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R. v. Hendrickson

2018 BCSC 288

COURT

Supreme Court of British Columbia

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2018 BCSC 288 R. v. Hendrickson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hendrickson,

2018 BCSC 288

Date: 20180228

Docket: 66284

Registry: Chilliwack

Regina

v.

Dylan Ross Hendrickson

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment on Voir Dire

Counsel for the Crown:

M. Reinhart

Counsel for the Accused:

P.A. McDermick

Place and Date of Hearing:

Chilliwack, B.C.

January 29-31, 2018

February 1-2, 2018

Place and Date of Judgment:

Chilliwack, B.C.

February 28, 2018

INTRODUCTION

- [1] Dylan Ross Hendrickson is charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 ["CDSA"]. The charge arises out of an August 9, 2015 encounter between Mr. Hendrickson and members of the Mission RCMP during their investigation into a dropped 911 call.
- [2] Mr. Hendrickson asserts breaches of ss. 8, 9 and 10 of the Charter in connection with the police stopping him, asking him his name and subsequently conducting a pat down search. Mr. Hendrickson also asserts that the subsequent seizure of a bag he had deposited on the ground while approaching the police constitutes an unreasonable search and seizure in breach of his s. 8 rights. If the breaches are established, Mr. Hendrickson intends to apply to have the evidence excluded pursuant to s. 24 (2) of the Charter.
- [3] I granted Mr. Hendrickson's application for a voir dire with respect to allegations that the police breached his rights under ss. 8, 9 and 10 of the Charter during their encounter with him in the early morning hours of August 9, 2015. Although Mr. Hendrickson asserts multiple breaches of his Charter rights, the central issue on this voir dire is whether Mr. Hendrickson was detained and if so, was the detention lawful.

BACKGROUND FACTS

- [4] Shortly after midnight on August 9, 2015 two members of the Mission RCMP, Cst. Jones and Cst. Peck, received a dispatch over the police radio to attend the area of Heritage Park on Prentice Avenue to follow-up on a dropped 911 call from a female who reported being lost in the area. The dispatch also advised that the female caller was intoxicated and had said she thought her boyfriend was looking for her.
- [5] Cst. Jones testified that he and his partner Cst. Peck arrived in the area at 00:18 a.m. They were both in full uniform in a marked police car. Cst. Jones testified that there is a high school in the area adjacent to the woods but given the time of night the area was vacant and very dark. Upon arrival in the area, he noticed a 4-door sedan parked on the south side of the road. The police officers thought that the people in the car might be associated with the 911 call so Cst. Peck activated his police car lights and spot light. Cst. Jones and Cst. Peck got out of their police car, and while Cst. Peck went to speak to the occupants of the sedan, Cst. Jones dealt with a male he observed about 15-20 feet away from him walking across the parking lot towards the bushes. Cst. Jones called out to the accused to stop and waved him over towards where Cst. Jones was standing in the parking lot. As the accused started to

walk towards Cst. Jones, he appeared to drop his cell phone and then bent down to the ground to pick it up. Cst. Jones described this motion as awkward.

- [6] As the accused and Cst. Jones walked back towards the police car where there was some light, Cst. Jones explained to the accused that the police were in the area checking into a 911 call from a woman who reported being lost. Cst. Jones asked the accused if he knew anything about it and the accused said no and explained that he was in the area to meet up with his own girlfriend. During their conversation, Cst. Jones asked the accused for his name which he provided. Cst. Jones testified that the accused appeared to be genuine and was polite and cooperative throughout the exchange. However, when asked about the exchange in cross-examination Cst. Jones testified that people lie to the police all the time so he does not necessarily believe everything someone tells him.
- [7] When the accused identified himself, Cst. Jones recognized his name from a drug investigation three years earlier. Cst. Jones testified that during the 2012 incident, the accused was polite and cooperative and Cst. Jones had no concerns about his personal safety. The 2012 incident did not result in charges.
- [8] After the brief exchange between the accused and Cst. Jones regarding the 911 call, Cst. Jones directed the accused to place his hands on the police car so that he could conduct a pat down search. During the search, Cst. Jones felt an object inside the accused's man-purse and proceeded to look inside where he located what he described as a vaporiser, although I note there was no such object depicted in any of the photographs tendered on the voir dire. Cst. Jones also located the accused's wallet in his pants.
- [9] Cst. Jones testified that he was not conducting a criminal investigation at this point and had no basis to arrest the accused. Although he considered Mr. Hendrickson detained, Cst. Jones also testified that he knew Mr. Hendrickson could have left and there would have been nothing he could have done to stop him. When asked why he conducted the pat down search Cst. Jones explained, "we pat down everybody".
- [10] Following the pat down search Cst. Jones directed the accused to remain at the police car with Cst. Peck. The accused was not handcuffed or physically restrained in any fashion. Cst. Jones walked to the area in the parking lot where he had observed the accused appear to drop something moments earlier. Cst. Jones located a clear plastic bag on the ground that contained numerous smaller clear plastic bags with a white substance. Cst. Jones noted that the bag was dry even though the pavement and the grass were wet due to rain earlier in the day. Upon locating the plastic bag, Cst. Jones advised Cst. Peck to arrest the accused for possession of a controlled substance. Although Cst. Peck's testimony does not align exactly with that of Cst. Jones in terms of who actually arrested the accused, Cst. Peck provided the accused with his Charter rights at 00:27 am. The accused was then photographed at the scene and released on a promise to appear.

