

Citation: ☀ R. v. [REDACTED]
2021 BCPC 319

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File No: 21832-1
Registry: Western Communities

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

[REDACTED] [REDACTED]

**REASONS ON VOIR DIRE
OF THE
HONOURABLE JUDGE GOUGE**

Counsel for the Crown:

J. Farenholtz and T. Corsi

Counsel for the Defendant:

R. Neary

Place of Hearing:

Colwood, B.C.

Dates of Hearing:

November 16, 17, 18 and December 9, 2021

Date of Judgment:

December 9, 2021

SUMMARY:

Application by the Accused to exclude results of search from evidence at trial. The Accused was facing charges of possession of drugs for the purpose of trafficking. In 2020, the Accused was driving a vehicle and collided with a power pole by the side of the road. A fire truck was dispatched to the scene to offer assistance. The police dispatched two RCMP constables, constables Roy and Bainbridge to attend the scene. While en route to the accident scene, Constable Bainbridge checked the police database and confirmed that the Accused was the registered owner of the vehicle, which had collided with the pole. Upon attending the scene, a firefighter informed Constable Roy that the Accused was behaving in a suspicious manner and was trying to flee the scene. When Constable Roy made eye contact with the Accused and told him to 'stop', the Accused started walking away with two bags. Constable Roy caught up to the Accused and retrieved the bags. The Accused immediately jumped over an embankment and disappeared into the darkness. Drugs were found in the two bags, which were in the Accused's possession. The counsel for the Accused asserted he was arbitrarily detained by the police and that his detention violated his rights under s. 9 of the Canadian Charter of Rights and Freedoms (Charter). The counsel also asserted that the search of the bags infringed the Accused's rights under s. 8 of the Charter and that the appropriate remedy for the infringement was to exclude the results of the search from the evidence at trial. The Crown argued that the Accused's rights had not been infringed and that even if they had been, the Accused had abandoned the bags when he fled from the police officers. As a result, the Accused no longer had any privacy interest in the bags or their contents at the time of the search.

HELD: Application allowed.

Constables Roy and Bainbridge were not investigating a crime. There was no basis in the evidence for a suspicion that any crime had been committed. Similarly, there was no basis in the evidence for a suspicion that the bags might contain firearms or other weapons. If Constable Roy was looking for weapons, the fact did not justify the search of the bags. It was not a crime for a person to possess weapons unless the person was subjected to a prohibition against such possession. There was no evidence that the Accused was subject to such a prohibition. Therefore, the Accused's detention was not justified by the common-law power of investigative detention. His detention was not authorized by law, and it infringed his rights under s. 9 of the Charter. If the results of the search were admitted into evidence, the police would understand that they could proceed with unlawful searches with confidence that, if the search turned up evidence of wrongdoing, the results of the search would be received in evidence, on the principle that the ends justified the means. Thus, the results of the search were inadmissible.

A Corrigendum was released by the Court on January 12, 2022. The corrections have been made to the text and the Corrigendum is appended to this document.

The Issues

[1] Mr. [REDACTED] is accused of possession of drugs for the purpose of trafficking. The drugs were found in two bags which were in Mr. [REDACTED] possession. The police searched those bags, and found the drugs, after Mr. [REDACTED] fled from them. Mr. Neary, counsel for Mr. [REDACTED] says that:

- a. Mr. [REDACTED] was arbitrarily detained by the police, with the result that his detention violated his rights under section 9 of the *Canadian Charter of Rights & Freedoms*; . . .
- b. the search of the bags infringed Mr. [REDACTED] rights under section 8 of the *Canadian Charter of Rights & Freedoms*; and
- c. the appropriate remedy for those infringements is to exclude the results of the search from the evidence at trial.

[2] Mr. Farenholtz, for the Crown says that Mr. [REDACTED] rights were not infringed by police conduct, and that, even if they were, Mr. [REDACTED] had abandoned the bags when he fled from the police officers. As a result, he says, Mr. [REDACTED] no longer had any privacy interest in the bags or their contents at the time of the search.

The Facts

[3] In the early morning hours of February 1, 2020, Mr. [REDACTED] was driving a vehicle and collided with a power pole by the side of the road. A bystander reported the accident to the police by telephone. After doing so, she handed her telephone to Mr. [REDACTED] who gave his name and confirmed to the police despatcher that he was both the driver and the registered owner of the vehicle. A fire truck was despatched to the scene to offer assistance. The police despatched two RCMP constables, Constables Roy and Bainbridge, in separate police cars, to attend at the scene. The police officers arrived on the scene of the accident about 5 minutes after the fire truck.

