

CANADA / JUDGMENT

R. v. Karaim

2023 BCSC 72

COURT

Supreme Court of British Columbia

DECIDED

16 January 2023

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2023 BCSC 72 R. v. Karaim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Karaim,

2023 BCSC 72

Date: 20230116

Docket: 42045

Registry: Courtenay

Rex

v.

Alina Marie Karaim and

Darren Michael Kinney

Corrected Judgment: The text of this judgment was corrected at paragraphs 24 and 33 where changes were made on October 30, 2023.

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment re: Voir Dire #1 - s. 24(2) Analysis

Counsel for the Crown:

T. Ian McFadgen

Counsel for the Accused Karaim:

Bobak Movassaghi

Place and Dates of Hearing:

Courtenay, B.C.

January 5, 2023

Place and Date of Judgment:

Courtenay, B.C.

January 16, 2023

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I. Introduction

- [1] These reasons for judgment address Ms. Karaim's Charter s. 24(2) application, following upon my conclusion that she was arbitrarily detained in breach of s. 9, and that breaches of s. 10(a) and 10(b) of the Charter occurred, as set out in my reasons for judgment indexed at 2022 BCSC 1849 (the "Reasons").
- [2] Ms. Karaim seeks to exclude the evidence of the police officers about their observations made when they searched her purse. That is, in particular, their observations of the cash, and the empty dime sized baggie imprinted with a marijuana leaf, of the same type as packaging found on the subsequent search of the vehicle.
- [3] In the Reasons, I found that search of the vehicle and the search of Ms. Karaim's purse were legal: paras. 72; 76-79. However I held that a reasonable person in Ms. Karaim's circumstances would reasonably believe that she was obliged to remain present while her purse was being searched, as part of the vehicle search: paras. 94, 98.
- [4] The detention of Ms. Karaim, within the meaning of s. 9, was brief, lasting only a few minutes, while her purse was searched, and until she was advised that she was free to go.

- [5] As the police officers did not believe they detained Ms. Karaim, in the technical sense, they did not comply with s. 10(a) and 10(b) of the Charter. Ms. Karaim was not promptly informed of the reason for her detention, and was not informed of her right to retain and instruct counsel without delay.
- [6] On the search the purse, the police noted some suspicious items:
- a) a large amount of cash, in the amount of approximately \$4000; and
 - b) a small, empty dime sized baggie with a marijuana leaf printed on it: paras. 47 to 48.
- [7] Ms. Karaim told the officers that the cash was her COVID 19 federal government CERB payment or payments. She said that the baggie was used to hold a piercing. After searching the purse, the officers told Ms. Karaim that she was free to go. She left on foot, with her purse. Subsequently, the officers completed the search of the vehicle. The police officers found various quantities of cocaine, methamphetamine, and fentanyl/heroin, and GHB in the vehicle, along with the number of items of drug paraphernalia, such as a digital scale, a gum tin containing numerous dime sized baggies (some with a marijuana leaf, of the same type as the officers noted in Ms. Karaim's purse), and other items: paras. 52, 53.
- [8] Ms. Karaim and Mr. Kinney are charged with four counts of unlawful possession of a controlled substance for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19.

II. Legal Principles

- [9] The s. 24(2) inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute: *R. v. Grant*, 2009 SCC 32, at para. 68.
- [10] When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:
1. the seriousness of the Charter infringing state conduct (admission may send the message the justice system condones serious state misconduct);
 2. the impact of the breach on the Charter protected interests of the accused (admission may send the message that individual rights count for little); and
 3. society's interest in the adjudication of the case on its merits: *Grant*, para. 71.
- [11] The court's role on a s. 24(2) application is to balance the assessments under each one of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute: *Grant*, para. 71.

III. Analysis

1. Seriousness of the Charter infringing state conduct

- [12] The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to disassociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law: Grant, para. 72.
- [13] At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a willful or reckless disregard of Charter rights will inevitably have a negative effect on public confidence in the rule of law, and risk bringing the administration of justice into disrepute: Grant, para. 74; R. v. Tim, 2022 SCC 12, at para. 82.
- [14] The breaches in this case were at the less serious end of the culpability scale. The breaches were inadvertent, minor, and reflect an understandable mistake.
- [15] In the reasons, I discussed the principles relating to the meaning of "detention" under s. 9 and 10 of the Charter, at paras. 80-82. In this case, there was no real physical restraint, but I found that Ms. Karaim would have reasonably believed she was obliged to remain present while her purse was being searched: Reasons, para. 94.
- [16] It is not always easy for the police to accurately determine whether a person is detained within the meaning of s. 9. The question depends upon "the circumstances of the encounter as a whole": R. v. Suberu, 2009 SCC 33, at para. 22. It may not be clear whether a person has been detained, in cases where there is no physical restraint or legal obligation: Grant, at para. 44(2).
- [17] The circumstances of the individual is a factor: Grant, para. 44(2)(c). As noted in Suberu, every interaction with the police does not amount to a detention; even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police, they may not be detained within the meaning of s. 9: Suberu, paras. 23 and 24.
- [18] In this case, the search of the purse was legal. Indeed, the police officers would have been derelict in their duty if, pursuant to the search of the vehicle, they had not searched the purse. Ms. Karaim did not want to leave without her purse. It was not unreasonable for the police officers to believe that Ms. Karaim was not formally detained within the meaning of s. 9 of the Charter.
- [19] In R. v. Omar, 2018 ONCA 975 Justice D.M. Brown, in dissent, noted:

Grant offered general guidance at the conceptual level about when a psychological detention occurs. However, the jurisprudence reveals that the application of Grant's conceptual principles to the reality of street-level interactions stills leaves us in the situation described by the trial judge -- "the point at which an encounter becomes a detention is not always clear".

