
CANADA / JUDGMENT

R. v. Tombs

2012 BCSC 1826

COURT

Supreme Court of British Columbia

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2012 BCSC 1826 R. v. Tombs

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tombs,

2012 BCSC 1826

Date: 20120904

Docket: 58084-2

Registry: Chilliwack

Regina

v.

Gary Kenton Tombs and Mark Bartlett

Before: The Honourable Mr. Justice N. Brown

Oral Ruling on Voir Dire

Counsel for the Crown:

S. Gill

Counsel for the Accused Tombs:

Counsel for the Accused Bartlett:

O.A. Snowdon

D Schultz

Place and Date of Hearing:

Chilliwack, B.C.

April 18 - 20, 2012

September 4, 2012

Place and Date of Judgment:

Chilliwack, B.C.

September 4, 2012

Introduction

- [1] Gary Kenton Tombs, one of the two accused, applies under s. 24(2) of the Canadian Charter of Rights and Freedoms for an order excluding admission into evidence of drugs found in the driver's seat of a vehicle in which he had been sitting before an RCMP officer asked him to exit it.
- [2] Pursuant to s. 24(2) of the Charter, he also seeks exclusion of any other objects found in the vehicle, or on his person, from the search another police officer carried out after his arrest. These objects include a cell phone, which after his arrest received numerous calls from individuals seeking delivery of cocaine and heroin to various locations throughout Mission, British Columbia.
- [3] Mark Bartlett, the co-accused, does not allege any Charter violations.
- [4] Mr. Tombs asserts that two RCMP officers arbitrarily detained him and violated his right against unreasonable search and seizure. He also alleges the officers failed to promptly advise him of the reasons for his detention, deprived him of his right to retain and instruct counsel without delay, and failed to inform him of that right.
- [5] The relevant sections of the Charter state:
8. Everyone has the right to be secure against unreasonable search or seizure.
 9. Everyone has the right not to be arbitrarily detained or imprisoned.
 10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right .
- [6] Section 24(2) states:

- (2) Where, in proceedings under subsection (1) [which I will not recite here]], a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
- [7] Neither of the accused testified on the voir dire that declared to determine if Mr. Tombs' Charter rights had been violated. The burden of proof on the balance of probabilities on the voir dire rests on him.
- [8] For ease of reference, I sometimes will refer to Gary Kenton Tombs by his last name and Mark Bartlett by his last name.

Facts

- [9] On February 19, 2009, RCMP officer Constable Miller, assigned to the Street Crime Unit, was on patrol wearing plain clothes, driving an unmarked car in Mission, B.C. He has over five-and-a-half years experience as a police officer. He has been involved in approximately 200 vehicle stops and about 30 dial-a-dope investigations.
- [10] He saw a late model Ford Explorer and two men inside, sitting in the front seats. He recognized the man in the passenger seat, the accused, Mr. Bartlett. He was aware at the time that he was under court-ordered curfew and believed Mr. Bartlett was in breach of a court order. Mr. Tombs, the driver, he did not recognize.
- [11] At about 1515 hours, Constable Miller observed the Explorer fail to come to a complete stop at a stop sign. From a distance of about five blocks, he followed the Explorer through several left and right turns the Explorer took over a distance of about five blocks. Apart from the traffic infraction at the stop sign, he did not notice anything else unusual about the driving. He activated his lights and pulled the Explorer over.
- [12] After the pullover, he parked his car behind the Explorer. He then went to the driver's side window to question the driver. He intended to ensure he had valid insurance and a driver's licence. He asked Mr. Tombs for his documents. He did not have any prior knowledge of him.
- [13] At the window, he noticed right away Mr. Tombs' hands were shaking a lot. When he asked for vehicle registration papers, Mr. Tombs became extremely nervous. Constable Miller could see the papers plainly sitting on Mr. Tombs' lap; but instead of giving them to him, he handed Constable Miller his Air Care registration. Mr. Tombs' body was trembling and his hands were shaking as he passed him the papers.
- [14] Constable Miller acknowledged it was not unusual for people to be nervous when apprehended by police, but in his experience, this degree of trembling and shaking was exceptional. He had never before seen anyone so nervous in that situation.

- [15] Mr. Tombs' exceptional nervousness heightened Constable Miller's senses and concerns. He said he felt it was necessary for him to find out why he was so nervous and to gain control of the whole situation. He had not intended to give Mr. Tombs a ticket. Usually, Constable Miller said, he would not give anyone a ticket for a rolling stop infraction, just a caution. Therefore, he had completed his motor vehicle investigation and the traffic infraction was a secondary concern, Mr. Bartlett's suspected breach of a curfew being the primary one - and the reason he had pulled the Explorer over in the first place.
- [16] Constable Miller went to Mr. Tombs' side of the Explorer first, leaving Bartlett sitting in the passenger side. He asked Mr. Tombs why he was so nervous. At some point in his discussion with Tombs, Constable Miller recalled him mentioning something along the lines of feeling nervous about being pulled over by the police. Constable Miller asked him to turn off the engine and to come to the rear of the car to talk about why he was acting so nervous. He expected him to comply with his request and he did. He was cooperative.
- [17] As the two men stood at the rear of the Ford Explorer in the space between the police car and the rear of the Explorer, Constable Miller kept an eye on Bartlett, who remained in the passenger side of the vehicle.
- [18] He called another officer, Corporal Scott, who he knew was in the vicinity, to come and assist. Corporal Scott received the call around 1553 and 1555 hours and arrived at the scene within three to four minutes.
- [19] With 14 years experience, Corporal Scott is an experienced police officer. He has been NCO for the Street Crime Unit for five years. He has also been involved in all facets of dial-a-dope operations; more than 100 of them. Approaching the scene, he saw Constable Miller, standing with two males in the space between the rear of the Ford Explorer and the police car.
- [20] It was not made clear when it was that Constable Miller asked Bartlett to exit the Ford Explorer and come over to where he and Tombs were standing. Constable Miller testified at first that he believed Bartlett had remained inside until after Corporal Scott arrived, but later granted he could have exited earlier. I find Bartlett remained inside the Ford Explorer until shortly before Corporal Scott arrived at the scene, within a block of it, and saw the two men with Constable Miller. I find a fair estimate of when Bartlett exited the vehicle is in the range of 30 seconds to a minute before Corporal Scott arrived.
- [21] As Corporal Scott exited his vehicle, he recognized Bartlett. He did not recognize Tombs. Like Constable Miller, Tombs' shaking drew his immediate attention. Constable Miller continued dealing with Bartlett.
- [22] Corporal Scott found Tombs' trembling and nervousness unsettling, raising concerns he might possess a weapon or flee. He felt unsure. He knew Constable Miller was dealing with Bartlett for breach of a condition, but did not know why Tombs was being detained and Cpl. Scott did not specifically discuss that with Constable Miller. Cpl. Scott said on cross-

