

CANADA / JUDGMENT

## R. v. Fillery

2021 BCSC 1858

COURT

Supreme Court of British Columbia

DECIDED

15 April 2021

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2021 BCSC 1858 R. v. Fillery

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Fillery,

2021 BCSC 1858

Date: 20210415

Docket: 40732-2

Registry: Duncan

Regina

v.

Keenan Michael Fillery and

Chaz Christopher Milne

Before: The Honourable Mr. Justice Williams

Oral Ruling on Voir Dire No. 1

Re Accused Milne's Charter Application

Counsel for the Crown:

J.E. Farenholtz

Counsel for the Accused, Keenan M. Fillery:

R.R. Drury

Counsel for the Accused, Chaz C. Milne:

D.J. McKay

Place and Date of Trial/Hearing:

Duncan, B.C.

April 12 and 14, 2021

Place and Date of Judgment:

Duncan, B.C.

### **April 15, 2021**

- [1] THE COURT: I am going to deliver my ruling in respect of Mr. Milne's application. I am going to deliver this ruling orally from a draft or note I have prepared. I am not going to include cites in my delivery, and I will reserve the right to make editorial adjustments in the event a transcript is required.
- [2] Chaz Christopher Milne is before this Court charged with two counts of trafficking in a controlled substance contrary to the provisions of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.
- [3] Mr. Milne applies to the Court for a finding that his Charter rights were violated by police officers in the course of their investigation and seeks an order excluding certain evidence.

### **Background Circumstances**

- [4] On March 19, 2018, members of the Duncan RCMP were conducting an undercover drug purchase operation. The evidence is that, on that date, an undercover operator made a purchase of drugs from an individual or individuals in a small vehicle. At the conclusion of the transaction, no enforcement action was taken and the persons in that vehicle went on their way.
- [5] In order to know who the individuals in the vehicle were, one of the police officers involved in the undercover operation made a request to a uniformed general duty police officer patrolling in the Duncan area. That police officer, Constable Kongus, who was wearing a full working police uniform and operating a marked police vehicle, was requested to stop the suspect vehicle. Constable Kongus was advised that the vehicle was being operated with a broken light. It was requested of him that he determine the identity of the occupants of the vehicle.
- [6] Constable Kongus observed the vehicle in motion. He also observed the broken light and effected the stop of the vehicle. His recollection is that he did so by activating the lights on his police vehicle and that there was no siren sounded, nor was there any pursuit. The subject vehicle pulled over without incident.

- [7] Constable Kongus approached the vehicle. He spoke with the driver, requesting that person to produce a driver's licence and explained why he had stopped them: that there was a burned-out light on the vehicle. The driver of the vehicle was the co-defendant, Mr. Fillery, who indicated that the vehicle belonged to his girlfriend.
- [8] Constable Kongus also requested that the individual who was seated in the front passenger seat identify himself. He testified that the person identified himself as Chaz Milne and provided his date of birth. Evidently, Mr. Milne indicated that he did not have identification on his person and the officer was content to proceed on what the passenger told him.
- [9] Constable Kongus returned to his police vehicle where he prepared a notice order document, which made note of the burned-out light and which required the repair be made and the driver to then report to the police. No violation ticket was issued.
- [10] Constable Kongus then provided that document to the driver of the vehicle and the vehicle proceeded on its way.
- [11] Constable Kongus described that the interaction was relatively brief in nature, less than 15 minutes. He was alone in his vehicle at the time. He described the interaction with the two persons in the automobile as being low key. He said that he was calm and relaxed and that there was no sense of danger. He did not raise his voice and no threats were made nor was any anger displayed. He made no mention of any apparent nervousness on the part of Mr. Milne or the driver.
- [12] In cross-examination, he agreed that he did not advise Mr. Milne that he was not obliged to comply with the request for identification. He also did not make clear to Mr. Milne that he was free to go as he wished.
- [13] The information with respect to the two men was subsequently provided to members of the undercover operation.

