

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Thompson, 2020 ONCA 264

DATE: 20200423

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Strathy C.J.O., Harvison Young and Jamal JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

O'Neil Thompson

Appellant

Marianne Salih, for the appellant

Meaghan Hourigan, for the respondent

Heard: November 25, 2019

On appeal from the conviction entered on December 14, 2017 by Justice John R. Sproat of the Superior Court of Justice, sitting with a jury.

Jamal J.A.:**A. OVERVIEW**

[1] The appellant, a 31-year-old black man, was sitting in his parked car at a Brampton shopping plaza at night when he was arrested for being in possession of the remains of a partially smoked marijuana cigarette or “roach”. After arresting the appellant, the police searched his car incident to arrest and found cocaine, marijuana, a weighing scale, and a large amount of cash.

[2] Two police officers had driven to this shopping plaza after receiving an anonymous tip about drug dealing from a car, and found the appellant’s car parked with its engine running. Although the police had no basis to believe the car’s occupants were engaged in criminal activity, they parked two police cruisers directly behind it — boxing in the appellant so he could not drive away.

[3] The police then approached the car, with one officer on either side. One officer smelled burnt marijuana from the open driver-side window; the other officer directed the passenger to

roll down her window, smelled burnt marijuana, and then spotted a marijuana roach on the centre console. The officers arrested the two occupants for possession of the marijuana roach, searched the car incident to arrest, and discovered the cash and other drugs. About 21 minutes after having parked behind the appellant, the police advised him of his right to counsel.

[4] The appellant was charged with possession of cocaine for the purpose of trafficking, the only count on which the Crown proceeded. At trial the appellant moved to exclude the evidence found in the car pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms* because the police had arbitrarily detained him (s. 9), illegally searched his car (s. 8), and failed to inform him of his right to counsel immediately (s. 10(b)). The trial judge rejected the ss. 8 and 9 arguments, but accepted that there was a “fairly serious” breach of s. 10(b) that reflected a “chronic problem” with the Peel Regional Police in systematically delaying s. 10(b) rights. Even so, the trial judge admitted the evidence under s. 24(2), and a jury convicted the appellant. The appellant now appeals his conviction, arguing that the trial judge erred in finding no breach of ss. 8 or 9 and contending that the evidence should have been excluded under s. 24(2).

[5] For the reasons below, I would allow the appeal. Unlike the trial judge, I conclude that the appellant was arbitrarily detained contrary to s. 9 of the *Charter* the moment the first police cruiser parked directly behind his car, because at that point the appellant could no longer choose to leave by driving away unless and until the police decided otherwise. This arbitrary detention triggered the appellant’s right to counsel. Like the trial judge, I conclude that because of a systemic problem with Peel Regional Police in delaying the right to counsel, this was a serious breach of s. 10(b). I do not find it necessary to address the alleged breach of s. 8 of the *Charter* because, based on the combined effect of the ss. 9 and 10(b) breaches, I conclude that the admission of this evidence would bring the administration of justice into disrepute. I would therefore exclude the evidence and acquit the appellant.

B. BACKGROUND

[6] The following background draws on the trial judge’s factual findings and the undisputed evidence of the two arresting officers, Officers King and Wong.

[7] Officer King received an anonymous tip that drug dealing was taking place behind a shopping plaza in Brampton. The tip, which was vague, alleged that women were going to and from a vehicle.

[8] On April 19, 2016, at 12:14 a.m., while on patrol, Officer King shared the tip with Officer Wong, who was also on patrol in a separate car. Both officers were in uniform and in marked police cruisers.

[9] At 12:23 a.m., both officers arrived at the plaza and drove to the back. A Cadillac was parked in a parking spot facing the curb. Officer Wong could tell that the car was occupied because he saw movement inside. Officer King could not discern this because the car’s windows were tinted, but she knew that the car was running because she saw exhaust fumes. She thought it was unusual for a car to be parked with its engine running at this time of night.

[10] At 12:23 a.m., Officer King parked her police cruiser “directly behind” the Cadillac, which she estimated was about 11 feet away. She acknowledged that the way she parked led to “blocking the Cadillac from exiting”. Officer Wong then parked his car directly behind Officer King’s car. He acknowledged that “[b]oth [police] vehicles were essentially preventing the Cadillac from reversing should it choose to do so.” Both officers conceded that at this point they had no basis to believe that anyone in the car had committed a criminal offence.

[11] Officer King got out of her car and approached the Cadillac on the passenger’s side, while Officer Wong got out of his car and approached on the driver’s side. Officer King tapped on the passenger-side window. When the female passenger rolled down the window, Officer King smelled burnt marijuana. She shone her flashlight into the car and within a minute saw the stub of a smoked marijuana cigarette in the centre console. This was at about 12:26 a.m.

[12] Meanwhile, as Officer Wong approached on the driver’s side, he also smelled burnt marijuana. The driver-side window was already down. When he shone his flashlight at the driver, the appellant’s head “popped up”, possibly because he had been reclining. The trial judge inferred from this that the appellant was not even aware of the presence of the police, much less the position of the police cruisers, until Officer Wong was very close to the driver-side window and had shone his flashlight at him.

