
CANADA / JUDGMENT

R. v. B.S.

2014 BCCA 257

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 257 R. v. B.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. B.S.,

2014 BCCA 257

Date: 20140627

Docket: CA040567

Between:

Regina

Respondent

And

B.S.

Appellant

Restriction on Publication: A publication ban has been automatically imposed under s. 110(1) of the Youth Criminal Justice Act restricting the publication of information that would identify a young person referred to in this judgment by the initials B.S. This publication ban applies indefinitely, unless the information is published by that young person under s. 110(3) or the court has ordered publication.

Restriction on Publication: A publication ban has been automatically imposed under s. 111(1) of the Youth Criminal Justice Act restricting the publication of information that would identify a young person as having been a witness. The publication ban covers the young person referred to in this judgment by the initials K.A. and may also affect the person referred to by the initials K.J. The ban applies indefinitely, unless the information is published by that young person under s. 111(2) or the court has ordered publication.

Before:

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Provincial Court of British Columbia,
dated May 25, 2012 (R. v. B.S., Western Communities Docket No. 2952-2-C).

Counsel for the Appellant:

J.L. Stamm

Counsel for the Respondent:

P. Eccles

Place and Date of Hearing:

Vancouver, British Columbia

February 14, 2014

Place and Date of Judgment:

Vancouver, British Columbia

June 27, 2014

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

Summary:

This appeal is from the appellant's conviction by a Provincial Court judge on drug and weapon charges based on the evidence from a search. The appellant young person was walking with a group of other youths in the early hours of a Saturday morning. Believing they might be intoxicated, two police officers stopped to check on them. One of the group tried to walk away but an officer called him back. After the officer had spoken to several of the youths, the other officer noticed the appellant behaving suspiciously. The police became concerned for their safety and decided to search the appellant for weapons. Their search produced drugs and a concealed baton.

The judge found the police did not detain the appellant until they developed a legitimate concern for officer safety and decided to search him. He concluded there was no breach of the appellant's Charter rights and accordingly rejected the appellant's submission that the evidence should be excluded under s. 24(2) of the Charter.

Held: appeal dismissed. The finding that the detention began only at the point the police formed a justified concern for officer safety was open to the trial judge on the evidence. Consequently, the judge did not err in declining to find a Charter breach. Nor did he err in finding that, had there been Charter breaches, the admission of the evidence would not bring the administration of justice into disrepute.

Reasons for Judgment of the Honourable Madam Justice Neilson:

- [1] The appellant, a young person under the Youth Criminal Justice Act, S.C. 2002, c. 1 ("YCJA"), appeals his convictions on three counts of possession of a controlled substance for the purpose of trafficking, involving cocaine, ecstasy, and LSD respectively, and a fourth conviction for carrying a concealed weapon. He maintains the trial judge erred in finding the police did not violate his rights under ss. 8, 9, and 10 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, as well as his rights under s. 25(2) of the YCJA. If he is successful on that ground of appeal, he argues the trial judge erred in finding that even if his Charter rights were violated, the evidence obtained in the investigation would have been admissible under s. 24(2) of the Charter.

Background

- [2] In the early morning of Saturday, October 8, 2011, while Cst. Hall and Cst. Der of the RCMP were on patrol in a marked police car in Colwood, they came across a group of five young people walking down the road in a residential area. They appeared to be under the age of 19, and Cst. Hall believed they may have been intoxicated, based on their "buoyancy", and their "body language", which exhibited some swaying as they walked. He decided to stop and check to see if they were okay and to ensure there was no threat of property damage, which, in his experience, commonly occurred when young people were intoxicated. Cst. Hall stopped, got out, and went to speak with them, leaving Cst. Der in the car.