examination he did not see the need to know such details then, thinking it more important first to protect his own safety and that of Constable Miller and to control the situation. He felt confident Constable Miller had dealt with Tombs appropriately and had detained him for proper purposes.

- [23] Corporal Scott asked Tombs for his I.D. He produced a driver's licence from a pocket. Cpl. Scott conducted a brief pat-down. He then left Tombs, unhandcuffed, at the rear of the vehicle, near Constable Miller and Bartlett.
- [24] He did not tell Tombs the reason for his detention or say anything about officer safety to Tombs. Constable Miller had not told him either why he had asked him to leave the vehicle or why he was detaining him. I find Tombs was already under detention and neither officer suspected Tombs of any specific criminal offence at that time.
- [25] Corporal Scott testified he did not know if Tombs was being detained at all, or for what reasons he might be detained, if he indeed was. Corporal Scott said his focus was on safety and control of the situation and he was not concerned about whether Tombs was being detained or for the reasons Constable Miller had for detaining him. Although Corporal Scott worried about Tombs' behaviour, he admitted Tombs was cooperative.
- [26] Leaving Tombs near Constable Miller and Bartlett behind the Explorer, Corporal Scott walked to the open driver's side window, intending to see if any weapons were visible inside, or if anyone was inside. He looked through the driver's side open window. He saw in plain view the bag of drugs marked as Exhibit 1 on the voir dire depicted in the photograph contained in Exhibit 8. The package was sitting on the front driver's seat, partially covered, but he was still able to see a portion of the bag and its contents, which he quickly recognized as probable drugs. Corporal Scott placed Tombs under arrest at 1600 hours and advised him of his s. 10(a) and s. 10(b) Charter rights. He also read the police warning.
- [27] Around one minute, therefore, had elapsed between Corporal Scott's arrival on the scene, his pat-down of Tombs, leaving him with Constable Miller, looking through the front driver's window and Tombs' arrest and search incident to arrest. That search of Tombs following his arrest produced a BlackBerry cell phone in one pocket and a pill bottle containing pills. Until then, neither Constable Miller nor Corporal Scott had given Tombs any reason for his detention or advised him of his rights to speak to counsel.
- [28] Corporal Scott called for secure transport and attended to securing the scene and taking photographs that have been included in Exhibit 8.
- [29] After Corporal Scott returned to the vehicle for a search, he found a cell phone in the front passenger seat. He also found some batteries on the floor of the rear passenger seat, evidently detached from the cell phone. He inserted the batteries into the cell phone and immediately began to receive calls for delivery of heroin and crack cocaine, receiving, within a period of about ten minutes, five calls for delivery of crack cocaine and three calls for heroin.

- [30] Corporal Fossum, an expert qualified to testify on packaging, pricing, use, and methods of distribution, as well as the value of cocaine and heroin in the Mission area testified. He opined that the number of calls was consistent with a busy dial-a-dope line.
- [31] Moving forward on now to the police station, at around 1650 hours, about 50 minutes after his arrest, Mr. Tombs was given a private location at the police station so he called Legal Aid. Corporal Scott assigned the delay between arrest and the call to Legal Aid to the location in Mission where the arrest occurred, the time needed to secure the scene, to take photographs, delay waiting for detainee transport to come, and to the fact that he and Constable Miller needed to deal with the drugs found at the scene.
- [32] On cross-examination, Cpl. Scott agreed he had not allowed Mr. Tombs to use his own cell phone, explaining he could not use the phone in the police car because he needed privacy, and he could not provide any privacy elsewhere at that location. Mr. Tombs could not be left alone inside the unmarked police vehicles. Cpl. Scott did not tell officers transporting Tombs to the police station for processing to arrange for Tombs to consult counsel. Mr. Tombs was searched again at the police station but not strip-searched.
- [33] Returning now to Constable Miller and some further coverage of his dealings with Tombs and Bartlett. As mentioned, although he pulled over the Explorer because of the driving infraction, it was his belief Bartlett was in breach of a condition, which concerned him. He was not intending to issue a ticket for the infraction.
- [34] When Constable Miller spoke with Tombs, he did not tell him he could leave once the Motor Vehicle Act, R.S.B.C. 1996, c. 318 infraction was dealt with. Apart from telling Tombs he wanted to talk to him about why he was acting so nervously, he did not give any reason for his detention.
- [35] Although Constable Miller said he was not investigating Tombs for any specific criminal offence, he asserted a link between Tombs' nervousness and the Motor Vehicle Act infraction. He suggested Tombs' behaviour could affect his fitness to drive or, as I understand his evidence, make him unpredictable.
- [36] I note however, that until Tombs' rolling stop and afterwards, Constable Miller found nothing unusual about Tombs' driving. Bartlett and his suspected breach of condition was his major concern. Constable Miller admitted Tombs was being detained from the time he pulled the Explorer over.
- [37] At 1648 hours, and pursuant to his arrest for possession for the purposes of trafficking, Bartlett was strip-searched at the station. During it, a flap of drugs fell from his waistband. It contained crack cocaine, Exhibit 7. The 1648 hours strip-search preceded his 1654 hours call to Legal Aid that the police had arranged. The packaging of Exhibit 7 was similar to that of the larger Ziploc package found on the front driver's seat marked as Exhibit 1. Constable Miller did not direct the search of Bartlett but he was present when the flap fell from his waistband.