ISSUES

- [11] As stated earlier, the central issue to be determined on this voir dire is whether the accused was detained during his encounter with the police at any point prior to his arrest. I propose to deal with the issues raised in this voir dire as follows:
1. Were the accused's ss. 8, 9 and 10 Charter rights infringed when Cst. Jones first spoke to him and asked him for his name?
 2. Did Cst. Jones conduct a valid safety search?
 3. Was the seizure of the bag a breach of the accused's reasonable expectation of privacy, contrary to s. 8 of the Charter?
- [12] Before I commence my analysis of the issues, I will set out the legal principles dealing with detention that will guide my discussion.

Detention - The Legal Principles

- [13] In *R. v. Grant*, 2009 SCC 32 [Grant], the Supreme Court of Canada set out the analytical framework for determining whether a person has been detained for Charter purposes. In *R. v. Suberu*, 2009 SCC 33 [Suberu], the Supreme Court of Canada applied that framework in finding that Mr. Suberu had not been detained. I will briefly review the facts in Grant and Suberu and summarize the principles that must govern my analysis.
- [14] Grant involved three police officers patrolling a school area around the lunch hour when they saw a young man they deemed suspicious. One officer stood in front of the man blocking his path and asked the man his name and address. The man appeared nervous and adjusted his jacket prompting the officer to tell him to keep his hands visible. The two other officers approached and stood behind the man. In Grant, the Court held that Mr. Grant was not detained when the uniformed police officer stepped into his path and asked him "what was going on" and for his name and address: para. 47. However, the nature of the encounter changed when Mr. Grant was told to keep his hands in front of him, and the two other officers took up a position behind him. At that point the "encounter took on the character of an interrogation" paras. 48, 49 and the detention of Mr. Grant crystallized.
- [15] In Suberu, the police were responding to a report of two men trying to use a stolen credit card. When one of the police officers who responded to the call entered the store, Mr. Suberu walked passed him saying, "he did this not me, so I guess I can go". The officer followed Mr. Suberu out of the store stating, "wait a minute, I need to talk to you before you go anywhere". The police officer followed Mr. Suberu to his car and engaged Mr. Suberu in conversation about any connection he might have to events in the store. The officer then learned that the vehicle Mr. Suberu was in matched the description of the vehicle associated with the use of a stolen credit card earlier that day and he noticed a number of shopping bags in the vehicle. At that point, the police officer decided he had reasonable grounds to arrest Mr. Suberu for fraud.

- [16] In *Suberu*, the Court found the initial encounter between Mr. Suberu and the officer was "preliminary investigative questioning falling short of detention": para. 29. The Court found that the trial judge had not erred in finding Mr. Suberu was not detained prior to his arrest. The encounter arose in the context of an officer orienting himself to the situation, the officer made no move to obstruct or impede Mr. Suberu, the conversation was brief and not strained and Mr. Suberu never told the officer he did not want to speak to him. Considering all these factors, a reasonable person would not have concluded that they had no choice but to cooperate.
- [17] In *Grant*, the Court held at paras. 28-30 that the fundamental general principle that determines detention for Charter purposes is that a person is detained when he or she submits to a deprivation of liberty and reasonably believes that there is no choice but to comply with that deprivation. The Court summarized the test for determining whether there has been a detention for the purposes of ss. 9 and 10 of the Charter 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.
 - (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[18] According to *Suberu* at para. 28:

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 the failure of the applicant to testify as to his or her perceptions of the encounter 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.