[4] One of the RCMP officers, Constable Bainbridge, had had previous dealings with Mr. [REDACTED] in connection with a criminal investigation involving stolen license plates.

She remembered him from that investigation. While en route to the accident scene, she checked the police data base and confirmed that he was the registered owner of the vehicle which had collided with the pole.

[5] Constables Roy and Bainbridge gave the following evidence respecting their knowledge of Mr. [REDACTED] before they arrived at the accident scene.

[6] Constable Bainbridge said:

I remembered dealing with Mr. [REDACTED]. He's got a very unique name. So, I recalled his name and I did a quick computer check, just to confirm that my memory was correct, that I had dealt with him on October 29, 2019 in regards to a suspicious vehicle file, where he was the registered owner of the vehicle.

* * *

[On October 28, 2019,] I explained to him, basically, what we were going to do was seize the license plates from his vehicle.

She said that she remembered from her dealings with Mr. [REDACTED] in October, 2019 that Mr. [REDACTED] was on parole for a drug offence. She said that she did not conduct a criminal record check on Mr. [REDACTED] but that she did a motor vehicle search, which confirmed that Mr. [REDACTED] was the registered owner of the vehicle at the accident scene to which she had been despatched. It will be noted that there is no reference to weapons or violence in Constable Bainbridge's evidence

[7] By contrast, Constable Roy said:

While I attended the scene along with Constable Bainbridge, I was informed over the radio of the past drug and weapon history of Mr. [REDACTED] ... I do not recall the exact wording. I know that there was some drugs, weapons and firearms involved in that history and flagged as violent as well.

[8] Mr. [REDACTED] criminal record was not tendered in evidence. There is no other evidence of his criminal history. There is no evidence that he was prohibited from possessing firearms or other weapons on February 1, 2020.

[9] When the fire truck arrived on the scene, the firefighters found Mr. [REDACTED] standing near a vehicle which had run into a power pole. Lieutenant Benedict, one of the firefighters, was assigned to speak with Mr. [REDACTED] while his colleagues attended to other matters. Mr. Corsi, for the Crown, asked Lieutenant Benedict whether he observed any sign that Mr. [REDACTED] might be impaired. Lieutenant Benedict replied that Mr. [REDACTED] "... seemed very sober to me". The only sign of injury upon Mr. [REDACTED] was a black eye. Mr. [REDACTED] told Lieutenant Benedict that he had suffered the black eye in a separate incident sometime before, and that he had suffered no injury in the collision. Mr. [REDACTED] asked one of the firefighters, Mr. Reimer, if he would be permitted to leave the scene. The firefighter responded that it "... would be better for him to stay ...". Constable Roy arrived a few minutes later.

[10] Constable Roy arrived on the scene before Constable Bainbridge. She spoke with a firefighter, who told her that Mr. [REDACTED] was behaving in a suspicious manner and was trying to flee the scene. She then made eye contact with Mr. [REDACTED] who started walking away with two bags in his hands. She told him "Stop. Police." in a firm tone of voice and he started to walk faster away from her. She shouted "Stop. Police" and he began to run. She ran after him, shouting "Stop. Police". After about 50 metres, he dropped the bags into some bushes. She caught up to him and told him to go back and speak with Constable Bainbridge. He complied with that instruction. Constable Roy went to retrieve the bags. When she picked up the first of the bags, she made eye contact with Mr. [REDACTED]. He immediately jumped over an embankment and disappeared into the darkness.

[11] In her evidence on the *voir dire*, Constable Roy confirmed that it was her intention to detain Mr. [REDACTED] and that, in her view, he was not at liberty to leave the scene when he did. The following questions and answers are taken from the transcript of her cross-examination (underlining added):

Q. OK, so at the point you have just first seen Mr. [REDACTED] all he is doing is walking away. In your mind, you were going to stop him, command him to wait with you while you searched those bags, correct?

A. Yes, correct.

Q. OK, and that's what you did. You yelled at him. You said "stop", right?

A. Yes, I did.

Q. And he did stop and he turned around and complied with your direction to speak to you and stay there, correct?

A. I directed him to speak with Constable Bainbridge.

Q. And he complied with that direction?

A. I believe so.

* * *

Q. OK, and at that stage what you did was tell Constable Bainbridge to stay with Mr. [REDACTED] while you went to investigate the bags, correct?