### Position of the Applicant

- [14] The initial filed notice alleges breaches of ss. 8, 9, and 10 of the Charter. In his submissions, counsel for the applicant did not pursue his claim of the breach of s. 8, that is, an unlawful search. Rather, he took the position that the interaction between Cst. Kongus and Mr. Milne effectively constituted a detention such as to engage Mr. Milne's rights under ss. 9 and 10 of the Charter. In counsel's submission, accepting that there was a detention, Mr. Milne says that his rights under ss. 9 and 10 were breached, and accordingly, there is an entitlement to a remedy.

## Position of the Crown

[15] The Crown disputes the proposition that there was a detention. In the submission of Crown counsel, in order for the Court to find a detention, there must be a not-insignificant interference with the liberty of the subject in accordance with the Supreme Court of Canada jurisprudence and, says the prosecutor, the interaction between Mr. Milne and the officer in this case does not rise to the level that it would be appropriate to find a detention.

## Discussion

[16] To start, as a preliminary matter, I am satisfied that Mr. Milne has standing to assert this claim.

[17] The onus is upon Mr. Milne to establish on a balance of probabilities that the police conduct breached his Charter rights. In the event he succeeds, the Court is then required to address his claim for a remedy in accordance with s. 24(2) of the Charter.

[18] A critical determination to be made in assessing this claim of Charter breach is whether or not Mr. Milne was detained in the course of his dealing with the officer at the roadside. Only if he was detained can he assert rights under ss. 9 and 10 of the Charter.

[19] Section 9 of the Charter provides that everyone has the right not to be arbitrarily detained or imprisoned.

[20] Section 10 provides that everyone has certain rights that arise on arrest or detention.

[21] Accordingly, it is evident that the status of detention is a necessary condition for Mr. Milne to be able to claim Charter relief. It follows that a critical component of the analysis is to determine whether detention is made out.

[22] Mr. Milne relies most centrally upon a decision of a judge of this court, *R. v. Forsyth*, 2015 BCSC 2663.

[23] The facts in that case are substantially similar to the matter at bar. An undercover officer made purchases of cocaine. Following the transaction, the police, operating on a belief that the suspect was associated to a particular motor vehicle, requested a general duty patrol officer to do a traffic stop of that vehicle and identify the occupants. The general duty officer duly located the vehicle and pulled it over, noting that the vehicle displayed an "N" sign indicating the driver has a Class 7 driver's licence. There were three male persons in the vehicle. The accused was a passenger. The police officer asked the driver for his driver's licence and asked the other two persons for their identification. All three complied. At some point in the stop, the suspect, Mr. Forsyth, got out of the vehicle and stood on or near the sidewalk. At around that time, the undercover officer, being driven in another vehicle, went past the scene of the stop and made an observation of Mr. Forsyth as the individual who had sold cocaine.

- [24] Mr. Forsyth applied to exclude the evidence relating to his identification on the basis that the traffic stop was arbitrary and therefore an unlawful detention violating s. 9 of the Charter and that there was also a breach of his s. 10 Charter rights. In addition, because he had provided an identification document to the officer, an allegation of breach of s. 8 was advanced.
- [25] Justice Blok was satisfied that the traffic stop was legitimate and bona fide, but he concluded that the general duty officer did not have a valid reason to investigate the passengers because of the apparent licencing breach and that the detention of Mr. Forsyth was an arbitrary one.
- [26] Justice Blok also concluded that there was a seizure with respect to the request for the identification. That is not a factor in the matter at bar.
- [27] Mr. Milne has also made reference to a number of other decisions including *R. v. Jennings*, 2018 BCSC 2342, and more generally, the following cases: *R. v. Harris* (2007), 87 O.R. (3d) 214 (Ont. C.A.); *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Nolet*, 2010 SCC 24; and *R. v. Pinto*, [2003] O.J. No. 5172, a 2003 decision of Mr. Justice Hill of the Ontario Superior Court of Justice.
- [28] The Crown urged upon this Court for consideration two decisions of the Supreme Court of Canada, *R. v. Suberu*, 2009 SCC 33 and *R. v. Grant*, 2015 SCC 9. Those decisions deal quite directly with the concept of meaning of detention.
- [29] In addition, the prosecution relies upon other cases which explore the detention issue in the context of a passenger in a motor vehicle search that has been subject to a traffic stop all post-Suberu. Those decisions include a decision of the Saskatchewan Court of Appeal, *R. v. Mooiman and Zahar*, 2016 SKCA 43; and two trial decisions from the Ontario Superior Court of Justice, *R. v. Humphrey*, 2011 ONSC 3024 and *R. v. Frank*, 2012 ONSC 6274. Both of the latter two are decisions of Justice Code.
- [30] In my view, the necessary analysis must take into consideration the Grant and Suberu decisions. Those are obviously binding upon this Court and constitute the law as regards detention. They are, accordingly, fundamentally important to the analysis of the s. 9 and 10 Charter issues as regards detention.
- [31] I pause here to make clear that in declining to follow Blok J., I intend no disrespect to him. I note that he made no reference in Forsyth to either Grant or Suberu, and I could only assume that those authorities were not referenced in the submissions he heard.
- [32] Nevertheless, on the basis of the submissions which have been made by the Crown in the present application, I am obliged to conduct my analysis taking those decisions into account.

