
CANADA / JUDGMENT

R. v. Webber

2019 BCCA 208

COURT

British Columbia Court of Appeal

DECIDED

13 June 2019

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2019 BCCA 208 R. v. Webber

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Webber,

2019 BCCA 208

Date: 20190613

Docket: CA45164

Between:

Regina

Respondent

And

Mark Daniel Webber

Appellant

Corrected Judgment: The paragraph number at the Conclusion of the judgment was corrected on June 13, 2019.

Before:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Savage

The Honourable Mr. Justice Hunter

On appeal from: An order of the Provincial Court of British Columbia,
dated November 22, 2017 (R. v. Webber, Vancouver Docket 233739-1).

Counsel for the Appellant:

N.J. Preovolos

Counsel for the Respondent:

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

April 3, 2019

Place and Date of Judgment:

Vancouver, British Columbia

June 13, 2019

Written Reasons by:

The Honourable Mr. Justice Savage

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Hunter

Summary:

After pulling over the appellant's vehicle for traffic violations, a police officer conducted a warrantless safety search of the front centre console of the appellant's vehicle. The officer found and seized cocaine and MDMA, and the appellant was charged with possession for the purpose of trafficking. The appellant applied to exclude the drug evidence on the basis that his rights under ss. 8, 9, 10(a) and 10(b) of the Canadian Charter of Rights and Freedoms had been violated. The voir dire judge found there had been no violation of the appellant's Charter rights, and the appellant was convicted. The appellant appeals, arguing the judge misapprehended evidence, erred in applying the standard of reasonable suspicion, rather than reasonable belief, in determining the scope and necessity of the safety search, and erred in finding his detention during the search of the centre console to be lawful. Held: Appeal dismissed. The judge's conclusions were available to him on the evidence. The applicable standard for lawful safety searches is "reasonable suspicion", and thus the judge did not err in applying that standard. The Supreme Court of Canada in *R. v. MacDonald*, 2014 SCC 3, did not recalibrate the test for lawful police safety searches.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

- [1] The fundamental duty of the police is to protect life and safety. In the course of this duty, police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others. On occasion, in furtherance of this duty, a citizen's liberty will be interfered with. Sometimes, when it is reasonably necessary in the circumstances, the police are authorized to conduct a limited search for the purpose of ensuring their own and the public's safety. The present appeal engages the question of the legal standard to apply in determining whether a limited search is reasonably necessary.
- [2] On July 3, 2016, in the course of a daytime traffic stop in the West End of Vancouver, the police found cocaine and MDMA while conducting a warrantless search of the front centre console of the appellant, Mark Webber's, vehicle. The police purported to conduct the search of the centre console for safety reasons. The entire episode commencing from the traffic stop to Mr. Webber's arrest took approximately ten minutes.
- [3] On appeal, Mr. Webber accepts that his initial detention and the pat-down search of his body were lawful but argues that the trial judge erred by applying the "reasonable suspicion" standard instead of the "reasonable belief" standard when he concluded that the console search did not breach Mr. Webber's rights under the Canadian Charter of Rights and Freedoms. Mr. Webber says that the decision of the Supreme Court of Canada in *R. v. MacDonald*, 2014 SCC 3, "recalibrated" the requisite legal standard from that applied in *R. v. Mann*, 2004 SCC 52.
- [4] The Crown says that the trial judge, Provincial Court Judge Lee, did not err when he determined that the centre console search was reasonably necessary, and that the facts amply demonstrated that such a search was objectively reasonable to ensure the safety of the officers and the public. The Crown says the argument that MacDonald recalibrated the requisite legal standard from that applied in Mann is not properly raised, but that, in any event, MacDonald did not overrule Mann but applied Mann to the facts before the Court.
- [5] For the reasons that follow, I have concluded that the judge did not err in applying the reasonable suspicion standard and would dismiss the appeal.

II. Background

- [6] On the afternoon of July 3, 2016, two police officers, Constable Sargent and Constable Wu, were on patrol in an unmarked police vehicle in the West End of Vancouver. They observed a car being driven in an erratic manner. The officers saw the driver make quick turns in a pedestrian-heavy area and drive through a controlled intersection without stopping, in contravention of the Motor Vehicle Act, R.S.B.C. 1996, c. 318.
- [7] The officers activated their lights and sirens to pull the vehicle over and the vehicle stopped abruptly, causing the driver to jerk forward and backward. The officers then observed the driver lean towards the front centre console of the car and make a motion with his right

arm.

