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— Police Powers—

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1. Odour of Alcohol on Breath Constitutes Reasonable Grounds to Suspect Alcohol in the Body; Indicia of Impairment Not Required

Facts: A police officer conducting a morning R.I.D.E. program near a local motorsports event approached a pickup truck and immediately detected an odour of alcohol on the driver’s breath. The officer advised the driver that he smelled alcohol on his breath and the driver advised he had his last drink about 10 hours earlier. He could not say how much, or what, he had to drink, nor could he recall what time he had fallen asleep. The officer made

a roadside breath demand. The driver provided a sample and the device registered a fail. The officer arrested the driver for driving with over 80 milligrams of alcohol in his body per 100 milliliters of blood. At the police station, the driver provided two samples which showed concentrations of 120 and 109 milligrams.

At trial, the driver applied to have the breath samples excluded under s. 24(2) of the *Charter*, arguing that the police officer did not have sufficient grounds to make the roadside breath demand under s. 254(2) of the *Criminal Code*. The police officer testified that he formed a reasonable suspicion the driver had alcohol in his body based on the odour of alcohol and the information provided about his drinking. The officer, a trained breath technician, acknowledged that the driver did not exhibit any obvious signs of impairment. As well, the officer acknowledged that generally speaking, alcohol from "a drink" would normally be eliminated from a person's body in four to five hours, and even if an odour of alcohol is detected, alcohol consumed 10 hours earlier *may* have been eliminated. The trial judge found, relying on *R. v. Chehil*, 2013 SCC 49, 2013 CarswellNS 693, that the officer's suspicion the driver had alcohol in his body was not objectively reasonable in all the circumstances, given the fact that the driver did not exhibit any signs of impairment, and had indicated he last consumed alcohol 10 hours previously. Having found a s. 8 breach, the trial judge excluded the breathalyzer samples and acquitted the driver. The Crown appealed to the summary conviction appeal court, and the acquittal was upheld. The Crown applied for leave to appeal to the Court of Appeal for Ontario.

Held: Leave to appeal granted; appeal allowed; new trial ordered.

The summary conviction appeal court judge erred in upholding the acquittal. First, the absence of any indicia of impairment and the absence of additional evidence of consumption did not render the officer's subjective suspicion that the driver had alcohol in his body objectively unreasonable. In order to make a roadside demand for a breath sample under s. 254(2), the officer must have reasonable grounds to suspect that a person has alcohol in their body: *R. v. Lindsay*, [1999] O.J. No. 870, 1999 CarswellOnt 796 (C.A.). The standard of "reasonable grounds to suspect" involved possibilities, not probabilities: *R. v. Williams*, 2013 ONCA 772, 2013 CarswellOnt 17812, at para 22; *R. v. MacKenzie*, 2013 SCC 50, 2013 CarswellSask 655, at para. 38; *R. v. Chehil*, 2013 SCC 49, 2013 CarswellNS 693, at para. 27; *R. v. Kang-Brown*, 2008 SCC 18, 2008 CarswellAlta 523, at para. 75.

The absence of indicia of impairment, even when combined with the driver's admission that he had his last drink 10 hours previous to the interaction with police, did not negate the *possibility* that the driver *may* have had alcohol in his body. The fact that the officer acknowledged that alcohol consumed 10 hours before *may* have been eliminated from the driver's body did not negate the reasonableness of the officer's grounds for *suspecting* the presence of alcohol in the driver's body.

Commentary: In these brief reasons, the Court of Appeal for Ontario affirms the decision in *R. v. Lindsay*, [1999] O.J. No. 870, 1999 CarswellOnt 796 (C.A.): an odour of alcohol emanating from the breath of a driver may constitute reasonable grounds to suspect the presence of alcohol in the body for the purposes of issuing a roadside breath sample. Relying on the decisions in *R. v. MacKenzie*, 2013 SCC 50, 2013 CarswellSask 655 and *R. v. Chehil*, 2013 SCC 49, 2013 CarswellNS 693, the Court of Appeal iterated that the standard of reasonable grounds to suspect requires nothing more than the *possibility* that a driver has alcohol in their body, not that the driver "probably" has alcohol in his body. To satisfy the requirements of s. 254(2) of the *Criminal Code*, it is not necessary that the officer observe any indicia of impairment, nor is it necessary for the officer to believe the person is committing an offence.

R. v. Schouten, 2016 ONCA 872, 2016 CarswellOnt 18095 (Ont. C.A.)

2. "Cursory" Search of Computer Survives Section 8 Challenge

Facts: In September 2012, the appellant was serving a term of probation imposed following convictions for possession of child pornography and breach of probation. The conditions of his probation included that he was not allowed to have Internet access at his residence and was not permitted to possess any device capable of accessing the Internet.

During a meeting with his probation officer, the appellant provided his business card. On it was listed an address, phone number, website, email address and cell phone number. The probation officer conducted an investigation and ascertained that there was an active Internet subscription at the appellant's apartment. The probation officer forwarded the information to the Edmonton Police Service, who prepared an Information to Obtain ("ITO") for a search warrant for the appellant's apartment. The ITO included a request to search for "any and all devices that are capable of accessing the interner [*sic*]"; residency documents and statements of account for Internet service. The ITO detailed that members of the Edmonton Police Service Technical Crime Unit would be used to seize the equipment, ensure that all evidence is preserved and that an "audit" would be performed on the devices, to determine whether the devices were used to access the Internet in contravention of the appellant's terms of his probation. The search warrant was granted, but did not refer to an "audit" of the devices by the Technical Crimes Unit. On execution of the warrant, police seized a smart phone, Internet bills in the appellant's name, a wireless router, a cable television digital video recorder, a laptop, two thumb drives and a box of the appellant's business cards.