- [38] Exhibit 1, the package found on the seat, contained 65 flaps broken down into packages of soft cocaine, crack cocaine, and heroin, with a total value of \$2,310 as estimated by Corporal Fossum.
- [39] Tombs was not strip-searched. Constable Miller testified about the contents of Tombs' wallet: \$70 comprised of three \$20 bills and one \$10 bill.
- [40] By 1650 hours, a call to Legal Aid had been facilitated for Tombs. Between 1651 and 1654 hours, he spoke to them. As soon as Tombs was finished speaking to them at 1654 hours, Bartlett spoke to Legal Aid. His call ended two minutes later.
- [41] As mentioned, one of the photographs in Exhibit 8 shows a wallet sitting on the console. It is not clear in the evidence whether that wallet belonged to Tombs. The vehicle was registered to a [redacted], in Mission, B.C.

Expert's evidence on dial-a-dope operations

- [42] Corporal Fossum, as mentioned earlier, was qualified as an expert on drug trafficking. He has been a member of the RCMP for 20 years and gained many years experience working in the drug investigation unit in various locations throughout British Columbia, including the Lower Mainland; he has been involved in 46 undercover investigations and has spoken to users and all levels of traffickers, and is familiar with the argot of drug trafficking. He was familiar with pricing in Mission and with dial-a-dope operations in that area.
- [43] Crown counsel put to Corporal Fossum various hypothetical situations that effectively mirrored the circumstances of the present case. As mentioned, he confirmed the dial-a-dope operation was a busy one, involving a lot of product and a variety of drugs. With respect to the \$70 cash found in Mr. Tombs' wallet, he suggested this is consistent with the drugs having recently been reloaded, or with funds used to purchase a new load, or with the start of a new shift.
- [44] He testified the quantity of drugs is inconsistent with a one-person operation. Dial-a-dope operations can consist of one to three individuals. He testified that in his experience dial-a-dope operations are usually comprised of two people to minimize the risk of being robbed or stabbed and also to provide another set of eyes to look out for the police. When there is only one operator, drugs are usually hidden, with only enough drugs on the seller's person to make the sale. He acknowledged the presence of drugs in the waistband, as was the case with Bartlett, is consistent with the possessor being either a trafficker or a user. He explained, however, that he considers all the circumstances as a whole.
- [45] I asked whether it is common for a user to get a ride in a seller's vehicle. He agreed this happens on occasion but because sellers fear a rip-off, or are concerned a passenger would interfere with the next sale, they do not allow them to stay in the vehicle long. Since 1984, when his involvement in dial-a-dope operations began, Corporal Fossum has never seen a client ride more than a very short distance in a seller's car.

Investigative detentions and dat-downs

- [46] Defence counsel submits Constable Miller's actions extended beyond the legitimate investigative purposes of the initial stop and detention, which was to allow him to deal with the traffic infraction. Because s. 9 of the Charter protects against arbitrary detention, all detentions, including investigative ones, are subject to Charter scrutiny: *R. v. Mann*, 2004 SCC 52 at para. 20.
- [47] Officers do not have unbridled authority to detain a person and they cannot detain a person on a hunch, or allow a detention to become, in effect, an arrest (*Mann*, supra, para. 35).
- [48] An investigative detention is arbitrary under s. 9 of the Charter if it is not carried out lawfully in accordance with "common law police powers" (*Mann*, supra, paras. 29 and 49).
- [49] Justice Iacobucci summarized the principles governing investigative detentions in *Mann*, supra, at para. 45:
- [45] police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest .

check stops

- [50] Counsel for Mr. Tombs relies on *R. v. Mellenthin*, [1992] 3 S.C.R. 615, 76 C.C.C. (3d) 481. Although this case dealt with a vehicle check-stop program, counsel submits the underlying principles are similar. The Supreme Court found that although such programs constitute arbitrary detention, the program's social objective of lessening injuries and death caused by impaired driving and unsafe vehicles justified the detention. However, the Court held the police should not use such stops beyond those aims or turn them into a way to conduct an inquisition or an unreasonable search. The Court found it was acceptable for the officer in that case to shine his flashlight into the vehicle to ensure officer safety. The court found this did not constitute a search; but it should be noted that before the officer in that case had noticed glass vials inside a gym bag stowed behind the driver, he did not suspect the driver of possessing drugs or alcohol. Therefore, in his questioning of the driver about the glass vials he noticed inside it and his later search of it were improper. That is because the search also went beyond the intended purposes of the check-stop.