- [8] Constable Sargent described the motion as a stuffing and pulling motion. Constable Wu described it as a stuffing motion or a motion where the driver was putting something in the centre console. Both officers testified they were concerned that the driver was pulling out or concealing something in the centre console, possibly a weapon.
- [9] The officers conducted a records search of the licence plate, which revealed the car was registered to a "Jason Webber" and had been involved in an attempted murder investigation in October 2015. The officers approached the driver and asked him to step out of the vehicle. Constable Sargent observed that the driver was shaking and seemed excited. The vehicle was strewn with empty cans and bottles, two cell phone chargers, a cell phone, various fast food wrappers and half a dozen five-hour energy drinks. Constable Sargent testified that these items are consistent with cars involved in drug trafficking.
- [10] The driver stepped out of the car and Constable Sargent conducted a pat-down search of the driver, Mr. Webber. He found no weapons on Mr. Webber. Then, while Mr. Webber remained by the curb with Constable Wu, Constable Sargent returned to his vehicle and conducted a second police records search of "Mark Webber".
- [11] The second police records search revealed that: (1) Mr. Webber was prohibited from possessing firearms due to a prior extortion conviction; (2) Mr. Webber had been one of two intended victims of the attempted murder in October 2015 associated with the vehicle; (3) the second intended victim was the subject of a drug trafficking investigation; and (4) the suspect in the attempted murder was also associated with drug trafficking.
- [12] Constable Sargent testified that this additional information elevated his concern that Mr. Webber had a weapon concealed in the front centre console of his car. The weapons prohibition suggested to Constable Sargent that Mr. Webber had used weapons in the past, and the links between Mr. Webber and the drug trade elevated his safety concerns as he was aware of frequent violence in the Vancouver drug trade.
- [13] Based on these safety concerns, Constable Sargent conducted a safety search of the centre console area of the vehicle (the "Console Search"). The search revealed several small bags containing what appeared to be cocaine. Constable Sargent left the bags and arrested Mr. Webber. Constable Wu read Mr. Webber his Charter warnings. Constable Sargent then returned to the vehicle to perform a more thorough search incident to arrest.
- [14] The officers seized approximately 83 grams of cocaine and 9 grams of MDMA from the vehicle, packaged in various plastic bags. Mr. Webber was charged with two counts of possession for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. He was not charged with an offence under the Motor Vehicle Act.

- [15] At trial, Mr. Webber admitted he had possessed the drugs for the purpose of trafficking. The only issue was his application to exclude the drug evidence on the basis that his rights under ss. 8, 9 and 10 of the Charter had been breached. He also challenged the evidence of Constables Sargent and Wu as inconsistent and untrustworthy. Mr. Webber did not testify.
- [16] Mr. Webber argued that: (1) there was no legal basis for his initial detention, the pat-down search or the Console Search; (2) he was not informed of the reason for his detention; and (3) he was not adequately apprised of his right to counsel. He submitted the evidence obtained from the Console Search should be excluded pursuant to s. 24(2) of the Charter.
- [17] The judge began his reasons by assessing the evidence of Constables Sargent and Wu. He accepted their evidence, although he referenced some shortcomings. He considered it inconsequential that the officers' notes had been written shortly after, rather than contemporaneously, with the incident, as a minor delay would not make the notes unreliable or inaccurate.
- [18] The judge held that the officers' initial detention of Mr. Webber was lawful. The officers had a legal right to detain Mr. Webber because he failed to stop at a controlled intersection and because of erratic driving. The judge found the fact that no ticket was ultimately issued to Mr. Webber did not make the detention improper.
- [19] The judge found that Constable Wu had informed Mr. Webber of the reasons for his detention -- erratic driving and failing to stop at a traffic stop -- and thus that there was no breach of s. 10(a) of the Charter. He also found that s. 10(b) of the Charter is not engaged during detentions for driving offences.
- [20] The judge concluded that both the pat-down search and the Console Search were objectively reasonable under s. 8 of the Charter.
- [21] The judge accepted the evidence of Constable Sargent who testified that he conducted the pat-down search due to concern over concealed weapons. With respect to the Console Search, Constable Sargent relied on the same grounds, as well as the additional information he learned from the second police records search, which he testified further substantiated his concerns regarding whether a weapon was concealed in the centre console of the vehicle.
- [22] The judge found that Constable Sargent had subjectively believed that both the pat-down search and the Console Search were necessary to ensure that no weapon was present. He found that the grounds for conducting both searches were objectively reasonable. He noted that the second police records search bolstered the grounds underlying the initial pat-down safety search.

[23] The judge further held that both the pat-down search and Console Search were minimally intrusive. The Console Search was limited to the area of the pulling or stuffing motion, and the time between initial detention and the discovery of the drugs was short, no more than ten minutes.

