

CANADA / JUDGMENT

R. v. T.G.

2026 ONCA 298

COURT

Court of Appeal for Ontario

DECIDED

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R. v. T.G.

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COA-24-CR-1379, COA-25-CR-0155

Judges

George, Jonathon C.; Favreau, Lise G.; Pomerance, Renee M.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. T.G., 2026 ONCA 298[1]

DATE: 20260429

DOCKET: COA-24-CR-1379 & COA-25-CR-0155

George, Favreau and Pomerance JJ.A.

BETWEEN

His Majesty the King

Respondent

and

T.G.

Appellant

T.G., acting in person (COA-24-CR-1379)

Dan Stein, for the appellant (COA-25-CR-0155) and appearing as duty counsel (COA-24-CR-1379)[2]

Andrew Cappell, for the respondent

Heard: November 19, 2025

On appeal from the convictions entered by Justice E. Llana Nakonechny of the Superior Court of Justice, on December 18, 2023, and from the sentence imposed on October 28, 2024.

Pomerance J.A. (dissenting):

I. OVERVIEW [1] This appeal arises out of a case of mistaken identity.

- [2] The police had grounds to arrest L.G. Instead, they arrested his brother T.G. Before the mistake was discovered, police found a gun and drugs in T.G.'s possession. The question is whether the arrest and search were lawful despite the fact that police arrested the wrong man.
- [3] Mistakes can happen during investigations. Sometimes, the mistake will involve an error of law. Investigators may misapprehend the scope of their investigative authority or perceive such authority where none exists. Police are expected to know the law that they are to enforce, and the law that they are to obey: *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at para. 30; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 133; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 149. Where police search, detain or otherwise interfere with a person's liberty, without lawful justification, such conduct will invariably breach the Canadian Charter of Rights and Freedoms.
- [4] The mistake in this case is of a different kind. It is one of fact rather than law. There is no dispute that police had the requisite grounds to arrest L.G. and a corresponding power to search L.G. incident to arrest. They did not have grounds to arrest T.G. However, they mistakenly believed that T.G. was L.G. and arrested him on that basis.
- [5] The trial judge found that, despite the mistake, the arrest and subsequent search were lawful. I do not agree. The police subjectively believed that the person they arrested was L.G. but that belief was not, in the circumstances, objectively reasonable. It was incumbent upon the police to take additional steps to discern the appellant's identity before subjecting him to the most invasive form of detention. As the arrest was unlawful, it violated the appellant's

rights under s. 9 of the Charter and the search conducted pursuant to the arrest violated the appellant's rights under s. 8 of the Charter.

[6] The finding that ss. 9 and 8 were infringed necessitates a fresh analysis under s. 24(2) of the Charter. Having conducted that analysis, I conclude that, despite the additional Charter violations, the evidence was properly admitted at the appellant's trial. The outcome being no different, I would, for that reason, dismiss this ground of appeal. I would also dismiss the other grounds, as I see no error in the trial judge's finding that the appellant possessed cocaine for the purpose of trafficking, or in the sentence that was imposed.

[7] I will explain these conclusions in the reasons that follow.

II. BACKGROUND AND EVIDENCE a. The Search Warrant [8] The police obtained a search warrant for a residence. The target of the investigation was a young person named L.G., who was under investigation for various offences, including participation in a criminal organization, cocaine trafficking, and weapons offences.

[9] Police attended a briefing before attending at the location of the warrant. The briefing package contained a photograph and description of L.G.

[10] Two officers were in a marked cruiser parked near the residence to be searched. They were to assist with the transport of anyone who was arrested. At about 5:18 am, they were told by the officer in charge that L.G. was not at the address of interest and that they were no longer required.

b. The Appellant Arrives [11] As they were driving from the street in question, the officers saw a grey Honda Civic enter and drive toward the target address. The car had dark tinted windows and took the corner at a high rate of speed. The officers followed behind. While one officer tried to check the licence plate, he kept making errors as he tried to put the plate into the system.

[12] The officers saw the vehicle stop and a Black male passenger carrying a satchel exited the car. He was dropped off a few doors away from the target residence. The car drove away at a high rate of speed. The man began walking away from the residence that was listed in the warrant.

[13] The officers drove the car next to the man slowly as they tried to observe him. Both officers testified that, based on the man's face and physical features, they believed him to be the man identified during the briefing and depicted in the photograph. Contrary to the photograph, the man being followed had a moustache, goatee and braids. The officers testified that they did not see this to be significant given that hair styles and facial hair can change. The briefing package said that the man to be arrested had a tattoo of a specific word on his right forearm. The police did not check for the presence of the tattoo. One of the officers explained in cross-examination, "we were concerned for our safety at that point making the arrest. So we weren't, we weren't going to start telling him to, to look over his tattoos and stuff." There was also a height difference of approximately five inches between the two men,

as well as a difference in complexion.

- [14] The officers testified that there were some “impediments” to their ability to view the appellant, such as their viewing angle, their low riding vehicle, obstruction from the car frame, as well as the quick time frame to make a decision. One of the officers decided that “this is our guy.”
- [15] The officers perceived that there was some exigency as L.G. was believed to be involved in drug and gun trafficking on behalf of a criminal organization. They were concerned that weapons might be concealed in the man’s satchel. They had been told in the briefing that satchels could be used to conceal and transport firearms. One of the officers testified that the “thought had crossed [his] mind” that the appellant might be armed. He considered this possibility because of the actions of the Honda and L.G. not being at the address, saying “a whole bunch of stuff...led me to just be [in] a heightened alert.” The other officer similarly testified that he was concerned about the safety of the officers and the appellant if they stopped him.
- c. The Appellant is Stopped [16] Having formed the belief that the man was L.G., one of the officers drove the car onto the sidewalk in front of the man to block his path. When asked his name, the man replied with a name that was not L.G.’s. The officer testified that he believed that the man had given him a false name. The man was trying to dial his phone but could not do so because he was shaking. He appeared to be panicking. This reinforced the officers’ belief that the man was L.G. The officer testified that he told the man to put his phone down, but he twice refused.
- [17] The officers testified that, based on these observations, they believed that the man – the appellant – was the target of the investigation, that he might be armed, and that he might try to flee. They placed him under arrest and advised him of the charges listed in the briefing regarding L.G. The officers advised him of his right to counsel and handcuffed him.
- d. The Appellant is Searched [18] One of the officers was going to pat down the appellant as part of a search incident to arrest. He did not want to be cut by a sharp object, so he asked the man whether he had anything on him. The officer was concerned for his own safety and public safety in the residential area. The appellant replied, “To be honest, I have a gun”. At that point, the officer saw the butt of a Glock handgun coming out of the top of the open satchel. The officer removed the gun which had one hollow point bullet in the chamber and 12 hollow point bullets in an overcapacity magazine in the satchel.
- [19] Before performing the pat down search, the officer asked the appellant if he “had anything else”. He replied, “I have crack in my right pocket”. The officer found two black knotted plastic baggies in the appellant’s left pocket, and a \$20 bill in the right pocket. One bag was found to contain 1.78 grams of crack cocaine, and the other was found to contain 0.26 grams of crack cocaine.
- [20] The appellant was advised of new charges based on what had been found.