Investigative detentions and officer safety

- [51] Defence counsel submits it is important that judges not conflate questions related to an officer's safety factor with the requirement that the police first have reasonable grounds for detention. Counsel submits Constable Miller could not point to any link between Mr. Tombs and a reasonable ground of suspicion for his involvement in a criminal offence.
- [52] Counsel submits Constable Miller directed him to exit the vehicle and then detained him behind it only because Tombs appeared so nervous. It was his nervousness, she submits, that in turn resulted in Constable Miller's sense that something was wrong, not an objective reasonable suspicion that Tombs was engaged in a criminal offence. The only clear link between a criminal investigation and a particular individual, counsel submits, was the one that existed between the passenger Bartlett, and Constable Miller's suspicions that he was in breach of a curfew.
- [53] Counsel points to the likenesses between the case at bar and *R. v. Hoy*, 2009 BCSC 1687 where Ritch, a passenger in a vehicle driven by Hoy, was suspected of being in breach of his curfew. Because of Ritch's bad reputation, which included firearms use, combined with the fidgety demeanours of both men, the officers became concerned about safety. They therefore searched Hoy, found cocaine and arrested him for possession for the purposes of trafficking. Justice Humphries found there were no objectively discernible facts to suspect Hoy was criminally implicated in the breach of curfew under investigation. Justice Humphries also excluded the evidence under s. 24(2) because she found the infringements were serious, there was no urgency at the time, and no obvious factors supported a finding of good faith.
- [54] Defence counsel submits that Mr. Tombs' nervousness does not justify his detention. In *R. v. Peardon*, 2005 BCPC 117, the accused was very nervous and his hands were shaking. This, combined with items observed in the vehicle, such as coffee cups and luggage, grounded the officer's suspicion that Peardon might be hauling contraband. The judge found the accused's extreme nervousness was not a sufficient basis for a reasonable suspicion the accused was linked to a crime.
- [55] Defence counsel referred also to *R. v. Kang-Brown*, 2008 SCC 18. In that case, the Supreme Court found police had no reasonable and probable grounds to believe the appellant, who was at a bus depot and acting suspiciously, had drugs in his possession. The Court's decision split along various lines; however, the majority upheld the standard of reasonable and probable cause as opposed to reasonable suspicion.
- [56] In *Kang-Brown* at para. 96, Chief Justice McLachlin and Justice Binnie partially concurring, Justice Binnie wrote that the fact that the "appellant seemed nervous or 'antsy' when confronted by an RCMP officer" does not on its own make this "a sufficient marker of unusual conduct to afford grounds of reasonable suspicion nor taken with the other factors (or 'indicia') mentioned".

Dual purpose investigations

- [57] This was a dual-purpose investigation, and I will discuss principles relating to that briefly.
- [58] If a police officer pulls over a vehicle and detains the occupants for two reasons, one, say a motor vehicle infraction, and the other say, a robbery, the officer's dual purposes does not taint the stop for the motor vehicle infraction and turn it into a Charter violation: *R. v. Kaddoura*, 2009 BCCA 113.
- [59] In *Kaddoura*, an officer received a dispatch request from another officer telling him to pull over a vehicle and identify the occupants. The officer received no other reason for the request but supposed based on his knowledge that the requesting officer was a member of the Drug Unit that it related to drugs. He found the vehicle, noticed the damaged tail light and pulled it over. He took the driver to the rear, showed him the damaged tail light and obtained the driver's identification documents.
- [60] The Court of Appeal overturned the acquittal stating:
- [23] ... In this regard, I agree with the decision of the B.C. Supreme Court in *R. v. Madill*, 2005 BCSC 1564; where a police officer has a lawful and reasonable basis to stop a motor vehicle, the presence of additional reasons to effect a stop does not transform it into an arbitrary detention.
- [61] Counsel submits Mr. Tombs' case is distinguishable from *Kaddoura* because in that case a vehicle offence investigation and an ongoing criminal investigation were both underway, both investigations linked to the driver. But in the case at bar, Constable Miller conducted no actual continued investigation of the vehicle offence and Mr. Tombs' continued detention related, not to a criminal investigation, but to Constable Miller's hunch something was wrong.
- [62] In *R. v. Grunwald*, 2010 BCCA 288, officers examining the appellant's driver's licence when conducting a road check, smelled marijuana. One of the officers, holding a flashlight, saw garbage bags inside the truck's canopy. In one of the open bags beneath the canopy, he saw a Ziploc bag of marijuana. The accused was arrested and charged. The Court found that at para 23 "the fact that one officer pursued a new avenue of investigation while the original investigation was ongoing did not transform the detention into one which is arbitrary."
- [63] Counsel points out that the Court found the police had properly detained the accused. The fact the officer had "looked about" as Corporal Scott also did changed the nature of the investigation not the lawfulness of the earlier one.
- [64] Counsel for Mr. Tombs points out, however, that when the police discovered the marijuana in *Grunwald*, the investigation was ongoing; whereas in Mr. Tombs' case, there was no ongoing investigation of the stop sign infraction.

[65] Further, counsel submits Constable Miller, unlike the officer in Grunwald, could not articulate an acceptable investigative reason for his continuing detention of Tombs.

Officer safety

[66] If police have reasonable grounds to detain a person for investigative purposes, they may search a person for their protection, but a clear link between the person detained and an investigation of an offence must be present.

[67] In *R. v. Crocker*, 2009 BCCA 388, Justice Smith provides a helpful analysis of the correct standard for evaluating the reasonableness of an officer's claim of officer safety. The officer said in that case that, out of concern for his safety and the safety of his partner, he had asked the driver to open his clenched fist. He said his safety concerns were based on:

1. his belief that the occupants of the Cavalier were at the time or in the past involved in a criminal offence;
2. the driver's failure to respond immediately to his demand that he roll down the window;
3. his concern over the driver reaching under the front seat with his right hand which suggested to him that the driver was trying to hide something; and
4. the driver's attempt to conceal something in his clenched fist which the officer was concerned might be a weapon.

[68] At para. 25, Justice Smith confirmed that the central issue for the trial judge was the reasonableness of the search, and she commented on *Mann*, *supra*, stating:

[25] Mann authorizes a protective safety search incidental to a lawful investigative detention where an officer believes, on reasonable grounds, that his or her own safety, or the safety of others, is at risk, and the search is reasonably necessary in light of the totality of the circumstances [and which I referred to earlier in these reasons] (paras. 40 and 45). The officer must have an honest belief in the risk to his and others' safety and there must be objective grounds, based on all of the known facts and circumstances, from which reasonable inferences can be drawn to support the officer's subjective belief (paras. 41 and 43). A search will not be justified if it is based on "a vague or non-existent concern for safety ... [or] premised upon hunches or mere intuition" (para. 40).

