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Table of Contents

1. — An Ontario Superior Court judge excludes drugs under s. 24(2) of the Charter *where there is a direct nexus between breaches of ss. 9 and 10(b) and the discovery of the drugs*

In a very well written judgment, Justice Conlon of the Ontario Superior Court of Justice excluded a large quantity of drugs because a police officer breached the applicant's rights under ss. 9 and 10(b).

On 30 December 2014, in the early evening hours, in the village of Lucknow, Bruce County, in the heart of rural Ontario, Det. Cst. Johnson of the Ontario Provincial Police was on general patrol in an unmarked van. He was in plain clothes.

Retired by the time of the trial, the officer was, as the trial judge put it at para. 6, "a seasoned officer with 30 plus years of experience".

He saw a woman whom he knew to have been involved in drug activity and she was walking, apparently purposefully. She got into the front passenger seat of a motor vehicle — a Dodge Durango SUV — which was parked in the parking lot of a nursing home. It was not running and had no lights on at all.

The officer drove up behind the Durango and parked some five to 10 feet away from the rear corner of the vehicle. In cross-examination, Det. Cst. Johnson acknowledged that there was an embankment in front of the Durango and, because he parked behind it, it was "blocked in".

The officer noticed what looked like, to quote Conlon J. at para. 13, "fresh and significant damage" to the body of the Durango.

On foot, he approached the front passenger door of the Durango. The accused, Mr Riley, was the driver. The officer identified himself and asked what they were doing. The female passenger answered that they were just talking.

In cross-examination, the officer denied that the driver was detained. He stated that had Mr Riley got out of the Durango and left on foot, he would have let him go. Det. Cst. Johnson admitted that, when he was standing at the front passenger door of the Durango, he "did not have enough for an investigative detention", as Conlon J. paraphrased his evidence at para. 46.

While standing at the passenger-side door of the Durango, Det. Cst. Johnson smelled a faint odour of marihuana inside the vehicle. He also saw a small object on the centre console that appeared to have white powder on it.

He asked Mr Riley for his name and Mr Riley answered truthfully. When he was asked for his driver's licence, he surrendered it.

Det. Cst. Johnson then asked Mr Riley if there were any drugs inside the Durango. Mr Riley then gave him an orange hydromorphone pill that he was holding in his right hand and said that they were about to take it.

The officer admitted that, until he was handed the orange pill by Mr Riley, he did not have adequate grounds to arrest or to detain Mr Riley.

Because he intended to arrest Mr Riley for possession of a controlled substance, Det. Cst. Johnson then moved to the driver's door of the Durango, opened it and asked Mr Riley if he had other drugs. Mr Riley said that he had some "percs" (i.e. percocets, an opioid pain medication) and gave the officer a small baggie from inside his jacket. It had 10 percocet tablets inside.

Det. Cst. Johnson then arrested Mr Riley for possession of a controlled substance and, after a brief struggle, he was handcuffed. Mr Riley was then placed inside the unmarked police van and Det. Cst. Johnson called for assistance and then read Mr Riley his right to counsel and caution.

When Mr Riley was searched, a container with some 23 orange hydromorphone pills was found inside his jacket.

The Durango was searched and the police found a backpack behind the driver's seat. Within the car and backpack found inside the car, the police found almost 20 grams of crystal methamphetamine, 1975 grams of marihuana in several individually wrapped bags, scales and cell phones.

Mr Riley was charged with four offences: possession of marihuana for the purpose of trafficking; possession of methamphetamine for the purpose of trafficking; possession of oxycodone for the purpose of trafficking; and possession of hydromorphone for the purpose of trafficking.

His lawyer brought applications under the *Charter*, alleging breaches of ss. 8, 9, 10(a) and 10(b), and seeking exclusion of the drugs that he had.

As Conlon J. put it at para. 35, the defence alleged, in essence, that

> . . . Riley was arbitrarily detained from the moment that Johnson pulled up behind the Durango. He was then not told of any reason for the detention but rather simply questioned by Johnson. He was not told of his right to seek counsel. The subsequent searches of the Durango and the backpack were warrantless and unreasonable.

Justice Conlon held that, at the very latest, Mr Riley was detained once Det. Cst. Johnson had his driver's licence.