When discovered, the laptop was operational and connected to the Internet. The laptop was running an application called "IMVU," described as the world's largest "ED chat and dress-up community." A chat room decorated with teddy bears was open on the screen, and included a sexually suggestive avatar of two figures in a sexual posture, one of which was much smaller than the other. A constable from the Technical Crimes Unit, who had not previously encountered the IMVU application, took various photographs of the laptop's display, including the open window and other screens. He later testified at trial that it is not possible to determine whether a device can access the Internet by external examination of the device itself.

As a result of the search of the appellant's residence, a second ITO was sworn requesting a general warrant to allow police to conduct a forensic examination of the laptop, cell phone and thumb drives. Child pornography was subsequently found on the computer.

At trial, the appellant argued that the first warrant did not authorize the officers who executed the search warrant to examine the contents of the laptop, such that the search itself, and the photographs taken, constituted an unreasonable search and a breach of his rights under s. 8 of the *Charter*. The appellant argued that the general warrant to forensically examine the contents of the laptop was granted on the basis of unconstitutionally obtained evidence and ought to be invalidated. The appellant sought the exclusion of the evidence of child pornography under s. 24(2).

The trial judge found that while the face of the warrant did not authorize the search of the seized items, the ITO referenced authorization to search the items seized, by way of reference to the "audit." The appellant was convicted, and appealed.

Held: Appeal dismissed.

The warrants at issue on appeal were issued and executed prior to the decision of the Supreme Court of Canada in *R. v. Vu*, 2013 SCC 60, 2013 CarswellBC 3342 and *R. v. Fearon*, 2014 SCC 77, 2014 CarswellOnt 17202. In both *Fearon* and *Vu*, the Supreme Court acknowledged the common law rule in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, 1990 CarswellQue 8, that the imminent loss or destruction of evidence is a factor to be considered when evaluating the purpose or extent of a search.

The face and wording of the first warrant authorized an assessment of whether the device was "capable of accessing the Internet." The warrant authorized police to take steps to determine whether an electronic device, including a computer, was capable of accessing the Internet. Therefore, there existed prior judicial authorization for a cursory search of electronic devices, including the computer, to ascertain the ability to connect to the Internet. To the extent that the officer took steps to ascertain whether or not the laptop was capable of accessing the Internet, those acts did not constitute a breach of s. 8 of the *Charter*. As there was no breach of s. 8, the information obtained as a result of that cursory search did not require excision from the general warrant.

However, even if the cursory search did amount to a breach of s. 8 of the *Charter*, the three lines of inquiry under *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104, all favoured the admission of the evidence. The appellant's rights under s. 8 were minimally impaired; the police were acting in good faith in obtaining two warrants; the officer who conducted the search and took the photographs did not understand the capabilities of the IMVU application at the time of the cursory search, and; the law with respect to computer searches was unsettled at the time the warrants were issued and executed. In *R. v. Mohamed*, 2014 SCC 63, 2014 CarswellAlta 2725, the Supreme Court acknowledged that an accumulation of breaches may simply amount to variants on a single theme, and thus not escalate the magnitude of the breach, or its impact on the subject of the search, let alone the determination of the repute of the administration of justice. This is one such case.

Commentary: The decision of the Alberta Court of Appeal that the cursory search of the computer on the execution of the warrant did not amount to an unreasonable search under s. 8 of the *Charter* is not surprising given the fact that *R. v. Vu*, 2013 SCC 60, 2013 CarswellBC 3342 and *R. v. Fearon*, 2014 SCC 77, 2014 CarswellOnt 17202 had yet to be decided at the time the warrants were issued and executed. The police could not be expected to predict future developments in the law. No doubt the nature of the offence, possession of child pornography, and the fact that the investigation involved a possible breach of the appellant's probation order in respect of that offence impacted the Alberta Court of Appeal's determination that the impact of the breach, if any, on the *Charter*-protected interests of the appellant was minimal.

R. v. King, 2016 ABCA 364, 2016 CarswellAlta 2203 (Alta. C.A.)

3. Bare Information from Confidential Informant and Two Short Interactions in Vehicle Constitute Reasonable and Probable Grounds to Arrest for Trafficking

Facts: Police began investigating the appellant after receiving a tip from a confidential informant that there was a drug dealer on Goreway Drive, trafficking heroin from a car. Following a search of police data banks, police connected the appellant to an apartment on Goreway Drive in Mississauga and to two vehicles, a BMW and a Ford Focus. Police conducted surveillance at the Goreway Drive address and observed the appellant driving the Ford Focus. The appellant was followed to a CIBC parking lot. The appellant remained in his car. Another man, carrying a black bag, exited the bank and approached the car. Officers watched the man place the bag inside the car, and very shortly after, re-entered the bank with black bag with a red object sticking out. Shortly thereafter, police followed the appellant to a residence on Summerfield Crescent. The appellant parked in the driveway. A man exited the residence carrying a small green object and entered the passenger seat of the car. One or two minutes later, the man re-entered the residence and the appellant drove way. The appellant was stopped a short distance away and was arrested at gunpoint. A search of the vehicle incident to arrest revealed significant amounts of cash, and a black leather shoulder bag containing heroin with an estimated street value of $18,000 and various drug-related paraphernalia.

At trial, the appellant argued that as police did not have reasonable and probable grounds to arrest him for drug trafficking, the search of his vehicle incident to arrest violated his rights under s. 8 of the *Charter*, and as such, the evidence obtained ought to be excluded under s. 24(2). On the *voir dire*, the supervising officer who ordered the arrest of the accused testified that taken in isolation, neither the incident at the bank, nor the interaction on

Summerfield Crescent would have provided grounds for arrest, but that taken together with the information provided by the confidential informant, the officers had reasonable and probable grounds to arrest the accused. The trial judge agreed, and the appellant appealed.

Held: Appeal dismissed.