[69] She went on to say starting at para. 62:

[62] In assessing an officer's expressed subjective belief it is important not to conflate the subjective and objective grounds for establishing the standard of reasonable suspicions. An officer's subjective belief in the level of risk for a protective safety search is established if he or she can articulate a basis for his or her suspicions. It is only when the objective standard is applied to the officer's articulated subjective belief for being suspicious that the reasonableness of his or her suspicions is determined.

[63] Mann recognized the need for police to ensure their short-term safety by non-intrusive means. As the Court noted at para. 43, "[t]he importance of ensuring officer safety has been recognized in obiter by this Court in *R. v. Mellenthin*, [1992] 3 S.C.R. 615. Police officers face any number of risks everyday in the carrying out of their policing function, and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible." Moreover, the potentially dangerous or even lethal risk to police officers in approaching a stationary, occupied vehicle, even when that risk is not readily observable, is well established [citations omitted].

[64] Similarly, in *R. v. Willis*, 2003 MBCA 54, 174 C.C.C. (3d) 406, the court acknowledged the high risk that police officers face when they enter into an unknown situation:

[36]... Police officers are at high risk everyday. They never know when a routine, mundane situation will explode into violence. Therefore, as has been said, it is undesirable to measure with extreme nicety whether their safety or that of the public in any particular search requires more or less than a quick pat-down.

[65] More recently, Madam Justice Rowles, writing for the Court in *R. v. Duong*, 2006 BCCA 325, 228 B.C.A.C. 183, described the standard for an officer's subjective belief in the need for a protective safety search as follows:

[54] There is no dispute that police officers are entitled to take reasonable steps to minimize the risks they face in the performance of their duties: [*R. v. Ferris*] [(1998), 126 C.C.C. (3d) 298 (B.C.C.A.)], at para. 54. Where a police officer has reason to believe that his or her safety is at risk in the course of an investigative detention, the officer is authorized to conduct a protective pat-down search: Mann, at para. 43. A "frisk search" for weapons is a relatively brief and non-intrusive procedure: Mann, at para. 42. Moreover, the reasonableness of a police officer's decision to conduct a search for officer safety cannot be judged by a standard that would second-guess the officer's actions with perfect hindsight: Ferris, at paras. 58, 71; *R. v. Willis* (2003), 174 C.C.C. (3d) 406, at para. 36 (Man. C.A.). The "police perception of reasonable necessity depends very much on the particular circumstances in which the police officer finds himself": Ferris, at para. 71.

...

[67] The second reason given by the trial judge for rejecting Cst. Johnson's subjective belief in officer safety concerns was his finding that Cst. Johnson's evidence on other unrelated matters was unreliable. However, while that finding may have been relevant to the trial judge's assessment of the reliability of the officer's evidence on other issues, it could not have informed his assessment of Cst. Johnson's evidence of his subjective belief because the basis of that belief was known facts and circumstances that were not in dispute. The Cavalier had reportedly been involved in an earlier criminal incident, Mr. Crocker had placed an envelope under the driver's seat and appeared to be hiding something in his fist, and he had refused to roll down his window until asked for a third time. While the trial judge may have questioned the validity of those concerns, that part of his analysis should

have been left for his assessment of the objective grounds to support Cst. Johnson's subjective belief. In my view, it cannot be said that Cst. Johnson's officer safety concerns were outside the scope of what reasonable inferences could be drawn from the undisputed circumstances of the February 6, 2007 investigative stop.

- [68] In my view, the trial judge also erred in law in finding a lack of objective grounds to support Cst. Johnson's subjective belief in officer safety concerns, by failing to consider the totality of the circumstances. Many of those circumstances were the same as those articulated by Cst. Johnson as forming the basis for his subjective belief and were not disputed. The trial judge also did not appear to factor into his assessment the objective factors that he noted at para. 25 of his reasons, including: (i) that Mr. Crocker was talking to a known drug user, (ii) the vehicle in which Mr. Crocker and his passenger were seated had been reportedly involved in a previous unsolved criminal offence, (iii) Mr. Crocker had placed a folder under his seat with his right hand and was clenching something in his left hand that he was attempting to conceal, and (iv) Mr. Crocker did not respond to Cst. Johnson's request that he roll down his window until asked for the third time.
- [69] Thirdly, the trial judge considered as relevant to his assessment of the reasonableness of Cst. Johnson's subjective belief, the lack of evidence that the officer believed Mr. Crocker was potentially violent, in possession of a weapon, or that the earlier incident in which he suspected him to have been involved, involved violence. However, Mann does not import a requirement that there be an overt indication of violence before a protective safety search may be undertaken. Other appellate decisions have also upheld a search incidental to an investigative detention for which there was no overt evidence of violence [citations omitted].
- [70] The test in Mann requires an assessment of all of the known facts and circumstances of a situation, including any reasonable inferences that might be drawn from those known facts or circumstances, in determining if the Crown has established reasonable grounds, both subjectively and objectively, to support an officer's decision to conduct a protective safety search.
- [71] In summary, police have a duty to investigate crime. Courts should be reluctant to second guess an officer's testimony as to his or her honest belief in the need for a protective safety search where he or she can articulate reasonably clear and focused reasons that inform their risk assessment. This is particularly so where the objective grounds for the search closely mirror those factors that informed the officer's subjective belief.
- [72] In today's world, weapons may extend to more than conventional guns or knives, and include other forms of weaponry of microscopic size. A lawful protective safety search to address these potential risks, particularly in a dynamic and potentially evolving street encounter with an occupant of a vehicle, need only meet the legal standard of reasonable suspicions. Here, the trial judge, in my view, applied a higher standard for establishing reasonable grounds for a protective safety search than that required by Mann...

[Emphasis added by Smith J.A.]

[70] I have instructed myself accordingly on all of the comments made by Justice Smith in that decision.

[71] In *R. v. Thibodeau*, 2007 BCCA 489, the Court of Appeal rejected the accused's contention that officer safety concerns deserve less weight where the accused's detention relates to a Motor Vehicle Act offence.