[33] I am also aware of a recent ruling made by Justice Saunders of this Court, delivered orally in Victoria on March 26, 2021, and not yet reported, *R. v. Robinson*. That case dealt with a police traffic stop where the police requested that a passenger provide his identification in a situation of police stopping a motor vehicle in a valid traffic stop. The officer questioned the passenger in the vehicle as to his identification. The passenger provided his name. The officer then checked that name on the CPIC database and found a warrant to be outstanding, whereupon the passenger was arrested. In the search which was conducted incidental to that arrest, the police located drugs. At trial, the defendant applied for exclusion of the evidence found on his person alleging, inter alia, that he had been arbitrarily detained.

[34] In his ruling, Saunders J. made the following observation:

In respect of analyzing alleged breaches of the s. 9 right to be free from arbitrary detention, *Harris and Pinto* have, however, been superseded by the reformulation of s. 9 jurisprudence undertaken by the Supreme Court of Canada in *R. v. Grant* and its companion case, *R. v. Suberu*.

[35] Ultimately, Saunders J. concluded that *Robinson* had not been detained. Implicitly, his analysis and decision cast doubt upon the correctness of the decision in *Forsyth*.

[36] I make mention of the *Robinson* ruling not because I consider it a precedent that should affect or govern my decision in this case, but rather as an example of the court in this jurisdiction taking a different view than *Forsyth* of the detention issue, one that incorporates the *Suberu* and *Grant* authorities.

[37] In the result, I propose to conduct my analysis in this case afresh with due consideration of the authorities I have described.

[38] I begin with the matter of the original vehicle stop. I am satisfied that it was legitimate and bona fide. In fact, I do not understand Mr. Milne to suggest that it was a ruse or a contrivance or otherwise improper.

[39] In addition to the traffic stop, the officer then made an inquiry of the passenger, Mr. Milne, asking him to identify himself which he did.

[40] As regards dual purpose stops, that issue has been considered by our Court of Appeal in *R. v. Kaddoura*, 2009 BCCA 113. The essence of that decision, as I understand it, is that a police officer observing a violation of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, is properly entitled to stop the vehicle under that statute and to request the driver produce his licence and vehicle registration documents. That is not an arbitrary stop. The fact that the officer may have had other reasons to effect a stop does not transform it into an arbitrary detention: para. 23. I note that at para. 18, Groberman J.A. also said this:

[18] It is clear that the authority of the police to stop a vehicle for traffic safety purposes does not entitle them to interrogate the occupants or search the vehicle for the purposes of proving the commission of criminal offences. The mere fact that the initial stop is legal will not insulate subsequent police conduct from Charter scrutiny.