A. I did, yes.

Q. OK, and at that point, Mr. [REDACTED] was not free to go, correct?

A. No, he was not.

* * *

Q. ... how far away from Mr. [REDACTED] are you when you first observed him?

A. I was approximately 10 metres away from Mr. [REDACTED]

Q. OK and pretty much immediately upon observing you, he starts to walk in the opposite direction, correct?

A. Correct, yes.

* * *

Q. At that stage, he does not pose any immediate officer safety threat, does he?

A. No.

Q. OK, and at that point, why isn't Mr. [REDACTED] free to go on his way?

A. Sorry, I don't understand the question.

Q. Why can't Mr. [REDACTED] walk away? He is not posing an immediate threat to officer safety, correct?

A. He was required by law to remain at the scene of the collision.

Q. OK. His vehicle is wrapped around a pole, right?

A. Correct.

Q. OK, he's not going to be driving away, correct?

A. No, he won't.

Q. All right, so there is no concern about making sure someone who is about to continue on the roadway ... is sober, one of that is in play because he's not driving away, right?

A. Correct.

Q. OK, and you know he has already identified himself to dispatch as the driver of the vehicle that was in the accident, correct?

A. Correct.

Q. OK, so we know that he is not going to be driving out of there. We know he has already taken responsibility for the accident, right?

A. Yes

Q. OK, why isn't he free to go?

A. Because I was worried that he might have weapons or firearms on him.

Q. It has got nothing to do with the *Motor Vehicle Act*. You want to stop him and figure out what is in the bags, right?

A. I wanted to stop and figure out if there was any weapons and firearms, yes.

Q. OK. Your intention from the moment you laid eyes on Mr. [REDACTED] was to search those bags, correct?

A. Yes.

* * *

Q. OK. It wasn't going to be voluntary. You were searching those bags, no matter what, as soon as you saw Mr. [REDACTED] correct?

A. Correct.

[12] The following questions and answers from the cross-examination of Constable Bainbridge are also material:

Q. It was very apparent to you, at first that he didn't want to speak with you, because he was trying to walk away, right?

A. Correct.

Q. And he acquiesced ... to that direction, and did indeed stop and turn around and come speak to you, correct?

A. Correct.

Q. So, essentially, you over-rode his will to walk away, and he acquiesced to your authority to speak to him, right?

A. Correct.

Q. That's how you perceived it happening. Yes?

A. Yes.

Q. OK, so at the point in time that he's turned around and he's back speaking to you, he's under your control, correct?

A. Yes

[13] It is worthy of note that neither constable articulated any basis for a suspicion:

- a. that there were any weapons or firearms in the bags;
- b. if so, that Mr. [REDACTED] lacked the necessary permits.

For all they knew, Mr. [REDACTED] was a fully-licensed gun owner.

[14] After Mr. [REDACTED] departed the scene, the two constables searched the bags, in which they found large quantities of drugs and drug paraphernalia.

Was Mr. [REDACTED] Detained by the Police?

[15] In *R. v. Grant* [2009] 2 SCR 353 at paragraph 44:

Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

(a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

(b) The nature of the police conduct, including the language used; the use of physical contact; the place where the

interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

R v Grant [2009] 2 SCR 353 @ paragraph 44

I refer also to *R. v. Reddy* [2010] BCJ No. 49; 2010 BCCA 11 at paragraphs 58 to 62 and *R. v. Suberu* [2009] 2 SCR 460.

[16] In this case, it is clear that Constables Roy and Bainbridge intended to detain Mr. [REDACTED] and believed that they had done so. Anyone who is pursued by a police officer who is shouting “Stop. Police” would understand the police officer intended to restrain the person from leaving the scene, and that he had no option but to comply with that instruction, I conclude that Mr. [REDACTED] was detained.

Did the Detention of Mr. [REDACTED] Infringe His Rights Under Section 9 of the *Charter*?

[17] “[A]n individual confronted by state authority ordinarily has the option to choose simply to walk away . . .”: *Grant* at paragraph 21. That option is an important aspect of personal liberty.

[18] A “... detention not authorized by law is arbitrary and violates s. 9 ...”: *Grant* at paragraph 54. See also *Reddy* at paragraph 71. The next question is whether Mr. [REDACTED] detention was authorized by statute or by the common law.

[19] Section 68(1) of the *Motor Vehicle Act* provides:

(1) The driver or operator or any other person in charge of a vehicle that is, directly or indirectly, involved in an accident on a highway must do all of the following:

- (a) remain at or immediately return to the scene of the accident;
- (b) render all reasonable assistance;
- (c) produce in writing to any other driver involved in the accident and to anyone sustaining loss or injury, and, on request, to a witness
 - (i) his or her name and address,

- (ii) the name and address of the registered owner of the vehicle,
- (iii) the licence number of the vehicle, and
- (iv) particulars of the motor vehicle liability insurance card or financial responsibility card and, if applicable, blanket certificate for that vehicle,

or such of that information as is requested.