[72] In *Thibodeau*, police had pulled over the appellant, who had been driving on the wrong side of the road. Her behaviour inside the vehicle made the officer nervous and he became very concerned about his safety. Reasons given for his concerns rested on the accused's being more nervous than he believed circumstances warranted. The accused had looked for her driver's licence in her wallet for more than two minutes, before then starting to look in her fanny pack. While doing so, she had turned her back away from the officer and he could not see her hands or the fanny pack. Addressing the argument of defence counsel that Mann appears to grant officers rights to detain and give pat-downs only in connection with suspected criminal activity, therefore logically ceding less authority for Motor Vehicle Act offences, Justice Newbury stated at para. 10:

[10] With respect to Mann, I am not persuaded the passage quoted from para. 43 by the trial judge, and the Supreme Court's concern generally for balancing privacy expectations with concerns for officer safety, do not have application, or have very diminished application where only a Motor Vehicle Act offence is concerned.

... but the fact remains that police officers may have valid safety concerns even where the offence is not a crime and even where the person detained seems polite and co-operative.

Discussion and analysis

[73] Constable Miller's pulling over of the Ford Explorer was a lawful detention. Although his primary concern and motivation for his pulling over the Explorer was a traffic infraction, his dual suspicion and his central concern that Bartlett was in breach of a curfew did not turn the initial detention into an unlawful one.

[74] The fact that the passenger in a vehicle that Tombs was driving was suspected of being in breach of a curfew in relation to a criminal offence does not make Mr. Tombs a suspect, although it could be a factor on matters related to officer safety and public safety.

[75] Constable Miller did not intend to issue a ticket to Mr. Tombs. He had carried his investigation as far as he intended to do. As mentioned earlier, he directed Mr. Tombs to exit the vehicle because his extremely nervous behaviour made him suspicious something was going on. He wanted to find out why Mr. Tombs was so nervous and he wanted to get control of the situation.

- [76] Counsel for Mr. Tombs submits that there is no discernible reasonable objective basis for the officer's concerns about officer safety. When he took him to the rear of the Explorer, he did not conduct a protective pat-down of Mr. Tombs, for example. This goes against Constable Miller having a concern that Mr. Tombs was concealing a weapon on his person. Further, Constable Miller did not look inside the window of the vehicle for weapons. He left Bartlett inside the vehicle, while he spoke to Tombs about the reasons for his nervousness. In this regard, however, counsel points out that Bartlett had been compliant and had remained inside the car until directed to exit.
- [77] Moreover, counsel submits that apart from his nervousness, Mr. Tombs made no gestures with his hands or moves, either in the Explorer or outside it, nor did he say anything aggressive that could reasonably give Constable Miller pause for officer safety. He did not refuse to follow directions. He was cooperative. A certain degree of nervousness is common and nervousness standing alone is insufficient grounds for an investigative detention. Mr. Tombs was not being investigated incidental to a lawful investigative detention when Constable Miller directed him to exit the Explorer. There is no evidence he was suspected of involvement in Bartlett's breach of condition. A search will not be justified if it is based on "a vague or non-existent concern for safety or premised upon hunches or mere intuition": Crocker at para. 40.
- [78] Even if Mr. Tombs was being detained pursuant to a lawful investigative detention, the concern for officer safety standing alone would not necessarily justify Constable Miller ordering Mr. Tombs to get out of the vehicle. Directions must be minimally intrusive without of course second-guessing the officer's judgment or expecting perfection on such questions. But some correspondence should be detectable between an officer's reasonable suspicions regarding officer safety and the actions they have taken.
- [79] As mentioned, Constable Miller was not involved in an investigative detention at the time; nor did he articulate a valid reason why, to ensure his officer safety, he found it necessary to direct Mr. Tombs to exit and come to the rear of the vehicle. The fact he did not give Mr. Tombs a pat down, or conduct some other form of protective search after Mr. Tombs got out of the vehicle, or handcuff him, does not give reason to dismiss entirely Constable Miller's concerns. It does suggest, however, other considerations influenced his decision to direct Tombs to come to the rear of the vehicle, leaving Bartlett still inside it until Corporal Scott arrived.
- [80] On the other hand, while I agree with defence counsel that Constable Miller had fully spent his powers of investigative detention after he had identified the driver, and thereafter had no intention of investigating him further in relation to a Motor Vehicle Act offence, I somewhat disagree with the suggestion that all Constable Miller was entitled to do was to remove Bartlett from the vehicle and advise Mr. Tombs he was free to go. I will discuss this further a little later in these reasons.