- [41] Indeed, that has application in the matter at bar. The conduct of Cst. Kongus must be subject to Charter scrutiny.
- [42] I should observe at the outset that Mr. Milne did not testify on the *voir dire*. In my view, that is not determinative of the outcome. The jurisprudence makes clear that the court is to apply an essentially objective standard and assess the allegation of detention in the context of the reasonable person.
- [43] Speaking generally, in *Suberu*, the Supreme Court of Canada establishes that not every interaction that an individual has with the police will amount to a detention for the purpose of the Charter, even when a person is under investigation for criminal activity and is asked questions or is physically delayed by contact with the police. Section 9 of the Charter does not dictate that the police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Likewise, not every police encounter, even with a suspect, will trigger an individual's right to counsel under s. 10(b). According to the purposive approach adopted in *Grant*, 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. The onus is on the applicant to show that in the circumstances he or she was effectively deprived of his or her liberty of choice. The test is an objective one, and as I have noted, the failure of the applicant to testify as to his or her perceptions of the account is not fatal to the application. However, the applicant's contention that the police by their conduct effected a significant deprivation of his or her liberty must find support in the evidence. The line between general questioning and focused interrogation amounting to detention may be difficult to draw on particular cases. It is the task of the trial judge on a Charter application to assess the circumstances and determine whether the line between general questioning and detention has been crossed.
- [44] Specifically, at paras. 24 and 25, the Court said this:
- [24] As explained in *Grant*, the meaning of "detention" can only be determined by adopting a purposive approach that neither overshoots nor impoverishes the protection intended by the Charter right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interest in robust Charter rights. To simply assume that a detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the Charter.
- [25] For convenience, we repeat the summary set out in *Grant*, at para. 44:

1. 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.
  2. 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.
- [45] The particular characteristics or circumstances of the individual where relevant, include age; physical stature; minority status; level of sophistication.
- [46] My understanding of the issue is informed by the quite extensive discussions found in the decisions of Code J. of the Ontario Superior Court of Justice in *Humphrey and Frank*.
- [47] *Humphrey* concerned a police stop of an automobile in Downtown Toronto. The basis for the stop was held to be valid and pursuant to an apparent violation of the Ontario Highway Traffic Act. The officers dealt both with the driver of the automobile and the passengers. Specifically, the officers asked the passengers to provide identification. It turned out that one of the passengers was subject to a curfew term in a recognizance, and at that point in time, was in breach and thus arrestable. Matters developed and, in the course of the investigation, firearms were found in the vehicle.
- [48] The issue of relevance to the matter at bar is the question of whether police questioning of the passengers violated s. 9 of the Charter.
- [49] Justice Code was satisfied that there was no s. 9 violation. At para. 118, he said this:
- It is clear that s. 9 is only engaged by a "detention" and I am satisfied that the passengers were never detained. There is nothing wrong with police officers asking questions, indeed, it is their job to ask questions. It is the power to "detain" that is regulated by s. 9 of the Charter and the fact of "detention" then triggers additional rights under s. 10 of the Charter. Merely questioning the passengers, short of "detention", does not engage any Charter rights.
- [50] Also relevant, in my view, are the following comments of Code J.:

[121] Doherty J.A.'s approach in Harris, that is, not treating every H.T.A. stop of a vehicle as necessarily involving a "detention" of the passengers, makes intuitive sense. One can imagine many fact situations, involving H.T.A. stops, where the passengers would clearly not be detained. For example, consider a driver who is stopped in downtown Toronto for an H.T.A. offence, such as speeding, and the driver's spouse and children are also in the car and they are late for work or school or an appointment. A police officer stopping the car, who had no officer safety concerns, would surely not prevent the spouse and children from exiting the car and taking a taxi, assuming it was going to take the officer some time to complete the H.T.A. investigation and write up the ticket. There would be no "detention" of the passengers on these facts. Also see: R. v. Bradley (2008), 2008 NSCA 57 (CanLII), 233 C.C.C. (3d) 129 (N.S.C.A.).

[122] The "fact specific" approach taken in Harris and Bradley is also consistent with the subsequent Supreme Court of Canada cases, Grant and Suberu, supra, which stress the need to take a purposive approach to the meaning of "detention". On the framework for analysis developed in those cases, merely asking the passenger Jason Humphrey for his identification could not amount to a s. 9 "detention".