- [3] The trial judge described what next transpired in these terms:
- [5] Constable Hall pulled his vehicle in ahead of the young people, got out of the motor vehicle and started talking to them. He said that he could smell liquor coming from someone in the group. One by the name of [K.J.] tried to walk away and he was called back by the constable who noted symptoms of intoxication or impairment by some substance, despite [K.J.] saying that he had had nothing to drink.
- [6] He then spoke to a [T.M.], and said that that gentleman was cooperative and was apparently 22 years of age. He said that he could smell liquor on [T.M.'s] breath.
- [7] He said that he then spoke to a [K.A.] and whilst doing this noticed that [the appellant] was becoming fidgety, and at the same time he received a radio message from Constable Der, who had remained in the car as she was on light duties recovering from an injury, that [the appellant] was doing something behind his back.
- [8] At this stage Constable Hall said that he had concerns for officer safety because they were dealing with a group of five young people, and that he decided to tell [the appellant] that he was going to search him.
- [9] He accordingly, with the assistance of a Constable Narraway, who had by then arrived on the scene, handcuffed [the appellant] and searched him by the back of the police vehicle. He said this was a cursory search for weapons.
- [10] It is clear that [the appellant] was, at this stage, detained within the meaning of the Charter. What is not so clear is whether or not he was detained from the first stopping of the group by the officer.
- [11] During the search the officer found in the small of his back a baton and a bag of what appeared to be rock cocaine. Constable Hall then told [the appellant] he was under arrest for possession of a weapon dangerous to the public peace, and of a controlled substance. Back at the police detachment further drugs were found on [sic] [the appellant's] possession.
- [4] The appellant was not advised of the reason for his arrest or his right to counsel until after he was searched.
- [5] At trial, the appellant sought exclusion of the drugs and baton on the basis of a violation of his rights under ss. 8 and 9 of the Charter. He maintained he had been immediately and arbitrarily detained by Cst. Hall when he first approached the group, and the officer's subsequent search of him and seizure of the drugs and baton were unlawful. As well, he contended his rights under s. 10 of the Charter and s. 25(2) of the YCJA were violated because he was not advised of his right to counsel immediately upon his detention.

[6] Due to the appellant's Charter challenge, the parties agreed that all of the evidence would be heard on a voir dire. The appellant gave evidence, and testified that he believed he was not free to leave once Cst. Hall stopped the group. Although he agreed Cst. Hall did not tell him this directly, he said that when Cst. Hall called K.J. back, he assumed he wasn't allowed to leave either.

[7] By contrast, K.A., one of the other youths, testified that when the police stopped them, she believed they remained free to leave. She stated:

Q When the police stopped, did you think that you were free to leave?

A I thought that we were free to leave.

THE COURT: I'm sorry, you thought --

A I thought that we were free to leave.

THE COURT: You thought you were free to leave.

MR. STAMM:

Q Was anyone there told that they weren't free to leave?

A Just [B.S.]

Q Just to be clear, when the police officer steps out of the car and asks for names and addresses and if you have warrants, do you feel that you're obliged to speak to him?

A I don't think I was obliged to speak to him about the warrants, but name and addresses I suppose.

[8] The trial judge found the appellant had not been detained until Cst. Hall started to question him. He set out his reasoning as follows:

[13] The Crown relies on the case of *R. v. Mann*, [2004] 3 S.C.R. 59 where at page 19 the court said:

'Detention' has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to 'detain', within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be 'detained' in the sense of 'delayed', or 'kept waiting'. But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so.

[14] The Crown say that on the basis of that decision [B.S.] was not detained until he was, in fact, handcuffed by Constable Hall.

- [15] The accused took the witness stand on the voir dire and said that he felt that he was not free to go at any time after they were stopped by the police, and was in fact detained in his mind. This is corroborated by the evidence that [K.J.] attempted to leave and was called back.
- [16] The defence urges me to find that it was, in fact, detention and a breach of the accused's Charter rights and also his rights under s. 25(2) of the Youth Criminal Justice Act.
- [17] Having considered the evidence I have concluded that there was, in fact, a detention within the meaning of s. 10(a) and (b) when Constable Hall started to question [B.S.].
- [9] Thus the trial judge found no violation of the appellant's rights under s. 9 of the Charter. He then considered whether the appellant's rights under ss. 8 and 10 had been breached. He found Cst. Hall had legitimate concerns for officer safety that justified his search of the appellant. As well, relying on *R. v. Suberu*, 2009 SCC 33, the trial judge found there had been no violation of the appellant's s. 10 rights because those concerns entitled Cst. Hall to search the appellant before performing his obligations under s. 10.
- [10] The trial judge concluded there had been no breach of the appellant's Charter rights. He nevertheless went on to find that even if the appellant's Charter rights had been violated, he would have admitted the evidence of the baton and drugs under s. 24(2) of the Charter, applying the analysis required by *R. v. Grant*, 2009 SCC 32.
- [11] At the conclusion of his reasons, the trial judge directed that the evidence on the voir dire be admitted on the trial, stating:
- [23] Accordingly I find that the evidence on the voir dire should be admitted into the trial, except the evidence of Constable Narraway with regard to the accused's background, and also I accept the evidence given by the accused and his witness.
- [12] I do not construe this final statement of the trial judge as an assessment of the appellant's credibility. Given this observation was made at the end of the decision, and its subject matter, it is apparent that the word "accept" is an error and should be "except".
- [13] At trial, the judge accepted the expert evidence of Cpl. Pilot that the 13 grams of cocaine recovered from the appellant represented approximately a six-day supply of the drug valued at \$1,300. He found this, together with the appellant's possession of a cell phone and three kinds of drugs, and the fact the drugs were packaged for individual sale, supported a conclusion the appellant possessed the drugs for the purpose of trafficking. As well, the trial judge found the baton that had been concealed in the appellant's trousers was a weapon. He convicted the appellant on all four counts.