[24] As there had been no violation of Mr. Webber's Charter rights, the judge did not consider whether the evidence should be excluded pursuant to s. 24(2) of the Charter. Following the judge's voir dire ruling, the drug evidence tendered at the voir dire became evidence in the trial. Mr. Webber called no evidence. The trial judge found that the evidence established Mr. Webber's guilt on both counts.

III. Issues on Appeal

[25] Mr. Webber submits the trial judge erred in finding the Console Search did not violate his s. 8 Charter rights and further in failing to exclude the evidence obtained from that search under s. 24(2) of the Charter. Specifically, Mr. Webber alleges the judge erred:

- a) in fact by misapprehending evidence, specifically by:
 - i. finding that Mr. Webber had been the "subject of a drug investigation";
 - ii. inferring that Mr. Webber's extortion conviction and firearms prohibition suggested he may have used weapons in the past; and
 - iii. accepting Constable Sargent's evidence that he had to conduct the Console Search to address safety concerns;
- b) in law, by relying upon a "reasonable suspicion" standard (from Mann) for determining the scope and necessity of the safety search, rather than a "reasonable grounds to believe standard" (from MacDonald); and
- c) in law, by finding Mr. Webber's detention during the Console Search was lawful pursuant to an investigation under the Motor Vehicle Act.

[26] Mr. Webber submits that each of these errors individually led the judge to erroneously conclude Mr. Webber's Charter rights were not violated and therefore that the evidence obtained from the Console Search should not be excluded.

IV. Discussion and Analysis

A. Was there a Misapprehension of the Evidence?

Standard of Review

[27] The standard an appellant must meet to demonstrate misapprehensions of evidence in relation to issues of fact or mixed fact and law is high. Appellate courts may not interfere with findings of fact and factual inferences made by the trial judge unless they are palpable and overriding: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10-25.

- [28] To find reversible error, the finding must be clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must be plainly identified and it must be shown to have affected the result: *R. v. Clark*, 2005 SCC 2 at para. 9.
- [29] This Court has recently reviewed and applied the standard in two decisions, *R. v. Wei*, 2016 BCCA 75, and *R. v. Kaemmer*, 2019 BCCA 136. In *Kaemmer*, Justice Hunter summarized the law, including the more recent articulation of the standard found in *R. v. Sinclair*, 2011 SCC 40.
- [30] A misapprehension of the evidence will only vitiate a conviction if the error was a central element of the judge's reasoning on which the conviction is based. The means of determining whether the error was a central element of the judge's reasoning is to consider whether striking it from the judgment would leave the trial judge's reasoning on unsteady ground: *Sinclair* at para. 56.

Subject of a Drug Investigation

- [31] In his voir dire reasons, the trial judge says that Mr. Webber was the "subject of a drug investigation" and "linked to the drug trade". Mr. Webber says those findings were not supported by the evidence on the voir dire and were material to the judge's finding that supported the reasonableness of the Console Search. The Crown says that one of those findings was correct, but in any event, they were not essential to the trial judge's conclusion that the Console Search was reasonably necessary.
- [32] While the trial judge was incorrect to say that Mr. Webber was the subject of a drug investigation, in my view, the trial judge was not clearly wrong in saying Mr. Webber was "linked" to the drug trade. Mr. Webber was a victim in an attempted murder investigation in which he and another person were targeted, and both the other intended victim and the perpetrator were associated with the drug trade.
- [33] The trial judge found that "reasonable grounds existed to conduct a safety search of both Mr. Webber and the centre console area of the vehicle" when Mr. Webber was first detained and the initial police records search was made (at para. 31). The second police records search only served to "bolster" those findings (at para. 33). Thus, any misapprehension of the evidence regarding Mr. Webber's association with the drug trade derived from the second police records search was not central or essential to the trial judge's reasoning on which the conviction was based, as was acknowledged in oral argument. In my view, striking it from the judgment would not affect the trial judge's reasoning or the result.

Extortion and Firearms Prohibition

[34] Mr. Webber says that the trial judge made a palpable and overriding error when he considered Mr. Webber's lifetime weapons prohibition relating to his criminal record for extortion. With respect to the criminal record for extortion and lifetime firearms prohibition, Constable Sargent said this:

Q And what did your queries of Mr. Webber reveal in your police database system?