- [21] One of the officers advised the officer in charge that they had L.G. in custody.
- [22] Upon photographing the items seized from the appellant, including multiple cell phones and \$1820 in 50 and 100 dollar bills, a health card with the appellant's name was found.
- [23] At 5:51 pm, one of the arresting officers asked the appellant if he was L.G. The appellant advised that he was T.G., and that L.G. was his brother. Both he and his brother lived at the target address.
- e. Right to Counsel [24] One of the officers placed the appellant in the rear of the police car and read him his right to counsel again on camera. The appellant said that he did not have a lawyer but wanted to speak to one. The officer told him that he would be put in contact with duty counsel when they got to the station. Prior to leaving the scene, the police had to wait for an officer to arrive who would take photographs of, and collect the items seized. While waiting, the appellant asked: "Can I maybe call someone?" One of the officers told him that he could not. He was not provided with an opportunity to exercise his right to counsel at the roadside as the officers could not assure that the call could be made in private.
- [25] At 6:10 a.m., the officers transported the appellant to 31 Division. There was a long line of cars with persons to be booked, and the appellant was not booked until 8:10 a.m. The appellant was finally connected with duty counsel at 9:17 a.m. The trial judge found that the delay in implementing the appellant's right to counsel resulted in a violation of his rights under s. 10(b) of the Charter, though she ruled that, despite that violation, the evidence seized as a function of a lawful arrest should be admitted under s. 24(2) of the Charter.
- f. Intention to Traffick [26] Detective Sergeant Jeffrey Ross testified as an expert with regard to the possession of cocaine for the purposes of trafficking and possession of proceeds of crime under \$5,000. He testified that the presence of two pieces of pre-wrapped crack cocaine in torn pieces of garbage bag, multiple cell phones, and the amount of cash seized were indicia of trafficking. Single-use plastics were consistently used to package cocaine at the street level. He testified that \$1,820.00 was a significant amount of money, depending on what the individual's resources were, for an average person. Handguns were consistently seen in the possession of persons who were traffickers, although a person with a gun could also be a drug user. Multiple cell phones were also commonly seen with drug traffickers, although not uncommon to the practice of many other businesses. The value of two grams of cocaine in 2018 was between \$160.00 and \$220.00.

III. ISSUES [27] The appellant raises a number of issues on appeal, which I would reframe as follows:

- (1) Did the trial judge err in finding that the arrest and search of the appellant were lawful and did not violate the Charter? If so, should the evidence be excluded?
- (2) Did the trial judge err in finding that the appellant's possession of crack cocaine was for the purpose of trafficking?

(3) Did the trial judge err in imposing a sentence of three years?

[28] I will deal with each of these in turn.

IV. ANALYSIS a. The Reasons of the Trial Judge [29] The trial judge found that the officers acted reasonably in arresting T.G., even though they were mistaken as to his identity.

[30] The trial judge rejected the notion that the police had engaged in racial profiling when they arrested T.G. The defence had argued that the only physical similarities between the appellant and L.G. was that they were both young Black men, that the car they saw the appellant exit had no connection to L.G. or the target address, and that police failed to check for the tattoo. The trial judge agreed with the Crown that there were objective grounds, apart from race, that justified the officers' belief that T.G. was L.G.

[31] The trial judge found, as a fact, that the officers held an honest belief that the man that they saw exiting the vehicle was the target of the warrant and that, based on the earlier briefing, they had grounds to arrest him. The trial judge accepted the officer's testimony as credible and reliable. As she put it in para. 53: "I accept that they believed the man who exited the Civic was L.G. based on their observations of his appearance, his behaviour, the behaviour of the Civic and the information in the briefing package".

[32] On the question of whether the officers' subjective belief was reasonable, the trial judge looked at "the objectively discernable facts through the eyes of a reasonable person with the same knowledge, training and experience as the officers", applying "common sense, flexibility and practical everyday experience".

[33] The trial judge considered the following factors in determining that the officers' subjective beliefs were reasonable:

- a. The officers attended a briefing and were tasked to assist Major Crimes Unit with executing a search warrant at [L.G.'s address]. This was a city-wide sweep in the Project Patton investigation. The police expected to find L.G. and evidence of weapons and drug offences related to gang activity at [L.G.'s address];
- b. Based on the briefing, the police had grounds to arrest L.G. for the weapons and drug offences;
- c. It was early in the morning. The officers observed no cars or people on the street while they waited for the search to be completed;
- d. The officers were advised that L.G. was not in the home;
- e. A car with dark tinted windows entered [L.G.'s street] at a high rate of speed. It drove past the target address and stopped nearby;
- f. A man got out of the car. The car sped away. The man began walking quickly away from [L.G.'s address]. He was wearing a satchel;

- g. The officers followed the man, observed him and compared him to the description and photo in the briefing package. He appeared to them to be of the same size and stature as L.G.;
- h. When stopped by the officers, the man began shaking violently and appeared to be panicked. He was trying to dial his phone but was unable to do so.

[34] The trial judge stated that it was objectively reasonable for the police to disregard certain factors, citing, as one example, the tattoo:

The Defence argues that the officers acted arbitrarily because they failed to check [T.G.'s] right forearm for the tattoo. If they had, it would have confirmed that [T.G.] was not L.G. While both officers admitted they did not look for the tattoo, I must consider the totality of the circumstances including the dynamics in which the officers acted and their experience when considering the objective reasonableness of the subjective grounds of arrest. It would constitute an error in law to assess each fact or observation in isolation. [Citations omitted.]

[35] The trial judge concluded as follows:

I do not find that the police were motivated by race or applied racial profiling when deciding to arrest [T.G.]. The target of the warrant was a young black man of medium build expected to be found at [L.G.'s address]. He was not at home. At about 5:00 a.m. a car with dark tinted windows entered [L.G.'s street] quickly, dropped a man of a similar build near to the target address and sped away. The man walked quickly away from the target address. The officers followed the man and determined he resembled the photo from the briefing. He was carrying a satchel which had been discussed at the briefing. I find there were sufficient physical, temporal and geographic connections to give the officers reasonable grounds to arrest [T.G.].

- b. Positions of the Parties [36] The appellant argues that the trial judge erred in concluding that the officers acted reasonably in arresting T.G. It is said that at least some of the factors considered by the trial judge occurred after T.G. was detained, such as his apparent panic and resulting shaking. It is argued that the police could easily have confirmed the man's identity through a visual observation, such as checking for the tattoo, and that they were obliged to do so in the circumstances. As a result of this error, the appellant argues that this court must revisit the trial judge's ruling on s. 24(2) of the Charter.

[37] The Crown argues that the trial judge did not err in concluding that the police acted reasonably in arresting T.G. It is said that the whole constellation of circumstances is relevant. In the alternative, in the event that any additional Charter breach occurred, the Crown submits that the evidence should nevertheless be admitted.

- c. Standard of Review [38] When the lawfulness of an arrest is an issue on appeal, the trial judge's factual findings are entitled to deference, subject to a showing of palpable and overriding error. The trial judge's application of the law to the facts raises a question of law and is reviewed on a standard of correctness: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20; *R. v. Beaver*, 2022 SCC 54, [2022] 3 S.C.R. 718, at para. 73; see also *R. v.*

Araujo, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; R. v. Biniaris, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23.

- [39] There is a mix of standards at play when the issue is the lawfulness of arrest. The police must subjectively believe that it is probable that the arrestee has committed an indictable offence. Upon review, a trial judge must ask two questions: 1) whether the police subjectively believed it to be probable that the arrestee committed an indictable offence; and 2) whether that belief was objectively reasonable. On appeal, the appellate court is to ask whether the trial judge was correct in his or her conclusion about the subjective and objective justification for the arrest.
- [40] As will be further discussed below, the standard for arrest is rooted in notions of reasonableness and probability, both of which are incongruous with the idea of “correctness”. It might therefore seem anomalous to ask whether a trial judge was correct in finding that it was reasonable for the police to believe that something was probable.
- [41] The answer lies in an acknowledgement that there need not be perfect symmetry between the respective standards of review. Appellate review for correctness makes sense when one considers that the trial judge is applying a legal standard in reviewing the police’s conduct. The law expects the police to act reasonably; but it expects trial judges to be correct. The identification of Charter rulings as questions of law allows for robust review of decisions that deal with the constitutional rights of individuals. This approach also ensures that the Crown, who enjoys a narrow right of appeal, can challenge Charter decisions about detention and arrest by way of appellate review.
- d. Reasonable Grounds for Arrest: General Principles [42] Section 495(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, provides that police may effect a warrantless arrest of “a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence”.
- [43] A warrantless arrest requires both subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint: R. v. Storrey, [1990] 1 S.C.R. 241, at pp. 250-51; R. v. Latimer, [1997] 1 S.C.R. 217, at para. 26; and Tim, at para. 24.
- [44] In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence: Shepherd, at para. 17. This requires the trial judge to evaluate the officer’s credibility, a finding that attracts particular deference on appeal: R. v. G.F., 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81; R. v. Beaudry, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 4.