Issues on Appeal

- [14] The appellant contends the trial judge erred:
- a) in finding there was no violation of his rights under ss. 8, 9 or 10 of the Charter; and

- b) in finding that if there were Charter violations, the admission of the evidence obtained would not bring the administration of justice into disrepute.

Analysis

- [15] The central question before the trial judge was at what point Cst. Hall detained the appellant. This determined the lawfulness of his detention, and informed the inquiry as to whether there had also been violations of his rights under ss. 8 and 10 of the Charter.
- [16] It was common ground that if the appellant was detained before Cst. Hall spoke to him, this was a psychological as opposed to a physical detention. The authorities recognize that it can be difficult to determine when a suspect has been psychologically detained. As noted in the excerpt from Mann to which the trial judge referred, not all citizens delayed or kept waiting by police are detained. Whether there has been a detention is determined by an objective test: having regard to the entire interaction, would the actions of the police cause a reasonable person in the position of the suspect to conclude that he or she is not free to go, and must comply with the directions of the police: Grant at paras. 31-32; Suberu at paras. 3, 24.
- [17] In Grant, Justice Charron, writing for the majority, recognized the complexities of neighbourhood policing in this context:
- [40] A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. ...
- [41] As discussed earlier, general inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community-oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter in [sic] a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the Charter does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions.
- [18] At para. 44 of Grant, Charron J. summarized the principles derived from her analysis, and provided this list of factors to be considered in deciding whether a psychological detention has occurred:

- (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.
- [19] The appellant maintains the trial judge erred in finding he was not detained until Cst. Hall began to speak to him, and says he and his companions were arbitrarily and unlawfully detained as soon as Cst. Hall approached them. While the appellant concedes Cst. Hall was entitled to approach the group and chat generally with them, he argues the circumstances went well beyond a permissible exchange and instead constituted unreasonably proactive community policing that improperly targeted young people for random street checks solely because they were out at night.
- [20] The appellant contends he and his friends were just walking down the street and there was nothing to suggest they were intoxicated or presented any risk to the community or themselves. He argues Cst. Hall thus had no reason to stop them, and clearly exceeded his authority by asking them for identification or about outstanding warrants. Further, the appellant argues that if, as Cst. Hall testified, he believed his authority lay in the Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, he was obliged to advise the young people of this before he asked them to identify themselves and tell him if they had been drinking. The appellant maintains these inquiries were directed to soliciting conscriptive evidence without complying with state obligations under s. 10 of the Charter. As well, he contends Cst. Hall had no basis for telling K.J. that he could not walk away. The appellant says he reasonably believed that this direction applied to him as well, and contends the trial judge erred in rejecting his testimony on this point.
- [21] In support of his position, the appellant relies on cases in which he says similar circumstances produced findings of Charter breaches: *R. v. Thavarajah*, 2006 ONCJ 456; *R. v. Chronopoulos*, [2009] O.J. No. 1619 (S.C.J.); *R. v. Peters*, 2006 BCSC 1560; *R. v. Darling*, 2010 BCSC 546; and *R. v. Trott*, 2012 BCPC 174.
- [22] The Crown responds that the appellant is essentially attacking the trial judge's findings of fact and credibility. It says these findings are supported by the evidentiary record, and the appeal must therefore be dismissed as the appellant has not identified a reviewable error. The Crown correctly reminds us that we must approach the trial judge's findings as to the propriety of the detention with deference, as long as the findings of fact underpinning his conclusion are supported by the evidence: *Grant* at para. 45.