[13] Officer Wong asked both occupants for identification and asked the appellant for vehicle ownership documents. The appellant gave Officer Wong his Ontario driver’s licence. The female passenger orally identified herself. Officer King then told the appellant and the passenger that they were both under arrest for possession of a controlled substance — the marijuana roach.

[14] At about 12:26 a.m., Officer Wong told the appellant to get out of his car and took him to the rear of it. He then spent about five minutes doing a pat-down search of the appellant. At about 12:33 a.m., he put the appellant in Officer King’s car and went to help Officer King by taking control of the female passenger.

[15] Officer King then searched the appellant’s car. She found some loose cash and a scale in the centre console. She also found a backpack in the back seat and searched it – finding 29 grams of cocaine, 5 grams of marijuana, 8 grams of hash oil, 12 grams of hash, and about \$18,000 in cash.

[16] At 12:41 a.m., Officer King told Officer Wong what she had seized. She then went to her car.

[17] At 12:44 a.m., Officer King told the appellant that he was charged with possession for the purpose of trafficking, cautioned him, and advised him of his right to counsel.

C. THE VOIR DIRE RULING

[18] At trial the appellant applied to exclude the evidence from the car under s. 24(2) of the *Charter* based on breaches of ss. 8, 9, and 10(b), among other grounds.

[19] The trial judge rejected the appellant's argument that he was detained when Officer King parked her police cruiser behind his car. He concluded that the appellant was detained only when he was arrested because: (1) the appellant was not even aware of the presence of the police until Officer Wong shone his flashlight close to the open driver-side window; (2) the occupants were sitting in the car with no immediate plan to move; (3) the encounter involved general neighbourhood policing, rather than the police effectively taking control of the appellant; (4) the encounter was not inherently intimidating and was brief, lasting less than a minute from when the appellant noticed the flashlight to when he was arrested; and (5) the appellant was not a young person. The trial judge also stated that it was safer for the police to park directly behind the appellant's car to signal that the police were there rather than someone who might pose a threat.

[20] The trial judge, however, found that Officer Wong should have advised the appellant of his right to counsel and cautioned him when he placed him in Officer King's car at 12:33 a.m. The failure to do so breached the appellant's rights under s. 10(b).

[21] The trial judge also found that the police did not breach the appellant's s. 8 rights by using a flashlight to identify the marijuana roach or in searching his car incident to arrest. They could use flashlights for their own and the occupants' safety and to warn the occupants that they were approaching. And because the appellant's arrest was lawful, the police could search the appellant's car and backpack incident to his arrest.

[22] Finally, despite finding a breach of s. 10(b), the trial judge declined to exclude the evidence under s. 24(2) of the *Charter*. He concluded that even if the police had advised the appellant of his right to counsel immediately upon arrest, they still would have obtained the evidence. The evidence was thus not "obtained in a manner" that breached the *Charter*, and s. 24(2) did not apply.

[23] Even if s. 24(2) did apply, the trial judge still would have admitted the evidence. Although he found that the s. 10(b) breach was "fairly serious" — reflecting a "chronic problem" with Peel Regional Police officers believing that the right to counsel only needs to be provided "as soon as practicable" — he concluded that the impact of the violation on the appellant's rights was minimal. He was not questioned before he was advised of his right to counsel, the evidence was non-bodily physical evidence that did not arise from any deliberate or egregious police conduct, and it was reliable and essential to the Crown's case.

D. ANALYSIS

[24] I will address the following issues:

1. Was the appellant arbitrarily detained contrary to s. 9 of the *Charter*?
2. When were the appellant's rights under s. 10(b) of the *Charter* engaged?
3. Should the evidence have been excluded under s. 24(2) of the *Charter*?

[25] Because I conclude that the evidence should have been excluded under s. 24(2) based on the combined breaches of ss. 9 and 10(b), I need not address the alleged breaches of s. 8

of the *Charter*.

Issue 1: Was the appellant arbitrarily detained contrary to s. 9 of the *Charter*?

Introduction

[26] I will begin by reviewing some of the general principles that apply to whether an individual is “detained” under s. 9 of the *Charter*. I will then apply those principles to assess whether the appellant was psychologically detained, and if so, whether any detention was arbitrary. I conclude that the appellant was detained and, because the Crown concedes (as it did at trial) that the police lacked reasonable grounds to detain the appellant, the detention was arbitrary and breached s. 9.

General principles

[27] Section 9 of the *Charter* provides that “[e]veryone has the right not to be arbitrarily detained or imprisoned.”

[28] An inquiry under s. 9 involves two questions. First, was the claimant detained? Second, was any detention arbitrary? Both questions are reviewed on appeal under a correctness standard: *R. v. Le*, 2019 SCC 34, 434 D.L.R. (4th) 631, at para. 29.

[29] As with other *Charter* rights, the Supreme Court has adopted a generous and purposive interpretation of s. 9, one that seeks to balance society’s interest in effective policing with robust protection for constitutional rights: see *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 24; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 15-18, 23.

