

CANADA / JUDGMENT

HMTQ v. Bartoli and Botticelli

2003 BCSC 1888

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

HMTQ v. Bartoli and Botticelli

2003 BCSC 1888

Date: 20031118

Docket: 21926

Registry: Vancouver

Her Majesty the Queen

Against

Fabrice Dino Bartoli and

Domenic Botticelli

Before: The Honourable Mr. Justice Groberman

Oral Reasons for Judgment

November 18, 2003

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Place and Date of Trial/Hearing:

November 18, 2003

Vancouver, B.C.

- [1] THE COURT: The accused are charged with possession of cocaine for the purposes of trafficking. Members of the Burnaby RCMP found quantities of cocaine in Mr. Bartoli's jacket pocket and Mr. Botticelli's vehicle. Both accused seek to exclude this evidence on the basis that it was obtained through Charter violations and on the basis that its reception in evidence would tend to bring the administration of justice into disrepute.
- [2] In order to decide the issues on this voir dire, I must determine whether the initial detention of the accused was arbitrary, in violation of s. 9 of the Charter. Next, I must determine whether the searches of Mr. Bartoli's jacket pocket and Mr. Botticelli's vehicle were unreasonable, contrary to s. 8 of the Charter. Finally, if I find that the accused have made out any of these violations, I must decide whether I ought to exclude evidence pursuant to s. 24(2) of the Charter.

Background Facts

- [3] The case arises out of surveillance operations undertaken by Constables Rose, Luke and Siddiqui of the Burnaby RCMP drug squad in the parking lot of the McDonald's Restaurant at Boundary Road and Lougheed Highway on March 6, 2002.
- [4] The drug squad found this location, in common with other fast-food location parking lots and other high traffic parking lots in the general vicinity, to be an area with a high incidence of drug trafficking. It set up surveillance in the parking lot with the intention of observing drug transactions and making arrests. The surveillance was random rather than targeted at specific individuals. In the past, such surveillance at this location had been successful in detecting drug trafficking activity.
- [5] At about 5:45 p.m., Constable Luke and Constable Rose noted a grey Dodge Durango sport utility vehicle in the special order area of the parking lot. That area is generally for vehicles that have gone through the drive-through lane. The Durango had not gone through the drive-through, nor had the driver, later identified as Mr. Botticelli, been into the restaurant to pick up food.

- [6] Mr. Botticelli appeared to be looking around the parking lot and then he drove to another space and waited there, still looking around. After a while, a person, later identified as Mr. Bartoli, approached the vehicle and got into the passenger side. The surveillance officers did not notice him carrying any food, though it is plausible, in light of food later found in the vehicle, that he might have been.
- [7] The vehicle left the McDonald's parking lot and proceeded to drive to Skeena Street, a short distance away. Skeena Street is a wide street in an area that is largely industrial. At the time of day in question, the area is very quiet.
- [8] On Skeena Street, the vehicle pulled over to the side of the road and stopped. The two occupants appeared to engage in conversation. After a period of two to five minutes, depending on which of the constables is more accurate in his or her estimate, the vehicle was again put in motion and it drove back to the McDonald's parking lot.
- [9] At that point, the constables, who had followed the vehicle, decided to do a takedown for the purposes of investigative detention of the occupants. They did not consider that they had sufficient evidence to arrest the occupants or to lay charges, but considered that they had articulable cause to detain the vehicle and its occupants and perform permitted investigations.
- [10] When the Durango came to a stop in the parking lot, the two police vehicles boxed it in. Constables Siddiqui and Luke went to the driver's side, while Constable Rose went to the passenger side. Constable Luke remained toward the front driver's side of the Durango observing, while Constable Siddiqui dealt with Mr. Botticelli, and Constable Rose dealt with Mr. Bartoli.
- [11] Constable Rose considered it necessary to order Mr. Bartoli from the vehicle in order to control the situation. He was concerned that he was unable to see Mr. Bartoli's hands as he approached the Durango, though Mr. Bartoli did comply with his demands, once they were made, to keep his hands visible.
- [12] Meanwhile, Constable Siddiqui required Mr. Botticelli to exit the vehicle on the pretext of concern over the Durango's licence plate. As the two men left the vehicle, the three officers had their service revolvers drawn but aimed at the ground.
- [13] Constable Siddiqui dealt with Mr. Botticelli towards the back passenger's side of the vehicle, while Constable Rose dealt with Mr. Bartoli at the front driver's side. It is apparent that both Mr. Botticelli and Mr. Bartoli were very nervous.
- [14] Constable Rose states that he explained to Mr. Bartoli his right to counsel from memory, and that during this time Mr. Bartoli kept putting his hands in his rear pocket. Constable Rose told Mr. Bartoli to keep his hands out at least three times. Mr. Bartoli was initially compliant each time, but then again reach into his rear pocket.