- [45] The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer: *Storrey*, at pp. 250-51; *Latimer*, at para. 26; *Tim*, at para. 24.
- [46] There is no magic formula. Every case turns on its own facts. The standard of reasonable grounds takes its meaning from the surrounding circumstances. What constitutes reasonable grounds will depend on the context at issue, the nature of the criminal allegations, and the observations made by the police, viewed through the lens of common sense and experience: *R. v. Canary*, 2018 ONCA 304, 361 C.C.C. (3d) 63, at para. 22.
- [47] Ultimately, the reasonable grounds standard tries to strike a proper balance between individual and state interests. Courts must take care not to impose too exacting a standard for fear of hindering the police in the discharge of their duties to detect and investigate crime. There is a compelling public interest in the maintenance of social order through the enforcement of the law.
- [48] At the same time, courts must ensure that the standard, as interpreted, offers adequate protection to civil liberties. The right of an individual to be let alone and to move freely is one of the central precepts of a free and democratic society. Interference with a person's liberty is no small matter and must be carried out with due regard to constitutional limits and principles. The standard for arrest must not "leave law-abiding citizens at the mercy of the officers' whim or caprice": *Wong Sun v. United States*, 371 U.S. 471 at p. 479 (1963). Detention and arrest, themselves subject to constitutional review, often lead to other consequential intrusions, such as search.
- [49] Police must not be held to a standard of perfection, but nor are they at liberty to arbitrarily restrict an individual's freedom of movement. The standard of reasonable grounds to believe – rooted in objective, credibly based probability – prevents indiscriminate and discriminatory exercises of police power. It marks the point at which individual liberty properly yields to law enforcement objectives.
- e. Application of Reasonable Grounds [50] The question in this case is whether the police had reasonable grounds to arrest the appellant. It is common ground that the police had the requisite grounds to conduct an arrest of L.G., based on cogent and compelling information pointing to his involvement in crime. The question, then, is whether police had reasonable grounds to believe that the appellant was L.G.
- i. Did the police subjectively believe that there were grounds to arrest?
- [51] The first question to be asked is whether police subjectively believed that there were grounds to arrest. That analysis must begin with the trial judge's finding of fact, namely, that the officers subjectively believed that the man walking beside the police car was L.G. The trial judge based this finding on the testimony of the officers, whom she found to be

“credible and reliable witnesses”. The officers testified about several of their observations that morning, including the driving pattern of the car, the appellant’s shaking, and the officers’ comparison between the appellant and L.G.’s photograph. The trial judge noted that one of the officers testified that, while the photographs of the two men looked different, “at that time, in those circumstances, it looked to [him] like L.G.” The trial judge’s acceptance of the officers’ evidence is entitled to deference and sets the parameters for appellate review.

- [52] The Supreme Court considered a case of mistaken identity in *R. v. Burke*, 2009 SCC 57, [2009] 3 S.C.R. 566. An officer arrested an individual he believed to be the subject of an arrest warrant. The respondent was arrested while riding his bicycle during the evening. The officer believed that the respondent was the person he had arrested the week before and who had managed to escape. In fact, the respondent was that person’s brother. The evidence revealed that the two brothers looked alike. L. Côté J.A., writing for the Quebec Court of Appeal, affirmed the trial judge’s reasons, holding that it was clear that the trial judge did not believe the officer: *R. c. Burke*, 2009 QCCA 85, 248 C.C.C. (3d) 450, at para. 64. The majority of the Supreme Court of Canada similarly affirmed the trial judge’s factual conclusions, stating, at para. 3: “The trial judge’s reasons, delivered orally, explain in detail why she found the evidence of the arresting officer inconsistent, contradictory and wanting as to the circumstances surrounding the respondent’s arrest.”
- [53] I read *Burke* as, fundamentally, a case about deference. In that case, the trial judge had concerns about the credibility of the arresting officer and, on that basis, was not prepared to accept his testimony about the circumstances of the arrest. That finding set the contours for appellate review. By way of contrast, the trial judge in this case made positive findings of credibility, accepting the officers’ testimony that they subjectively believed T.G. to be L.G. at the time of the arrest. As in *Burke*, those findings, not marred by palpable and overriding error, are owed deference on appeal.
- [54] Of course, the officers’ subjective beliefs are only part of the equation. In order for the arrest to be lawful, the subjective grounds for arrest must be objectively reasonable. I will turn to that now.

ii. Was that belief objectively reasonable?

- [55] We know, with hindsight, that the police arrested the wrong man. That does not, standing alone, mean that there were insufficient grounds to arrest. The police may be mistaken as to the facts, yet still have reasonable grounds. The probabilistic nature of the inquiry invariably leaves space for error: *R. v. Whitfield*, 2023 ONCA 479, 89 C.R. (7th) 117, at para. 21. Reasonable grounds can be based on a reasonable belief that certain facts exist, even if it turns out that the belief is mistaken: *R. v. St. Clair*, 2021 ONCA 895, 408 C.C.C. (3d) 117, at para. 26, leave to appeal refused, [2022] S.C.C.A. No. 238. As Cromwell J. stated in *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 23, “the decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be”: see also *R. v. Biron*, [1976] 2 S.C.R. 56, at p. 72. The operative

question is what the police believed, why they believed it, and whether that belief was reasonable in all of the circumstances. In order to pass constitutional scrutiny, “the mistakes must be those of reasonable [people], acting on facts leading sensibly to their conclusions of probability”: *Brinegar v. United States*, 338 U. S. 160 at p. 176 (1949).

- [56] I do not see the mistake as to the appellant’s identity to be reasonable in the circumstances of this case. In this case, the officers inferred that the appellant was L.G. When the entire factual constellation is considered, that was not an inference objectively available on a probability standard. This is so, even accepting that the standard of reasonable grounds is a lesser standard than a *prima facie* case or balance of probabilities. The standard must be appropriately flexible and forgiving. It must not, however, be diluted to such an extent that an arrest – a significant interference with individual liberty – can be based on what the police acknowledge to be a poor vantage point for observation, discrepancies in physical appearance, and a failure to take readily available steps to confirm identity.
- [57] The trial judge found that the officers’ belief that the appellant was L.G. was reasonable, based on “objectively discernable facts”, seen “through the eyes of a reasonable person with the same knowledge, training and experience as the officers”, applying “common sense, flexibility and practical everyday experience”. The trial judge set out a list of factors that led her to conclude that the officers’ belief was objectively reasonable and that they acted reasonably in the circumstances at issue.
- [58] The trial judge found that the police did not merely stop a Black man who bore some resemblance to the photograph of L.G. They stopped a Black man who, from their vantage point, looked like the picture of L.G., who emerged from a fast-moving vehicle in the vicinity of L.G.’s residence, and immediately began walking away from the target address at a time of the morning when many people are still asleep. They observed the man carrying a satchel, which they had learned from the briefing might be used to carry a weapon. After the police stopped him, the man began shaking violently, at which point the police placed him under arrest.
- [59] It is not uncommon for arrests to be based on circumstantial evidence: an amalgam of discrete items of evidence, some of which may be entirely neutral when viewed in isolation, but which, in the aggregate, support an inference of criminality: *R. v. Nolet*, 2009 SKCA 8, 245 C.C.C. (3d) 419, at para. 127, *aff’d* 2010 SCC 24, [2010] 1 S.C.R. 851, citing *R. v. Drury*, 2000 MBCA 100, 150 Man. R. (2d) 64, at para. 90, leave to appeal refused, [2000] S.C.C.A. No. 619; see also *R. v. L. (M.A.)* (2003), 173 C.C.C. (3d) 439 (Ont. C.A.), at para. 6.
- [60] The drawing of inferences from circumstantial evidence represents a process of inductive reasoning, whereby the “decision maker relies on logic, common sense, and experience”, applied against “the measuring stick of human experience”: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at paras. 111-12, per Martin J. (dissenting, but not on this point). Circumstantial evidence requires the decision maker to make assessments based on probable interpretations of the evidence: *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385, at para. 71.

