Barry Gittens, which she did.

7 He was searched as part of the arrest procedure and it was determined that he had no identification documents in his possession, he had no credit card and just had \$5.00 in cash and a cell telephone.

8 P.C. Angela Dietrich arrived at the Wal Mart store at 4:47 p.m., having received information that the accused had stolen from the store, she placed Bryan Brathwaite under arrest, who was then searched in the presence of P.C. Dietrich by a male officer. The accused had no money and no identification documents.

9 P.C. Sherry Thompson, formerly McPherson, arrived at the Wal Mart store at 4:38 p.m. Upon receiving information that the accused was involved in a shoplifting, she arrested Kathleen Barry at 5:00 p.m. She then conducted a search of that accused and determined that she had no money, nor credit or debit card.

10 Jamie Lee Kolarsky was the Wal Mart Loss Prevention Officer on July 23, 2005.

11 She described in detail how the video security cameras were positioned, what was recorded on the tapes and how the system was operated.

12 At the conclusion of a *voir dire*, and for the reasons delivered at the trial, the court ruled that the tapes and the C.D. ROMs to which the images were transferred, were admissible as evidence.

13 The video, which is about 33 minutes in duration, was viewed in court.

14 Jamie Lee Kolarsky identified the departments which were being portrayed in the various segments and noted the persons of interest, their gender and the clothes they were wearing.

15 These three persons of interest were seen in the lobby of the store, the pharmacy department, the food department and the seasonal department.

16 They were three black persons, two males and one female.

17 One male wore a dark shirt with white lettering and blue jeans.

18 The other male wore a white shirt and shorts.

19 The female wore a white jersey and black pants and at certain times was wearing an orange bandana.

20 When in the pharmacy department, one of the males is observed taking items from the shelf and placing them in a shopping cart while the female appears to be acting as a lookout. Later all three persons of interest are observed filling up that shopping cart with items taken from various shelves in the pharmacy department.

21 Later, all three persons of interest enter the seasonal department, the male in the white shirt is pushing the shopping cart with the items. They now had two totes in their possession as well.

- 22 They all exited the seasonal department and entered the garden centre, where there is no video camera to observe them.
- 23 The garden centre is a separately fenced-in area.
- 24 A few minutes later all three were observed on the video to exit the garden centre, come into the store and then leave the store. During this period of time they did not possess any totes or other items.
- 25 During some parts of this series of events recorded on the video, Jamie Lee Kolarsky was on the floor following and observing the three persons of interest. She was close enough to be able to identify them directly and to relate their activities to those which were observed on the video. She identified Kathleen Barry and Bryan Brathwaite, the two accused, as two of the persons observed in the video and also as observed by her when she followed them on the floor of the store.
- 26 After the police arrived, she went into the garden centre where she located two totes with numerous pharmaceutical items in them. They were placed under a shelf where some plants had also been placed.
- 27 All the items were recovered. A list of the recovered items has been filed as an exhibit. These items were identified as having been kept in the pharmacy department and later found in the two tote bags, and they are priced at a total of \$3,547.54
- 28 Jamie Lee Kolarsky stated that the totes were kept in the houseware department where there are no cameras.
- 29 In cross-examination, Jamie Lee Kolarsky said that she did not tell P.C. Thompson that the totes were on the outside of the fence around the garden centre.
- 30 She confirmed that she produced only those tapes which videoed the three persons of interest engaging in relevant or suspicious activities. About 270 to 324 minutes of video were reviewed but only about 33 minutes of video was produced at the trial.
- 31 Jamie Lee Kolarsky is accepted as a reliable and credible witness. Her testimony, together with the video, establishes beyond a reasonable doubt, that the two accused are two of the persons who removed these pharmaceutical items from the store shelves, placed them into the two totes, which also belonged to the Wal Mart store, and placed these two totes under the shelf in the garden centre.
- 32 Pursuant to section 322 (1) of the *Criminal Code*, everyone commits theft who fraudulently or without colour of right takes or converts to his use anything with intent to deprive, temporarily or absolutely, the owner of it.
- 33 Section 322(2) states that a person commits theft when, with intent to steal anything, he moves it.
- 34 Defence counsel submits that the Crown has failed to prove beyond a reasonable doubt both the *mens rea* and the *actus reus*.
- 35 The rather high value of these numerous pharmaceutical items, and the surreptitious manner in which they were removed from the shelves and placed in the two totes, which later were placed out of the way under a shelf in the garden centre, raise reasonable suspicions with respect to the intent of the accused. Moreover, at the time of their arrest, neither accused was in possession of money or credit cards which would enable them to purchase these items.
- 36 On the other hand, at the time of their arrest, they were not in physical possession of these two totes, nor were they exercising any apparent control over them. These items were still within the store premises and located at some considerable distance away from where the accused were at the time of their arrest.
- 37 They were at the exit of the store and it is not clear whether they had left and returned or were about to leave.
- 38 There was no attempt to move these items past the cash register without paying for them, nor any other actions taken or embarked upon to remove these items from the store property.

39 If these totes had been thrown over the fence and off the Wal Mart property, or if there were some attempt made by the accused to remove the totes to the outside of the fence, then it would be clear that they were intending to deprive the owner of its goods and were converting such goods to their use. However, there is no such evidence.

40 Crown counsel suggests that these totes were concealed and when the totality of the evidence is considered, the logical conclusion is that these accused have committed the offence of theft.

41 Shortly after the police left the scene, Jamie Lee Kolarsky went to the garden centre and located the two totes under the shelf. She apparently had no difficulty in finding them. There was no damage to these items.

42 There is no doubt that these accused were behaving in a suspicious manner and that they have committed a wrongful act. However, that is not the test which needs to be applied. Rather, it is the prosecution who must prove beyond a reasonable doubt that each of the material factors that constitute the offence of theft have been established.

43 Upon a consideration of the totality of the circumstances, the Crown has not proven beyond a reasonable doubt that the accused intended to steal these items, nor has it established that these items were removed from the control of the store or converted to the use of the accused.

44 The charge is dismissed.