The vehicle was blocked in by the police vehicle and, as he put it at para. 49, " . . . no reasonable person in Riley's shoes would have felt that he could simply drive or walk away". Further, "no reasonable person in Riley's shoes would not have felt an atmosphere of oppression, to some degree, and compulsion to answer the police officer's questions".

Conlon J. held that the detention was an arbitrary one and in breach of s. 9. This was, to quote him at para. 52, "a classic case of an experienced hunch of the part of a veteran detective". As the judge observed, the officer, to his credit, did not suggest otherwise. But, as Justice Conlon put it at para. 53, "Mere suspicion is not enough, however". He did not have reasonable grounds to detain Mr Riley pursuant to the test that was enunciated in *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 CarswellMan 303 (S.C.C.).

The decision to detain Mr Riley was based on seeing a woman, who was known to be connected to drugs, walking fast and getting into a parked motor vehicle. (The officer did not notice the damage to the vehicle until after he decided to stop and approach the motor vehicle and, because he did not ask any questions about how the damage was occasioned until after the arrest, it could be surmised that it did not have anything to do with the detention.) To quote Conlon J. again, at para. 56, " . . . with much respect for Johnson, to describe this detention of the Durango and Riley as having been based on thin ice would be an understatement".

Justice Conlon did not find a breach of s. 10(a). While s. 10(a) provides that "everyone has the right on arrest or detention . . . to be informed promptly of the reasons therefor", there is no requirement that a detainee be "*immediately*" informed of the reasons for his or her detention. The entire dialogue between Det. Cst. Johnson and Mr Riley, from when the officer first approached the front passenger door of the Durango, to the arrest took only a few minutes. By the time of his arrest, Mr Riley must have been well aware of why he was being detained by the officer. Because, as the trial judge put it at para. 67, the police cannot be held to a standard of perfection, he could not find that the applicant established a breach of s. 10(a) of the *Charter*.

Justice Conlon found a violation of the right to counsel. (That conclusion was inescapable.) The officer was required to inform Mr Riley of his right to counsel "without delay" upon his detention and did not do so. In *R. v. Suberu* (2009), 245 C.C.C. (3d) 112, 2009 CarswellOnt 4106 (S.C.C.), the Supreme Court of Canada established that "without delay" means "immediately".

In fact, Conlon J. found that had the officer complied with his constitutional obligation and advised Mr Riley of his right to counsel immediately upon detention, that, to quote from para. 69, "may very well have changed the face of this case significantly". It was, as he put it at para. 71, "a likelihood" that Mr Riley would not have handed over his orange hydromorphone pill and made an incriminating remark had he been apprised of his right to counsel. "But for the orange pill being handed over", Justice Conlon wrote at para. 72, "there would not have been an arrest of Mr Riley for anything".

Justice Conlon found no breach of Mr. Riley's right to be free from unreasonable search or seizure. His ruling, he noted, was entirely based on how the s. 8 application was argued. The searches of the Durango and of Mr Riley's person were valid as being incidental to arrest. But had defence counsel argued that the arrest was unlawful in that it was tainted by an arbitrary detention and a breach of s. 10(b), he might well have reached a different conclusion.

Conlon J. held that his decision under s. 24(2) was, to quote him at para. 82, a "close call". But he held that, on balance, to admit the evidence gathered after Mr Riley's detention would bring the administration of justice into disrepute.

The first of the "*Grant*" factors favoured exclusion because, as Conlon J. put it at para. 85, there were "multiple infringements of two of the most sacred rights enshrined in the *Charter*".

The second "*Grant*" factor also favoured exclusion, despite the brief duration of the unlawful detention. The direct causal nexus between the *Charter* violations and the discovery of the drugs strongly favoured exclusion. To quote Conlon J. at para. 86:

> In my view, but for the arbitrary detention and the delayed provision of the right to counsel we would not be here. Riley would likely not have simply handed over a pill and confessed to be about to swallow it. Everything else flowed from that.

The third "*Grant*" factor strongly militated against excluding the drugs but the trial judge held that because two of the three factors favoured exclusion he should exclude the drugs.

As he wrote at para. 91, "This is not a condemnation of the police officer. The evidence just has to go".

R. v. Riley, 2017 CarswellOnt 827, 2017 ONSC 573 (Ont. S.C.J.)

2. — The Ontario Court of Appeal orders a new trial when the trial judge made improper use of the accused's criminal record

The Ontario Court of Appeal recently allowed an appeal from convictions arising from three break-ins to three Subway restaurants in Sault Ste. Marie during a span of five days during July of 2012.