- [15] Constable Rose says he considered that there was some danger that Mr. Bartoli might have weapons in his pocket. He handcuffed Mr. Bartoli and then commenced searching his pockets. He found a Ziploc bag with 30 grams of cocaine in it in his jacket pocket, and he arrested Mr. Bartoli.
- [16] Meanwhile, Constable Siddiqui had obtained Mr. Botticelli's consent to search the vehicle on the pretext that he was concerned about the vehicle's registration. Constable Siddiqui advised Constable Rose that he had permission to search the vehicle, and Constable Rose did search the vehicle. Constable Rose considered that he would have searched the vehicle in any event, incidental to Mr. Bartoli's arrest. Another Ziploc bag with just under 30 grams of cocaine was found in the centre console of the Durango.

Articulate Cause for Investigative Detention

- [17] The first issue to be determined is whether the police acted within their authority in detaining Mr. Bartoli and Mr. Botticelli when they returned to the McDonald's parking lot. At that time, the constables were of the view that they did not have sufficient information to arrest the accused. I agree with that assessment.
- [18] That is not, however, the end of the matter. The standard of suspicion that must be met in order to effect a lawful arrest has frequently been seen as too high a standard to apply to all detention by police. The well-known American case of *Terry v. Ohio*, 392 U.S. 1 (1968), was a case in which the United States Supreme Court found that stop and frisk practices of American police forces did not violate the American Bill of Rights. In *R. v. Simpson* (1993), 79 C.C.C. (3d) 482, 12 O.R. (3d) 182, Doherty J.A., speaking for the Court, held that powers of investigative detention short of arrest also exist in Canada and that such powers are constitutional.
- [19] His Lordship found (at C.C.C. p. 501) that the minimum requirement for investigative detention is one of "objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation." He went on to state that "a 'hunch' based entirely on intuition gained by experience cannot suffice, no matter how accurate that 'hunch' might prove to be".
- [20] Mr. Justice Doherty also emphasized that "articulate cause" was a necessary but not sufficient precondition for investigative detention. At C.C.C. p. 503, he said:

I should not be taken as holding that the presence of an articulate cause renders any detention for investigative purposes a justifiable exercise of a police officer's common law powers. The inquiry into the existence of an articulate cause is only the first step in the determination of whether the detention was justified in the totality of the circumstances and consequently a lawful exercise of the officer's common law powers.... Without articulate cause, no detention to investigate the detainee for possible criminal activity could be viewed as a proper exercise of the common law power. If articulate cause exists, the detention may or may not be justified. For example, a reasonably based suspicion that a person committed some property-related offence at

a distant point in the past, while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute the suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation.

In summary, I do not consider the articulable cause inquiry as providing the answer to the lawfulness of the police conduct but rather as the first step in the broader inquiry.

[21] The British Columbia Court of Appeal in *R. v. Ferris* (1998), 126 C.C.C.(3d) 298, 162 D.L.R. (4th) 87 agreed that investigative detention based on articulable cause is a common law power of peace officers. Madam Justice Ryan, speaking for the majority, added that investigative detention is not precluded simply because other less intrusive investigative techniques might be possible. At page 310, she stated:

... the reasonableness of the officer's decision to stop a person whom the officer suspects is committing or has just committed a crime does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the ability of the police to make swift, on-the-spot decisions.

Ferris is, of course, an authority that is binding on me. In any event, I agree with the general proposition that minimal interference with a person's liberty as represented by a stop and frisk or genuine investigative detention is not arbitrary detention when it is accompanied by articulable cause. To require more than articulable cause before a police officer is able to request that an individual briefly halt activities for the purpose of a non-intrusive investigation would be to place too high a value on personal liberty and too little emphasis on crime prevention and detection.