- [81] As for Corporal Scott, he did not know why Constable Miller had detained Mr. Tombs, or whether Constable Miller was detaining him at all. Corporal Scott insisted he was concerned about Tombs' highly unusual behaviour, and he believed their safety was at risk. He trusted Constable Miller had proper reasons for his actions and he was not concerned about finding out immediately what they were as counsel suggested he ought to have done.
- [82] Defence counsel was highly critical of Corporal Scott's testimony. She suggested he had disregarded his Charter obligations and argued everything unfolded so fast because the officers had ignored Mr. Tombs' right not to be arbitrarily detained.
- [83] I do not see Corporal Scott's evidence that way. He was on the scene for only one minute before he saw the drugs in plain view on the driver's seat, then arrested Mr. Tombs, advising him of both his Charter rights, and also gave him the police warning. Corporal Scott can rely on the knowledge and belief of other officers involved in the investigation (R. v. Deo et al., 2006 BCSC 1702 at paras. 32-34) and he is not required to prioritize updating information on the reasons why Constable Miller was detaining Mr. Tombs over his immediate concerns relating to officer safety.
- [84] I find, in summary, that Constable Miller did not have authority to order Mr. Tombs to exit the vehicle for questioning him about his suspicion something was going on and his wanting to find out why he was so nervous. His belief his nervousness showing "something was going on" was insufficient reason for an investigative detention and for questioning him about why he was so nervous. While I accept that Cst. Miller was concerned about how nervous Mr. Tombs was, his actions were not motivated by concerns for officer safety but out of a hunch something unlawful was going on. He acknowledged his investigation in relation to the Motor Vehicle Act was spent and that he did not intend to take any further investigative steps in that regard. Thus, he had no basis for questioning him regarding his fitness to drive for example.
- [85] Considering the totality of the circumstances, I find that Constable Miller's detention of Mr. Tombs in this manner at that time was not incidental to an investigative detention, was not necessary for officer safety and public safety, and was not objectively reasonable; and in the circumstances of this was arbitrary. In short, when he directed Mr. Tombs to leave the vehicle, he did so to question him because he felt something was going on and because he wanted to find out why Mr. Tombs was so nervous, not because he suspected a link between Mr. Tombs and an ongoing investigation, including that of Mr. Bartlett's suspected infraction of the court order.
- [86] There was no ongoing criminal investigation relating to Mr. Tombs, , nor was Cst. Miller was focussed on officer and public safety at the material time; and Mr. Tomb's continued detention was therefore unlawful and constituted a breach of s. 9 of the Charter. In addition, the search by Corporal Scott that followed is likewise arbitrary. Although I find Corporal Scott was subjectively concerned about Mr. Tombs' unusually high degree of nervousness and about the safety of the officers at the scene, he ultimately relied on an assumption for

Constable Miller's reasons for Mr. Tombs' detention.

- [87] Again, considering the totality of the circumstances, chiefly my findings regarding Constable Miller and his reasons for detaining Mr. Tombs, I find Mr. Tombs' continued detention was arbitrary.

Section 24(2)

- [88] In *R. v. Reddy*, 2010 BCCA 11 Justice Frankel distilled the principles of *R. v. Grant*, 2009 SCC 32, laid down to guide judges who are deciding applications under s. 24(2) of the Charter in para. 91 of that decision:

- [91] ...In deciding whether to admit or exclude evidence, a court must now 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.

See also: *R. v. Harrison*, 2009 SCC 34 at para. 2

- [89] With respect to the first factor, seriousness of the breach, the greater level of state misconduct, the greater will be the need of the courts to disassociate themselves from that conduct. Wilful or reckless disregard for Charter rights will therefore tend to support exclusion.
- [90] Further, as the Chief Justice and Justice Charron noted in *Grant* at para. 75:
- [75] "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith.
- [91] As for the second factor, impact of the breach on the accused, it was observed at paras. 76 and 77 that the impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact is on the rights of the accused more likely it will be that exclusion is warranted.
- [92] The last factor, society's interest in a decision on the merits involves the question of whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. The reliability of the evidence is an important consideration, as is the importance of the evidence to the truth-seeking function of the trial. Although seriousness of the offence remains a consideration, it has far less importance than

under the R. v. Stillman, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321 framework, because s. 24(2) focuses on the long-term implications for the reputé of the administration of justice and not the public's short-term desire for a conviction.

- [93] Defence counsel submits there is a direct link between Constable Miller's Charter breaches and the discovery of drugs. If Constable Miller had not directed Mr. Tombs to exit the vehicle, Corporal Scott would not have discovered the drugs in the front seat. I agree that a link has been established.

Seriousness of the conduct

- [94] In my view, the Charter breaches of s. 8 and 9 of the Charter falls into the moderate to serious range. I note the officers did not mislead the Court. Defence counsel submitted Corporal Scott had been evasive, however, while he resisted admitting what defence counsel thought he ought to have conceded, I did not find him evasive or misleading.
- [95] I accept Mr. Tombs was extremely nervous at the time of his detention, more so than either officer had encountered before in any other person they had pulled over in such circumstances, but for reasons given, I could not find that the concerns for officer safety was the motive for Constable Miller's actions in directing Mr. Tombs to come to the rear of the Explorer.
- [96] Constable Miller knew his Motor Vehicle Act investigation was spent and that he had no reasonable basis for suspecting Mr. Tombs was linked to an ongoing criminal investigation. He also knew, or ought to have known, that Mr. Tombs' nervousness, standing alone, did not give him the authority necessary to permit him to direct Mr. Tombs from the vehicle as and when and as he did.
- [97] In Corporal Scott's case, as soon as he encountered Mr. Tombs on the scene he became concerned about his behaviour. I accept Corporal Scott's testimony that he was seriously concerned about officer safety. Nonetheless, he did not know why Constable Miller had detained Mr. Tombs. He relied on Constable Miller's deficient reasons for his having done so.
- [98] Given Mr. Tombs' extreme level of nervousness and considering the totality of the circumstances, I do not see the fact pattern in this case supporting a finding of bad faith on the part of either of the officers. In other words, their actions were not arbitrary, in the sense of capricious; nor were they representative of an action without any reasonable basis at all, or high-handed. But neither could one say Constable Miller acted in good faith, given what I find he ought to have clearly known, which was that Mr. Tombs was not under investigation for any criminal offence at the time and that his nervousness was not grounds for his continued detention as occurred in this case. The officers otherwise treated Mr. Tombs with respect. He was Charter-warned under s. 10 immediately on discovery of the drugs in the front seat.

- [99] Given the location of Mr. Tombs' arrest; the practical concern of securing the scene, with the drugs on it; the time needed for arranging transport and for its arrival, the delay in Mr. Tomb's speaking to counsel is not sufficiently outside a reasonable range to constitute a breach of a kind that issues a strong call for exclusion of evidence.
- [100] Nonetheless, considering all the circumstances, particularly those relating to s. 9 of the Charter I find the circumstances of the breach favour exclusion of the evidence.