Those interpretations will depend, to some extent, on the life experience the actor brings to the task, which informs the common-sense inferences that are drawn: Kruk, at para. 71. Common sense is a necessary part of the calculus, as are assumptions about how the world works, and how people generally tend to behave: see Kruk, at para. 74.

- [61] It follows that circumstantial evidence may be capable of supporting multiple, competing inferences. The inference drawn by police need not be the only inference that is available, but it must fall within the range of reasonable inferences that could properly be drawn. The inference must flow logically from the cumulative whole of the evidence, rather than single items viewed in isolation, or a cherry picking of the most incriminating items. Moreover, an inference will not be reasonable if it is rooted in, or accompanied by discriminatory beliefs or assumptions, such as racial profiling, or other negative stereotypes.
- [62] The grounds to arrest the appellant were rooted in circumstantial evidence. There was no direct evidence indicating the appellant was L.G. The police inferred this to be the case, relying on the various circumstances recited by the trial judge. However, those circumstances must be understood and scrutinized within the broader factual context. Other circumstances called into question the reasonable likelihood that the appellant was L.G.
- [63] For example, the police knew their vantage point from inside the police vehicle was less than ideal. They believed that the man on the street was L.G., but they also knew that it was relatively dark, that the low vehicle ride height did not permit accurate assessments of height, and that they could only see the individual from a side profile. It was objectively unlikely that police could make an accurate identification from that observation point. From inside the cruiser, the officers could not accurately evaluate the individual's appearance beyond a likeness of some sort to the photograph obtained during the briefing. However, even that likeness was objectively questionable. The photographs of L.G. and the appellant were entered into evidence. The apparent differences between the two, including hairstyle, facial hair, complexion, and height, vastly outnumbered the similarities. It is true that hairstyles and facial hair can change. However, the discrepancies between the photograph and the appellant's physical appearance called for some additional investigation regarding the appellant's identity.
- [64] Other factors similarly point to the need for some additional confirmation of identity. The vehicle carrying the appellant entered the area at a high rate of speed. However, the appellant was not dropped off in front of the target residence of the search warrant. Instead, he was dropped off several houses down from that location. When he alighted from the vehicle, he walked away from the residence of interest, rather than toward it. Thus, there was no direct geographical nexus between the appellant's conduct upon leaving the vehicle and the investigation that was underway. It was early in the morning, and the street was relatively deserted. However, it could not be the case that any Black man who entered the area faced the prospect of arrest. The trial judge rejected the suggestion that the officers engaged in racial profiling and that finding is owed deference on appeal. Nonetheless, given

the appellant's movements away from L.G.'s residence, his presence on the street offered only a minor link to the investigation.

- [65] Even if it was open to the police to believe, from their vantage point in the cruiser, that the appellant might be L.G., once they stopped the appellant, there were objective and obvious indicia that he was not the man they were looking for. For example, it would have, or should have, been evident to the officers that there was a significant height difference between the appellant and L.G., with approximately five inches in disparity. The appellant provided a name that was not L.G. The officers explained in their testimony that people sometimes provide false names upon arrest. However, this was yet another indicator that the appellant may not be the person they had grounds to arrest.
- [66] It is true that the standard of reasonable grounds is a “practical, non-technical” standard based on “factual and practical considerations of everyday life on which reasonable and prudent men act”: *Illinois v. Gates*, 462 U.S. 213 at p. 231 (1983), citing *Brinegar* at pp. 175, 176; see also *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 73. The standard defies “precise definition or quantification into percentages” and is neither “a scientific [nor] metaphysical exercise”: *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) citing *Gates*, at p. 232, and *Brinegar*, at p. 175; *MacKenzie*, at para. 73; *Beaver*, at para. 72.
- [67] The standard of reasonable grounds is a lower standard than proof of a *prima facie* case or balance of probabilities. Yet, it requires more than a reasonable suspicion. As the Supreme Court of Canada explained in *Beaver*, at para. 72, “[r]easonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime” (emphasis in original): see also *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 27; *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1166. A reasonable belief exists when “there is an objective basis for the belief which is based on compelling and credible information”: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114.
- [68] While the standard does not imply certainty, police must advert to evidence that contradicts or detracts from the reasonableness of their belief. The police are not required to seek out exculpatory facts or to rule out possible innocent explanations for the events before making an arrest: *Beaver*, at para. 72; *Chehil*, at para. 34; *Shepherd*, at para. 23. Nor are police “required to evaluate evidence according to legal standards or to make legal judgments”: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 50. However, police must take account of exculpatory evidence that is available within the ambit of their understanding and/or field of observation: *R. v. Fyfe*, 2023 ONCA 715, 432 C.C.C. (3d) 145, at para. 60. They should only disregard information that there is good reason to believe is unreliable: *R. v. Golub* (1997), 34 O.R. (3d) 743 (C.A.), at p. 751, leave to appeal refused, [1997] S.C.C.A. No. 571; *Chartier v. Quebec (Attorney General)*, [1979] 2 S.C.R. 474, at p. 499.

- [69] In these circumstances, it was incumbent upon the police to make further inquiries or observations before effecting an arrest. For example, the officers knew L.G. had a unique tattoo on his arm. Unlike hairstyles and facial hair, the tattoo was not something that could be readily changed or removed. The appellant was wearing a short-sleeved shirt. It would have been a simple matter for police to direct the appellant to show them his arms, so that they could confirm whether he was L.G. Alternatively, police could have asked the appellant to produce his identification before rushing to arrest. The evidence established that the satchel contained the appellant's health card. A request to produce identification would have exposed the mistaken identification prior to arrest.
- [70] In this case, there was obvious "exculpatory" evidence suggesting that the appellant might not be L.G. The police were required to consider that evidence in assessing whether they had reasonable grounds to arrest. The police inferred that the man on the street was L.G., but that inference did not flow logically when one considers the whole of the circumstances at issue.
- [71] Nor was the inference made reasonable by the appellant's reaction to his arrest. The officers testified that the appellant's reaction to the arrest, his apparent panic, buttressed their belief that he was L.G. A panicked reaction to arrest might, in some instances, retroactively support the grounds for arrest. However, people may react to police presence for any number of reasons, including historical fear or distrust of law enforcement: *Le*, at paras. 89-97. If there are objective indicia that the wrong person has been arrested, that person's reaction will not be enough to establish identity, or outweigh the countervailing considerations. In this case, the appellant's apparent panic was relevant, but of minimal weight in the inferential calculus.
- [72] In short, the police must act reasonably, and that includes making reasonable inquiries as permitted by the prevailing circumstances.
- [73] It is true that this case posed some operational exigencies. Those exigencies must be given proper consideration by a reviewing court. The relative calm of the courtroom is not a reliable proxy for the often dynamic situations that can occur on the streets. Police are confronted by situations of known or uncertain danger and must act to protect themselves and the surrounding public. They must "expect the unexpected" and "must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing": *R. v. Stairs*, 2022 SCC 11, [2022] 1 S.C.R. 169, at para. 74; *Golub*, at p. 750; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 16.
- [74] Hindsight is not the lens through which to judge police action. A decision that must be made in mere moments on the street may be subject to intense scrutiny for hours or even days in a criminal courtroom. However, exigency does not lower constitutional standards or forgive unconstitutional conduct.