A Yes, so what I saw quickly was that Mr. Webber was prohibited from possessing firearms due to criminal convictions. I believe it was extortion. This led me to believe that Mr. Webber may have been involved in criminality associated to firearms. I then went on and read the police report of the attempted murder associated to the vehicle. I saw that Mr. Webber was the victim of the attempted murder. I saw that there was one other victim, and there was a suspect. Saw that the victim was the subject of a drug trafficking investigation. I can't recall, Your Honour, at this point, what exactly it was, what drug was involved. And then I saw that the suspect of the attempted murder was also associated to drug trafficking. I know that one of them was associated to cocaine, and the other, marihuana.

Q And what, if any, impact did those queries have on your safety concerns at that point?

A At that point, it elevated my safety concerns once again, because it created pretty clear links between Mr. Webber and drug trafficking. I knew that drug traffickers often carry weapons to protect themselves. And at that time, in the Lower Mainland, there was an increased amount of gun violence associated to drugs and gangs throughout the Lower Mainland. All of these things started to lead me down the path that I suspected that Mr. Webber had just concealed a firearm, with the stuffing motion that I had observed. And the reason for believing or suspecting that the firearm was -- was concealed was obviously Mr. Webber's association and his prohibition of possessing them, which led me to believe he had previously been associated in a criminal way with firearms.

[Transcript at 17, lines 8-45]

[35] The information regarding Mr. Webber's criminal conviction for extortion came about during the second police records search. As noted, the judge found that there were reasonable grounds to conduct the Console Search before the second police records search. Thus, this finding is not material to the outcome. That said, I do not think it could be said that it was unreasonable for Constable Sargent's safety concerns to be elevated by knowledge that Mr. Webber had a record for extortion and a lifetime firearms prohibition, or for the judge to accept that this was so.

Accepting the Police Evidence

[36] Mr. Webber says that Constable Sargent's evidence that he believed a safety search of the centre console was necessary "defies logic and common sense". He submits that a "more logical inference" regarding the purpose of the Console Search is that it was a search for drugs.

[37] This argument reiterates Mr. Webber's head-on attack of the police evidence based on credibility. Constable Sargent testified thus:

Q And as a result of you coming to that conclusion, what did you decide to do at that point?

A I decided to take -- to extend the safety search to just the area around the driver where I had seen the stuffing motion inside of the vehicle. My reasoning for doing this was, at this point we were dealing with a Motor Vehicle Act infraction, and that we were about to let Mr. Webber go, and he was going to be free to walk back into that vehicle and, again, have access to it. And like I described earlier, the safety risk, to me, happens when he was inside the car and when he has ready access to all those areas where anything could be concealed. I thought it was reasonable to take a quick look there where I had seen that stuffing motion, to make sure that my suspicion was incorrect, that Mr. Webber wasn't running from anyone, that he wasn't being - didn't believe that my partner and I were pursuing him, and that perhaps he'd grabbed a weapon to defend himself.

Some of the things that I was thinking about at this time were that I obviously noted clear connections between Mr. Webber and drug trafficking. I had -- I knew about the fact that drug traffickers carry weapons. I mentioned that many times. I was aware that Mr. Webber was prohibited from possessing firearms. I was aware that Mr. Webber was driving in a way that led my partner and I both to feel that he was running from something. I was aware that he had stopped abruptly. I had seen a stuffing motion towards that centre console. And I was aware that when I got up to the vehicle, he was not -- he appeared terrified.

And all these things made me very uncomfortable about letting him get back in that car. I thought maybe he -- because he had recently been the victim of an attempted murder, and a lot of the people associated had been associated to drugs, perhaps there was some kind of problem with him and he was trying to defend himself. It seemed reasonable to me that he would carry a weapon to defend himself from another attack, and that perhaps he believed my partner and I, in our unmarked police vehicle, were somehow pursuing him through the West End, and he had armed himself, thinking about the next vehicle that follows him too closely, what is his action going to be.

So, with all that, I went to the driver's side of the vehicle to extend that safety search, to look at the -- where I had seen the stuffing motion.

[Transcript at 17-19, starting at line 46]

- [38] The judge reviewed the specific attacks on the police officers' credibility: (1) the lack of handwritten contemporaneous notes (the typewritten reports were prepared one and a half hours later); (2) Constable Wu's knowledge of street names (she relied on Constable Sargent's notes for street names); (3) the evidence about the time estimates for the events (Constable Sargent said the entire episode lasted six minutes but Constable Wu said approximately ten minutes); and (4) the differences in the descriptions about Mr. Webber's activities associated with the centre console (Constable Sargent said a stuffing motion in statements and a "stuffing or pulling" motion at the voir dire). He found:
- [10] The evidence of Constables Sargent and Wu was clear, concise and was not shaken on cross-examination. Weaknesses in their evidence as I have described were admitted and in my view were not critical. I do accept the evidence of Constables Sargent and Wu.
- [39] Mr. Webber accepts that the pat-down search was lawfully conducted as incidental to his investigative detention. Thus, he must be taken to accept that there were reasonable grounds (on the elevated standard) to believe that a pat-down search for weapons was justified. The reasons for both the pat-down and Console Search were the same, and there were additional facts that supported the Console Search. Both officers had observed the pulling or stuffing motion, which was not related to procuring a driver's licence arising from the stop.
- [40] I see no error in the judge accepting the police officers' evidence, including their evidence about their safety concerns arising from both what they observed and their knowledge of the local circumstances. The officers' subjective concerns were objectively reasonable.