[22] It must be borne in mind, however, that while the required degree of suspicion of investigative detention is lower than for arrests, the power to interfere with the person is correspondingly reduced. Serious intrusions on personal liberty or privacy cannot be countenanced in the name of investigative detention. It cannot allow more than a brief diversion of a person from the activities that he or she is pursuing, nor can it involve any serious incursion on their privacy.

[23] In the case at bar, I am satisfied that the constables did have articulable cause to detain the occupants of the Durango. The activities observed by the police were suspicious. The Durango had entered the McDonald's lot, parked in a place well away from the restaurant, and the driver had talked on a cell phone and looked around the lot furtively.

- [24] Such activity is not consistent with the normal purpose of attendance at the lot, to obtain food, nor with other readily available explanations. Parking well away from the building in a zone used for other purposes does not suggest that the driver was merely attending to pick someone up. The fact that a person eventually entered the vehicle does not suggest that the driver merely pulled off the road into a convenient spot to talk on his cell phone.
- [25] The brief drive to a secluded stop, the short stop and the return to the parking lot all lead to a strong suspicion that the driver and his passenger were engaging in some clandestine activity. Given that drug dealing is common in this area - a fact known to the police, and supported in the evidence before me - the natural suspicion from the train of events was that a drug deal had taken place. This was not a mere "hunch."
- [26] In argument, counsel for the accused expended significant effort in suggesting legitimate activities that the accused might have been engaging in, some rather fanciful, such as the suggestion that Mr. Botticelli might have been showing off his truck, and others more plausible, such as the suggestion that the two may have been engaging in some sort of clandestine though non-criminal activity such as a scheme to buy a company to raid another company's employee. With all due respect to counsel, however, the fact that there might be legitimate explanations, rather, for the activity in question is not particularly helpful to the analysis I must undertake. It is not necessary for the Crown to demonstrate that the activities that were witnessed were necessarily or even most probably criminal in nature. Rather the test is whether the police had articulable cause to detain the accused. In my view, they had ample articulable cause in this case.
- [27] I also find no basis on which the police ought to have chosen to forego detaining the accused in this case. The information they had was fresh and firsthand. Counsel for Mr. Botticelli, supported by counsel for Mr. Bartoli, argues strongly that detention ought not to have taken place in the parking lot of a family restaurant at the dinner hour. While it seems to me that great care is necessary on the part of police in effecting a detention in such an area, I am not convinced that in this case the decision to detain the accused in the parking lot was wrong, or, at any rate, so wrong as to negate the legality of the detention. The police, in essence, must go to where crime takes place.

The Search of Mr. Bartoli's Pocket

- [28] The next question is what powers the police were entitled to exercise once the accused were detained. In my view, those powers must be very limited. It would not make sense to place the threshold for arrest as high as it is, and then allow police forces to circumvent the threshold by exercising the same powers they have on arrest under the rubric of "investigative detention". It must also be recognized that investigative detention is a common law power and it ought not to be interpreted as allowing serious incursions on the personal liberty or privacy of the suspect except in exigent circumstances.

- [29] In particular, I think it is clear that investigative detention cannot be a replacement for the obtaining of a search warrant, nor can it justify any but the most superficial pat-down search of the individual, unless there is a bona fide concern for the safety of a police officer. Indeed, this much is clear from *R. v. Johnson*, 2000 BCCA 204, 32 C.R. (5th) 236.
- [30] I have significant doubt as to whether the initial actions of the police upon stopping the Durango, in this case, come within the scope of investigative detention. The idea that the police, without more than articulable cause, are entitled, with arms drawn, to order individuals out of a vehicle and control their movements does not sit well. I accept that the circumstances encountered by the police at the time of detention may require them to take defensive steps in order to minimize the danger to themselves. The words of Hood J. in *R. v. Lee* (1993), 16 C.R.R. (2d) 348 at 365 have been quoted with approval on a number of occasions and are apt:

If police officers are to effectively discharge their duties, then it is absolutely necessary that in the performance of them they feel and be as safe as the circumstances will permit. The duty to investigate, and to prevent, offences, must of necessity have associated with it a legitimate self-protection power to search. The safety and lives of officers on the street must be paramount. Constable Lim [in that case] was entitled, or empowered, to search the accused in the circumstances, given his movements or conduct which gave rise to her perception that he was reaching for a gun and that she and her fellow officers were in danger.