- [75] Here, the officers testified that they needed to stop the man and control the situation quickly. They learned at the briefing that L.G. was believed to be affiliated with a criminal organization and that he might be carrying a firearm. One of the officers testified that, once they determined they had L.G., the arrest “happened in a matter of seconds”. Events then unfolded in quick succession, with the police finding the firearm and the drugs. These were fluid circumstances. The police testified that the need to gain control was paramount and prevented a measured consideration of height and tattoos. The trial judge accepted this as a reasonable perception.
- [76] I accept that the officers in this case perceived that they had to act with some dispatch. Moreover, they were not required to let the appellant simply be on his way. They did not have objectively reasonable grounds to believe that the appellant was L.G., but they did have a reasonable suspicion, sufficient to justify a brief detention for investigative purposes. The police had a sufficient basis for stopping the appellant to determine his identity, and whether he was L.G. The problem is that the police arrested first and inquired into identity later. They proceeded to the most intrusive form of detention – arrest – before taking reasonable steps to determine if arrest was warranted.
- [77] An investigative detention is to be less intrusive than an arrest. An investigative detention is intended to serve as a relatively brief, and relatively non-invasive encounter between the police and an individual: Mann, at para. 45; Le, at para. 131. The exigencies described by the police in their testimony would have justified a brief detention for purposes of evaluating whether the appellant was L.G.; those exigencies said nothing about whether the appellant was L.G.
- [78] For all of these reasons, I find that the trial judge erred in finding that the police had reasonable grounds to arrest the appellant and that the arrest was lawful.
- f. Did additional Charter breaches occur? [79] Where, then does that take the analysis? Having found the arrest to be unlawful, it follows that the detention of the appellant violated s. 9 of the Charter: R. v. Stevenson, 2014 ONCA 842, 317 C.C.C. (3d) 385, leave to appeal refused, [2015] S.C.C.A. No. 37. This is so even though it is arguable that the police could have detained the appellant for investigative purposes based on a reasonable suspicion that he was L.G. As held by Doherty J.A. in Stevenson, at para. 56: “The arbitrariness of the appellant’s detention must be determined having regard to the police power actually exercised and not by reference to some other police power which may have been, but was not, exercised”.
- [80] Furthermore, the arrest being unlawful, there was no lawful basis for the search that was conducted incident to the arrest. Therefore, the searches revealing the gun and the drugs violated s. 8 of the Charter. The officers conducted the searches on the basis of the power to search incident to arrest. They asked the appellant what he had on his person rather than conducting a physical search of his person. However, asking the appellant to produce the items was as much a search as a physical search would have been. The power to search

incident to arrest exists at common law and flows from the lawfulness of an arrest: *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 27. If an arrest is found to be unlawful, so too is the search conducted incident to that arrest: see *Tim*, at para. 50.

- [81] There was no other lawful basis for the searches conducted in this case. The police had grounds to believe that L.G. was involved in a criminal organization, and that he might be carrying a firearm in a satchel. The appellant looked like L.G. and was carrying a satchel. However, once police checked his identity, and realized that he was not L.G., any concerns relating to L.G. would no longer have been of any relevance. The appellant did not, himself, present as posing any real danger. When police approached him, he was carrying a phone in one hand, and a drink cup with a straw in the other. Once police learned that the appellant was not L.G., there would be no basis for any further engagement with him. As was observed in *R. v. Zacharias*, 2023 SCC 30, 487 D.L.R. (4th) 571, at para. 42: "... the police need to respond to exigencies, but in doing so must be mindful of the authority that the law confers and also the constraints that the law imposes".
- [82] Having found that the searches yielding the gun and drugs violated s. 8 of the Charter, those searches could not legally sustain the arrests of the appellant for the offences before the court. Thus, the searches violated s. 8, and the consequential arrests, based as they were on unconstitutionally obtained evidence, were unlawful.
- g. Section 24(2) [83] The above findings require this court to take a fresh view of the admissibility of the evidence under s. 24(2) of the Charter: *Tim*, at para. 72; *R. v. Davidson*, 2017 ONCA 257, 352 C.C.C. (3d) 420, at para. 46.
- [84] The trial judge found that the police violated the appellant's rights under s. 10(b) of the Charter by failing to provide him with a reasonable opportunity to speak to counsel in a timely manner. She found that, while the evidence was seized before the s. 10(b) violation, there was a sufficient temporal nexus to conclude that the evidence was obtained in a manner that breached the appellant's Charter rights. The trial judge conducted a full Grant analysis, concluding that the gun and drugs were admissible, despite the violation of s. 10(b). She reasoned that, because the gun and drugs were discovered pursuant to a lawful search incident to arrest, and there was no causal nexus between the breach and the discovery of the evidence, the admission of the evidence would not bring the administration of justice into disrepute.
- [85] Once it is accepted that the arrest and search of the appellant were unlawful, the trajectory of the s. 24(2) analysis must shift. Those breaches of ss. 9 and 8 were directly and causally linked to the discovery of the evidence sought to be introduced by the Crown. This necessarily affects the analysis under the various limbs of the Grant test. I will turn to that now.

- [86] The first limb of the Grant test inquires into the seriousness of the Charter-infringing conduct. Is the Charter-infringing state conduct so serious that the court must dissociate itself from it? The spectrum of seriousness involves, at one end, “inadvertent or minor violations of the Charter” and, at the other, “wilful or reckless disregard of Charter rights”: Grant, at para. 74; Beaver, at para. 120; R. v. Singer, 2026 SCC 8, at para.110.
- [87] The officers in this case acted in good faith. The trial judge found that the police genuinely believed the appellant was L.G. They believed, albeit erroneously, that they had the necessary grounds to arrest the appellant. There is no suggestion that police acted in wilful or flagrant disregard of the appellant’s Charter rights. While police were obliged to take greater care to determine the appellant’s identity, they perceived that the appellant was L.G., and that there were safety concerns given L.G.’s connection to crime and the likelihood that he was carrying a gun in a satchel. In the recent case of Singer, at para. 112, the gravity of the breach was mitigated by the fact that police were acting “to protect the general public and their safety from potential impaired drivers”. So too here, the trial judge found that police subjectively believed that a speedy arrest was necessary in the interests of public safety. While the grounds for arrest were not objectively reasonable, they were not without evidentiary support. The grounds fell short of reasonable grounds, but they did not fall far short of that standard.
- [88] The different standards that govern investigative activity – such as reasonable grounds to suspect and reasonable grounds to believe – are not stand-alone compartments. They are points on a continuum, ranging from unsubstantiated hunches at the one end, to proof beyond a reasonable doubt at the other. Between these extremes lie varying degrees of proof: reasonable suspicion, reasonable grounds to believe, a prima facie case, and proof on a balance of probabilities. These are not insular categories. They are points along a spectrum that tracks increasing levels of proof.
- [89] By their nature, spectrums do not generate bright lines. It is sometimes difficult to distinguish the top end of reasonable suspicion from the bottom end of reasonable belief. The answer to this conundrum does not lie in quantification of the standard. Quantity is relevant. The police must have enough information to make their belief objectively reasonable. But there is no fixed list of ingredients or boxes to be checked. It adds little clarity to estimate a percentage point, such as 35 or 40 percent likelihood. Fundamentally, it is not about numbers or percentages; it is about what is reasonable to believe, based on logic, experience and common sense.
- [90] Here, the grounds relied upon by police hovered close to the putative line separating reasonable suspicion from reasonable belief. The police believed, albeit erroneously, that they had reasonable grounds and they conducted themselves on that basis. They were wrong, but this error does not rise to the level of a wilful or flagrant violation that would defeat a claim of good faith.