- [23] The trial judge's reasons present some difficulties. It is evident from his reference to Mann, and from his decision to deal with the Grant analysis under s. 24(2) in case he had erred in finding no Charter breaches, that the judge appreciated the timing of the appellant's detention was a close call. Yet, although he reviewed the evidence in some detail and stated he had considered it all, his reasons provide no comments on credibility, and little in the way of clear findings of fact.
- [24] While these deficiencies make appellate review more difficult, they are not determinative if the trial judge's reasons, read in the context of the evidence, arguments, and issues at trial, reveal he was responsive to the issues before him, and demonstrate a discernible foundation for his decision that the appellant was not detained until Cst. Hall began to question him: *R. v. R.E.M.*, 2008 SCC 51 at para. 35.
- [25] Reviewed in that context, the trial judge's reasons leave no doubt that he was aware the central issue was whether the appellant had been arbitrarily detained, and that this was dependent on the timing of his detention. It is also clear he recognized there were two possible resolutions of that issue. The theory of the defence was that the appellant was arbitrarily detained as soon as Cst. Hall stopped the group, and the appellant reasonably assumed the officer's direction to K.J. applied to him as well. The Crown argued the appellant was not detained until his furtive gestures attracted attention and raised concerns for officer safety, leading to a justifiable search and the discovery of the baton and drugs. The trial judge resolved this issue in favour of the Crown. The question is whether the evidentiary record demonstrates a logical basis for that finding.
- [26] I find it useful to examine the record in the context of the three factors set out in Grant. With respect to the circumstances giving rise to the encounter, the trial judge found the appearance and behaviour of the appellant and his friends justified reasonable police inquiries. I am satisfied this finding is supported by the following evidence. Cst. Hall believed the group wandering down the street at 2:30 a.m. was under the legal drinking age and, based on his experience, exhibited a degree of exuberance and some mobility characteristics that he associated with intoxication and potential property damage. This impression was confirmed when he smelled alcohol on approaching the group, and observed signs of impairment in K.J.
- [27] With respect to the nature of the police conduct, when asked what his authority was for the stop, Cst. Hall mentioned the Liquor Control and Licensing Act, but also said he stopped the young people as a preventive measure to talk to them and make sure they were not so intoxicated that they were a danger to themselves or to others' property. He testified he had no intention of detaining them, and believed they were free to refuse to speak to him or to produce their identification and were free to walk away. His tone was conversational, and he had no physical contact with any of the young people prior to his dealings with the appellant. He said he expected that once he finished talking with each of them, he would be on his way.

- [28] The evidence that Cst. Hall asked the young people for identification and about outstanding warrants provides some support for a conclusion his inquiries were directed to investigation rather than prevention. There is, however, no evidence of the responses he received. Nor is there evidence that the police followed up with computer checks, or other action to further these inquiries. Instead, despite the fact that some of the young people were under age and had been drinking, the record indicates that all but the appellant were permitted to go on their way.
- [29] I agree with the appellant that Cst. Hall's testimony about his dealings with K.J. introduced a somewhat different tenor to the encounter. Cst. Hall said when he told K.J. he appeared intoxicated and he wanted to confirm his age, K.J. began to walk away from him, and he called him back to produce his identification. Cst. Hall agreed K.J. was detained at that point, but said he did not advise him of his rights because K.J. showed his identification. Cst. Hall then moved on to talk to the others, and there were no further repercussions for K.J.
- [30] The impact of this exchange on the other youths was a central issue in ascertaining whether a reasonable person in the appellant's position would conclude he too was not free to go. The appellant testified he subjectively believed this to be the case. The record, however, includes K.A.'s evidence, set out at para. 7 above, that she believed they were free to leave. It is unfortunate the trial judge did not make express findings on the import of this disparate evidence. Given his conclusion that the appellant was not detained until later in the encounter, however, the only inference is that he decided the appellant's evidence on this point did not support a finding that he reasonably believed he was detained before Cst. Hall spoke to him.
- [31] It is also significant that the record shows that Cst. Hall, after greeting the young people generally, dealt with each of them individually and sequentially. He had not yet approached the appellant or communicated with him directly before the appellant attracted police attention through his own actions, by becoming "fidgety" with his hands behind his back. I accept it was open to the trial judge to find on this evidence that the appellant up to that point was not the subject of the "focussed suspicion" that may crystallize a detention. The trial judge's reference to Mann at para. 13 of his judgment supports the view that he saw the appellant as someone who was "delayed" or "kept waiting", rather than detained, while Cst. Hall dealt with the others in the group.
- [32] As the Supreme Court observed at para. 29 of *Suberu*, the difficult question of where to draw the line between general questioning and focussed interrogation amounting to detention falls to the trial judge. I agree it was a close call in this case. Another judge might have decided differently. It is not for this Court, however, to substitute its view of the facts, absent a palpable and overriding error. The appellant's central contention that the trial judge failed to give sufficient weight to his evidence does not constitute such an error. I agree with the Crown the evidentiary record is sufficient to support the trial judge's finding that the appellant was not detained until Cst. Hall began to question him.