No one at the scene required any assistance. Constable Bainbridge had Mr. [REDACTED] name, confirmation that he was the registered owner of the vehicle and the license plate number of the vehicle before she arrived on the scene. There is no evidence that she asked Mr. [REDACTED] for any of the other items of information mentioned in section 68(1)(c), or that she had any interest in any of them. Indeed, it is clear that the constables' interest was limited to the contents of the bags.

[20] Constables Roy and Bainbridge proceeded on the premise that section 68(1) required Mr. [REDACTED] to remain at the scene of the accident until they told him that he was free to go. Section 68 doesn't say that. It requires a driver to remain at the accident scene and provide certain information. Mr. [REDACTED] had already done that in his telephone call to the police despatcher. Having provided that information, and there being no other person or vehicle involved in the collision, he was free to leave the scene.

[21] Sections 320.16(1) and 320.17 of the *Criminal Code* provide:

320.16(1) Everyone commits an offence who operates a conveyance and who at the time of operating the conveyance knows that ... the conveyance has been involved in an accident ... and who fails ... to stop the conveyance, give their name and address, and, if any person has been injured or to require assistance, offer assistance.

320.17 Everyone commits an offence who operates a motor vehicle ... while being pursued by a police officer and who fails ... to stop the motor vehicle ... as soon as is reasonable in the circumstances.

Mr. [REDACTED] departure from the accident scene did not offend either section. He gave his name to the police despatcher. No one was injured in the accident. He did not leave the scene in a motor vehicle. Section 320.17 does not apply to pedestrians.

[22] I conclude that Mr. [REDACTED] detention was not authorized by any of section 68 of the *Motor Vehicle Act* or sections 320.16 to 320.17 of the *Criminal Code*.

[23] It is also necessary to consider whether Mr. [REDACTED] detention was justifiable as an exercise of the common-law power of investigative detention, as discussed in *R v Clayton* [2007] 2 SCR 725. That power may be exercised where:

- a. "... there is a clear nexus between the individual to be detained and a recent or on-going criminal offence ...": *Clayton* at paragraph 28; or
- b. the police believe, on reasonable grounds, that the detention is necessary for the safety of the police officers or the public.

However, the search "... cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition": *Clayton* at paragraph 29.

[24] In this case, Constables Roy and Bainbridge were not investigating a crime. Constable Roy confirmed that she was not investigating an infraction of the *Motor Vehicle Act* (see the underlined passage in paragraph 11, above). There is no basis in the evidence for a suspicion that any crime had been committed. Similarly, there is no basis in the evidence for a suspicion that the bags might contain firearms or other weapons. If Constable Roy was looking for weapons when she searched the bags (a proposition of which I am deeply sceptical), she was acting on a mere hunch, which proved to be unfounded.

[25] If Constable Roy was looking for weapons, that fact does not justify the search of the bags. It is not a crime for a person to possess weapons unless the person is subject to a prohibition against such possession. There is no evidence that Mr. [REDACTED] was subject to such a prohibition.

[26] I conclude that Mr. [REDACTED] detention was not justified by the common-law power of investigative detention.

[27] It follows that Mr. [REDACTED] detention was not authorized by law, and that it infringed his rights under section 9 of the *Charter*.

Officer Safety

[28] Mr. Farenholtz, for the Crown, emphasized the importance of searches conducted for the purpose of ensuring the safety of police officers and the public. The short answer to that submission is that there is no evidentiary basis to support a suspicion that the bags contained weapons, or that the contents, posed any threat to public or officer safety. Constable Roy was not asked why she thought that they might. By time the search was conducted, Mr. [REDACTED] had fled the scene, and had no access to the bags. Constable Roy acknowledged during her cross-examination that he did not pose any threat – see paragraph 11, above. If the search of these bags can be justified on grounds of officer safety, the personal property of any citizen is liable to police search at any time.

Did Mr. [REDACTED] Lose His Privacy Interest in the Bags by Abandoning Them As He Fled?

[29] Mr. Farenholtz submits that, by abandoning the bags, Mr. [REDACTED] forfeited his privacy interest in their contents. Mr. Farenholtz refers to *R. v. Nesbeth* 2008 ONCA 579, *R. v. Ratt* 2020 SKCA 19 and *R. v. Schirmer* 2020 BCSC 209. I reject that submission for the reasons given by Justice Frankel in *R. v. Reddy* 2010 BCCA 11; [2011] BCJ No. 49 at paragraph 87:

To accept the Crown's argument that Mr. Reddy, by acting as he did in the face of an unlawful detention, lost his privacy interest in the jacket, would be to turn the law on its head. It would mean that a person who refuses to submit to an unlawful interference with his or her constitutional rights would, by that act of refusal, be abandoning other constitutional rights. This is illogical, unprincipled, and not in keeping with a purposive interpretation of the *Charter*.