[30] The purpose of s. 9, broadly stated, is to protect individual liberty against unjustified state interference: *Grant*, at para. 20. This liberty includes an individual’s right to make an informed choice about whether to interact with the police or to simply walk away. If the police have removed an individual’s choice to leave, the individual is detained: *Grant*, at paras. 20-21. As noted by then-Professor David Paciocco: “[w]hat is given protection, essentially, is the right to choose whether to stay or leave when interacting with state agents”: David M. Paciocco, “What to Mention About Detention: How to Use Purpose to Understand and Apply Detention-Based *Charter* Rights” (2010) 89 Can. Bar Rev. 65, at p. 71.

[31] A detention occurs where the individual has been taken “into the effective control of the state authorities”: *Grant*, at para. 22. At this point, the individual’s liberty has been “meaningfully constrained”, and the individual has a “genuine need of the additional rights accorded by the *Charter* to people in that situation”: *Grant*, at para. 26. These rights include the right to be informed of the reasons for the detention (s. 10(a)); the right to retain and instruct counsel without delay and to be informed of that right (s. 10(b)); and the right to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful (s. 10(c)).

[32] Yet not every trivial or insignificant interference with individual liberty attracts *Charter* scrutiny under s. 9. Such a broad interpretation would “trivialize the applicable *Charter* rights and overshoot their purpose”: *Grant*, at para. 26. The police may, as a result, interact with or

even delay members of the public, without necessarily prompting a “detention” under ss. 9 or 10(b): *Suberu*, at para. 23, citing *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 19; *Le*, at para. 27.

[33] Instead, a “detention” arises only where the police have suspended an individual’s liberty interest through “a significant physical or psychological restraint”: *Grant*, at para. 44.

[34] Physical restraint has been called “the paradigm form of detention”, with arrest being the “paradigm form of physical restraint”: *Paciocco*, at p. 75.

[35] But a detention can also arise from psychological restraint. This is because police conduct “short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the *Charter*”: *Suberu*, at para. 21.

[36] A psychological detention can arise either if: (1) an individual is legally required to comply with a police direction or demand (as with a demand for a roadside breath sample); or (2) absent actual legal compulsion, “the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand”: *Grant*, at paras. 30-31; *Suberu*, at para. 22; and *Le*, at para. 25. This involves “an objective determination, made in light of the circumstances of an encounter as a whole”: *Suberu*, at para. 22.

[37] The Supreme Court summarized the framework for analyzing whether an individual is detained at para. 44 of *Grant*:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual’s liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual’s circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

- (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[38] I now turn to consider the appellant's claim that he was psychologically detained.

Was the appellant psychologically detained?

[39] The appellant asserts that the trial judge erred in concluding that he was detained only when he was arrested. He says he was psychologically detained earlier, when the police parked the first police cruiser behind his car, because at that point the police had removed his choice to drive away. He submits that the trial judge erred in law by applying a subjective rather than an objective approach to the encounter. Based on all the circumstances, he says it is inconceivable that a reasonable person in his shoes would believe that he was free to leave after the police obstructed his car.

[40] As I will explain, I agree that the trial judge erred by failing to apply the objective approach to psychological detention mandated by the Supreme Court in *Grant*, *Suberu*, and most recently, *Le*.

[41] *Grant* and *Suberu* clarified that, when there is no legal compulsion, psychological detention is evaluated under an objective test. The operative question is "whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand": *Grant*, at para. 31. An objective test allows the police to know when a detention occurs so that they can discharge their obligations under s. 10 of the *Charter*. While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perception that the individual had no choice but to comply with the police directive: *Grant*, at para. 32. The failure of the claimant to testify is not fatal to the detention claim: *Suberu*, at para. 28.

[42] The Supreme Court's recent decision in *Le*, which was released after the trial judge's decision here, confirms the objective nature of the inquiry. The majority warned that "[u]ndue focus on subjective perceptions detracts from the underlying rationales for adopting an objective test", of which it identified at least three: (1) to allow the police to know when a detention occurs so that they can discharge their attendant *Charter* obligations and afford the individual its added protections; (2) to maintain the rule of law, as all claims will be subjected to the same standard; and (3) to recognize "the reality that some individuals will be incapable of forming subjective perceptions when interacting with the police": *Le*, at para. 115.

[43] Given these strong reasons for an objective approach, the majority in *Le* warned that the focus must not be on "what was in the accused's mind", but on "how the police behaved" and "how such behaviour would be reasonably perceived". This avoids putting "the onus on the claimant to gauge correctly when they are detained and when they are not": *Le*, at para. 116.

[44] In *Le* itself, the claimant had testified that he did not believe that he was detained by the police at a particular point. The majority placed little stock in the claimant's belief because it concluded that he was already detained based on an objective evaluation of the circumstances: at para. 116.

[45] This court has similarly highlighted that it is an error of law to approach psychological detention “largely as a subjective inquiry”: *R. v. McSweeney*, 2020 ONCA 2, at para. 35; see also *R. v. Wong*, 2015 ONCA 657, 127 O.R. (3d) 321, at paras. 26-28, 43.

[46] Here, the trial judge did exactly that. He conducted a largely subjective inquiry into the appellant’s state of mind during the encounter, rather than an objective inquiry about whether the police conduct would cause a reasonable person in the appellant’s circumstances to conclude that he was free to leave. I say this for two reasons.