- [19] The "liberty of choice" on which the analysis centers is broad, although it generally refers to the freedom to choose whether to comply with a request or demand to physically do something, such as remain in a certain place, and/or answer questions or engage in a conversation with the police. Although the test is objective (whether a reasonable person in the individual's circumstances would conclude that he or she had no choice but to comply with the alleged deprivation of his or her liberty of choice), the court may consider the particular circumstances of the individual bringing the application: Grant at para. 32.
- [20] The police may effectively interfere with an individual's freedom of movement without detaining that individual where they take control of a situation in order to help people or gather information, such as when responding to a medical emergency, because it is commonly understood that such interference carries no legal consequence: Grant at para. 36. Further, general inquiries precipitated by community-oriented concerns usually do not threaten individuals' liberty of choice: Grant at para. 41. However, when the basis for an inquiry shifts towards focused suspicion of a particular individual, the courts must scrutinize whether the police's words or actions would cause a reasonable person in the suspected individual's position to conclude that "he or she [was] not free to choose to walk away or decline to answer questions": Grant at para. 41. In this regard, it is important to recall that the police's subjective intentions are not determinative; rather, the question is whether the police have done anything to provide an objective basis on which the individual could conclude that he or she was deprived of the ability to choose whether to cooperate: Grant at para. 32.
- [21] Ultimately, the test involves a "realistic appraisal of the entire interaction, as it developed, not a minute parsing of words and movements": Grant at para. 32.
- [22] With these principles in mind, I turn to my analysis.

Analysis

- (i) Was the accused detained when Cst. Jones told him stop?
- [23] Counsel for the Mr. Hendrickson argues that the accused was detained upon being directed by Cst. Jones to stop. In the alternative, he argues that detention occurred once Cst. Jones determined that Mr. Hendrickson had no connection to the 911 call and during that detention he was asked for his name. In my view, the initial encounter between Cst. Jones and the accused was similar to the situation that arose in *Suberu*. In *Suberu* the Court rejected the argument that the accused was detained as soon as he was told to "wait" and engaged in questioning by the police officer. While it was acknowledged that Mr. *Suberu* was momentarily "delayed" when the police asked to speak to him, he was not subjected to physical or psychological restraint "so as to ground a detention within the meaning of the Charter" (*Suberu* para. 7). As stated in *Suberu* "not every interaction between the police and members of the public, even for investigative purposes, constitutes a detention within the meaning of the Charter" with reference to the earlier decision in *R. v. Mann*, 2004 SCC 52

[Mann]. Similarly, in Grant the Court held that Mr. Grant was not detained when the uniformed police officer stepped in his path and asked him for his name and address. (Grant, para. 47) In my view, Mr. Hendrickson is urging me to conduct my analysis by engaging in a minute parsing of words and movements rather than a "realistic appraisal of the entire interaction, as it developed" as contemplated in Grant.

- [24] Applying the analytical framework set out in Grant and Suberu, I find that the initial interaction between the accused and Cst. Jones did not involve a significant deprivation of the accused's liberty. As in Suberu, the accused was not subject to physical or psychological restraint. When first speaking to Mr. Hendrickson, Cst. Jones was orientating himself to the situation. The conversation between Cst. Jones and Mr. Hendrickson was very brief and polite. Cst. Jones made no move to obstruct or impede Mr. Hendrickson's movement as they walked towards the police vehicle. Cst. Jones made some general inquiries in order to ascertain if Mr. Hendrickson had any connection to the 911 call. These inquiries included asking Mr. Hendrickson for his name. Mr. Hendrickson never told Cst. Jones that he did not want to speak with him. Indeed, they had a quick, pleasant, casual conversation. As set out at para. 30 of Suberu "the introductory and preliminary questions were merely to determine if there was any involvement by this person before him". There was no evidence to support Mr. Hendrickson's contention that his freedom to choose whether to cooperate with the police was removed during the initial encounter.
- [25] As stated earlier, mere contact with a police officer does not constitute arbitrary detention. As established in Grant "general inquiries precipitated by community-oriented concerns usually do not threaten an individual's liberty of choice". (Grant, para. 41) Cst. Jones' actions would not cause a reasonable person in Mr. Hendrickson's position to conclude that he was deprived of the ability to choose whether to cooperate. I find that Mr. Hendrickson was not detained within the meaning of the Charter when Cst. Jones initially spoke to him. In these circumstances, Mr. Hendrickson bore the onus of establishing, on a balance of probabilities, that he was detained. I find that he has failed to do so.