Each restaurant had video surveillance and video footage showed that in the early morning hours a person in a black balaclava and a black jacket entered Subway restaurants and stole money from a safe on 11 and 12 July 2012 or tried to on 15 July 2012.

A witness who was driving home from work in the early morning hours of 15 July 2012 saw that a window of a Subway restaurant had been smashed. She stopped her car and as she was calling police, she saw a man, who was wearing a black mask, run out of the restaurant and get into a van. She followed the van to a dead end and then saw a man leaving the driver's side of the van, which she believed was left running with the lights on.

About a minute or two later, she saw a man without a mask get into the van and turn the van off (or the lights in the van off). He had the same stature as the man she had seen earlier. He told her that she should not be parked where she was and then left the scene on foot.

A police officer who was dispatched to the Subway break-in saw a man, who fit the same general description as the perpetrator of the break-in, crossing the street and he arrested him. That man was the appellant. The police later found an axe and a sledge hammer in the van and a black balaclava on the ground beside the driver's door of the van. A swab was taken from outside the mouth area of the balaclava which matched the appellant's DNA.

There were no witnesses to the other incidents but the appellant was convicted of committing the other break-ins owing to similar fact evidence.

The appellant did not have a lawyer and represented himself at the trial.

He testified in his defence.

He denied committing any of the break-ins. He said that he went to a bar on the night of the last break-in. He left it in the early morning hours of 15 July and, intending to walk to his sister's home, he saw a man running, carrying something like a bag. He also saw a van and a car parked behind it. He noticed that the van was rolling down the alleyway and he testified that he opened the door of the van, put it in park and turned off the ignition. He said that he was "at the wrong place at the wrong time".

He acknowledged that his DNA was on the balaclava but denied that the balaclava was his. He said that he must have touched it or sat on it when he got into the van. He said that it fell to the ground when he got out of it.

The trial judge rejected his defence.

He noted that the appellant had what he characterized as a "lengthy and substantial" criminal record; it was "replete with property offences, break and enters and possession of stolen property". He cautioned himself and noted that the record could not be used to infer that the appellant was likely to have committed the offences for which he was charged.

He went on, however, to point out that the appellant's criminal record undermined his credibility because it shed light on whether it "makes sense for him to hang around a crime scene" when he knew or ought to have known that he would, by virtue of his record, rightly or wrongly be regarded as a suspect. To quote the trial judge, from a longer passage quoted at para. 18 of the Court of Appeal's endorsement, "The sensible and logical thing for a person with Mr Marini's past to do would be to get out of the area as fast as he could." To the trial judge, a man with the appellant's "past criminal background" would have continued on his way to his sister's "as expediently as possible".

In other words, an innocent man in his place would have fled the scene.

The Ontario Court of Appeal observed that the trial judge would have been entitled to consider the record in assessing the appellant's credibility and would have been entitled to reject his evidence because of it. This is permitted by s. 12(1) of the *Canada Evidence Act*. The trial judge's use of the criminal record went well beyond the limited use permitted by the *Canada Evidence Act*.

While the trial judge made other errors in that he misapprehended evidence, the misuse of the appellant's criminal record, the Court said at para. 28, in and of itself justified appellate intervention.

A new trial was ordered.

R. v. Marini, 2017 CarswellOnt 519, 2017 ONCA 46 (Ont. C.A.)

3. — A judge of the Ontario Superior Court sentences a first offender to a suspended sentence and probation for an aggravated assault

Justice Edward Morgan of the Ontario Superior Court recently sentenced a man, whom he convicted after a trial, to a suspended sentence and probation for a serious aggravated assault.

The accused, Mr Shahcheraghi, was head of security at a nightclub in Toronto.

He and a fellow bouncer removed a university student who was so intoxicated that he could barely stand. The patron was, as Morgan J. put it at para. 6, "in no condition to threaten or resist". The accused punched the patron "multiple times" and smashed his head against a glass door. The victim sustained injuries that included a cut near his eye that severed a tear duct. Fortunately, the victim made a full recovery within weeks and suffered no lasting injuries or effects as a result of his injuries.

The accused was a first time offender and had a very favourable pre-sentence report. Letters from friends and colleagues (and even police officers he knew through his job) painted a glowing picture of him.