The existence of reasonable and probable grounds to arrest is anchored in the factual findings of a trial judge, and is entitled to deference. Whether the facts amount at law to reasonable and probable grounds is a question of law and reviewable on a correctness standard: *R. v. Shepherd*, 2009 SCC 35, 2009 CarswellSask 430. The trial judge correctly stated the law that an arresting officer must not only subjectively believe that he or she has reasonable and probable grounds to arrest, but that those grounds must be justified on an objective basis, as seen from the perspective of a reasonable person standing in the shoes of the officer: *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CarswellOnt 78. He also recognized that in assessing the objective grounds for arrest, the court must take into account the totality of circumstances: *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111.

On appeal, the appellant submitted that the trial judge failed to taken into account weaknesses in the information provided by the confidential informant, in light of the *Debot* factors: whether the information provided was compelling, whether the source was credible and whether the information was corroborated by the police. Indeed, the Crown conceded, and the trial judge recognized that the information from the confidential informant was not compelling or credible to justify an arrest, but did warrant further investigation.

Determining whether there were objective grounds for an arrest is not a mathematical exercise involving the counting of the number of surveillance incidents (although more presumably makes the case stronger). Rather, it is the nature of the information derived from the surveillance, taken in the context of the totality of the circumstances and weighed through the perspective of the experience of the arresting officer that informs the decision. The record supports the trial judge's determination that the supervising officer did have an objective basis for arrest, given the totality of the circumstances.

In any event, even if the trial judge erred in finding there were reasonable grounds to arrest the appellant, he did not err in his assessment of the factors for excluding the evidence under s. 24(2) as articulated in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104. A trial judge's decision whether to exclude evidence under s. 24(2) is a matter entitled to deference on appeal. The trial judge conducted the very type of balancing exercise mandated in *Grant*, recognizing the serious impact on the *Charter*-protected interests of the accused but also the absence of bad faith on the part of the arresting officers, and the fact that the evidence seized was reliable and essential to the case for the Crown.

Commentary: In this case, the Court of Appeal for Ontario reiterates the standard of review for the existence of reasonable and probable grounds for arrest, articulated in *R. v. Shepherd*, 2009 SCC 35, 2009 CarswellSask 430, and the assessment of a trial judge's decision with respect to the exclusion of evidence under s. 24(2) in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104.

R. v. Anang, 2016 ONCA 825, 2016 CarswellOnt 17666 (Ont. C.A.)

4. Gun Discovered in Plain View During Investigative Detention Found Admissible

Facts: Police received an anonymous tip that a male in a "black jeep" near the Froude Avenue Community Centre in St. John's, Newfoundland, had a firearm, possibly a shotgun or rifle. The first officer on the scene saw a lone black sport utility vehicle with a male occupant in the parking lot of the community centre. A second officer arrived a few minutes later. The first officer activated his vehicle's emergency lights, exited the vehicle, drew his firearm and told the male driver, whom he recognized from a previous occasion, to put his hands out the window.

The driver exited the vehicle and was told to lie down on the ground. The second officer handcuffed the driver, read him his rights to counsel and secondary caution, and told him they were investigating a weapons complaint. The driver admitted there was a shotgun in his vehicle.

The first officer, unaware of the admission of the driver, used his flashlight to look inside the vehicle and observed the partially covered barrel of a shotgun on the back seat. The first officer opened the door of the vehicle, seized the shotgun and told the second officer to arrest the driver for unsafe handling of a firearm.

At trial, the driver alleged violations of his rights under ss. 8 and 9 of the *Charter* and sought the exclusion of the evidence under s. 24(3). On the *voir dire*, the first officer testified that he did not have grounds to arrest the driver prior to observing the firearm, but also testified that he conducted the search of the vehicle incident to the driver's arrest. The trial judge agreed, finding that the detention of the driver was unlawful, and that the conduct of the officer, looking into the vehicle amounted to a search. The trial judge excluded the evidence under s. 24(2) and acquitted the driver. The Crown appealed.

Held: Appeal allowed in part, new trial ordered.

In *R. v. Clayton*, 2007 SCC 32, 2007 CarswellOnt 4268, the Supreme Court of Canada held that in the absence of any information indicating that a tip is substantially unreliable, police are entitled to rely on information obtained from an anonymous tipster to justify an initial investigation. In these circumstances, police need not have a subjective belief in the accuracy of the information when commencing an investigation based on an anonymous tip. That said, the right to investigate does not imply a right to detain or use force short of arrest. In *Clayton*, the Court stressed the importance of balancing the liberty interests of a suspect against the risks to the public and police in determining whether the nature of the detention is no more intrusive of the liberty interests of the detainee than is reasonably necessary to address the risk. More recently in *R. v. McGuffie*, 2016 ONCA 365, 2016 CarswellOnt 7507, the Court of Appeal for Ontario reiterated the obligation to minimize the length and nature of an investigative detention to what is reasonably necessary on an objective view of the totality of the circumstances.

Applying the analyses in *Clayton* and *McGuffie*, the trial judge did not err in finding that the detention and questioning of the accused was reasonably necessary in the totality of the circumstances. However, in the absence of any indication of attempted flight, uncooperativeness, or threatening behavior, the circumstances did not require ordering the accused to the ground at gunpoint, handcuffing him, and placing him in the back of the police cruiser. What began as a lawful detention became unlawful when excessive force was employed by police. The detention became arbitrary and was therefore a breach of s. 9 of the *Charter*.

However, the trial judge erred in finding that the conduct of the first officer, in looking into the vehicle, amounted to a search. Consistent with the decision of the Newfoundland and Labrador Court of Appeal's decision in *R. v. Diamond*, 2015 NLCA 60, 2015 CarswellNfld 518, police were entitled to look into the vehicle; observing something in plain view is not a search for the purposes of s. 8 of the *Charter*. In any event, the seizure of the shotgun was a valid search incident to the driver's arrest, in accordance with the principles in *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111. Finally, the trial judge erred in his analysis of the test for the exclusion of evidence under s. 24(2) as articulated in *R. v. Grant*, 2009 SCC 32, 2009 CarswellOnt 4104.