Remedy

[30] In *Reddy* at paragraph 91, Justice Frankel said:

In deciding whether to admit or exclude evidence, a court must now assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

- (a) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
- (b) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little); and
- (c) society's interest in the adjudication of the case on its merits.

[31] In this case, the infringement of Mr. [REDACTED] *Charter* right was very serious. Constables Roy and Bainbridge had absolutely no basis for a belief that he had done anything wrong. He was simply exercising the right of a citizen to walk away from police interrogation: see Grant at paragraph 21.

[32] Working, as I do, in the criminal courts, I see many attempts by police officers to justify warrantless searches on grounds of officer safety when officer safety was clearly not at risk. "Officer safety" has become a meaningless incantation, ritually uttered by police officers in an attempt to justify warrantless searches in circumstances in which there was no reasonable basis for a concern that officer safety was at risk.

[33] The impact on Mr. [REDACTED] *Charter*-protected rights was very serious. It rendered meaningless his right to refuse to submit to police interrogation. If the results of this search are admitted into evidence, the message to police officers will be clear. They will understand that they can proceed with unlawful searches with confidence that, if the search turns up evidence of wrongdoing, the results of the search will be received in evidence, on the principle that the ends justify the means.

[34] I acknowledge that society has a real and pressing interest in suppressing the drug trade, which is the root cause of much of the criminal activity which I see daily in the courtroom. However, the drug trade must not be suppressed at the cost of the liberties guaranteed by the *Charter*.

[35] On balance, I conclude that more harm would be done to public confidence in the administration of justice if I were to receive in evidence the results of the search than would be done if I were to reject them.

Disposition

[36] I conclude that the results of the search are inadmissible.

December 9, 2021

T. Gouge, PCJ

CORRIGENDUM - Released January 12, 2022

In the Reasons on Voir Dire dated December 9, 2021, the following changes have been made:

[1] Paragraph 1 a. should read:

Mr. [REDACTED] was arbitrarily detained by the police, with the result that his detention violated his rights under section 9 of the *Canadian Charter of Rights & Freedoms*; . . .

[2] Paragraph 11 should read:

. . .

Q. OK, and at that point, Mr. [REDACTED] was not free to go, correct?

. . .

Q. All right, so there is no concern about making sure someone who is about to continue on the roadway ... is sober, one of that is in play because he's not driving away, right?

[3] Paragraph 15 should read:

In *R. v. Grant* [2009] 2 SCR 353 at paragraph 44:

. . .

I refer also to *R. v. Reddy* [2010] BCJ No. 49; 2010 BCCA 11 at paragraphs 58 to 62 and *R. v. Suberu* [2009] 2 SCR 460.

[4] Paragraph 17 should read:

“[A]n individual confronted by state authority ordinarily has the option to choose simply to walk away . . .”: *Grant* at paragraph 21. . . .

[5] Paragraph 18 should read:

A “... detention not authorized by law is arbitrary and violates s. 9 ...”: *Grant* at paragraph 54. See also *Reddy* at paragraph 71. . . .

[6] Paragraph 23 a. should read:

“... there is a clear nexus between the individual to be detained and a recent or on-going criminal offence ...”: *Clayton* at paragraph 28; or
...

However, the search “... cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition”: *Clayton* at paragraph 29.

[7] Paragraph 28 should read:

Mr. Farenholtz, for the Crown . . .

[8] Paragraph 29 should read:

Mr. Farenholtz submits that, by abandoning the bags, Mr. [REDACTED] forfeited his privacy interest in their contents. Mr. Farenholtz refers to *R. v. Nesbeth* 2008 ONCA 579, *R. v. Ratt* 2020 SKCA 19 and *R. v. Schirmer* 2020 BCSC 209. I reject that submission for the reasons given by Justice Frankel in *R. v. Reddy* 2010 BCCA 11; [2011] BCJ No. 49 at paragraph 87: . . .

[9] Paragraph 30 should read:

In *Reddy* at paragraph 91, Justice Frankel said: . . .

[10] Paragraph 31 should read:

. . . He was simply exercising the right of a citizen to walk away from police interrogation: see Grant at paragraph 21.

The Honourable Judge T. Gouge
Provincial Court of British Columbia