[47] First, in finding that the appellant was not detained, the trial judge highlighted that he was not subjectively aware that the police had parked behind him until they shone a flashlight into his car:

I do not accept the defence argument that Mr. Thompson was detained the moment the police cruiser parked behind his vehicle. Officer Wong testified that Mr. Thompson’s head popped up when he directed his flashlight in the direction of Mr. Thompson. That evidence suggests, and I find, that he was not even aware of the presence of the police, much less the position of the police cruisers until Officer Wong shone his flashlight and was positioned very close to the driver’s side window that was open. I conclude that it was his flashlight that initially attracted Mr. Thompson’s attention, that Mr. Thompson’s attention would immediately be directed to Officer Wong who was by then at the driver’s side window. [Emphasis added.]

[48] The trial judge focussed on what the appellant subjectively perceived about the police presence, rather than what a reasonable person in his circumstances would conclude from the nature of the police interaction. Whether the appellant was detained, triggering the police’s *Charter* obligations, should not turn on whether the appellant saw the police in his rear-view mirror as they boxed him in (a subjective approach), but on whether a reasonable person in his circumstances would conclude that this police conduct effected a detention (an objective approach).

[49] Second, the trial judge inferred that the appellant had no subjective intention to drive away when the police arrived:

Stepping in the path of someone and forcing a person to stop is more confrontational and potentially intimidating than parking a vehicle behind another vehicle particularly when on the evidence there was no indication that Mr. Thompson had any indication of moving the vehicle. ... I find that the occupants of the vehicle were simply sitting there with no immediate plan to move. [Emphasis added.]

[50] The correct question, however, was not whether the appellant intended to drive away, but whether objectively the police had taken away his choice to do so.

[51] This case underscores each of the three reasons supporting an objective approach: (1) it allows the police to know when the detention occurs, based on their own conduct rather than the subjective perceptions of the accused; (2) it maintains the rule of law, as all claims are subjected to the same standard, avoiding a different result if, for example, one accused saw the police in his rear-view mirror as they obstructed his car, but another did not; and (3) it

recognizes that some individuals are incapable of forming subjective perceptions, like the appellant here, who did not appear to immediately perceive when the police obstructed his car.

[52] In view of the error of law in applying a largely subjective analysis, this court must apply an objective approach based on the factors identified in *Grant*, at para. 44: (i) the circumstances giving rise to the encounter; (ii) the nature of the police conduct; and (iii) the characteristics and circumstances of the appellant.

(i) *The circumstances giving rise to the encounter*

[53] The circumstances giving rise to the encounter as they would be perceived by a reasonable person support a finding that the appellant was detained when the police obstructed his car. The police were not called to provide general assistance, maintain order, or respond to unfolding events. No one called the police to attend at the plaza. While the police were there at first in response to an anonymous tip, the tip was general, and they approached the appellant's car because they thought it was suspicious for a car to have its engine running late at night. The trial judge fairly characterized this police activity as "general neighbourhood policing", at least before they obstructed the appellant's car.

[54] But after that, a reasonable person would know only that the police showed up late at night and for no apparent reason obstructed the appellant's car. Regardless of the officers' intentions as they blocked the appellant, a reasonable person would not perceive this action as "assisting in meeting needs or maintaining basic order": *Grant*, at para. 40; *Le*, at para. 42.

(ii) *The nature of the police conduct*

[55] The police conduct was authoritative from the outset. By obstructing the movement of the appellant's car, the police would reasonably be perceived as sending the message that the appellant was not free to leave until the police decided otherwise.

[56] This conclusion that the police conduct was authoritative is only reinforced by considering other circumstances of the encounter: the police were uniformed and in marked police cars; they placed themselves on either side of the car to question the occupants; they looked into the car with flashlights and directed the passenger to roll down her window; and they directed the occupants to produce identification and vehicle ownership documents.

[57] I therefore disagree with the trial judge's view that the character of the encounter did not move from "general neighbourhood policing to a situation where the police had effectively taken control of Mr. Thompson." That is exactly what happened. As in *Grant*, the police effectively took control of the appellant's car and its occupants, first by obstructing the appellant's car, and then by approaching the car and seeking information from the appellant and the passenger: see *Grant*, at para. 49.

[58] While the police did not engage in physical contact with the appellant before his arrest, their physical proximity in blocking his car would have created "an atmosphere that would lead a reasonable person to conclude that the police were taking control of the situation and that it was impossible to leave": *Le*, at para. 50.

[59] I also disagree with the trial judge that it was “safer for all concerned for the police to park in plain view”, directly behind the appellant’s car, or that the encounter was “not inherently intimidating” and only “fleeting” before the appellant was arrested. The brevity of the encounter “is simply one consideration among many”: *Le*, at para. 65. A psychological detention can occur at the start of an interaction or within seconds: see *Le*, at para. 66; *Grant*, at para. 42. That occurred here, as soon as the police parked behind the appellant. In my view, most reasonable people would find it intimidating to have their car’s movement obstructed by two police cruisers.

[60] The Crown did not provide any authority for the lawfulness of the police detaining the appellant in this case. Nor did the Crown rely on any statutory power of the police to obstruct the appellant’s car, such as under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 or the *Criminal Code*, R.S.C. 1985, c. C-46. The appellant had a right to be where he was and a basic liberty to come and go by car as he pleased without being impeded by the police.