The dissenting judge found that the detention of the driver was arbitrary and the search of the vehicle unreasonable, and would have dismissed the Crown's appeal.

Commentary: This case provides a good overview of the law of investigative detention, beginning with the Supreme Court of Canada's decisions in *R. v. Mann*, 2004 SCC 52, 2004 CarswellMan 303, and expanded on in *R. v. Clayton*, 2007 SCC 32, 2007 CarswellOnt 4268 and *R. v. McGuffie*, 2016 ONCA 365, 2016 CarswellOnt

7507.

R. v. Squires, 2016 NLCA 54, 2016 CarswellNfld 400 (N.L. C.A.)

5. Actions of Accused Considered Cumulatively Established Grounds for Arrest

Facts: After the police received complaints about a white Hyundai delivering drugs to a particular address, police officers set up observations in the area. They saw a woman outside the address, using a cell phone and looking around as if waiting for someone to arrive. As the officers made observations, a resident of the building called them, said that a drug user was pacing at the location, and predicted that a drug dealer would arrive.

A black Kia drove up and stopped near the woman. The officers watched as the hands of the woman and the driver of the Kia met through the driver's window. Then the Kia left.

The officers followed the Kia. They stopped it for traffic violations. As one of the officers approached the car, he saw a double-folded $20 bill in the lap of the accused, who was the driver and lone occupant of the car. The officer also saw the accused put his hands down his pants as if concealing something. A cell phone was ringing inside the vehicle as this happened.

The officer tapped on the driver's window and motioned the accused to open it. The accused looked surprised, and opened his door. The officer arrested the accused for drug trafficking, and gave him his rights to counsel. The officer realized that the accused did not speak English, and arranged for a Korean-speaking police officer to come to the scene.

The arresting officer took the accused to the rear of the police car, and did a pat down search. He found a box shoved down the front of the accused's pants. The officer reached in and removed the box. It contained small packets of controlled drugs. While the officer was with the accused, two cell phones in the accused's car rang constantly.

A Korean-speaking police officer arrived and gave the accused his rights to counsel in both Korean and English. The accused indicated that he wanted to speak to a lawyer free of charge. The accused was taken to a police station, where the police arranged for him to speak by telephone with a legal aid lawyer assisted by a Korean interpreter.

The accused's car was towed and searched by the police. More controlled drugs were found inside it, along with three wallets containing cash.

At his trial, the accused sought the exclusion of the seized drugs on the grounds that the police violated his ss. 8, 9 and 10 *Charter* rights.

Held: Application dismissed. There were no *Charter* breaches.

The trial judge found that because the arresting officer witnessed the accused commit multiple traffic offences, he was justified in stopping the car. Further, there were ample grounds, both objectively and subjectively, for the officer to arrest the accused, which the officer did promptly after approaching the vehicle. Those grounds included:

- The complaints of drug trafficking in the area.

- The behaviour of the accused's customer before the accused arrived, along with the complaint the officers received that a dug transaction was occurring at that time.

• The manner in which the accused drove his vehicle, which was consistent with delivering drugs to a customer.

• The brief exchange between the accused and the woman through the car's window, which was consistent with a drug transaction.

• The accused's quick departure after the exchange.

• The officer's observation, once he stopped the accused's car, that the accused placed an object down his pants.

• The fact that the accused had a $20 bill on his lap folded in a manner consistent with a drug purchase, while his phone rang continuously.

Given that the arrest was valid and there was no s. 9 breach, the search of the accused was valid as a search incidental to arrest. It was related to the offence for which the accused was arrested, and it was conducted in a reasonable manner. There was no s. 8 breach.

The trial judge further found that there was no breach of s. 10. The arresting officer's request for the assistance of a Korean speaking officer was appropriate. That officer arrived within 10 minutes, and repeated to the accused in Korean the reason for his arrest and also his rights to counsel. It was not practical to give the accused access to counsel at the scene using a cell phone, especially since an interpreter was needed. The delay from arrest to the first call to legal aid was minimal. In all the circumstances, it did not contravene the accused's right to instruct counsel without delay.

Commentary: An important factor in this case was that the arresting officer had been part of a police force drug section for several years, and testified that he had witnessed hundreds of street drug deals and undercover drug buys. He was able to provide evidence, which the trial judge accepted, that put the actions of the accused and his customer in a particular context. As the trial judge noted, the various behaviours, considered separately, might yield an innocent explanation. But, when considered together along with the explanatory testimony of an experienced drug officer, their consistency with a "dial a dope" operation was established.

R. v. Kim (2016), 2016 BCSC 2192, 2016 CarswellBC 3271 (B.C. S.C.)

6. Officer's Steps to Ensure Accused's Understanding of Roadside Demand Sufficient

Facts: Police were called to a restaurant after the accused, who had been drinking there, got into a vehicle and tried to drive out of the parking lot. The accused told the second officer to arrive at the scene that he had had a couple of drinks. The officer noticed a strong odour of alcohol. He placed the accused in the rear of a police cruiser and read him the Approved Screening Device ("ASD") demand. The accused asked the officer to read it again. The officer did so. When asked if he would comply with the demand, the accused said that he would not. The officer told the accused that he would be charged if he did not comply. The accused indicated that he understood, but maintained his refusal.

At trial, the officer conceded that the accused had a heavy accent, and that he had the impression that English was not the accused's first language. But, he was able to understand the accused, and the accused appeared able to understand him. He read the words of the ASD demand slowly and pronounced the words carefully, because he found that lots of people had difficulty understanding the legal words of the demand. When he read the demand the second time, he did so slowly. He also testified that he used plain language to explain to the accused that he would be charged if he refused to comply with the demand.

The accused did not testify at trial.