(ii) Did asking for the accused's name constitute an unreasonable search and seizure?

- [26] Mr. Hendrickson relies on R. v. Whyte, 2009 ONCJ 389 [Whyte], to support his position that the request for his name constituted an unreasonable search and seizure. Unlike the case at bar, in Whyte, Pringle J. found that Mr. Whyte was detained at the time he was asked his name. Given I have determined that Mr. Hendrickson was not detained during the initial encounter with Cst. Jones including when asked for his name, the Whyte decision does not assist my analysis. I find the request for his name did not amount to an unreasonable search and seizure as contemplated in Whyte.

(iii) Were the accused's s. 10 Charter rights engaged?

- [27] Further, having determined that Mr. Hendrickson was not detained during his initial encounter with Cst. Jones, I also find that his s. 10 Charter right to counsel was not engaged.

Issue 2: Was the accused's detention justified as a safety search?

[28] Crown counsel concedes that Mr. Hendrickson was detained at the point he was directed by Cst. Jones to place his hands on the police car in order to conduct a search. However, the Crown submits the detention was lawful relying on *R. v. MacDonald*, 2014 SCC 3 [MacDonald] to justify the detention on the basis that Cst. Jones was conducting a safety search to ensure his own safety and that of Cst. Peck. Counsel for Mr. Hendrickson takes the position that the detention was unlawful, as the safety search was not justified. Further, the search of Mr. Hendrickson's man-bag was a further breach of his s. 8 Charter rights. Many of the cases cited by counsel deal with searches in the context of investigative detention which concern a different standard than when dealing with safety searches. Therefore, my analysis will be guided by the legal principles established in MacDonald.

What constitutes a valid safety search?

[29] In MacDonald, the police attended at the accused's apartment in response to a noise complaint. The police knocked on the door, which the accused partially opened so that the police could see half of his body. An officer noticed that the accused was holding a black and shiny object behind his leg. The officer twice asked the accused what he had behind his leg, and the accused did not respond. The officer pushed the door open further, at which point he noticed that the accused was holding a handgun. The police forcibly entered the suite and arrested the accused at that point. LeBel J. writing for a 4-3 majority, held that the officer's actions in opening the door to see what the accused had behind his leg constituted a "search" for the purposes of s. 8 as it was an intrusion upon the accused's reasonable expectation of privacy that went beyond the police's implied licence to approach the door of a residence and knock (para. 27). The Court went on to find that the search, although warrantless, was authorized under the common law police power to conduct what LeBel J. called a "safety search" - that is, a search that is reasonably necessary to eliminate threats to the safety of the public or the police - and that this common law power was reasonable. At para. 32 LeBel J. defined a "safety search" as follows:

A search that is reasonably necessary to eliminate threats to the safety of the public or the police - which I will term a "safety search" - will generally be conducted by the police as a reactionary measure. In other words, although such searches may arise in a wide variety of contexts, they will generally be unplanned, as they will be carried out in response to dangerous situations created by individuals, to which police must react "on the sudden".

[30] While finding that the police have the power to conduct safety searches, LeBel J. emphasized at para. 41 that such power is not unlimited:

[41] But although I acknowledge the importance of safety searches, I must repeat that the power to carry one out is not unbridled. In my view, the principles laid down in [*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59] and reaffirmed in [*R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725] require the existence of circumstances establishing the necessity of safety searches, reasonably and objectively considered, to address an imminent threat to the safety of the

public or the police. Given the high privacy interests at stake in such searches, the search will be authorized by law only if the police officer believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search (Mann, at para. 40; see also para. 45). The legality of the search therefore turns on its reasonable, objectively verifiable necessity in the circumstances of the matter (see *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 33). As the Court stated in Mann, a search cannot be justified on the basis of a vague concern for safety.