[61] Finally, I reject the Crown’s argument that the appellant was not detained, even though his car was obstructed, because he always remained free to “walk away” – by literally exiting his car and leaving on foot. In my view, a reasonable person in the appellant’s position, whose car was deliberately obstructed by a police cruiser, would conclude that they were not free to leave, on foot or otherwise.

[62] But even if the appellant was free to leave on foot, as the Crown asserts, this confirms that his freedom of movement was significantly constrained. If the individual is a motorist or a driver, their freedom of movement includes the freedom to leave by driving away: see *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at paras. 30-31 (referring to the rights of “a driver” and “every motorist”); *Suberu*, at para. 33 (accused not detained because the police “made no move to obstruct [his] movement” as he sat in his van). Here, the appellant’s freedom to drive away was significantly constrained, which suggests that he was detained.

(iii) *The characteristics and circumstances of the appellant*

[63] The trial judge noted that “Mr. Thompson is not a young person”, but more to the point he was a black man sitting in his car at night in Brampton when his car was obstructed without apparent reason by two marked police cruisers. I am not suggesting that the police engaged in racial profiling – to the contrary, they could not determine the race of the occupants because the windows were tinted. But the appellant’s status as a racialized Canadian in Brampton, one of the largest majority-racialized cities in Canada, is relevant to the perception of a reasonable person in his shoes. The majority in *Le*, at para. 97, referred to “a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions”. As in *Le*, at para. 97, I conclude that “[t]he documented history of relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the [appellant]”. Here, the appellant’s race would contribute to a reasonable person’s perception in all the circumstances that he was detained.

[64] I therefore conclude that the appellant was detained the moment the first police cruiser boxed in his car, because at that point the police had eliminated his choice to drive away

unless and until the police decided otherwise.

Was the detention arbitrary?

[65] A detention without at least reasonable suspicion is unlawful and therefore arbitrary: *Grant*, at para. 55. The trial judge accepted that the “generic” anonymous tip the police received “did not provide the police with any right to detain” the appellant. Nor did the police have any other basis to do so. The Crown does not suggest otherwise.

[66] The appellant was therefore arbitrarily detained contrary to s. 9 of the *Charter*.

Issue 2: When were the appellant’s rights under s. 10(b) of the *Charter* engaged?

[67] When an individual is arrested or detained, s. 10(b) of the *Charter* guarantees the individual the right to retain and instruct counsel “without delay” and to be informed of that right. Subject to concerns for officer or public safety, or limitations prescribed by law and justified under s. 1 of the *Charter*, “without delay” means “immediately”: *Suberu*, at para. 42.

[68] Here, the trial judge found that the police did not inform the appellant of his right to counsel immediately. The relevant timeline is as follows:

- 12:23 a.m. — The police arrive and park behind the appellant’s car.
- 12:26 a.m. — The police arrest the appellant.
- 12:26 a.m. to 12:33 a.m. — The police conduct a pat-down search of the appellant and place him in the back of a police cruiser.
- 12:33 a.m. to 12:41 a.m. — The police search the appellant’s car incident to arrest.
- 12:44 a.m. — The police inform the appellant of his right to counsel.

[69] The trial judge found a delay in informing the appellant of his right to counsel, running from 12:33 a.m. to 12:44 a.m. Although the appellant was arrested at 12:26 a.m., the trial judge did not count the period when the police did a pat-down search because he found this search was justified by concerns for officer safety.

[70] The appellant submits that he was arbitrarily detained at 12:23 a.m., not when he was arrested at 12:26 a.m., and that the trial judge had no basis to deduct the time for the pat-down search. He submits that this delay was unjustified because the police advanced only “generalized” rather than “concrete and specific” officer-safety concerns.

[71] I agree that the appellant’s s. 10(b) rights were triggered when he was arbitrarily detained rather than when he was arrested. I have concluded, however, that it is unnecessary in this case to decide whether the police were justified in conducting a pat-down search before advising the appellant of his right to counsel, given the subsequent delay before the appellant was advised of his right to counsel and the lack of any reason for that delay. There was no reason why the police could not have advised the appellant of his right to counsel at the latest at 12:33 a.m., before they searched his car. Instead they waited another 11 minutes. As the trial judge found, this conduct breached s. 10(b).

Issue 3: Should the evidence have been excluded under s. 24(2) of the *Charter*?

[72] The final issue is whether the evidence should have been excluded under s. 24(2) of the *Charter*. The trial judge found only a breach of s. 10(b), while I would also find a breach of s. 9.

[73] Because the trial judge erred in law in assessing the nature and extent of the *Charter* breaches, his conclusion to admit the evidence does not attract appellate deference. This court must consider that issue afresh: *Le*, at para. 138; *Grant*, at para. 129; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 42; *R. v. Gonzales*, 2017 ONCA 543, 136 O.R. (3d) 225, at paras. 162, 166; and *R. v. Adler*, 2020 ONCA 246, at para. 40.

[74] Section 24(2) is triggered where evidence is “obtained in a manner” that violates an accused’s *Charter* right. A s. 24(2) inquiry examines the impact of admitting evidence obtained in breach of the *Charter* on public confidence in the justice system over the long term, based on: (i) the seriousness of the *Charter*-infringing state conduct; (ii) the impact of the breach on the accused’s *Charter*-protected interests; and (iii) society’s interest in the adjudication of the case on the merits. The court’s task is to balance the assessments under these three inquiries “to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute”: *Grant*, at para. 71; *Le*, at paras. 139-141; and *McSweeney*, at para. 76.