The accused was found guilty of refusing to comply with a roadside breath demand. He appealed, contending that the trial judge did not consider evidence that supported the inference he had not understood the ASD demand.

Held: Appeal dismissed.

The summary conviction appeal judge found that it was speculative to suggest that because the accused asked for the ASD demand to be repeated, he did not understand it. There was no evidence adduced at trial that the accused indicated he did not understand the demand. He simply asked that the demand be re-read, which the officer did, slowly. The officer clarified for the accused that if he refused to comply with the demand, he would be charged with an offence, and the accused said that he understood. The summary conviction appeal judge was satisfied that the officer took steps to ensure that the accused understood both the demand and his jeopardy for failing to submit to the demand. The fact that it was about one minute from the making of the initial demand to the accused's arrest for refusal did not amount to evidence of a rushed environment that impacted on the accused's ability to understand his situation and his jeopardy. The summary conviction appeal judge concluded that the accused clearly and unequivocally refused to comply with the ASD demand.

Commentary: This is another in a line of cases dealing with the adequacy of police response when faced with an accused whose first language is not English or French. In this case, the officer appreciated that the accused was not a native English-speaker. Rather than ignoring the potential language comprehension problem and following "standard operating procedure", the officer took steps to address the issue at the roadside. He did so in a way that was held acceptable, by the manner in which he both made the roadside breath demand and explained to the accused the consequences of non-compliance with the demand.

R. v. Park, 2016 ABQB 670, 2016 CarswellAlta 2283 (Alta. Q.B.)

7. Validity of Search Warrant Based on ITO Containing Informant Information Upheld

Facts: Surveillance officers watched the accused travel on his motorcycle from his home to a fairgrounds, where he met up with two separate vehicles. He was seen reaching into the front passenger window of the first vehicle. He appeared to speak to the occupants, while having a cigarette. After that vehicle left, he got into the back seat of a truck. He remained in the truck for a few minutes before getting out. The truck drove away.

The accused then left and went to a plaza. There he met with another male. They got into a vehicle, with the accused taking the passenger seat and the other male the driver's seat. The police approached the vehicle and arrested the accused for possession of cocaine for the purpose of trafficking. The accused had on his person two separate bags of cocaine, a large amount of cash, and a pocket-sized digital scale.

One of the arresting officers prepared an Information to Obtain (ITO) search warrants for the accused's home and his car. The ITO contained information from a confidential informant that the accused was dealing cocaine from his vehicle, which the informant described, and that the accused had cocaine on his person.

The search warrants were granted. On execution, the police found bags of cocaine concealed inside the fuse box compartment of the accused's car.

At trial, the accused did not dispute that he was trafficking cocaine at the time of his arrest, but sought to exclude the cocaine found in his car on the basis of a s. 8 breach. He contended that the redacted ITO did not disclose reasonable grounds in relation to the search warrant for the car. In particular, the defence challenged the information provided by the informant as nothing more than a conclusory statement that the accused was dealing drugs out of his car, and asserted that there was a dearth of information about the informant's credibility.

Held: Application dismissed. There was no s. 8 breach.

The trial judge concluded that the content of the ITO supported the issuance of the search warrant for the car.

In assessing the credibility and reliability of the informant, the trial judge considered the totality of the circumstances, including the degree of detail of the "tip", the informant's source of knowledge, and indicia of the informant's reliability such as past performance or confirmation from other investigative sources.

The trial judge noted that the informant asserted that the accused was dealing cocaine out of his home and his car, which the informant described. The ITO set out information from police surveillance of the accused's car in the period leading up to his arrest. This included that officers saw the accused drive the car to his house, and leave soon after on his motorcycle to go to the meetings that led to his arrest. Those meetings were described as well. The ITO set out that the informant reported having seen the accused sell cocaine, and gave the police specific information about the accused's drug dealing.

The trial judge also considered an email sent by Crown counsel to defence counsel before the s. 8 application was argued. The Crown provided additional facts in the email, including that the informant had witnessed the accused selling cocaine on numerous occasions, that this was not the first time the informant had provided information to the police, and that all information the informant provided to the police in the past had been corroborated through investigation. The trial judge found that with this additional information there were substantive facts that supported the informant's veracity.

The trial judge also found that the informant information was corroborated. The trial judge pointed to the information from police surveillance of the accused's car on days leading up to the arrest, and the police observations of the accused in his car immediately before he left his house on his motorcycle on the afternoon of his arrest.

The trial judge rejected the defence argument that once the accused was arrested, the police needed to start afresh with their investigation and could not rely on the informant information to get the search warrant for the car. He concluded that once an accused is arrested, the police can use the information that led to the arrest in order to get a search warrant to continue their investigation, as long as the information is credible, reliable, and can sustain the issuance of the warrant. The accused's arrest did not stop the investigative process, or require a renewed investigation with or without revisiting the informant's information.

In summary, the trial judge found that the informant information in the ITO was not conjecture and had been confirmed by police observations during the relevant time period. There was surveillance of the accused in his car, including just before he left his house and while he engaged in the drug transactions soon after. There was a link between the criminal activity taking place prior to and post arrest.

Commentary: The ITO presented for the trial judge's review was redacted on the basis of informer privilege. Resort to step 6 of *Garofoli* was avoided, however, because Crown counsel proactively provided defence counsel with additional information regarding the ITO. That information was set out in a two page email, which was filed on the hearing of the s. 8 application on consent. The trial judge relied on it for the truth of its contents in deciding the application.

R. v. Kosterewa, 2016 ONSC 7231, 2016 CarswellOnt 18608 (Ont. S.C.J.)

8. Whether Officers in Execution of Duty for Purpose of Arrest for Obstruct Police

Facts: The police were searching a parked cargo van, because it bore stolen licence plates. The driver of the van had been arrested for possession of the stolen plates, and was seated in the back of a police cruiser.