Rather, for a safety search to be lawful, the officer must act on "reasonable and specific inferences drawn from the known facts of the situation" (Mann, at para. 41).

[Emphasis added.]

Was this a valid safety search?

[31] As stated earlier, the Crown submits the safety search was necessary to ensure the safety of the police. The factors the Crown relies on to establish a valid basis for a safety search are that the police were in a dark, remote area in the early morning hours and Cst. Jones had knowledge that the accused had been involved in a no charge drug seizure in the past.

[32] I find that the search of Mr. Hendrickson was not a valid exercise of the safety search power as the officer's safety concerns were not objectively reasonable. There was no basis to conclude that the search was reasonably necessary to eliminate an imminent threat to the safety of the public or the police. Indeed, Cst. Jones explanation for conducting the safety search "we pat down everybody" detracts from the Crown's argument that he had any basis to believe there was a risk to safety. While I appreciate that police officers often find themselves in the midst of unpredictable and volatile situations, which may pose an imminent threat to the safety of the public and the police, this was not one of them. The police officers were dealing with Mr. Hendrickson in a lighted area around a police car, the accused had no history of violence and the nature of the 911 call did not raise any concerns for safety. In addition, the accused was friendly and compliant throughout the initial encounter with Cst. Jones. Considering these circumstances, I find that Cst. Jones based the safety search on a non-existent concern for safety premised upon nothing more than a hunch.

[33] Further, I find that detention crystallized at the point the accused was directed to place his hands on the police car. There was no lawful basis for detaining the accused, his detention was arbitrary and infringed his rights under s. 9 of the Charter. Consequently, the search of the accused and his bag constituted an unreasonable search and seizure contrary to s. 8 of the Charter.

Were the accused's s. 10 Charter rights engaged?

[34] Having determined that Mr. Hendrickson was unlawfully detained I must determine whether his s. 10 Charter rights were engaged.

[35] Section 10 of the Charter provides rights on arrest or detention including the right to "retain and instruct counsel without delay". In *Suberu*, the Court considered the effect of the words "without delay" in the section and interpreted it as immediately, saying at para. 41:

If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

[36] The Court applied this standard in *Grant*, finding that Mr. Grant was entitled to be informed of his s. 10(b) rights immediately upon detention and that by failing to provide this information the officers had breached his rights notwithstanding the failure was due to the fact the officers did not believe they had detained Mr. Grant: para. 58.

[37] The point at which s. 10(b) rights arise is detention, regardless of whether that detention is lawful. As a result in cases like *Grant*, a s. 9 breach where officers did not believe the individual was detained will usually result in a s. 10 breach as well. That was the situation in *R. v. Wong*, 2009 BCPC 89. With respect to the consequence of a s.9 breach, *Galati P.C.J.* pointed out:

there seems to me to be little purpose in considering separately, at this stage, the consequent failure of the police to immediately advise Mr. Wong of his s. 10(b) right to counsel. The characterization of the detention is not impacted by any such failure. The failure to comply with s. 10(b), or any delay in doing so, seems more appropriate to consider in cases where the detention is lawful but evidence has been obtained from the accused prior to compliance with s. 10(b). In cases such as the one at bar, compliance with s. 10(b) is more appropriately taken into account when dealing with s. 24(2) of the Charter as a factor affecting the seriousness of any s. 9 breach

[38] I find that Mr. Hendrickson's Charter rights under s.10 were engaged at the moment Cst. Jones directed him to place his hands on the police car in order to be searched. As stated earlier, it is at this point where the encounter between Cst. Jones and Mr. Hendrickson crystallizes in a detention.

Issue 3: Was the retrieval of the bag of cocaine lawful?

[39] Mr. Hendrickson asserts a breach of his s. 8 rights as a result of the unreasonable search and seizure of the plastic bag by Cst. Jones. As set out earlier, as Mr. Hendrickson walked towards Cst. Jones he bent down and appeared to place an item on the ground. Following the search of Mr. Hendrickson, Cst. Jones returned to the spot he had observed Mr. Hendrickson place an item and retrieved a clear plastic bag containing the cocaine. Mr. Hendrickson asserts he maintained a privacy interest over the bag. The Crown takes the position that Mr. Hendrickson divested himself of any privacy interest over the clear plastic bag when he decided to leave it sitting in plain view in a public area.