B. Reasonable Suspicion or Reasonable Grounds to Believe?

- [41] Over time the common law has carved out a limited sphere for state intrusions on individual liberties in the context of policing. Those cases culminated in recognition of a limited power of police officers to detain for investigative purposes and search for safety purposes. Whether a police officer has acted within his or her common law powers is based on application of the two-part test articulated in *R. v. Waterfield* (1963), [1964] 1 Q.B. 164 (C.C.A.).
- [42] Under the *Waterfield* test, a court first considers whether police conduct giving rise to interference with individual liberty falls within the general scope of a duty imposed on the officer by statute or common law. Second, a court must consider whether such conduct, albeit within the general scope of such a duty, involves an unjustifiable use of powers associated with the duty: see *Mann* at paras. 23-35.

- [43] In Mann, the Supreme Court of Canada considered "the delicate balance that must be struck in adequately protecting individual liberties and properly recognizing legitimate police functions" (at para. 1). It concluded that police are empowered at common law to detain a person for investigative purposes on an officer's objectively reasonable suspicion that, in all the circumstances, the individual is connected to a particular crime and that such detention is necessary, and, in certain situations, to conduct a protective safety search (at para. 45).
- [44] The Court used differing language in describing the circumstances warranting a safety search -- that the officer must "believe on reasonable grounds that safety is at risk" (at para. 40) and that there is a "logical possibility" of risk to safety (at para. 48). In the result, the Court in Mann concluded that an investigative detention and protective pat-down search were warranted, but that a body search beyond the pat-down search was not.
- [45] There is debate whether the Supreme Court of Canada's decision in MacDonald changed the legal threshold for lawful police safety searches from the "reasonable suspicion" standard to a higher standard akin to the search warrant standard of "reasonable grounds to believe", which is equivalent to "reasonable and probable cause".
- [46] Mr. Webber submits that the trial judge erred in concluding the Console Search was lawful because he applied the "reasonable suspicion" standard rather than the "reasonable grounds to believe" standard. The reasonable grounds to believe standard is equivalent to reasonable and probable grounds to believe: *Baron v. Canada*, [1993] 1 S.C.R. 416 at 446-447; *R. v. Webster*, 2008 BCCA 458 at para. 47; *R. v. Montgomery*, 2016 BCCA 379 at para. 76, leave to appeal ref'd [2016] S.C.C.A. No. 493. Thus, his argument squarely rests on the proposition that the Court in MacDonald recalibrated the requisite legal standard.
- [47] I note that the trial judge did not refer to MacDonald in his ruling although it was cited to him. The judge applied the "reasonable suspicion" standard and referred to *R. v. Crocker*, 2009 BCCA 388, leave to appeal ref'd [2010] 1 S.C.R. viii, and *R. v. Chehil*, 2013 SCC 49, both decisions where the reasonable suspicion standard was applied (at paras. 29, 31-32). The judge said:
- [30] I have accepted the police evidence that Mr. Webber made motions that could be viewed as hiding something in the area of the centre console of the vehicle.
- [31] At the time Mr. Webber was first detained and the initial police records check was made I find that reasonable grounds existed to conduct a safety search of both Mr. Webber and the centre console area of the vehicle. I refer to the decision *R. v. Chehil* 2013 SCC 49 at paragraph 32 where the Supreme Court stated:

Further, reasonable suspicion need not be the only inference that can be drawn from a particular constellation of factors. Much as the seven stars that form the Big Dipper have also been interpreted as a bear, a saucepan, and a plough, factors that give rise to a reasonable suspicion may also support completely innocent explanations. This is acceptable, as the reasonable suspicion standard addresses the possibility of uncovering criminality, and not a probability of doing so.