- [33] As to the appellant's particular characteristics or circumstances, while his age and relative sophistication are factors to be considered in the Grant analysis, I am not persuaded the evidence on these matters undermines the trial judge's finding that his detention was not arbitrary.
- [34] Finally, the authorities relied on by the appellant do not provide definitive assistance. While each shares some similarities to this case, each exhibits differences as well. This case, like the others, must be determined on its own facts.
- [35] I conclude there is no reviewable error in the trial judge's finding that the appellant was not detained until Cst. Hall approached him directly and told him he was going to search him. The evidentiary record supports the trial judge's conclusion that at that point there were legitimate concerns for officer safety. The youths were unfamiliar to Cst. Hall, he did not know what the appellant was doing behind his back, and he was concerned the appellant might have a weapon. The justifiable concern for officer safety rendered the appellant's detention and search lawful, and precluded a finding that his rights under s. 8 and s. 9 of the Charter had been violated. The trial judge's finding that this safety concern also justified a postponement of the officers' obligation to advise the appellant of his rights under s. 10 of the Charter was justified, based on the Supreme Court's decision in *Suberu*.
- [36] I conclude the trial judge made no reviewable error in concluding there was no violation of appellant's Charter rights, or his rights under s. 25(2) of the YCJA.
- [37] While it is not necessary to address the second ground of appeal, I intend to do so due to the trial judge's express decision to deal with s. 24(2) "if I am wrong" about the Charter violations. Had there been Charter breaches, the trial judge found the three-step Grant analysis would nevertheless result in the admission of the drugs and baton as evidence at trial. He stated:
- [21] Even if I am wrong, and there was a Charter breach, the analysis required by *R. v. Grant*, [2009] S.C.J. No. 32 would nevertheless result in my admitting the evidence. The alleged breach was not of a serious nature in light of the accused's and his friends' appearance and behaviour at 2:25 in the morning, which justified reasonable police inquiries. The accused was not compelled to make an incriminating statement but merely subject to a pat down search for the legitimate purpose of officer safety. His personal privacy and human dignity were not unreasonably intruded upon.
- [22] If the evidence of the results of the search were excluded, there would be no adjudication on the merits and society's interest in having such an adjudication would not be satisfied.
- [38] For the following reasons, I am satisfied that, had the appellant's Charter rights been breached, the trial judge did not err in deciding the admission of the evidence would not bring the administration of justice into disrepute.

- [39] The first prong of the Grant analysis addresses the seriousness of the state-infringing conduct. I agree with the trial judge that a group of under-aged youths wandering the street in the early morning, apparently under the influence of alcohol, justifies reasonable police inquiries in the context of community policing. I agree with the appellant, however, that Cst. Hall was not entitled to require the youths to remain until they produced identification and satisfied him that they had no outstanding warrants. Having said that, any detention of the appellant prior to the search was fleeting. Cst. Hall testified that 14 minutes passed from the time the police stopped until the appellant's arrest, and only three or four minutes passed between the time he told K.J. he could not leave and the point at which he turned his attention to the appellant. As well, the police did not carry out any further investigative activity, and once the young people had answered their questions they were free to go. Looking at the circumstances as a whole, I am satisfied the intent of the police, the general tenor of the encounter, and its outcome for all but the appellant, demonstrate the police conduct was directed to appropriate preventative community policing rather than criminal investigation. I am not persuaded the appellant has established they acted in bad faith.
- [40] As to the second prong of Grant, I agree with the trial judge that any Charter breaches suffered by the appellant before his arrest had minimal impact on him and his Charter-protected rights. As set out above, any detention before that point was brief and did not result in further jeopardy for the appellant as Cst. Hall had not yet focussed his inquiries on him. If, as the appellant maintains, he was initially detained under the Liquor Control and Licensing Act, I am not persuaded the failure to immediately advise him of his s. 10 rights significantly undermined his s. 10 interests. Ultimately, it was the appellant's own furtive actions that attracted police attention before Cst. Hall engaged him in conversation about possible liquor offences.
- [41] Finally, on the third aspect of Grant, I agree with the trial judge's conclusion that society's interest in an adjudication on the merits of this case will be properly served by the admission of the evidence.
- [42] Having balanced these factors, I discern no basis on which to disagree with the trial judge's conclusion under s. 24(2) of the Charter.
- [43] I would dismiss the appeal.
- "The Honourable Madam Justice Neilson"
- I AGREE:
- "The Honourable Mr. Justice Harris"
- I AGREE:
- "The Honourable Madam Justice Stromberg-Stein"

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