[75] In *Le*, the Supreme Court recently clarified the interaction of the three inquiries under s. 24(2). The majority noted that while the first two inquiries typically “both pull towards exclusion of the evidence, they need not pull with identical degrees of force in order to compel exclusion”: at para. 141. The evidence can be excluded even if the first two inquiries do not both support exclusion, such as in a case of a serious *Charter* breach coupled with a weak impact on a *Charter*-protected interest: at para. 141. The third inquiry, while not a rubber stamp deeming all evidence reliable, typically points to admission. When, however, the first two inquiries taken together make a strong case for exclusion, the third inquiry “will seldom if ever tip the balance in favour of admissibility”: *Le*, at para. 142; see also *Paterson*, at para. 56.

[76] I now turn to apply the s. 24(2) analysis to this case.

“Obtained in a manner”

[77] Because the trial judge found no *Charter* breach before the discovery of the contents of the backpack and the s. 10(b) breach was brief, he concluded that the evidence was not “obtained in a manner” that breached the *Charter*, and thus s. 24(2) was not engaged. He still conducted a s. 24(2) analysis for completeness.

[78] The Crown asserts that the trial judge correctly found no causal connection between the breach of s. 10(b) and the discovery of the evidence, but concedes that because the breach and discovery were close in time and part of the same transaction, there was a temporal connection sufficient to trigger s. 24(2).

[79] I accept the Crown’s concession. A temporal connection between the breach of a *Charter* right and the discovery of evidence is enough to engage s. 24(2): see *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 83; *R. v. La*, 2018 ONCA 830, 366 C.C.C. (3d) 351, at

para. 35; and *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 35. Here, there was such a connection between the breach of s. 10(b) and the discovery of the evidence.

[80] I would, however, also find a causal connection because the evidence was discovered as a result of the arbitrary detention. The arbitrary detention had a direct causal connection to the discovery of the marijuana roach, and then to the arrest of the appellant, the search of his car, and the discovery of the evidence.

[81] I therefore conclude that s. 24(2) of the *Charter* was engaged.

[82] I now turn to the three lines of inquiry under s. 24(2).

(i) *The seriousness of the Charter-infringing state conduct*

[83] The first line of inquiry considers the seriousness of the police conduct that infringed the *Charter* and led to the discovery of the evidence. It asks whether the police engaged in misconduct from which the court should dissociate itself, such as where the departure from *Charter* standards was significant or where the police knew or should have known that their conduct breached the *Charter*, or rather whether the breach was merely of a technical nature or reflected an understandable mistake, in which case dissociation is much less of a concern: *Grant*, at paras. 72-74; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22; and *McSweeney*, at para. 78.

[84] The courts should dissociate themselves from evidence obtained through a negligent breach of the *Charter*: *Le*, at para. 143; see also *Grant*, at para. 75.

[85] Moreover, a systemic problem or pattern of *Charter*-infringing conduct is an aggravating factor that supports exclusion: *Grant*, at para. 75; *Harrison*, at para. 25.

[86] To recap, I have concluded that there were breaches of ss. 9 and 10(b).

[87] With respect to the breach of s. 9, I conclude that the police conduct in arbitrarily detaining the appellant was moderately serious in that it reflected negligence rather than wilful or deliberate conduct. When Officer King was cross-examined on why she had parked directly behind the Cadillac and blocked its exit, she simply said: “[i]t was just where I chose to stop my vehicle.” The police appear to have been unaware that their actions constituted or might constitute a detention.

[88] Even though the police did not deliberately set out to violate the appellant’s rights under s. 9, their failure to appreciate their duties led to this result: see *Wong*, at para. 63.

[89] More than a decade after *Grant*, the police must appreciate that, absent exigent circumstances or other appropriate justification, they cannot go about their undeniably important duties to enforce the law by obstructing ordinary Canadians in their cars until they are satisfied that they have answered their questions. To do so without a statutory or common law power would undercut the individual’s fundamental right to choose whether to engage with the police or to leave.

[90] The breach of s. 10(b) was, however, more serious. The police did not advise the appellant of his right to counsel “immediately”, as required by well-established jurisprudence under s. 10(b), but waited without justification before doing so: *Suberu*, at paras. 41-42. As this court recently noted, “[t]he law around s. 10(b) is clear and long-settled. It is not difficult for the police to understand their obligations and carry them out”: *R. v. Noel*, 2019 ONCA 860, at para. 34.

[91] Both officers here appeared to be confused about their obligations under s. 10(b). At trial Officer King testified that she understood that, on arrest or detention, the appellant had to be informed of his right to counsel “immediately”, though she also conceded that at the preliminary inquiry she had said, “as soon as practicable”. She said that at the preliminary inquiry she may have mixed up the word “possible” and “practicable”, but she also testified that, to her, “as soon as possible” means “if it’s convenient for [her] to give rights to counsel and practical”. Officer Wong testified that his understanding was that the appellant had to be informed of his right to counsel “as soon as practicable”. He said that this had been his practice for the two years that he had been a police officer and was still his practice. He said this is what he was taught at his initial police training and what he is taught as part of his ongoing training. But “as soon as practicable” is necessarily a laxer standard than “as soon as possible” or “immediately”.