This does not, however, justify the police in arbitrarily interfering with a suspect's liberty. While I do not suggest that the police must measure their actions with a medicine dropper, they must show some appreciation for the fact that the suspect is not and cannot be placed under arrest. Unless there is articulable cause for ordering an accused out of an automobile, for example, it seems to me that investigative detention should not include such a step.

- [31] In the case at bar, I accept that the police were justified in boxing in and stopping Mr. Botticelli's vehicle. I also accept that they may have had grounds to think it advisable to have the suspects exit the vehicle and even to insist that they not put their hands in their pockets.
- [32] Stretching the matter as far as it can be taken, I would accept for the purposes of argument that Constable Rose's concern about Mr. Bartoli's lack of complete compliance with detention directions over a period of about 15 seconds might have necessitated placing handcuffs on him.
- [33] Once that was done, however, I do not understand how there could be any legitimate fear for officer's safety that would justify a search of the interior of Mr. Bartoli's pockets. If any search was necessary, a simple pat-down should have been sufficient to establish that no firearms were present in the pocket.

[34] Indeed, Constable Rose did perform a pat-down, apparently for the purpose of ensuring that there were no sharp objects or needles in the pocket. It is hard to imagine that any weapon reasonably likely to be carried in a pocket, other than a firearm, could have posed any real concern to the police in the circumstances that they found themselves in on that day.

[35] I acknowledge that in *R. v. Mann*, 2002 MBCA 121, 169 C.C.C. (3d) 272, the Manitoba Court of Appeal came to the conclusion that a search of a suspect's pockets in the course of investigative detention was unobjectionable. The court stated at C.C.C. p. 282:

... as we are talking about a search undertaken for safety reasons, it would not be reasonable to place too rigid a restraint on a police officer's right to ensure that the detainee has no weapon or other object with which he might cause harm to the police, himself or members of the public. It is therefore my opinion that, so long as the court is satisfied that the search for weapons was conducted in good faith -- and not as an excuse to search the detainee for evidence of a crime -- the officer should be allowed some latitude. In the present case, the officer's explanation of why he searched inside the pouch -- "... because I feel something soft in, in the front, it may be hiding something hard behind, another weapon or anything" -- strikes me as a reasonable ground for extending the pat-down search to a search inside the pouch. There is certainly nothing to suggest that the officer was not acting in good faith in this regard.

I note that leave to appeal this decision to the Supreme Court of Canada was granted on March 27th of this year and that the appeal is currently scheduled to be heard in just over two weeks on December 5, 2003.

[36] It seems to me that the *Mann* case must, if it is correct in law, represent the very outside limits of a search incident to investigative detention.

[37] In the case at bar, I have no evidence suggesting that Constable Rose considered the initial pat-down of Mr. Bartoli's pocket led him to believe that a further search was needed. In the circumstances of the case, I find that he was not objectively justified in conducting a further search of that pocket.

[38] In my view, Constable Rose was taking liberties with the concept of a search for weapons in connection with investigative detention, for the purpose of attempting to uncover evidence on which he could lay a criminal charge. When he examined the inside of Mr. Bartoli's pocket, he clearly crossed over the line of what could reasonably be done in the cause of officer's safety. At that stage, in my view, his search became a search for evidence rather than a precautionary search for weapons.

[39] In this regard, I agree with the sentiments expressed in obiter by the Manitoba Court of Appeal in *R. v. Willis* (2003), 2003 MBCA 54, 174 C.C.C. (3d) 406 at C.C.C. p. 418:

There are two competing values at work in these scenarios that occur routinely on our streets. Police officers are at high risk everyday. They never know when a routine, mundane situation will explode into violence. Therefore, as has been said, it is undesirable to measure with extreme nicety whether their safety or that of the public in any particular search requires more or less

than a quick pat-down. On the other hand, an individual has a right to be free from unreasonable search and seizure. There is a temptation for authorities to sometimes use such a search as an opportunity to obtain evidence of a crime. That temptation must be resisted strongly by the courts:

... I do not believe that we have yet reached the stage where the incantation of "officer safety" can be used to legitimize every fishing expedition undertaken by the police under that mantra.