The accused, a local newspaper reporter, stepped out of a nearby pub to have a cigarette. He noticed two police vehicles with activated emergency lights near the van and blocking a lane of traffic. He went to where the van was parked and spoke with police officers there. He then went and got his camera.

When the accused returned to the van with his camera, the police told him that he could take photographs from the sidewalk, but that he was not to get in the officers' way and he was to stay away from the van.

The accused took photographs of the officers and the van, including one of the van's interior through the space created by its open doors. In order to take that photograph, part of the accused's camera lens entered the interior of the van. Within seconds of taking that photograph, the accused was arrested for obstructing police. The arresting officer alleged that the accused had obstructed him, because he had to stop his search of the van in order to remove the accused, and because he did not know whether the search had been compromised by the accused putting something in or retrieving something from the van.

At trial, the accused submitted that the search of the van was unlawful and in breach of s. 8 of the *Charter* because the applicable motor vehicle statute did not authorize a search of a vehicle in such a situation. Accordingly, the police officers were not in the execution of their lawful duties, and the accused could not be guilty of the obstruction offence.

Held: Application dismissed, but accused acquitted on the basis that he did not obstruct the police.

The trial judge observed that an unlawful search of the van would constitute a breach of the s. 8 right of its driver. The driver was the man who had been arrested for possession of the stolen licence plates, not the accused. The trial judge suggested that by arguing about the legality of the search in support of his contention that the police were not in the lawful execution of their duty, the accused was attempting to rely on the breach of someone else's *Charter* right. The trial judge declined to decide whether it was open to the accused to do so, because he found that the search was lawful on the basis that it was incidental to the driver's arrest.

Commentary: It is questionable whether, in arguing that the search of the van was not authorized by the motor vehicle statute, the accused was in fact attempting to invoke s. 8 of the *Charter*. If he was, establishing a reasonable expectation of privacy in the van that was not his, and to which he had no connection at all, would have been a stumbling block. The defence argument might better be viewed as one that the police were not authorized by statute or common law to search the van, and so were not in the execution of their duty at the time of the accused's arrest.

R. v. McFadden, 2016 NWTTC 15, 2016 CarswellNWT 58 (N.W.T. Terr. Ct.)

9. No "Home Free" Defence

Facts: Mr. Smith was driving home one night when he caught the attention of a police officer. He was speeding. Within 10 to 20 seconds of the officer activating his emergency lights, Mr. Smith pulled his vehicle into his private driveway. The officer pulled in behind him. He was blocked in.

Both the accused and officer exited their vehicles. The officer directed the accused back to his vehicle and told him to stay there. The officer checked Mr. Smith's driver's licence and it showed the vehicle as being registered to him. The officer approached the driver and detected signs of impairment. This culminated in an ASD demand. The officer testified that the purpose of his pursuit was a speeding infraction and a possible investigation into impaired driving.

The accused brought a s. 9 *Charter* application arguing that the officer had exceeded his powers when he entered onto private property and took control over the accused's person by detaining him in his vehicle.

Held: The officer acted lawfully and in hot pursuit. The application was dismissed.

The trial judge conducted a careful review of the authorities addressing the doctrine of hot pursuit. The police may enter upon private property in pursuit of an individual where their actions constitute part of a continuous pursuit engaged with reasonable diligence. The court noted that authorities applying this common law doctrine grant a much wider latitude than the 20 seconds of pursuit in this case. As the officer's conduct constituted a continuous pursuit conducted with reasonable diligence, it was part of a single transaction and the hot pursuit doctrine applies. The entry upon private property to engage with the accused was justified in the circumstances.

Moreover, the court made the practical observation that where the intention to stop a vehicle is formed before the vehicle makes it onto private property, the police should not be precluded from entering upon private property to pursue that intent. To hold otherwise would be to create a "home free defence" and this could lead to some mischief. Citing *R. v. Anderson*, 2014 SKCA 32, 2014 CarswellSask 167, at para. 25, the Court of Appeal noted that to preclude officers from entering upon private property in these circumstances "would encourage drivers to seek the sanctuary of private roadways if they suspected they were about to be stopped by police". There is a diminished reasonable expectation of privacy in a driveway and this should be taken into account when considering the level of intrusion involved.

In this case, the officer was involved in a hot pursuit. The accused had been speeding and the officer had a reasonable suspicion that he may be impaired. The detention on private property was justified.

Commentary: This judgment reinforces the common law doctrine of hot pursuit. The most authoritative treatment of the doctrine remains in *R. v. Macooh*, [1993] 2 S.C.R. 802, 1993 CarswellAlta 411 at para. 24, where the Court held that a person may be pursued onto private property where there is a "continuous pursuit conducted with reasonable diligence" such that the "pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction".

In addition to providing a nice review of the jurisprudence in this area, the judgment also addresses the common sense proposition that people cannot be incentivized to evade the police by finding private property. By structuring a common law rule in a way that encourages such conduct could undermine the legitimate goals of law enforcement and public safety. Eschewing this practice by rejecting the "home free defence" captures the operative public policy concerns.

R. v. Smith, 2016 SKPC 156, 2016 CarswellSask 765 (Sask. Prov. Ct.)

10. Safety Sweep Resulting in Drug Charges Found Constitutional

Facts: The police received a 9-1-1 call. A male and female were reported to be fighting in a basement apartment unit. The dispatcher requested an officer to "check on well-being". The written message received on the police computer included: "reporting a disturbance from this number ML and FML fighting . . . pls check on well being . . . address obtained through Bell trace". This was assigned a "priority call" status.

An officer responded to the call. He approached the residence once backup had arrived. A teenage boy greeted the officer at the door. The boy looked as though he may have a developmental issue. The officer entered the unit and spoke to the boy's mother. She told the officer that her son had "special needs" and that he had been playing with the phone. The officer told the mother that because of the nature of the call, he would be checking the residence to ensure that all of the occupants could be accounted for and that everyone was safe. The mother did not object.