[92] Worse still, the breach of s. 10(b) is rooted in a systemic disregard by the Peel Regional Police for their constitutional obligations. The trial judge himself found the breach of s. 10(b) to be “fairly serious” and highlighted a “chronic problem” with the Peel Regional Police and its officers believing that the right to counsel need be given only “as soon as practicable”. In support of this observation he referred to the comments of Schreck J. in *R. v. Sandhu*, 2017 ONCJ 226, 378 C.R.R. (2d) 306, at paras. 8-11. It is worth quoting Schreck J.’s comments at length given the serious systemic concerns he highlighted, at paras. 9-11:

... *Suberu* was decided over seven years ago. As the Court noted, the concept of immediacy leaves little room for misunderstanding. Despite this, the police in Peel Region have repeatedly demonstrated what is at best a failure to grasp the dictates of the judgment, or, at worst, an unwillingness to follow it. See, for example, *R. v. Athwal*, 2017 ONSC [9]6 at para. 230; *R. v. Kraus*, 2015 ONSC 2769 at paras. 36-37; *R. v. Moulton*, 2015 ONSC 1047 at paras. 86-89; *R. v. Grewal*, 2015 ONCJ 691 at paras. 41-44; *R. v. Medeiros*, 2015 ONCJ 707 at para. 30; *R. v. Singh*, 2015 ONCJ 643 at para. 39; *R. v. Ahmad*, 2015, ONCJ 620 at paras. 15-19; *R. v. Lam*, 2014 ONSC 3538 at para. 230; *R. v. Soomal*, 2014 ONCJ 220 at para. 39; *R. v. Ramocan*, 2014 ONCJ 692 at para. 66; *R. v. Volkov*, [2014] O.J. No. 5346 (C.J.) at para. 25; *R. v. Thomson*, 2013 ONSC 1527 at paras. 137-140; *R. v. Godday*, 2013 ONSC 1298 at para. 86; *R. v. Thompson*, [2013] O.J. No. 3570 (C.J.) at para. 5; *R. v. Dinh*, 2011 ONSC 5644 at para. 48; *R. v. Watson*, 2010 ONSC 448 at para. 109.

Cst. Darcy is not the only Peel officer who seems to believe that he is obliged to advise people he has arrested of their right to counsel “as soon as practicable”: *Kraus* at para. 36; *Medeiros* at para. 12. The term “as soon as practicable” is often used in the drinking and driving context as it appears in s. 258(1)(c)(ii) of the *Criminal Code* in relation to when breath samples should be taken. In that context, it means

“within a reasonably prompt time in the circumstances” and does not mean as soon as possible: *R. v. Vanderbruggen* (2006), 2006 CanLII 9039 (ON CA), 206 C.C.C. (3d) 489 (Ont. C.A.) at para. 12. It clearly does not mean “immediately”. Rather, it denotes a degree of flexibility that is simply not present in the s. 10(b) context.

In *Lam*, which was decided in 2014, Hill J. stated (at para. 337):

While the denial of the right to counsel, over 10 months after *Suberu*, was deliberate on the part of the officers in the sense of intended, it was without individual knowledge of its wrongness. However, once again, the PRPS [Peel Regional Police Service] as an institution failed to equip its officers with the knowledge required of a reasonably trained police officer by unreasonably delaying formal notification of its officers of this change in the law until an August 2013 Training Bulletin, over four years after the *Suberu* (SCC) decision - a Bulletin which still does not make it explicitly clear that both the informational and implementational duties of the s. 10(b) *Charter* right are to be provided immediately upon the imposition of investigation detention.

These concerns, expressed by a very experienced and well-respected jurist in this jurisdiction, apparently remain unheeded as in this case, an officer with almost 10 years of experience still does not appreciate that the right to counsel has to be provided immediately. This appears to be a systemic problem, which renders the breach more serious: *R. v. Harrison*, 2009 SCC 34 at para. 25.

[93] Since Schreck J. wrote these words, there have been even more instances of the Peel Regional Police failing to respect their obligation to inform a detainee of the right to counsel immediately, underscoring that this is an ongoing systemic problem: see, for example, *R. v. Kou*, 2019 ONCJ 966, at paras. 26-32; *R. v. Gordon*, 2018 ONSC 1297, at paras 49-54; *R. v. Bullock*, 2018 ONCJ 598, 418 C.R.R. (2d) 299, at paras. 59-66; *R. v. Lima*, 2017 ONSC 2224, 379 C.R.R. (2d) 1, at paras. 34-37; *R. v. Christopoulos*, 2017 ONCJ 845, at paras. 21-24; *R. v. Paskaran*, 2017 ONCJ 696, 394 C.R.R. (2d) 340, at paras. 10, 17, 19; *R. v. Williams*, [2017] O.J. No. 5787 (C.J.), at paras. 55-60, 67; and *R. v. Simpson*, 2017 ONCJ 321, 383 C.R.R. (2d) 134, at paras. 24-26.