- [32] Thus there may be a perfectly innocent explanation for the pulling and stuffing arm motions. For instance, Mr. Webber could have been reaching for his driver's licence. I note, though, that Mr. Webber did not have anything in his hands when the police officers approached him. Furthermore, another explanation for the arm motions was the possibility that something such as a weapon was being hidden in the centre console.
- [48] In Crocker, this Court emphasized that courts should exercise restraint in second guessing an officer's testimony as to their honest belief in the need for a protective safety search where the officer can "articulate reasonably clear and focused reasons that inform their risk assessment" (at para. 71), finding that "[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" (at para. 72).
- [49] Likewise, the Ontario Court of Appeal in *R. v. Atkins*, 2013 ONCA 586 at para. 15, interpreted Mann to apply the standard of reasonable suspicion to a safety search for a weapon.
- [50] In *Chehil*, a unanimous Supreme Court of Canada interpreted Mann as applying the "reasonable suspicion" threshold in limited searches accompanying investigative detentions (at para. 23). While "reasonable grounds to suspect" and "reasonable and probable grounds to believe" are similar in that they both must be grounded in objective facts, the reasonable suspicion standard is a lower standard as it engages "reasonable possibility" rather than "probability" of crime (at para. 27).
- [51] In *Chehil*, the Court referred to the consequences of applying the reasonable suspicion standard (sometimes police officers will reasonably suspect that innocent persons are involved in crime), the scope of the inquiry (the constellation of objectively discernable facts giving rise to the suspicion), the fact that the inquiry is fact-based, flexible and grounded in common sense and practical everyday experience, and the inadequacy of "generalized suspicion" (so as to avoid indiscriminate and discriminatory searches) (at paras. 28-31).
- [52] Although the Crown says the question of the proper standard is a new issue on appeal, both MacDonald and Mann were before the court, and Mr. Webber relied on MacDonald, as well as other authorities applying those cases. The judge applied the reasonable suspicion standard. In my view, the propriety of the standard he applied is squarely at issue in this appeal.

- [53] Did the Supreme Court of Canada in *MacDonald* intend to change the test? The Crown cites several cases for the proposition that the Court does not ordinarily overrule existing authorities without being explicit in its reasons that it is doing so. Those authorities support the proposition asserted. When "recalibrating" or revisiting legal standards, the Court generally says it is doing so expressly. That did not occur in *MacDonald*, which is some contextual evidence that the Court did not intend to revisit the standard.
- [54] For example, in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at para. 56, Chief Justice McLachlin and Justice LeBel, in joint majority reasons, note that overturning a precedent of the Court is not a step to be undertaken lightly, a view generally endorsed (at para. 130). If the majority in *MacDonald* intended to overturn *Mann*, it could have said so expressly. It did not. Nor did it refer to the reasons of the minority.
- [55] In *R. v. Grant*, 2009 SCC 32, the Court notes at the outset that resolution of the issues in that case requires it to "revisit two important and contentious areas of criminal law Charter jurisprudence" (at para. 2). Similar statements are made in such seminal cases as *R. v. Henry*, 2005 SCC 76 at paras. 43-46, and *R. v. Jordan*, 2016 SCC 27 at paras. 5-6. The majority reasons in *MacDonald* do not avert to overturning a prior precedent of the Court.
- [56] Mr. Webber says that it may be possible to reconcile the cases on the basis that the Court intended that there be two different tests for a safety search: i.e., one standard for a stand-alone safety search and a second standard for a safety search incidental to investigative detention. This approach was rejected by Justice Fitch speaking for this Court in *R. v. Patrick*, 2017 BCCA 57 at para. 93, leave to appeal ref'd [2017] S.C.C.A. No. 108.
- [57] In *Patrick*, while discussing the application of *MacDonald*, Fitch J.A. said "[i]t would be incongruous to bring a more restrictive interpretation to the scope of permissible searches in an investigative detention context - a context in which the police have already formed reasonable grounds to suspect that the detained individual is connected to a particular crime and that his or her detention is necessary - than in the safety search context" (at para. 93).
- [58] As this Court has observed, the language in *Mann* has given rise to interpretive difficulties: *Patrick* at para. 59; *R. v. Sheck*, 2015 BCCA 471 at paras. 47-61, leave to appeal ref'd [2016] S.C.C.A. No. 50. This is noted by the minority opinion in *MacDonald* (at paras. 70-71). Whether the Supreme Court of Canada intended to change the legal standard authorizing a safety search while a person is in investigative detention from reasonable suspicion to reasonable grounds to believe a weapon is present (which is equivalent to reasonable and probable grounds), has not been determined by any appellate court. That said, in my view, the Supreme Court of Canada, this Court and the Ontario Court of Appeal have all interpreted *Mann* as applying the reasonable suspicion standard as authorizing a safety search in certain contexts, where privacy interests are reduced.