What constitutes a reasonable expectation of privacy?

[40] Section 8 of the Charter provides that "Everyone has the right to be secure against unreasonable search and seizure." The purpose of s. 8 is to "protect individuals from unjustified state intrusions upon their privacy": *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at para. 27. Government action constitutes a "search" within the meaning of s. 8 where it intrudes upon some reasonable privacy interest: *R. v. Evans*, [1996] 1 S.C.R. 8 at para. 11. The first inquiry in relation to an alleged s. 8 violation is therefore whether the applicant had a reasonable expectation of privacy in respect of the subject matter of the search: *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45. The onus is on the applicant to prove on balance that he or she had such an expectation: *R. v. Nolet*, 2010 SCC 24 at para. 30. Whether the applicant had a reasonable expectation of privacy is to be determined based on the totality of the circumstances, with particular emphasis on the existence of a subjective and objectively reasonable expectation of privacy: *Edwards* at para. 45; *R. v. Tessling*, 2004 SCC 67 at para. 19. At the subjective stage, the reasonableness of the applicant's expectation of privacy is not in issue; the question is simply whether the applicant had, or is presumed to have had, an expectation of privacy in respect of the subject of the search: *R. v. Patrick*, 2009 SCC 17 at para. 37. The objective reasonableness of the expectation of privacy can vary with "the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion": *Patrick* at para. 38, citing *R. v. Colarusso*, [1994] 1 S.C.R. 20 at para. 70.

Did the accused have a reasonable expectation of privacy in respect of the plastic bag?

- [41] The first inquiry in relation to the accused's alleged s. 8 violation is whether he had a reasonable expectation of privacy over the clear plastic bag he left on the ground in a public area: *Edwards* at para. 45, *Patrick* at para 37. I must determine if it is reasonable for Mr. Hendrickson to assert an expectation of privacy in this situation where he has placed a clear plastic bag in a public area where any passerby could look and see the bag and the contents. In my analysis, the fact the cocaine was in a clear bag is significant. An individual could more reasonably assert an expectation of privacy in a backpack or other type of bag set down on the ground to which they intended to return though that expectation would be considerably lessened. That is not the case here where the cocaine was stored in a clear bag visible to anyone who cared to look.
- [42] Counsel have referred me to a number of cases in which the accused asserts a s. 8 breach in relation to the contents of a bag including *R. v. B.(L.)*, 2007 ONCA 596 [B.(L.)], *R. v. Nesbeth*, 2008 ONCA 579 [Nesbeth] and *R. v. Reddy*, 2010 BCCA 11 [Reddy]. As will be discussed below, It is significant to my analysis that in both *B.(L.)* and *Nesbeth*, the accused were found not be detained at the time they abandoned their privacy interests while in *Reddy* he was found to have been detained before the search of his property.
- [43] In *B.(L.)*, police officers saw two youths who appeared to be together sitting on school grounds. One of the officers called out "Toronto Police". L.B. who was holding a black bag, approached one of the officers without having been directed to do so. The officer spoke to L.B. and obtained his name and date of birth which he checked on the police CPIC system.

As he was doing this the officer noticed that L.B. was no longer holding a bag. A second officer located the bag on the grass near some litter and asked if it belonged to either of the youths they said it did not. The officer then searched the bag which contained a loaded handgun. The trial judge found that the youths were detained in violation of s. 9 when the officer asked about the bag and the officer's search of the bag infringed L.B.'s s. 8 Charter rights.