The officer searched the home. He did not open any drawers and only searched in locations where he thought a

person could hide. He located some stairs leading to a furnace room. There was a latch on the door. When he entered the room he saw a blue blanket with lighting behind. He thought that a person could hide there and so he lifted the blanket. He located marijuana plants behind the blanket. The officer arrested the mother. The accused, John MacLeod, was arrested later.

The accused challenged the officer's authority to enter the residence and search. He claimed a s. 8 *Charter* breach and said that the evidence should be excluded under s. 24(2).

During cross-examination on the *voir dire*, the searching officer agreed that he had not received any information from the dispatcher that there were more than two people involved in the fight. He said that he was not sure if other people, beyond the mother and son, were in the unit. He testified that he was following a police practice when responding to a 9-1-1 call. He had been taught that when police officers respond to a call such as this, they are to check the residence to ensure everyone is accounted for and safe.

Held: Justice Coroza found that while this was a close call, the police did not breach Mr. MacLeod's *Charter* rights.

While counsel acknowledged the ability of the police to enter a private residence where there are concerns over safety or life, the defence maintained that this was not what occurred here. Rather, the defence argued that the officer had entered the residence and searched because of a police policy. The ability to search arises from individual factors specific to the environment confronting the officer. It was alleged that the officer gave no mind to these specific circumstances in this case.

The defence further argued that even if a safety sweep was justified, there was no justification for entering the furnace room because of the fact that the door was latched shut.

Justice Coroza disagreed with both of these propositions. If the police had the lawful authority to conduct a safety sweep of the home, then they clearly had the lawful authority to enter the furnace room. The real question to be determined was whether the police had the lawful authority to enter and search in the first place. This question was answered in the positive.

The trial judge rejected the suggestion that the home had been searched automatically and as a matter of policy. The officer responded quickly to a priority call and wanted to fully investigate the complaint. The call related to a man and woman fighting. The information he had received from the teenage boy's mother contradicted the content of the call. She simply said that her "special needs" son had been playing with the phone. The officer had no way of knowing how many people were in the residence or whether the man and woman referred to by the caller were the mother and son. The officer testified that people do not always tell him the truth. He did not even know if the mother was telling the truth.

The officer had the subjective belief that a sweep was necessary and the belief was objectively reasonable in the circumstances. He was under no obligation to accept what the mother had told him. The officer remained properly focused throughout the search. He did not look in places that would not hold a person. He stayed focused on the safety purpose of the search and it was constitutional.

Commentary: This case provides a nice review of the jurisprudence governing the area of safety searches and the legal limits on entering a home: *R. v. Godoy*, [1999] 1 S.C.R. 311, 1998 CarswellOnt 5223 and *R. v. Golub* (1997), 34 O.R. (3d) 743, 1997 CarswellOnt 2448 (C.A.). The result of the case shows the latitude that will be afforded to law enforcement when there exist subjective and objectively verifiable concerns for the safety of a person who may be in the home. It also demonstrates the limits on searching a residence when safety considerations apply. The police behaviour here, focusing on areas where a person could be was critical to the

result. In circumstances where the police enter to search for safety, they must remain entirely focused on the purpose of the entry: to search for a person. Had the police looked in areas not conducive to effecting this goal, such as going into drawers or spaces where a person could not be found, the result may have been entirely different.

R. v. MacLeod, 2016 ONSC 6941, 2016 CarswellOnt 17921 (Ont. S.C.J.)

11. Section 10(b) Charter Breach Results from Failure to Provide Right to Counsel to Detained Individual

Facts: A woman approached two officers sitting in a patrol car and said that two men were “fighting”. The officers saw the defendant running away with another man chasing him. The officers decided to look into the matter and followed the men. One of the officers got out of the car and pursued the man chasing the defendant. The other officer pulled up beside the defendant and told him to “stop”. While he did not know if a crime had been committed, given the expression of concern by the civilian, the officer thought that the situation required some investigation.

The accused complied with the officer’s direction to stop. He was asked for his name and provided his driver’s licence. The officer asked him what happened and the accused said that he had been at 200 Wellesley Street with two girls and that the man had simply started to chase him. The officer thought that the explanation was “weird” and so he decided to conduct a CPIC check. Upon doing so, the officer learned that the accused was on a recognizance not to attend 200 Wellesley Street or to possess cellular phones. The officer cautioned the accused about breaching his recognizance, reminding him that he was not to be at that address. The accused responded by telling the officer he was in possession of a phone which he pulled out of his sock and provided to the officer. He was then arrested for failing to comply with the recognizance.

Mr. McLean claimed that his s. 10(b) *Charter* rights had been breached because he was detained without being provided his right to counsel.

Held: A s. 10(b) *Charter* breach was found, the evidence was excluded and the accused acquitted.

The sole issue for consideration by the trial judge was whether Mr. McLean was detained between the time that he was told to “stop” and his arrest. The trial judge reviewed the analytical approach to determining when a person is detained. Of course, if detained, the right to counsel must be afforded without delay. A person is detained if they are “legally required to comply with a direction” or in circumstances where a “reasonable person in the subject’s position would feel obligated to stay”.

The trial judge was careful to note that the police can keep people delayed without necessarily detaining them. Notwithstanding this fact, Mr. McLean was more than simply delayed.

He was given a direction to stop and the officer admitted that he wanted to investigate him in regard to the allegation of a fight. The identification was taken and checked. The officer testified that while he was not detaining the accused, he was not free to go. Had he tried to leave, the officer acknowledged that he would have stopped him. While there was no physical contact between the officer and accused, the trial judge noted that the exchange was approximately 10 minutes in length and the accused was a young, black male.

