

Making a **Difference** Canada

Communities Giving Voice to Sexual Assault Victims

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Invasive searches: penile washings, bodily examinations, and other investigative considerations for sex-related offences.

Presenters: S/Sgt. Barry Pennell, Ms Deborah Carlson, and Ms Wendy Friesen

Moderator: Det/Sgt. Paul Bevan

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John W. Burchill, CFE, BPA is currently a Sergeant in the Winnipeg Police Service. During his 22 year career in law enforcement he has served 17 years in the Criminal Investigations Bureau, 10 of which were as the services Major Crimes Analyst where he reviewed unsolved major crimes. During that time he extensively applied the use of DNA analysis in solving cold cases. His efforts led to the formation of a dedicated Unsolved Homicide Unit and in 2006 he received the Attorney Generals Award for Excellence in Law Enforcement. He holds a degree in Criminal Justice from Athabasca University and he has graduated from the Faculty of Law, University of Manitoba, and is presently articling.



Introduction

- Used for more than 70 years to collect circumstantial evidence in cases of recent sexual assault
- DNA technology has made this a source of powerful direct evidence whether the offender has used a condom or not
- Obtained during a search incident to arrest under Common Law. Police searching for evidence left by the victim of the crime as evidence of the commission of the offence. Consent is NOT an issue
- Powerful investigative tool based on statistical research



History

- Merkle (1924)
- Berg (1954)
- Dwight Rife, (1940) Medical Examiner, New Mexico State Police
- Law Reform Commission of Canada (1985) *Obtaining Forensic Evidence: Investigative procedure in Respect of the Person*
- Dr. Peter Gill (1986) envisioned that vaginal DNA could be extracted from penile washings in rape cases and that genetic fingerprinting would form an important part of forensic science.

Research

- (Cina et al 2000a, 2000b) tests showed even 24 hours after intercourse where the man did not shower or bathe after intercourse. After 24 hours a significant decrease
- (Rogers and Newton 2005) when an allegation of vaginal or anal intercourse is made, penile swabs from the suspect can be examined for cells, feces, hairs, fibers, blood and lubricants. After an allegation of fellatio, swabs from the complainant's penis can be examined for saliva. Data collected ...between 1987 and 1995 have shown that after vaginal intercourse, cellular material from the complainant can be recovered from the cornal sulcus (groove around the penis just below the glans) even if the suspect has washed or bathed since the offence. Female DNA profiles have been obtained on penile swabs up to 24 hours post-coitus.
- (Kaarstad et al 2007) where meantime between assault and examination was more than 19 hours investigators were less likely to obtain the victims DNA from the penile swab.



The Winnipeg Police Service Experience

Since 2001 the WPS Sex Crimes Unit has been obtaining penile swabs from suspects arrested shortly after the offence. In a five year review of the files (n =73) 76% of the penile swabs submitted for analysis were found to contain the victims DNA. In those same cases the suspects DNA was found on the victim's vaginal swabs in only 24% of those cases. (B. Pennell 2008)



Forensic DNA Analysis

- Randall and Riis (1985) reported that the recovery of vaginal epithelial cells (glycogenated cells) from the penile washings was strong presumptive evidence of recent sexual intercourse. However caution was required because Researchers in England and Germany indicated that glycogenated cells were found in lower amounts in other bodily fluids.
- Presumptive Testing has since been abandoned in these investigations with the advent of DNA testing, as presumptive tests consume large amounts of biological evidence and provide no clear link between the bodily substance and an individual source. DNA profiles provide the best evidence.



Application

- any investigation where sexual a offence has occurred recently
- a suspect has been arrested
- the time between the occurrence and type of sexual activity involved indicates it is reasonable to assume that biological evidence linking the victim to the offender may be found on the person of the offender.
- this procedure is applicable in all cases of digital penetration where it is appropriate to swab the offenders fingers regardless of the use of a condom.



Canadian Case Law

- *R v. Backhouse* (2005) Ontario Court of Appeal
- *R v. Smyth* (2006) Superior Court of Justice Ontario
- *R v. Hodgson* (2008) Superior Court of Justice Ontario
- *R v. Stillman* (1997) Supreme Court of Canada



Case Law in the United States

- *Louisiana V. Leon Brent* (1964)
- *U.S. v. Sheard and Smith* (1972) Court of Appeals
- *State v. Burke* (2001)
- *Cupp v. Murphy* (1973)

General Warrants

- Section 487.05 *Criminal Code* Warrants
 - *R. v. S.F* (1997) SCC
- Section 487.01(1) *Criminal Code* Warrants (General Warrant)
 - *R. v. R.H.-G* (2005) Quebec Court of Appeal
 - *R. v. Sam* (2003) Superior Court Ontario

Collection

- Local practices for submission apply in the jurisdiction of the laboratory accepting biological samples for forensic examination.
 - collection by swabbing the shaft of the penis with two swabs that are lightly moistened with sterile water, and repeat with one dry swab.
 - collection by swabbing the glans penis, under the foreskin as above
 - collection by swabbing of the scrotum as above using two swabs in a rotating motion close to the base of the penis

Search Incident to Arrest

- *Cloutier v. Lanois* (1990) Supreme Court Canada
 - authorization of police to search incident to arrest entrenched in common law
 - Police have the power to search and seize anything in the possession of, or in the immediate surroundings of the arrested party, to guarantee the safety of the police and the accused, to prevent escape or provide evidence against the accused
 - Considerations
 - the arrest must be lawful
 - the search must be conducted incident to arrest
 - the search must be for a valid objective
 - the manner in which the search is conducted must be reasonable in the circumstances



Nexus Between Search and Arrest

- *R v. Caslake* (1998) Supreme Court of Canada
- *R v. Greffe* (1990) Supreme Court of Canada
- *R v. Golden* (2001) Supreme Court of Canada

Reasonable grounds to believe a search will afford evidence is not a requirement, articulable cause and a justified basis for the search based on a logical connection between the nature of the offence and the search conducted

Police are obliged to ensure that the privacy of the individual is respected as much as is possible while maintaining the interests of the police and the public in preserving relevant evidence



Conclusion

- Provided that the evidence is seized incident to a lawful arrest and the privacy and dignity of the offender is maintained, using the minimal amount of force required to collect the samples, the procedure is a powerful source of direct evidence that can link the offender and victim through biological evidence



Contact Information

To obtain a copy of this presentation email:

Ruth Montgomery, Coordinator
Making a Difference Canada

email: ruth.montgomery@telus.net