- [91] It is, of course, important to note under this limb of the analysis that the police engaged in more than one breach of the Charter. The searches violated ss. 9 and 8, and, as found by the trial judge, there was a subsequent violation of s. 10(b). Courts are required to consider the effect of multiple violations of the Charter when assessing the admissibility of the evidence, with attention paid to patterns of unconstitutional conduct: *Zacharias*, at para. 49; *R. v. Brunelle*, 2024 SCC 3, 488 D.L.R. (4th) 581, at paras. 76-77. I do not see the police conduct in this case as disclosing a disturbing pattern of constitutional non-compliance. There was more than one violation, but police acted inadvertently, and without wilful intent, in each instance. Therefore, even accounting for more than one breach, the first limb of the test pulls toward admission of the evidence: see *Zacharias*, at para. 69; *Tim*, at paras. 71, 89.
- [92] The second limb of the test considers the impact of the breach on the Charter-protected interests of the appellant. The unlawful arrest impacted the appellant's liberty interest, but that impact is tempered by the fact that police could have lawfully detained him for investigative purposes: *Stevenson*, at para. 70, *R. v. Brown*, 2012 ONCA 225, 258 C.R.R. (2d) 26, at para. 28. That is, it is arguable that police had a reasonable suspicion that would have justified an investigative detention. This reduces the impact of the s. 9 violation on the appellant's liberty interests.
- [93] On the other hand, the s. 8 breach had a significant impact on the appellant's constitutional rights beyond the impact that would have flowed from an investigative detention. He had the right to be on his way, without interference, once police checked his identity and determined that he was not L.G.: see *Stevenson*, at para. 71. As discussed above, the police had no basis on which to question the appellant about what he had in his possession. Absent a basis for an officer safety search, he was entitled to keep private the items that he was carrying on his person, despite, or because of, their character as contraband. The law is clear that privacy is not diminished merely because the suspect is concealing evidence of crime. If anything, the criminal nature of the possession increased the level of privacy that the appellant expected and desired: *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, at paras. 69-73. The second limb of the test pulls strongly toward exclusion.
- [94] The third limb of the test looks to society's interest more broadly, focusing on the truth-seeking function of a criminal trial: *Grant*, at para. 79. The court considers factors such as the reliability of the evidence, the importance of the evidence to the Crown's case, and the seriousness of the alleged offence: *R. v. McColman*, 2023 SCC 8, [2023] 1 S.C.R. 309, at para. 70. Recently, in *R. v. Fox*, 2026 SCC 4, 509 D.L.R. (4th) 670, at para. 122, the Supreme Court observed that: "[r]eliability is properly considered under s. 24(2), because evidence obtained in a manner that reduces its reliability or accuracy undermines the truth-seeking function of the criminal trial process and the long-term reput[e] of the justice system".
- [95] There can be no doubt that the gun and drugs seized from the appellant presented as reliable evidence of crime. The offences for which the appellant was tried were serious. The third limb of the inquiry strongly favours admission.

[96] How, then, does the balance ultimately unfold? In Fox, at para. 125, the Supreme Court noted the qualitative nature of the balancing exercise:

The final step in the s. 24(2) analysis involves balancing the three lines of inquiry to determine whether admitting the impugned evidence would bring the administration of justice into disrepute. The balancing is qualitative and does not admit of mathematical precision. The focus of the balancing is the long-term integrity of, and public confidence in, the administration of justice. The balancing is prospective: it seeks to ensure that evidence obtained through a Charter breach does not cause further damage to the justice system. The balancing is also societal: the goal is not to punish the police but rather to address systemic concerns regarding the broad impact of admitting the evidence on the long-term repute of the justice system. [Citations omitted.]

[97] Here, the first and third limbs of the test favour admission, whereas the second favours exclusion. In the circumstances, given the good faith of the officers, the fact that they acted with some justification, their perception of the exigencies, the nature of the evidence sought, and the gravity of the offences, I find that, on balance, the admission of the evidence would not bring the administration of justice into disrepute. This is not a case in which the long-term effects of admission would run afoul of the integrity of the justice system.

[98] Therefore, while I find that the trial judge erred in finding the arrest and search of the appellant to be lawful, consideration of the additional Charter violations does not change the ultimate disposition of the Charter analysis. I agree with the appellant that the arrest and search violated his constitutional rights, but, having conducted an independent Charter analysis, I must conclude that consideration of the additional violations would not have yielded a different remedy under s. 24(2). Therefore, the evidence was properly admitted at the appellant's trial, and this ground of appeal must fail.

h. Possession For the Purpose of Trafficking [99] The appellant argues that the trial judge erred in concluding that the possession of crack cocaine was for the purpose of trafficking.

[100] The trial judge accepted the testimony of the expert proffered by the Crown. Her reasons include the following, at paras. 109-112:

The Crown's case against [T.G.] on the possession for purposes of trafficking and possession of proceeds of crime charges is based on circumstantial evidence. When [T.G.] was arrested, he had, along with the drugs in his possession, a loaded handgun and ammunition, multiple cell phones and a large quantity of cash. The Crown argues that the only reasonable inference from this evidence, combined with all of the other evidence, is that [T.G.] possessed the crack cocaine for the purpose of trafficking.

Although the quantity of drugs contained in the two baggies is small, I accept DS Ross' evidence that street level dealers may pre-portion specific amounts for purchasers and that transactions take place in round numbers with the benefit going to the dealer.

[T.G.] had a Glock handgun loaded with hollow point bullets. This weapon is intended to do serious harm. I find that [T.G.] was seeking [to] protect himself, the drugs and the large quantity of cash on his person from threats while carrying out the sale of drugs. He was trying to call his mother on one cell phone. The other was in his satchel. This is consistent with DS Ross' evidence that dealers will use one phone personally and another for business. \$1820 in any denomination and any condition is a large amount of cash to have on one's person.

I have considered this evidence, along with all of the other evidence in deciding whether the Crown has proved [T.G.'s] guilt beyond a reasonable doubt. In my view the only rational inference that can be drawn from all of the evidence is that [T.G.] possessed the two baggies of crack cocaine for the purpose of trafficking and that the \$1820 in his possession was proceeds of drug trafficking. I am not persuaded that there is any other rational explanation.

[101] It was open to the trial judge to accept the testimony of the Crown expert, and to conclude, based on the circumstantial evidence before her, that the appellant possessed drugs for the purpose of trafficking. The trial judge properly considered the circumstantial evidence, concluding that intention to traffic was the only rational inference available on the evidence. The appellant has failed to demonstrate any basis for appellate intervention and the conviction appeal must be dismissed.

i. The Sentence Was Fit [102] The trial judge sentenced the appellant to three years for possessing a prohibited firearm, eight months consecutive for possession of narcotics for the purpose of trafficking, and three months concurrent for possession of the proceeds of crime. The appellant was given a total of 14 months credit for pre-sentence custody and time spent on restrictive bail conditions.

[103] The appellant argues, and the Crown agrees, that the trial judge misconstrued the Crown's position in the court below. There was, indeed, some confusion over what sentence the Crown asked for before reduction for credit. The Crown initially suggested that the sentence should be in the range of four years and two months, prior to consideration of credit. However, the Crown took the position that, applying proportionality, the pre-credit sentence should be three and a half years. The Crown then misstated the amount of credit that the appellant was entitled to for pre-sentence custody[3]. Ultimately, it was the Crown's submission that, after credit, the appellant should serve a total of two and a half years in custody.