- [59] In *Chehil*, the Supreme Court of Canada, in a nine-justice unanimous decision, refers to "reasonable suspicion" as a "sufficient threshold" to justify safety searches in certain investigative contexts, including limited searches involving investigative detentions, citing *Mann* (at para. 23). The Court goes on to explain that the reasonable suspicion standard is something more than mere suspicion and something less than a belief based on reasonable and probable grounds (at para. 26). In *Crocker*, this Court applied *Mann* in endorsing the reasonable suspicion standard (at paras. 70-72), as did the Ontario Court of Appeal in *Atkins* (at para. 15).
- [60] Moreover, in *MacDonald*, the difference between the majority and minority judgments concerning the standard to apply (reasonable and probable grounds or reasonable suspicion) did not affect the outcome. Both the majority and minority found that the standard was met in the context of a search in a private residence, a circumstance where there is an enhanced expectation of privacy. To the extent that the majority could be said to apply the more stringent reasonable and probable grounds standard, the reasonable suspicion standard was met. Thus, the difference between the majority and minority's interpretation of *Mann* in *MacDonald* was not determinative of the outcome.
- [61] In the result, in my view, this Court is free to follow the reasonable suspicion standard as set out by the unanimous court in *Chehil* and which is at least implicit in *Mann*. I agree with the minority in *MacDonald* that the whole context of the discussion in *Mann*, including the "history from which *Mann* emerged", lead to the same unavoidable conclusion: "*Mann* recognized a protective search power predicated on reasonable suspicion" (at para. 86).
- [62] In recognizing a power of investigative detention and related power to search for protective purposes incidental to detention, *Mann* relied on the US Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). Justice Iacobucci for the majority in *Mann* quoted Chief Justice Warren's statement (at 27) that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime" (at para. 41).
- [63] I find the discussion of Justice Campbell in *R. v. Le*, 2014 ONSC 2033, aff'd 2018 ONCA 56, rev'd on other grounds 2019 SCC 34, instructive on this point:
- [99] There is some question whether the decision in *R. v. MacDonald* changes the legal threshold for lawful police "safety searches" from the traditional "reasonable suspicion" standard to a higher standard akin to the search warrant requirement of "reasonable and probable grounds." I do not read the *R. v. MacDonald* decision as having such an effect. It is important to recall that, from its judicial inception in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), the courts in the United States and Canada have long applied, in somewhat different language, the standard of "reasonable suspicion" to measure the constitutional permissibility of such "stop and frisk" searches. The significantly higher standard of "reasonable and probable grounds" has never been the required threshold, for the sound functional reason that it

would render such searches legally redundant and practically useless. If a police officer possessed reasonable and probable grounds to believe a suspect was armed and dangerous, the suspect would invariably be arrested, not merely detained, and would be physically searched as incident to that arrest. There would be little point in the existence of the police "safety search" power, which has been clearly recognized in the appellate court jurisprudence, if it provided no search powers beyond those already recognized as being incident to an arrest. Moreover, if police officers are to lawfully conduct investigations in relation to detained (but not arrested) suspects, it only stands to reason that they must be given the lawful means of taking the necessary steps to protect themselves and others during the course of such investigations. Otherwise, the police would be needlessly placed at serious risk in the performance of their important public duties. See: *R. v. Chehil*, 2013 SCC 49, at para. 3, 20-24, 27; *R. v. MacKenzie*, 2013 SCC 50, at para. 74; *R. v. Clayton and Farmer*, at paras. 20, 28-30, 43-49, 81-84, 98, 103-104, 118, 123-126; *R. v. Simpson* (1993), 12 O.R. (3d) 182; 79 C.C.C. (3d) 482 (C.A.), at p. 202; *Arizona v. Johnson*, 129 S.Ct. 781 (2009), at p. 784; *R. v. Crocker*, 2009 BCCA 388, 275 B.C.A.C. 190, at paras. 62-72, leave denied: [2010] 1 S.C.R. viii; W.R. LaFave, *Search and Seizure - A Treatise on the Fourth Amendment* (2005, 4th ed.) at § 9.6(a); J.A. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada* (2010, 8th ed.) at pp. 709-712.