In the circumstances, Greene J. distinguished this case from *R. v. Suberu*, [2009] 2 S.C.R. 460, 2009 CarswellOnt 4106. While Mr. Suberu was also told to stop, he was not detained because of the brief encounter with the police. As well, unlike this case, the questions put to Mr. Suberu were not of an investigative quality. In this case, the questioning of Mr. McLean was directed at why he was running and what he was running from, the very circumstances that the police were investigating.

All of these factors pointed toward a clear detention. The accused should have been provided with his right to counsel so that he could have made an informed decision about whether to cooperate with the police. The failure to provide the s. 10(b) right led to his incrimination.

The evidence was excluded under s. 24(2) and an acquittal flowed.

Commentary: This is another example of an on-the-ground police-citizen interaction. It demonstrates the importance of officers understanding their common law powers of detention and the responsibilities that accompany an exercise of these powers. There was nothing wrong with detaining the accused in this case. The failure was in omitting to provide the right to counsel when the detention took root.

It is often difficult for officers to determine the moment in time when a detention takes place. This is particularly true given that the law is clear that the police are authorized to delay a person without necessarily engaging a "detention" within the meaning of s. 9 and 10 of the *Charter*. It is equally clear that a direction to stop will not necessarily engage a detention: *Suberu*. It is the full constellation of circumstances that will inform the end result, whether the individual was detained and, therefore, whether the right to counsel should have been afforded.

In the end, the police are likely best to error on the side of caution and afford the right to counsel when in doubt. While there may be procedural inconveniences associated with doing so, a failure to do so may have severe consequences for any ensuing result.

R. v. McLean, 2016 CarswellOnt 18779, [2016] O.J. No. 6142 (Ont. C.J.)

12. Statement Given in the Wake of MVA Not Compelled

Facts: Mr. Moussavi was driving a BMW and speeding along Highway 407. He rear-ended another vehicle, resulting in a very serious accident. The appellant's rate of speed just *after* impact was estimated to be between 171 and 226 km/hour. He would have been travelling at a greater rate of speed just prior to impact. The victim was travelling at an estimated 105 km/hour. The roadway was dry and well lit. The victim sustained very serious injuries, but the appellant was left unharmed.

A witness called 9-1-1. The first to arrive on scene was a tow-truck driver. He was approached by the appellant who told him that he had been hit by the other vehicle. The appellant then walked back to his BMW.

Two officers had contact with the appellant. The first officer asked the appellant if he was the driver of the BMW. He said that he was and that the other vehicle had hit him. The officer detected alcohol on his breath and asked the appellant if he had been drinking. He confirmed that he had been. This officer then directed the other officer to check into the matter. The second officer thought that the appellant was behaving nervously. He asked him if he was the driver of the BMW. After confirming that he was, the appellant said that the other vehicle had hit him. He was ultimately asked to perform a sobriety test which he failed. A breath demand was given and administered at the police station. He blew over.

He argued at trial that his ss. 7, 8, 9, 10(a) and (b) *Charter* rights had been infringed. Three arguments were made. He said that his statements to the police were self-incriminatory and should have been excluded because he was compelled to provide them. He further said that he had been detained at the scene of the accident and the police failed to promptly provide him with the reasons for his detention. Finally, he said that the breath demand was not made "forthwith".

The trial judge dismissed each of these *Charter* complaints and convicted the appellant of dangerous operation of a motor vehicle causing bodily harm. He appealed on the compulsion and forthwith issues.

Held: The appeal was dismissed.

Section 199(1) of the *Highway Traffic Act* maintains that everyone involved in an accident involving personal injury or over a certain amount must report the accident “forthwith” to the nearest police officer and furnish information regarding the accident. Despite the fact that s. 199 compels information from an accused in specified circumstances, it does not mean that every statement given to the police in the wake of a motor vehicle accident will be a “compelled” statement for purposes of *Charter* compliance.

Justice MacPherson noted that *R. v. White*, [1999] 2 S.C.R. 417, 1999 CarswellBC 1224, remains the governing authority in this area of the law. The judgment strikes a “balance” between the statutory obligation to report and the right to silence protected under s. 7 of the *Charter*. The question for determination on a s. 7 hearing in this context is whether the information was provided by the driver because of a “reasonably held belief” that the driver was required by law to report the accident to the police.

In this case, the trial judge made a clear and unequivocal finding of fact that Mr. Moussavi provided his statements to the police, including confirming that he was the driver of the BMW, in an effort to evade responsibility for the accident. His intent was actually to provide an exculpatory version of events, saying that he was hit by the victim’s vehicle. There was no basis to interfere with this finding of fact on appeal and, in fact, it was well supported by the evidence.

As for the timing of making the breath demand, the appellant was first suspected of having alcohol in his system at 1:49 a.m. The breath demand was made at 2:00 a.m. The test was administered at 2:04 a.m. He argued that the 11 minutes between the officer forming the grounds to make the demand and actually making the demand failed the requirement of “forthwith” in s. 254(2) of the *Criminal Code*.

Justice MacPherson made short order of this argument. The trial judge’s reasons were endorsed. A very brief amount of time passed between when the appellant was determined to be the driver and alcohol was detected on his breath. The investigation took place in the early morning hours and on a major highway. The accident was very serious, involving one badly injured driver. As well, the debris field on the highway was strewn over three lanes. In these circumstances, a brief delay in administering the ASD was entirely reasonable.

Commentary: This judgment constitutes a good reminder to trial judges to consider all of the circumstances surrounding a decision by a driver to speak with the police. Just because the statute requires information to be provided, does not mean that this is the reason it is provided. Indeed, *White* is clear at para. 76 that compulsion “implies an absence of consent”. The statute must be the reason why the declarant’s statement is given before the statement can be considered compelled.

This is a very important issue and one that comes up all of the time. On any *voir dire* alleging compulsion in this context, it is critically important to determine the reason for why the accused spoke to the police.

R. v. Moussavi, 2016 ONCA 924, 2016 CarswellOnt 19222 (Ont. C.A.)

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