[123] Prior to the recent decisions of the Supreme Court of Canada in Grant and Suberu, a long line of Ontario Court of Appeal authority had held that simply asking a suspect for identification does not amount to a detention. See: R. v. Grafe (1987), 1987 CanLII 170 (ON CA), 36 C.C.C. (3d) 267 (Ont. C.A.); R. v. Hall (1995), 1995 CanLII 647 (ON CA), 22 O.R. (3d) 289 at 295 (C.A.); R. v. Grant (2006), 2006 CanLII 18347 (ON CA), 209 C.C.C. (3d) 250 at paras. 13 and 29 (Ont. C.A.); R. v. Harris, supra at para. 42. As Doherty J.A. put it in the latter case:

Those cases accept that the police may in the course of their duties properly request identification from individuals in circumstances where the police have no reason to suspect that individual of any misconduct. Grafe and the other cases turn largely on the finding that the person who was asked for identification was not under police detention

[124] The root case in this line of authority is R. v. Grafe, supra at pp. 271 and 274, where Krever J.A. (Martin and Tarnopolsky JJA. concurring) stated, in reference to a police request for identification:

The law has long recognized that although there is no legal duty there is a moral or social duty on the part of every citizen to answer questions put to him or her by the police and, in that way to assist the police: see, for example, Rice v. Connolly, [1966] 2 All E.R. 649 at p. 652, per Lord Parker C.J. Implicit in that moral or social duty is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed.

The Charter does not seek to insulate all members of society from all contact with constituted authority, no matter how trivial the contact may be.

[125] In my opinion, Grant and Suberu have not changed this approach to s. 9 "detention". If anything, the police now have even more flexibility when asking preliminary non-coercive questions, such as requests for identification, without causing a "detention" and thereby triggering s. 10 rights. In Grant, *supra* at paras. 6-7 and 37-52, McLachlin C.J.C. and Charron J., speaking for the majority, adopted the above passage from Grafe, and held that the preliminary questioning of the accused Grant, in which he was asked for his identification, did not amount to a "detention" for s. 9 and s. 10 purposes:

Section 9 of the Charter does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel.

The encounter began with Cst. Gomes approaching Mr. Grant (stepping in his path) and making general inquiries. Such preliminary questioning is a legitimate exercise of police powers. At this stage, a reasonable person would not have concluded he or she was being deprived of the right to choose how to act, and for that reason there was no detention.

It was only later in the encounter, when the police took further more coercive steps, that the Court found a "detention" on the facts of Grant, *supra*.

[126] In Suberu, *supra* at paras. 23-35, McLachlin C.J.C. and Charron J. maintained the distinction between "preliminary investigative questioning falling short of detention" and "focused interrogation amounting to detention". In drawing this line, the majority asked whether there was a "significant deprivation of liberty", as opposed to mere "delay" caused by "exploratory" questioning, for example, "for purposes of identification":

However, this latter understanding of detention does not mean that every interaction with the police will amount to a detention for the purposes of the Charter, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. This Court's conclusion in Mann that there was an "investigative detention" does not mean that a detention is necessarily grounded the moment the police engage an individual for investigative purposes. Indeed, Iacobucci J., writing for the majority, explained as follows:

"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. [Emphasis of McLachlin C.J.C. and Charron J.]

As explained in Grant, the meaning of "detention" can only be determined by adopting a purposive approach that neither over-shoots nor impoverishes the protection intended by the Charter right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interest in robust Charter rights. To simply assume that a detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the Charter.

[127] The extent and the nature of the questioning of the accused in Suberu, while seated in his car and wanting to leave, was far more intrusive, focused and incriminating than the questioning of the passenger Jason Humphrey in the case at bar. And yet the majority found no "detention" on the facts of Suberu. In the present case, the evidence is unchallenged that P.C. Ho engaged in nothing more than innocuous banter with Jason Humphrey and that P.C. Stuart did no more than politely ask him for his identification. Jason Humphrey was very cooperative and verbally identified himself, albeit by giving a false name. The case is identical on its facts to Grafe, supra, except that Humphrey happened to be seated in the back seat of a car whereas Grafe was standing on the sidewalk. In Bradley, supra at paras 3, 15 and 16, the accused was seated in the back seat of a car when asked for his identification, and he too gave a false name. The Nova Scotia Court of Appeal, applying the "fact-specific" approach in Harris, found no "detention". In two recent decisions of Marrocco J. and Spies J., this Court has found no "detention" of passengers who were merely asked for their identification during H.T.A. stops. See: R. v. Johnson 2010 ONSC 1490 (CanLII), [2010] O.J. No. 975 (S.C.J.); R. v. Yousofi and Safi, 2011 ONSC 2298.

[Emphasis in original.]