[20] Grant did not offer a conceptual "bright line" to which police officers could look in order to guide their on the street actions: Omar, para. 81.

[21] The dissenting decision of Justice D.M. Brown was affirmed by the Supreme Court of Canada: R. v. Omar, 2019 SCC 32.

[22] In this case, the police officers were well aware of the concept of detention under s. 9, and of their obligations under s. 10(a) and (b) to promptly inform a person on arrest or detention of the reasons for that, and the person's right to be informed of their right to retain and instruct counsel without delay. They reasonably believed that Ms. Karaim was not detained within the meaning of s. 9. They were acting and deciding in real-time, without full information, and without the opportunity for deliberation. I found differently, on a consideration of all of the circumstances, including the circumstances relating specifically to Ms. Karaim.

[23] I conclude that the seriousness of the Charter infringing state conduct, viewed in terms of the gravity of the offending conduct, is low.

2. Impact on the Charter protected interests of the Accused

[24] I held that Ms. Karaim was detained while her purse was being searched, which took only a few minutes. During that detention, she was asked a couple of questions about the contents of her purse. She gave exculpatory answers. She was sent on her way, with her purse, including the cash and the baggie that the officers considered suspicious.

[25] Had the police officer specifically told Ms. Karaim that she was free to leave, before searching the purse, it is quite unlikely that I would have found a detention within the meaning of s. 9.

[26] Since the search of the purse was legal, the impact of the breach does not relate to the fact that the purse was searched. It relates to the fact that Ms. Karaim was psychologically detained for a few minutes, and not told, during that time, of her rights under s. 10(a) and (b). The Crown is not seeking to tender any statements made by Ms. Karaim at the trial proper.

[27] In relation to the observations of the officers as to the contents of the purse, access to counsel would have made no difference, since the police were entitled to search the purse.

[28] In summary, the effect of the s. 9 breach was that, subjectively to Ms. Karaim, and objectively on my determination, her liberty interests were minimally interfered with, for a few minutes. The psychological detention was not intrusive. The impact of the breach was fleeting: Grant, para. 76.

[29] In summary, the impact on the Charter protected interests of the accused was low.

3. Society's interests in the adjudication of the case on the merits

[30] The Crown's case will not be "gutted" by an order excluding the police officers' observations. However the observations of the police officers as to the cash and the baggie may lead to important inferences. They are significant pieces of circumstantial evidence that may assist the Crown in establishing knowledge and control of the controlled substances found in the vehicle. Large quantities of cash are often hallmarks of drug trafficking, and have frequently been considered as significant pieces of circumstantial evidence in establishing knowledge and control: *R. v. Fisher*, 2005 BCCA 444 at para. 36; *R. v. Liu*, 2011 BCSC 1269 at para. 36.

[31] In *Fisher*, the accused was found with \$1,380 in his pants pocket when arrested. K. Smith J.A. noted that "the evidence of the unexplained cash found in the appellant's pocket is particularly cogent".

[32] The third factor pulls in favour of admission of the evidence.

4. Balancing the Considerations

[33] Having made the above-noted inquiries, the Court must consider whether on balance the admission of the evidence obtained by a Charter breach would bring the administration of justice into disrepute. The task of the trial judge is to weigh the various indications. No overarching rule governs how the balance is to be struck; mathematical precision is obviously not possible: *Grant*, paras. 85, 86. The cumulative weight of the first two lines of inquiry must be considered and balanced against the third line of inquiry: *R. v. Beaver*, 2022 SCC 54, at para. 134. Each factor must be assessed and weighed in the balance, focusing on the long-term integrity of, and public confidence in, the administration of justice: *Tim*, at para. 98.

[34] In this case, the first two lines of inquiry pull only weakly towards exclusion of the evidence. Society's interests in the adjudication of the case on the merits falls quite strongly in the other direction, towards admission of the evidence. I conclude that admission of the evidence would not bring the administration of justice into disrepute. A reasonable person, informed of all relevant circumstances and the values underlying the Charter, would not conclude that the admission of the evidence would bring the administration of justice into disrepute.

IV. Conclusion

[35] For these reasons, the application to exclude the evidence of the observations made by the police officers of the contents of Ms. Karaim's purse is dismissed.

"Verhoeven J."

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Prepared on 26 October 2026 · Esheria