In so saying, I do not mean in the least to trivialize the danger faced by the police officers patrolling our streets nor to undermine their legitimate right to take all reasonable and lawful steps to ensure their own safety in a given situation. However the courts must be equally vigilant in not giving the police carte blanche to initiate an "investigatory" conversation with unsavoury individuals as a guise for carrying out a personal search that they would not otherwise be able to make. Proportionality and individual circumstances must be examined in each instance of reliance on this doctrine.

R. v. Flett (S.) (2002), 168 Man. R.(2d) 130 (Prov. Ct.), at paras. 23-24, per Devine Prov. Ct. J.

[40] I note that in Willis, itself, the evidence was found to be admissible. An application for leave to appeal to the Supreme Court of Canada was submitted to a leave panel this week.

[41] In my view, Constable Rose's search in this case was an attempt to extend the search for weapons incidental to investigative detention beyond its outer limits. The search was therefore unreasonable.

[42] I have not overlooked the cases of R. v. Derkson, unreported, October 14, 1999, No. CC990129, Vancouver Registry and R. v. Omelusik, 2003 BCCA 319, [2003] B.C.J. No. 1237, cited by the Crown. I do not believe that either is of assistance. In Derkson, Boyd J. was dealing with the search of an accused who was under arrest for dangerous driving. The search conducted was legitimate as a search incidental to arrest. In Omelusik, the Court of Appeal dealt with a very limited search of a kangaroo top stating:

Assuming without deciding that the officer should not have pulled out the bag from the kangaroo top as search incidental to an investigative detention, the ruling under s. 24(2) was free from reversible error.

I do not see the Omelusik case as determining the extent of permissible searches incidental to investigative detention.

The Search of Mr. Botticelli's Vehicle

[43] I am satisfied that without the evidence of the contents of Mr. Bartoli's pockets, the search of Mr. Botticelli's vehicle was also unreasonable. The Crown has not attempted to justify the search as one that was consented to. It has merely asserted the search was incidental to Mr. Bartoli's arrest.

[44] While I agree that if that arrest had been proper the search would have been justifiable, I cannot find it justifiable in view of my findings with respect to the search of Mr. Bartoli. In the circumstance, the evidence of the two quantities of cocaine violated s. 8 of the Charter.

Should the Evidence Be Excluded?

[45] I have concluded in this case that the Charter violation was far from trivial. It was a serious one and I find that it would bring the administration of justice into disrepute if I admit the evidence.

[46] I have considered the factors discussed in *R. v. Collins*, [1987] 1 S.C.R. 265 and in *R. v. Stillman*, [1997] 1 S.C.R. 607, but, in my view, despite an attempt to fit this case within the public safety pigeonhole, it is simply a case where a warrantless search of the person was conducted without reasonable grounds and with the intent of uncovering incriminating evidence. The police must be free to detain persons engaged in suspicious activity and conduct non-intrusive investigation, and must also be given significant leeway to conduct intrusive investigations for weapons to ensure their own safety. We must not, however, allow these intrusions to serve as an excuse to search for other contraband.

[47] Without some basis for concluding that Constable Rose could have genuinely concluded that some risk to his personal safety was present, I find that the search was not bona fide.

[48] I, therefore, conclude that the evidence ought to be excluded under s. 24(2) of the Charter.

[49] That is my ruling on the voir dire. Ms. Swift, how do you wish to proceed?

[50] MS. SWIFT: The Crown's case is now closed.

[51] THE COURT: Thank you. Defence?

[52] MR. JEVNING: I Invite Your Lordship to dismiss the charges.

[53] MS. SWIFT: I have no submissions.

[54] THE COURT: Under the circumstances, the charges are dismissed, as there is no evidence capable of sustaining a conviction on the charge. I take it Mr. Bartoli and Mr. Botticelli are not in custody?

[55] MS. SWIFT: No they are not, My Lord.

[56] THE COURT: Very well. Then they are free to go. The charge is dismissed.

"H. Groberman, J."

The Honourable Mr. Justice H. Groberman

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