[51] Frank was another case dealing with a lawful Highway Traffic Act stop and a questioning of the passenger by the police. The issue was whether or not that constituted a detention.

[52] I do not intend to examine the case in any detail, but note that Code J. concluded that there had been no detention. His observation at para. 47 is germane in the present context:

It is well established that merely asking a suspect for identification does not give rise to a detention.

[53] In support of that position, a lengthy series of authorities are relied upon, dating back to R. v. Grafe, 1987 CanLII 170 (O.N.C.A.).

[54] Now, turning to the matter at hand, it seems to me that the position advanced by Mr. Milne suggests that the police are generally precluded from making inquiries of a passenger in a vehicle that has been subject to a traffic stop unless those inquiries are made pursuant to a discernible, on-the-ground, developing investigation. Unless those limited circumstances are present, then the interaction will be characterized as a detention. To some extent, Mr. Milne's submission tends to conflate somewhat the act of making an inquiry and a

detention.

[55] On my understanding, the Suberu and Grant decisions are more attuned to the position of the individual vis-à-vis the state agent: does the action of the state actor intrude upon the liberty of the individual in such a way that Charter protection is appropriate so that the individual may have access to legal counsel to protect himself in that dynamic? That is, did the interaction involve a significant deprivation of liberty? But a balance is struck and non-coercive, non-confrontational interactions, essentially, neither detailed nor intrusive, with citizens will be permitted without every interaction triggering the need for warnings and the engagement of counsel.

[56] Apposite to the analysis is the following statement of Justice Caldwell of the Saskatchewan Court of Appeal writing for the court in *R. v. Mooiman* at para. 21, and I quote:

Only the driver of a vehicle is necessarily detained by a traffic-safety stop. In the absence of some other suggestion of significant physical or psychological restraint, a passenger of a vehicle that is subject to a traffic-safety stop is simply a bystander and is not detained for the purposes of s. 9 of the Charter

He concludes the police may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the Charter.

[57] To summarize, it is my understanding of the authorities that where the police make a valid traffic stop, the officer is not prohibited from asking or making inquiries beyond the immediate purpose of the stop. A certain level of inquiry relating both to the driver and the passengers is permitted without the circumstances constituting a detention. The matter of asking for identification is an example of a low level of intrusion that falls well short of any basis to find detention.

[58] Of course, the circumstances must always be examined in a fact-specific way.

[59] In the matter at hand, I am not able to find that Mr. Milne was detained. It is relevant, in my view, that the tone and tenor of the contact between the officer and Mr. Milne was brief and non-confrontational. The officer, although he was in uniform and driving a marked police car, was clear that there had been nothing intense or confrontational about his interaction with Mr. Milne.

[60] In short, the inquiry and the provision of the information by Mr. Milne were relatively innocuous and did not rise to the level that would constitute a detention.

[61] Although I did not hear from Mr. Milne, I will assume he is a young man of no more than ordinary sophistication. There is no basis to infer that he was cowed or intimidated in the exchange. I am not aware of anything about his particular character or circumstances that would warrant a conclusion that he considered himself detained physically or psychologically in his interaction with the constable.

- [62] The interaction did not involve a significant deprivation of liberty or, in fact, anything approaching that.
- [63] In the result, it is my view that Mr. Milne's application must fail.
- [64] Before concluding, I wish to make mention of two points advanced by Mr. Milne.
- [65] The first was to the effect that the Crown submission argued that a more substantial level of compulsion was necessary to warrant a finding of detention, but Mr. Milne suggested that the standard applied in this province was not the same as that. It is different and less. To my mind, that submission cannot succeed. The substantive criminal law in Canada is the same across the land and decisions of the Supreme Court of Canada are binding on the courts in this province. As I have endeavoured to explain, my decision is based on an application of relevant Supreme Court of Canada jurisprudence.
- [66] The second point advanced was to the effect that the situation of the officer's interaction with Mr. Milne should be considered through the lens of informed consent, that Mr. Milne's response to the officer's inquiry could only be Charter-compliant and admissible if he had been advised by the officer that he was not obliged to answer the question and that he had consented to answer.
- [67] Suffice to say, that approach does not accord with the law.
- [68] In conclusion, Mr. Milne's application stands dismissed.

"Williams J."

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