Inevitable discovery of the drugs

- [101] If evidence subject to exclusion because of a Charter breach would have been discovered inevitably through a continuing lawful investigation, this is a factor that weighs in favour of its inclusion - for example, if the vehicle were seized and subjected to a legal inventory search that would have led inevitably to the discovery of drugs, that would weigh in favour of inclusion of the evidence: Grant at para. 122.
- [102] In this case, a continuing lawful investigation of Mr. Bartlett's suspected offence conceivably could have led to discovery of the drugs found in the front seat, where Mr. Tombs had been seated pursuant to a lawful investigation continuing.
- [103] As mentioned earlier, I agree with defence counsel that after Constable Miller had identified Mr. Tombs as the driver and had no further intention of investigating him further regarding his Motor Vehicle Act offence, Constable Miller had by then fully spent his powers of investigative detention. But I find the view that Mr. Tombs was then free to go after Mr. Bartlett was removed from the vehicle is somewhat simplistic, because a criminal investigation of Mr. Bartlett, Tombs' passenger, was also underway at the scene.
- [104] The officers were entitled to take steps to safeguard officer safety and to secure the scene for the purposes of finding evidence associated with Mr. Bartlett's offence. Constable Miller asked Mr. Tombs to turn off the engine, which he did, and defence counsel did not challenge Constable Miller's right to do so. That was an obvious and reasonable safeguard to ensure officer and public safety in relation to investigation of the traffic infraction. Further, a police officer is entitled to take reasonable steps to secure the safety and integrity of the scene in a lawful detention, which Mr. Bartlett's investigation clearly was, and to give minimally intrusive directions to the driver, Mr. Tombs in a way that does not breach the driver's privacy rights: R. v. Clayton, 2007 SCC 32 at para. 25.
- [105] In circumstances where the officers are conducting an investigation of Mr. Bartlett, the officers would have had authority to search his person and the inside of the Explorer in the areas near to where he had been seated for investigation purposes connected with the suspected breach of his conditional sentence: R. v. Caslake, [1998] 1 S.C.R. 51 at para. 19. This could include objects or documents evidencing his activities relevant to his suspected breaches of his conditional sentence.

- [106] It is at least arguable that it would have been reasonable for an officer to direct Mr. Tombs to exit the Explorer for an objectively reasonable time to allow a search of the Explorer for evidence relating to Mr. Bartlett's suspected breaches of sentencing conditions.
- [107] Although it has not been established how the drugs that Corporal Scott found on the driver's seat came to be there upon Mr. Tombs' exit from the Explorer, they nonetheless would have lain in plain view and an officer would have been entitled to investigate that. In summary, the discovered drugs could have found their way into evidence in that way. I realize this pathway to inclusion was not a pathway that the investigation of Mr. Bartlett inevitably would inevitably have followed and so led to the discovery of the drugs on the front seat of the Explorer; but mention it here simply to show that Mr. Tombs could have been directed to exit the Explorer for other legitimate reasons related to investigation of Mr. Bartlett's breach of court order and this could have led to either officer seeing the drugs in plain view on the driver's seat.
- [108] Of course, this is an analysis based on hindsight. Events did not flow in that hypothetical way and this scenario remains somewhat speculative. I have considered, this potential chain of events, however, in my deliberations.

Impact on Charter rights

- [109] Insofar as the impact on Mr. Tombs' liberty is concerned, I find his detention at the scene falls into about the moderate range of impact. It was not nearly as long as seen in some cases, but neither was it only a momentary interference. There was some delay in transfer to the Detachment for processing and having opportunity to speak to counsel, but as mentioned earlier, this was not intentional and there were reasonable explanations for the delays.
- [110] In my view, overlooking the ss. 8 and 9 Charter violations in this case relating to Mr. Tombs' detention and discovery of drugs at the scene could give rise to a concern Charter values will not be protected though not granted rising to the level of concern seen in some cases that reveal a pattern of bad faith or careless indifference to Charter rights.
- [111] In my view, allowing inclusion of the evidence could send a message that individual privacy rights count for little although such a message would be somewhat dampened by the fact the evidence was not conscripted from any statements and the drugs were discovered as an incidental part of what Corporal Scott saw as a legitimate officer safety search of the vehicle and that Mr. Tombs was accorded his rights under s. 10 of the Charter. However, on balance I find the nature and extent of the breach in this case favours exclusion of the evidence.

Adjudication on the Merits

- [112] The last factor is society's interest in the adjudication on the merits, to which I turn next.

- [113] Factors favouring inclusion in this case include the serious nature of the offence, the reliability of the evidence, and the fact that the exclusion of the drugs discovered and analyzed would see nothing left of the Crown's case to prosecute, although I note that even with inclusion of the evidence the Crown would still have to establish Mr. Tomb's possession of the drugs.
- [114] Numerous decisions of this Court and our Court of Appeal have commented on the destructive effects of dial-a-dope operations in the suburbs of Vancouver, and small cities and towns throughout the Province, such as Mission as well as in rural areas. Judges of this Court travel throughout the Province and see in every part of it the devastating effects of drug trafficking, and particularly those involving dial-a-dope operations. They make highly destructive drugs available in areas of the Province where access to them would otherwise be very difficult. These kinds of operations are difficult to police and their investigation consumes considerable resources to prosecute, as they have in this case. The public has a strong interest in seeing such crimes tried on the merits, particularly given the tremendous harm dial-a-dope operations cause our vulnerable young people and drug addicts.
- [115] At the same time, overlooking a pattern of Charter violations such as these may in the longer term undermine the reputation of the justice system, a finding that calls for exclusion, even if that means seeing a potential conviction of a person involved in a dial-a-dope operation lost. It is very difficult to see cogent evidence on such a case as this excluded, given the nature of the offence. But I find the balance on this test still favours exclusion. Including the evidence would more likely bring the administration of justice into disrepute than would its inclusion.
- [116] There is no point having a Charter of Rights intended to protect individual privacy in such circumstances if the courts do not safeguard them when such an obvious breach of it occurs.
- [117] In conclusion, I order the evidence excluded from the evidence at the trial proper.

"N. Brown J."

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