[100] In *R. v. Mann* and its progeny the courts have confirmed the existence of the police power to detain individuals for investigative purposes and, where the police have "reasonable grounds" to suspect the detainee is armed and dangerous, to conduct a brief frisk or pat-down search to ensure their own safety and the safety of the public as they conduct such investigations. In my view, *R. v. MacDonald* is but an application of that well-established warrantless search power in a particular factual context, namely, where the search involves police entry of the confines of a private residence, where there is an increased expectation of privacy. See: *R. v. Zargar*, 2014 ONSC 1415, at paras. 29-32. Indeed, in *R. v. MacDonald*, the Supreme Court expressly purports to apply *R. v. Mann* in this factual context - not overrule it (or the many subsequent judgments that have clarified and applied it). The confusion in relation to this legal threshold has arisen, it seems to me, from the use of the phrase "reasonable grounds" to describe the threshold of "reasonable suspicion" or "articulable cause," as this same terminology is also used to describe the higher threshold of "reasonable and probable grounds." See: *R. v. Mann*, at paras. 33-35, 40-45, 63-64. Accordingly, it is important to recall that, in this particular context, the term "reasonable grounds" is used to describe a threshold of reasonable suspicion, not a threshold of reasonable probability.

[Emphasis added.]

[64] On appeal to the Ontario Court of Appeal, Justice Doherty for the majority said this about the reasonable grounds to suspect standard, albeit as applied to the question of whether investigative detention was warranted:

- [65] Having found that the appellant was detained when Constable O'Toole asked him what was in the bag, the trial judge went on, at paras. 91-93, to determine that the appellant's detention was lawful. He found that Constable O'Toole had reasonable grounds to suspect that the appellant was armed. That reasonable suspicion justified an investigative detention: see Mann, at para. 45; R. v. MacKenzie, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 35. The appellant fled before Constable O'Toole could physically detain him.
- [66] I see no basis upon which to interfere with the trial judge's factual findings underlying his conclusion that Constable O'Toole had reasonable grounds to suspect that the appellant was armed. This court must make its own assessment of whether those facts meet the "reasonable suspicion" standard: MacKenzie, at para. 54. I think they do. The appellant's movements simultaneously aroused the suspicions of two police officers who, based on their training and experience, connected the appellant's movements to the possession of a weapon.
- [67] As indicated in MacKenzie, at para. 63:
- [I]n assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person "standing in the shoes of the police officer".
- [68] This test described takes into account officer training and experience: MacKenzie, at paras. 60-65.
- [Emphasis added.]
- [65] In my opinion, the Supreme Court of Canada did not recalibrate the test for lawful police safety searches from the traditional "reasonable suspicion" standard. Thus, the judge did not err in concluding that he was to apply that standard.
- [66] The judge held the second more detailed police records search "further substantiated [the officers'] concerns over whether a weapon was concealed in the centre console of the vehicle and that [the officers'] safety concerns were now elevated" such that a "safety search of both the person of Mr. Webber and also the centre console area of his vehicle was necessary to ensure that there was no weapon present" (at paras. 26-27).
- [67] The judge held objectively "reasonable grounds existed to conduct a safety search of both Mr. Webber and the centre console area of the vehicle" (at para. 31). He noted that safety searches may legitimately attend investigations of Motor Vehicle Act violations (R. v. Thibodeau, 2007 BCCA 489 at para. 10, leave to appeal ref'd [2007] S.C.C.A. No. 592) and need not be confined to the person (R. v. Plummer, 2011 ONCA 350 at para. 53).

[68] The judge also found the pat-down search and vehicle search were conducted in a reasonable manner, minimally intrusive and done without delay (at para. 39). The whole episode, from the stopping of the vehicle to the Console Search took no more than ten minutes. In the result, the judge found that "[t]he search of the vehicle was part of the safety search and this search only became a drug investigation when the drugs were discovered" (at para. 40). In my view, the evidence supported that finding.

C. Detention During Console Search

[69] Mr. Webber appeals the finding that the police had the continued authority to detain Mr. Webber and conduct a safety search of the centre console after they had decided not to issue him a ticket for contravention of the Motor Vehicle Act. This arises from the cross-examination of Constable Sargent, that as he walked back to Mr. Webber and the vehicle, he had decided not to charge Mr. Webber for Motor Vehicle Act infractions.

[70] In my view, the continued detention and search of Mr. Webber's vehicle after the officers decided not to issue a ticket under the Motor Vehicle Act was authorized by law. Police have the authority to detain individuals and conduct searches to prevent avoidable harm through brief and minimally intrusive searches, which are not necessarily restricted to physical pat-downs: Patrick at para. 94.

[71] The powers of investigative detention and search incident thereto are lawfully exercised where the police have reasonable grounds to suspect it is necessary to ensure safety, even if the reason for the initial stop is not a crime. The authorization to conduct a brief, focused protective search, as was done here, does not end at the point in time that charging decisions are being considered or made.

V. Conclusion

[72] I would dismiss the appeal.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Hunter"

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Prepared on 26 October 2026 · Esheria