[104] The trial judge arrived at the same conclusion, though she got there by a different route. She perceived, erroneously, that the Crown was asking for a sentence of four years and two months pre-credit, rather than three and a half years. The trial judge imposed a sentence of three years and eight months, from which she deducted fourteen months of credit, leaving two and a half years to be served.

[105] The appellant argues that the trial judge erred in that she misconstrued the position of the Crown and imposed a pre-credit sentence that was longer than had been proposed by the Crown. While there was some confusion, I would not interfere with the sentence ultimately

imposed by the trial judge. While she misstated the Crown's position, she compensated for that error by increasing the amount of credit to which the appellant was entitled. The sentence imposed was well within the appropriate range given the gravity of the offences and the resulting potential harm to members of the public. Courts have long recognized that "the toxic combination of drugs and guns poses a pernicious and persisting threat to public safety and the welfare of the community": *R. v. Wong*, 2012 ONCA 767, at para. 11; *R. v. Pileggi*, 2021 ONCA 4, 153 O.R. (3d) 561, at para. 34.

[106] The appellant has failed to demonstrate any basis for appellate intervention.

V. DISPOSITION [107] For all of these reasons, I would dismiss the appeal against conviction. I would grant leave to appeal sentence, but dismiss the sentence appeal.

"R. Pomerance J.A."

George J.A.:

[108] I have read the reasons of my colleague, Pomerance J.A. I agree with her that the trial judge did not err in finding the appellant possessed cocaine for the purpose of trafficking. I also agree that the appellant's rights under ss. 8 and 9 of the Canadian Charter of Rights and Freedoms were violated. However, I do not agree with her characterization of the police conduct nor with her assessment of the impact admission of the evidence would have on the long-term reputation of the administration of justice. I would therefore allow the appeal, exclude the evidence seized under s. 24(2), and substitute acquittals.

[109] Instead of conducting a separate analysis that explains why I find the police officers violated the appellant's Charter rights, an outcome Pomerance J.A. and I agree on, I will set out where I disagree with her characterizations of the police conduct in my s. 24(2) analysis.

[110] As noted by my colleague, the trial judge found that the police violated the appellant's rights under s. 10(b) of the Charter by delaying implementation of his right to counsel. No one challenges that conclusion, nor the decision to admit the evidence with the s. 10(b) breach standing alone. However, the s. 10(b) violation is relevant to the s. 24(2) analysis that I must conduct anew. I will return to this.

[111] In deciding to admit the evidence, my colleague concludes that the "grounds relied upon by police hovered close to the putative line separating reasonable suspicion from reasonable belief." She finds that the police acted inadvertently, without wilful intent, and in good faith. She finds that the first branch of the Grant test, which assesses the seriousness of the Charter-infringing conduct, pulls towards admission: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. As I explain below, I disagree and find that the seriousness of the breach, even if the police officers acted in good faith, pulls in favour of exclusion.

- [112] On the second branch of the Grant test, I agree with Pomerance J.A.'s conclusion that the s. 8 Charter breach had a significant impact on the appellant's constitutional rights as "[h]e had the right to be on his way, without interference, once police checked his identity and determined that he was not L.G. ... [T]he police had no basis on which to question the appellant about what he had in his possession" (citation omitted). However, I do not share her view that the police could have lawfully detained the appellant for investigative purposes and that this "reduces the impact of the s. 9 violation on the appellant's liberty interests."
- [113] With respect to the last branch of the Grant test, I agree with my colleague that because this is reliable real evidence of a crime, and in light of society's interest in seeing such serious crimes prosecuted, the pull is clearly towards admission.
- [114] This case highlights the importance of people being able to freely move about in society, and the need for courts to demand objectively reasonable grounds before this fundamental right can be interfered with. As my colleague notes, mistakes can happen during investigations and evidence can still be admitted when the police make a mistake, including a mistake about identity. I am also mindful of Brown J.A.'s dissenting reasons in *R. v. Omar*, 2018 ONCA 975, 144 O.R. (3d) 1 ("*Omar (ONCA)*") – which the majority of the Supreme Court of Canada appears to have endorsed in *R. v. Omar*, 2019 SCC 32, [2019] 2 S.C.R. 576 – in which he writes, at para. 123:
- I would respectfully submit that to fail to give some recognition to the distinctive feature of illegal handguns – which are used to kill people or threaten them with physical harm, nothing else – and, instead, to treat them as fungible with any other piece of evidence risks distorting the Charter's s. 24(2) analysis by wrenching it out of the real-world context in which it must operate. [Emphasis added.]
- [115] I take no issue with this, but it does not alter the analysis. As this court also noted in *Omar (ONCA)*, "there is no 'firearms exception' requiring that guns obtained in breach of Charter rights be admitted into evidence", and that in any case this is a matter of balance under s. 24(2): at paras. 56, 122. The important point to take from *Omar (ONCA)* is that this balancing exercise is not a mathematical equation such that, in cases involving handguns, where the first two Grant factors pull towards exclusion, exclusion automatically follows. I do not quarrel with this as the court should be mindful of the lethal nature of illegal handguns when considering the third branch of the Grant test and when balancing all three of the Grant factors together. And I will do so.
- [116] The first factor under the s. 24(2) analysis, the seriousness of the Charter-infringing conduct, must be placed on a spectrum that ranges from inadvertent or minor Charter breaches to those involving the wilful or reckless disregard for Charter rights: *Grant*, at para. 74; *R. v. McSweeney*, 2020 ONCA 2, 451 C.R.R. (2d) 357, at para. 78. As articulated in *R. v. Thompson*, 2020 ONCA 264, 62 C.R. (7th) 286, at para. 83, the question at this stage is:

[W]hether the police engaged in misconduct from which the court should dissociate itself, such as where the departure from Charter standards was significant or where the police knew or should have known that their conduct breached the Charter; or rather whether the breach was merely of a technical nature or reflected an understandable mistake. [Citations omitted.]

- [117] In my view, although the police did not deliberately set out to violate the appellant's Charter rights, the breach they committed was serious.
- [118] It is important to note that the appellant was not dropped off immediately in front of the target residence. He was dropped off a few houses down, and after exiting the vehicle he walked away from the target residence. Which means, there was no direct or obvious association between the appellant and the target residence.
- [119] In addition, given the information the police officers were provided in advance about L.G.'s appearance and physical characteristics, they could have easily and quickly determined that the appellant was not L.G. In fact, other than the appellant and L.G. both being young Black men, they looked nothing alike.
- [120] In the officers' briefing package, L.G. was described as 6 feet, 2 inches tall, weighing 161 pounds. L.G. was further described as having a distinctive tattoo on his right forearm. Colour photographs show that L.G. has a much darker complexion than the appellant, and that he had short black hair and a clean-shaven face with no scars or markings. During cross-examination, Officer Hayford, who is 6 feet tall, agreed that he was looking for someone taller than himself and that the tattoo was a unique marker.
- [121] The man the police observed exit the vehicle, the appellant, was described in the evidence as having a light or fair complexion, a moustache and goatee, and cornrows in his hair. The booking data sheet reveals that the appellant is 175 centimetres tall, about 5 inches shorter than L.G., and that when the officers approached him on the sidewalk, he was wearing a short-sleeved shirt that exposed his forearms.
- [122] The police could not, as I believe they did, simply close their eyes to the information they had about L.G.'s identity. Nor can the prosecution now rely on an investigation as flawed as this one to minimize the police conduct to justify admission. And by flawed investigation, I am referring to the police officers' formulation of grounds while still in their vehicle, with an impeded view of the appellant, and how, on their own admission, they could not fully assess the appellant's appearance, including his height. When you consider the totality of the circumstances, the officers had the ability and the time to confirm their suspicions about the appellant's identity as they were approaching him. As this court held in *R. v. Fyfe*, 2023 ONCA 715, 432 C.C.C. (3d) 145, at para. 60: "Officers are expected not to shut their eyes to relevant circumstances, ignore appropriate inquiries or fail to take into consideration exculpatory, neutral or equivocal information. They must take account of all available information and disregard only information reasonably believed to be unreliable" (citations omitted). And when officers do "shut their eyes to relevant circumstances" they cannot expect courts to excuse it.