[94] To be clear, I do not wish to single out the individual officers here for blame. Neither of them appears to have intentionally breached s. 10(b) and both were relatively inexperienced officers who appear to have been following their training. The issue, rather, is institutional and systemic. It is, as the trial judge noted, a “chronic problem” with the Peel Regional Police force breaching their clear and well-settled constitutional obligations under s. 10(b).

[95] Even without a systemic problem, a clear breach of settled rules governing state conduct supports exclusion of evidence under s. 24(2). As noted in *Paterson*, at para. 44: “[e]ven where the *Charter* infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 24-25)”; see also *Noel*, at para. 34.

[96] Here, the infringement does reflect a systemic breach of settled rules under s. 10(b). This serves as an aggravating factor supporting exclusion. When coupled with the s. 9 breach, I conclude that this case involved serious *Charter* violations.

(ii) *Impact of the breach on the appellant's Charter-protected interests*

[97] The second line of inquiry under s. 24(2) asks whether the *Charter* breach “actually undermined the interests protected by the right infringed”: *Grant*, at para. 76; *Le*, at para. 151. This involves identifying the interests protected by the relevant *Charter* rights and evaluating how seriously the *Charter* infringements impacted those interests. The more serious the impact on *Charter*-protected interests, “the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute”: *Grant*, at paras. 76-77; *Harrison*, at para. 28; and *Le*, at para. 151.

[98] Here, the appellant's interest protected by s. 9 of the *Charter* was his liberty from unjustified state interference — his right, absent compelling state justification, “to live his life free of police intrusion”, and “to make decisions, including decisions of fundamental importance, free from state interference”: *Le*, at paras. 152-154; *Grant*, at paras. 19-20; see also *Harrison*, at para. 31.

[99] The s. 10(b) right to retain and instruct counsel without delay and to be informed of that right allows a detainee to obtain advice about how to exercise their rights relevant to their legal situation: *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 21; *Wong*, at para. 77. This helps ensure that a detainee's choice to speak to the police is free and informed and guards against the risk of involuntary self-incrimination: *Suberu*, at para. 40; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, at para. 25; and *Wong*, at para. 77.

[100] Here, the trial judge found that the impact of the violation of s. 10(b) was minimal because the police did not try to question the appellant before advising him of his right to counsel and he made no inculpatory comments. I agree with that assessment.

[101] But the impact of the violation of s. 9 — which the trial judge did not consider because he found no such violation — was far from minimal. Being obstructed by a police car without justification curtails a person's rightful expectation of liberty and therefore intrinsically injures s. 9 interests. In addition, although the detention was brief before the appellant was arrested, the detention did not merely restrict but eliminated any realistic choice the appellant might have had about whether to leave. This impact on his s. 9 interests is heightened by the lack of any reasonable basis for the police conduct in detaining him. As the Supreme Court has emphasized, even trivial or fleeting detentions “must be weighed against the absence of any reasonable basis for justification”: *Mann*, at para. 56 (emphasis in original); *Le*, at para. 155.

[102] As a result, I conclude that the impact on the appellant's s. 9 interests was significant and favours a finding that the admission of the evidence would bring the administration of justice into disrepute.

(iii) *Society's interest in the adjudication of the case on the merits*

[103] The last line of inquiry considers factors such as the reliability of the evidence and its importance to the Crown's case. It typically supports finding that admission of the evidence would not bring the administration of justice into disrepute: *Grant*, at paras. 79-84; *Harrison*, at para. 33; and *Le*, at para. 142.

[104] This inquiry asks whether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence or by its exclusion: *Grant*, at para. 79; *McSweeney*, at para. 81. Reliable evidence that is critical to the Crown's case will generally pull towards inclusion: *Harrison*, at paras. 33-34; *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 62; and *McSweeney*, at para. 81.

[105] Here, the appellant concedes that because the evidence is reliable and essential to the Crown's case against him, the third inquiry favours admission of the evidence. I agree with that concession.

Balancing the factors

[106] The final step under the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term reputation of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision: *Harrison*, at para. 36.

[107] If, however, the first two inquiries together make a strong case for exclusion, the third inquiry "will seldom if ever tip the balance in favour of admissibility": *Le*, at para. 142; *Paterson*, at para. 56; and *McSweeney*, at para. 81.

[108] Here, both the first and second lines of inquiry pull towards exclusion, though not with identical force. This case involves serious *Charter* breaches coupled with a somewhat weaker but still significant impact on the appellant's *Charter*-protected interests. Cumulatively, the first two inquiries make a strong case for exclusion, one that in my view outweighs society's interest in the adjudication of the case on the merits.

[109] Despite the reliability of the evidence and its importance to the Crown's case, I have therefore concluded that the administration of justice would be brought into dispute by its admission. The evidence therefore should have been excluded under s. 24(2).

E. CONCLUSION

[110] For these reasons, I would allow the appeal, exclude the evidence under s. 24(2) of the *Charter*, and set aside the conviction. Because the appellant could not be convicted without the evidence obtained as a result of the *Charter* breaches, I would direct an acquittal.

Released: April 23, 2020 ("G.R.S.")

"M. Jamal J.A."

"I agree. G.R. Strathy C.J.O."

“I agree. Harvison Young J.A.”