Everything suggested that the offence was "out of character" and "spur of the moment", to quote Morgan J. at para. 8.

The offender came to Canada with his family from Iran when he was a teenager. He completed a bachelor's and then a master's degree in engineering from a university in Toronto and then went into the security business. His parents and brother were physicians.

He was in a stable relationship and had been living with his common-law partner for some nine years. His family was, to quote Justice Morgan, at para. 10, "strongly supportive" of him.

At the time of the sentencing, the accused held a managerial position with a night club in Toronto and supervised some 10 to 15 employees. He was also a principal in a security business which offered its services to night clubs and music festivals. The business employed some 60 licenced security guards.

On the strength of *R. v. Craig*, 2005 BCCA 484, 2005 CarswellBC 2341 (B.C. C.A.), the Crown argued that the low end of the range for this offence was an upper reformatory sentence.

There were, however, competing authorities that suggested that a suspended sentence was within the range.

Justice Morgan referred to *R. v. Peters*, 2010 ONCA 30, 2010 CarswellOnt 152 (Ont. C.A.), in which the Ontario Court of Appeal upheld a suspended sentence where the appellant hit the victim with a beer bottle and caused lacerations that required 21 stitches to close, and *R. v. Hunter* (2014), 2014 CarswellOnt 18761 (Ont. S.C.J.), in which a suspended sentence was imposed, as he put it at para. 14, for "this type of offence".

In view of the offender's sterling background, Morgan J. observed, at para. 20, that "this will likely be the sole blemish on his record." He found that the accused posed no danger to the community. In view of this (and without any reference at all to the principle of general deterrence), Justice Morgan imposed a suspended sentence and placed the accused on probation for three years. One of the terms required him to perform 50 hours of community service work. He also imposed a 10-year firearms prohibition.

R. v. Shahcheraghi, 2017 ONSC 574, 2017 CarswellOnt 878 (Ont. S.C.J.)

4. — The British Columbia Court of Appeal holds that an accused who fails to stop at the scene of an accident may properly be convicted when he or she did not cause the accident

In a recent appeal, the British Columbia Court of Appeal shed light on the *mens rea* requirement of the offence of failing to stop at the scene of an accident under s. 252 of the *Criminal Code*.

Just as importantly, they also held that counsel need not obtain the instructions of his or her client to admit, after all the evidence has been tendered, that the Crown has proved some or all of the offences charged.

Mr Seipp was charged with eight *Criminal Code* offences arising from a break and enter into a dwelling house that belonged to the Davidsons in which one of their cars and some other property was stolen. The offences with which he was charged included: break, enter and theft; theft and possession of a motor vehicle; fraud for using a stolen debit card; fraudulent use of a stolen credit card; possession of a stolen cell phone, television and wallet; failing to stop at the scene of an accident.

The trial judge convicted him of fraudulent use of the credit card, of fraudulent use of stolen debit card, of possession of a stolen motor vehicle and of failing to stop at the scene of an accident.

Mr Seipp appealed only the conviction for failing to stop at the scene of an accident.

Someone broke into the Davidsons' house and stole their television, a wallet, debit card and credit card, a cellphone and Mrs Davidson's car.

Later that morning, the debit card was used to buy gasoline and make several withdrawals from a chequing account. Mr Davidson decided to drive around the neighborhood in search of the car on the chance that it may have been abandoned. He saw the stolen car being driven by the appellant. He pursued it and tried to overtake it. A collision ensued and Mr Seipp fled without providing his name or address.

A surveillance video showed Mr Seipp using a debit card stolen from the Davidsons' home and Mr Davidson identified Mr Seipp from a photo line-up.

The central issue in the trial was identification. The Crown's theory was that Mr Seipp committed the break and enter of, and thefts from, the Davidsons' home, and then was involved in the accident and fled because he did not want to be caught for the break-in and other offences he had committed.

Mr Seipp testified in his defence.

He denied breaking into the Davidsons' home and stealing anything from them. He admitted to driving their car and using the debit card under suspicion that both were stolen. He said that a friend had dropped by his house early one morning and invited him to drive the car that she had acquired. After dropping her off, he continued to joyride until the collision with Mr Davidson. In direct examination, he said that he fled because he suspected the car was stolen and did not wish to be present when the police arrived. He gave no other reason for fleeing the accident scene.