- [123] Here, the officers knew L.G.'s height, which was markedly different than the appellant's height; they knew that their target had a unique distinguishing feature, the tattoo; they had access to photographs which clearly showed that their target and the appellant had very different complexions and looked nothing alike. Not to mention the other, admittedly changeable, features such as facial hair and hairstyles which, while not immutable, did not match the description the police had of their target which should have at least given them some pause.
- [124] The police showed a clear disregard for the appellant's Charter-protected rights, and, even if not deliberate, they failed to appreciate that in the circumstances – where the appellant was walking away from them and the target residence, and where there were no other members of the public on the street when the appellant was dropped off, attenuating any safety concerns – they had to do more.
- [125] It is at this stage we take into account the presence of multiple Charter breaches, and assess them collectively. In that respect, I note the trial judge's characterization of the s. 10(b) breach as "moderately serious on the scale of culpability." After taking into account all of the breaches under ss. 8, 9, and 10(b), and given the seriousness of the Charter violating conduct, I find that the pull towards exclusion is strong.
- [126] I turn now to the second branch of the Grant test.
- [127] The impact of these breaches on the appellant strongly favours exclusion. Police officers blocked the appellant's path on a sidewalk with their vehicle; they approached him from the front and from behind; they immediately took the phone he was holding and placed him in handcuffs; and later subjected him to an invasive strip search.
- [128] My colleague is of the view that the impact of this unlawful search on the appellant's liberty interests is tempered by the fact that the police arguably could have lawfully detained him for investigative purposes.
- [129] I do not necessarily agree that the police had a reasonable suspicion, based on objectively discernable facts, that the appellant was connected to a specific recent or ongoing crime, sufficient to justify an investigative detention. But assuming for the moment that the police did have a basis to conduct an investigative detention, it is important to remember that it "must be conducted in a reasonable manner" and "should be brief in duration": *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 45. In other words, the nature, length, and scope of such a detention and a search incident to that detention, is dependent on the circumstances. I will not repeat what I have already said about the obvious differences in appearance between the appellant and L.G. other than to note that the appellant actually gave the police his right name when he was first approached. Of course people can lie about their name, and it is understandable that the police thought this might be a lie, but it is significant when considered alongside other relevant circumstances, including the information the police had about L.G.'s identity. The proper approach in this situation would have been to, instead of blocking the appellant's path on the sidewalk and being as

aggressive as they were, simply take the time to make the observations they could, measure it against what they knew about L.G., and/or ask to see some identification. There was nothing preventing the officers from doing this.

- [130] This was not a fast moving, fluid situation. The police observed a man walking, by himself, away from them and the residence they were observing, in the early morning hours when there were no other members of the public present. While the driver of the vehicle who sped into the neighbourhood would have surely raised suspicion, the appellant was not the driver. Nor was he openly carrying anything that could be considered a weapon or otherwise doing anything untoward. Quite the contrary, the appellant was holding a phone and a cup with a straw in his hands. And even if the officers had a reasonable suspicion that would be sufficient to justify a brief investigative detention, an “officer’s decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition”: Mann, at para. 40; R. v. Plummer, 2011 ONCA 350, 272 C.C.C. (3d) 172, at paras. 48-52. In the circumstances of this case, all the police had to do was confirm the appellant’s identity and let him be on his way.
- [131] The impact of this violation on the appellant’s Charter-protected interests cannot be overstated. Accordingly, I find that the second branch also leans strongly towards exclusion.
- [132] I turn now to the third branch of the Grant test, which focuses on society’s interest in an adjudication on the merits. Where the pull towards exclusion is strong on both of the first two branches, as is the case here, the third branch “will seldom, if ever, tip the balance in favour of admissibility” (citations omitted): R. v. McGuffie, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 63.
- [133] That said, the third branch is not rendered irrelevant when the first two weigh in favour of exclusion. Which leads me back to my earlier discussion about how handguns, because of their lethal nature, are different than other pieces of real evidence. The question is whether, after balancing the various relevant factors present in this case, the public interest in admitting the evidence outweighs the Charter breaches.
- [134] As Brown J.A. pointed out in his dissenting reasons in Omar (ONCA), handguns are not fungible with other kinds of evidence because of their lethal threat to people. And this makes good sense because the particular public safety concerns they give rise to are elevated. Their admission, or exclusion, significantly impacts the reputé of the administration of justice due to these public safety concerns.
- [135] However, courts must resist the temptation to reflexively admit this type of evidence, especially when both of the first two branches weigh in favour of exclusion. In this case, in addition to a moderately serious breach of the appellant’s right to counsel, the appellant was stopped while he was walking on a sidewalk, arrested, and searched when there were no grounds to do so, which is a very serious breach. In this weighing exercise, “it is the cumulative weight of the first two lines of inquiry” (emphasis in original), that are balanced

against the third branch to determine whether the scale tips towards exclusion: *R. v. Beaver*, 2022 SCC 54, [2022] 3 S.C.R. 718, at para. 134, citing *R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, at para. 90. Even though we would notionally say otherwise, admitting the evidence in circumstances like these would bring us perilously close to, what would in its practical effect be, a firearms exception requiring that handguns obtained in breach of one's Charter rights be admitted into evidence.

- [136] To the Crown's argument that the handgun would have inevitably been discovered by the officers as the butt of the handgun was sticking out from the top of the satchel, we must keep in mind that on an immediate, aggressive approach by the police and in response to their queries about what was in his satchel, the appellant answered truthfully. This was before the officers noticed, or had any chance to notice, the handgun, in circumstances where it would have been apparent that they were not going to make any attempt to confirm the appellant's identity or accept anything he said about who he was, and were going to arrest him and proceed with a search no matter what. These circumstances do not lend themselves to a discoverability argument.
- [137] Excluding this evidence is what is necessary to protect the long-term and broader reputation of the justice system. The Supreme Court articulated in *Grant*, at para. 68, that "[e]xclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence." In this case, a reasonable person, informed of all these circumstances, would conclude that admitting the evidence would bring the administration of justice into disrepute.
- [138] In these reasons I have focused on the handgun, but the drugs, ammunition, and cash found on and seized from the appellant, for the same reasons, must be excluded as well. As the Crown had no case without this evidence, acquittals were inevitable.
- [139] I would accordingly allow the appeal, exclude the evidence on a fresh s. 24(2) analysis, and substitute acquittals on all counts.

Released: April 29, 2026 "J.G."

"J. George J.A."

"I agree. L. Favreau J.A."

- [1] T.G.'s name has been initialized pursuant to s. 110 of the Youth Criminal Justice Act, S.C. 2002, c. 1. T.G. is not a young person. This was done to protect the identity of L.G., the young person that was under investigation by police.
- [2] The conviction appeal, COA-25-CR-0155, was argued as a solicitor appeal. The appellant's appeal against sentence, COA-24-CR-1379, was heard as an inmate appeal, the same day as the appeal against conviction.

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- [3] The Crown improperly calculated how much credit the appellant should receive for 129 days in pre-sentence custody on a 1.5 to 1 basis. The proper credit for 129 days on a 1.5 to 1 basis is roughly 6 months. The Crown erroneously stated that the credit should be 144 days, or between four and five months. This error was of no consequence to the Crown's overall submission on credit, as the Crown was "content that [the appellant] receive the usual credit for his pre-trial custody".
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