- [44] The Ontario Court of Appeal found that L.B. was not detained at the time the officer asked about the black bag and as such there was no obligation to advise L.B. of his s. 10(b) rights prior to asking who the bag belonged to. By responding that he did not know, L.B. disclaimed any privacy interest in the bag and could not subsequently rely on s. 8 Charter protections. (B.(L.) para. 71)
- [45] In Nesbeth police officers encountered Mr. Nesbeth holding a knapsack in a stairwell and asked him what he was doing at which point he cursed, turned and ran. Police chased him and in the course of the chase Mr. Nesbeth threw the knapsack to the ground. The police caught up to Mr. Nesbeth, tackled him and placed him under arrest. The knapsack was located by the police and found to contain a significant quantity of cocaine. Rosenberg J.A. found the accused had no reasonable expectation of privacy in the knapsack because he had divested himself of possession and control when he threw the knapsack away, he gave up the ability to regulate access to the knapsack and he offered no evidence of any subjective expectation of privacy at the point the knapsack was abandoned.
- [46] In both L.B. and Nesbeth, it was significant that the accused was found not to be detained at the time they abandoned their privacy interests. In contrast, in Reddy the accused was found to be unlawfully detained and the subsequent search of his jacket violated his rights protected by s. 8 of the Charter. In Reddy, Frankel J.A. writing for the Court rejected the argument that by leaving his jacket behind in the car when he fled the scene, Mr. Reddy had abandoned any privacy right he had in the items he left behind. Having found that Mr. Reddy was unlawfully detained, the Court held it would be improper to view Mr. Reddy's actions as abandonment when he was responding to an unlawful detention. The Court distinguished the situation in Reddy from that in Nesbeth, where Mr. Nesbeth threw his knapsack away as he fled from the police who were legitimately pursuing him.
- [47] The circumstances in *R. v. Borecky*, 2011 BCSC 1573, [Borecky] are also instructive. In Borecky, an accused fled from police who were attending his residence in response to a call about gunshots. Using a sniffer dog, the police later located two duffel bags filled with firearms and cocaine that had been stuffed under a log and covered with leaves and debris. The accused argued the search of the bags infringed his s. 8 Charter rights. The Crown argued that the bags had been abandoned by the accused who no longer had a reasonable expectation of privacy.

- [48] Mr. Justice Joyce found that the accused maintained a reasonable expectation of privacy in the bags as they were not dropped or discarded during a flight from police but were hidden with apparent intent that they would be retrieved at a later point. Joyce J. also noted that the expectation of privacy, while sufficient to grant standing to challenge the validity of the search, was considerably diminished as, though not abandoned, the level of control was low.
- [49] As these cases demonstrate, whether one has a privacy interest is a highly factual inquiry. The present case is closer to L.B. and Nesbeth than to Borecky. In this case there is no express disavowal of ownership as in L.B. nor is there a dramatic flinging away of a bag as in Nesbeth. Mr. Hendrickson voluntarily placed the bag of cocaine on the ground while walking towards Cst. Jones. As in L.B. and Nesbeth, the depositing of the bag on the ground occurs as a result of imminent interaction with police not as a result of an unlawful detention as in Reddy. Nor is this case similar to Borecky where drugs and guns were carefully hidden signalling an intent to maintain control over them. As in Nesbeth, Mr. Hendrickson divested himself of possession and control of the bag and gave up the ability to regulate access when he placed it on the ground in a parking lot in a public area where any passerby could look and see the contents inside. Having considered the totality of the circumstances, I find Mr. Hendrickson's conduct in dropping the bag on the ground in a public parking lot, precluded him from relying on the s. 8 protection.
- [50] Several of the cases discussed above deal with abandonment. While the facts of this case may suggest a possibility of abandonment, my finding of a lack of reasonable expectation of privacy in the circumstances makes such a finding unnecessary. As I stated earlier, the first inquiry in relation to the accused's alleged s. 8 violation is whether he had a reasonable expectation of privacy over the clear plastic bag he left on the ground in a public area: Edwards at para. 45, Patrick at para. 37. Had the cocaine been left on the ground in a backpack or some other container which had been searched, it may have been necessary for the Crown to show it had been abandoned, but that was not the situation in this case as the cocaine was essentially left in plain view.
- [51] Having considered the totality of the circumstances, I find that there is no reasonable expectation of privacy in items left in a clear bag in a public place. Therefore, since Mr. Hendrickson has no reasonable expectation of privacy in the bag, the police did not violate his s. 8 Charter rights when they seized and searched the bag.

conclusion

- [52] In summary, I have found that Mr. Hendrickson was not detained during his initial conversation with Cst. Jones therefore his ss. 8 or 9 Charter rights were not engaged at that point. With respect to the retrieval of the plastic bag, I find that Mr. Hendrickson no longer had an expectation of privacy in the bag and therefore his s. 8 Charter rights were not engaged.

[53] However, I find that Mr. Hendrickson was detained from the point Cst. Jones commenced the safety search and accordingly his s. 8, 9 and 10 Charter rights were infringed.

"Devlin J."

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