At the end of the defence evidence, the defence counsel was asked if she could admit that the evidence established guilt on any of the counts. Without seeking her client's instructions, she admitted that the Crown had satisfactorily proven that her client had committed the offences of possession of a stolen car and failing to stop. Believing that Mr Seipp's evidence that he did not break into the Davidsons' home or steal their property might be true, the judge acquitted him of those offences, but convicted him of the offences conceded by defence counsel and of fraudulent use of the credit and debit cards.

The judge found that Mr Seipp's driving was not the cause of the accident he had with Mr Davidson.

The appellant argued at his appeal that, notwithstanding the concession from the defence counsel, the trial judge erred in imposing a conviction for the failing to stop charge because Mr Seipp's driving was not a cause of the accident. Criminal provisions must be narrowly interpreted. Thus, the argument goes, there was no legal basis to conclude that he fled to escape liability for the accident. The appellant also pleaded that the concession on the part of his trial counsel was an error that amounted to ineffective assistance on her part.

His lawyer deposed in an affidavit that was entered in the appeal that she did not realize that the offence of failing to stop at the scene of an accident required proof of an "intent to escape criminal or civil liability" and she should not have admitted that her client committed this offence. The "mistake", she deposed, "was entirely my own".

Section 252(1) and (2) provide as follows:

> (1) Everyone commits an offence who has the care, charge or control of a motor vehicle . . . that is involved in an accident with
>
> (a) another person;
>
> (b) a vehicle, vessel or aircraft; or
>
> (c) in the case of a vehicle, cattle in the charge of another person,

> and with intent to escape civil or criminal liability fails to stop the vehicle . . . give his name and address and where any person has been injured or appears to require assistance, offer assistance.
>
> (2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle . . . offer assistance where any person has been injured or appears to require assistance, and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

The British Columbia Court of Appeal held that this section required a driver who is involved in a motor vehicle accident to take three steps: stop; give his or her name and address; and offer assistance if anyone is hurt or appears to need assistance.

Proof of failure to do *any one* of these steps, they observed, gives rise to a rebuttable presumption with respect to the driver's intent: *R. v. Roche*, [1983] 1 S.C.R. 491, 1983 CarswellBC 681 (S.C.C.) at paras. 496-7. In the absence of evidence to the contrary, a court is entitled to infer that someone who is involved in a motor vehicle and who does not take at least one of the required steps had the requisite intent to escape liability.

After a lengthy review of the case law and legislative history of the provision, the British Columbia Court of Appeal noted that drivers should not be free to leave the scene of an accident even if they are not at fault for the accident. To quote Madam Justice Bennett, who wrote for a unanimous panel, at para. 44:

> The object of the *Code* offence is to provide a penal incentive for a driver who is involved in an accident, regardless of whether they are at fault to remain at the scene, provide their name and address, and offer assistance if another person appears to be injured or in need of assistance. The liability a driver seeks to evade is not narrowly construed as solely arising from the consequences of the accident itself, but must also encompass offences connected to the driving, such as impaired driving, driving while suspended, criminal negligence and dangerous driving.

The Court of Appeal decided to apply the test enunciated by Borins J. (as he then was) in *R. v. Benson* (1987), 50 M.V.R. 131, 1987 CarswellOnt 62 (Ont. Dist. Ct.) and they quoted him, at para. 46, with approval:

> . . . civil or criminal liability should be broadly interpreted to include any liability, civil or criminal, which might properly arise from the operation of a motor vehicle by the defendant at the time the accident takes place . . .

Thus, because Mr Seipp did not want to be identified as a driver when he was knowingly in possession of a stolen car, his flight from the scene of the accident was to escape criminal liability and he was properly convicted of the offence under s. 252. His explanation, even if accepted, afforded him no defence to the charge. Thus, the trial judge committed no error in convicting him and the trial lawyer committed no error in conceding that a conviction should be entered.

Moreover, the Court of Appeal found that she did not need her client's instructions to make the admission after all the evidence was tendered. As Bennett J.A. put it at para. 51,

> . . . conceding an offence has been proved after hearing the evidence is within the ambit of counsel; it is a legal decision. It is not on the same footing as entering a guilty plea to the offence which would require instructions.

R. v. Seipp, 2017 BCCA 54, 2017 CarswellBC 226 (B.C. C.A.)

