COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McGuffie, 2016 ONCA 365
DATE: 20160513
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Doherty, Simmons and van Rensburg JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Philippe Fred McGuffie

Appellant

Howard L. Krongold, for the appellant

James D. Sutton, for the respondent

Heard: March 18, 2016

On appeal from the convictions entered on April 12, 2013 by Justice T.D. Ray of the Superior Court of Justice, reported at 2013 ONSC 2097.

Doherty J.A.:

OVERVIEW

[1] The appellant was convicted of two counts of possession of cocaine for the purpose of trafficking, three counts of breaching a condition of his recognizance and one count of breaching a probation order. He was also acquitted of several gun-related charges. The acquittals are not in issue on the appeal.

[2] The appellant's factual guilt on the charges for which he was convicted was never in doubt. However, he argued that the police obtained the evidence relied on to establish his guilt in a manner that breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought to exclude the evidence pursuant to s. 24(2) of the *Charter*. The trial judge found several breaches of the appellant's *Charter* rights, but declined to exclude the evidence. He convicted the appellant on the relevant counts.

[3] The appellant appeals, renews his claim and argues that the evidence should have been excluded under s. 24(2).

[4] I would allow the appeal. The trial judge made three legal errors in his s. 24(2) analysis:

- he treated the absence of evidence of systemic institutional non-compliance with the requirements of the *Charter* as mitigating the seriousness of the police misconduct;

- he failed to give any consideration to the impact of the several *Charter* breaches on the constitutionally protected interests of the appellant; and
- he treated the seriousness of the drug charges as the paramount and overriding consideration.

[5] On a proper s. 24(2) analysis, the evidence should have been excluded. I would quash all of the convictions and enter acquittals.

THE EVIDENCE

[6] The Ottawa Police Service received a telephone call at about 2:00 a.m. from security personnel at a downtown bar advising that a group of five men in the bar had been seen passing a handgun around. Several officers, including Constable Greenwood, responded to the call.

[7] Constable Greenwood arrived at the bar at about 2:07 a.m. Security staff were ushering the patrons out of the bar. Other officers were already present. The doorman identified two individuals as part of the group that had been passing the handgun around in the bar. The appellant, one of those two men, walked away quickly from the bar. Constable Greenwood followed him.

[8] Constable Greenwood caught up to the appellant a short distance from the bar. He asked the appellant why he was “running away from his friends?” The appellant gave conflicting responses. Constable Greenwood decided to detain the appellant as he suspected the appellant had the weapon seen earlier in the

bar. Constable Greenwood did not suggest that he had grounds to arrest the appellant. Constable Greenwood told the appellant he was being detained because Constable Greenwood believed he had a handgun. The appellant denied having a handgun.

[9] When asked in examination-in-chief why he detained the appellant, Constable Greenwood responded:

> I had a belief that he possibly had a firearm on him; for public safety; for the continuation of the investigation at the time.

[10] Constable Greenwood was also asked what he meant by "public safety":

> If he had a firearm on him, the safety of the public; concerned, obviously, firearms in the wrong hands is a very dangerous thing. I was concerned – there was a lot of citizens there, a lot of people, a lot of patrons, et cetera.

[11] Constable Greenwood handcuffed the appellant and conducted a pat down search of the appellant for firearms. He described the search as "cursory". Nothing turned up in the search. The appellant was standing on the street when he was handcuffed and searched.

[12] The appellant gave Constable Greenwood a health card in the name of David Piard and provided an address. Both the name and the address were false. Constable Greenwood did not check the name or address given to him by

the appellant. He decided to return to the bar to assist in the search for the handgun and to “make sure my colleagues [were] safe”.

[13] Constable Greenwood chose not to release the appellant. Instead, he placed him, still handcuffed, into the back of Constable McDonnell’s cruiser. Constable Greenwood told Constable McDonnell that he was detaining the appellant as he suspected that he was one of the group who were passing the handgun around in the bar. He asked Constable McDonnell if he could leave the appellant in his cruiser, but did not give Constable McDonnell any further detail or instruction.

[14] Constable Greenwood returned to the bar leaving the appellant handcuffed in the back of Constable McDonnell’s cruiser. There is no evidence that Constable Greenwood turned his mind to how long the appellant would be held in the cruiser. Constable Greenwood did not have reasonable and probable grounds to arrest the appellant.

[15] Constable McDonnell, who was seated in the driver’s seat of the cruiser, made attempts to verify the identification that the appellant had given Constable Greenwood. The appellant was not cooperative and Constable McDonnell could not verify the appellant’s identity.

[16] Constable Greenwood returned to Constable McDonnell’s cruiser 30 minutes later. The appellant was still handcuffed in the backseat. According to

Constable McDonnell, Constable Greenwood told him that he wanted to move the appellant to Constable Greenwood's cruiser so he could take the appellant back to the police station. The appellant was not under arrest at this time. Constable McDonnell testified that Constable Greenwood removed the appellant from his cruiser and that he assisted Constable Greenwood in conducting a further search of the appellant.

[17] Constable Greenwood's evidence was different. He testified that when he returned to Constable McDonnell's cruiser he was still concerned that the appellant might be in possession of the handgun that had been seen earlier in the bar. Constable Greenwood testified that he decided to conduct a more thorough "safety" search of the appellant for the handgun. Constable Greenwood acknowledged that when he left the appellant in Constable McDonnell's cruiser with Constable McDonnell sitting in the front seat, he had not expressed any concerns to Constable McDonnell that the appellant might still be armed.

[18] Constable Greenwood testified that he removed the appellant from the cruiser and began a more thorough search of the appellant. He felt a hard rectangular object in the pocket of the appellant's shirt. Concerned that it might be the handgun, he removed the object. It turned out to be a package of white powder that later analysis showed to be cocaine. Constable Greenwood testified

that he continued to search the appellant and found some money and marihuana in the appellant's pant pocket.

[19] Constable Greenwood arrested the appellant on a charge of trafficking in cocaine. He testified that he "would have" advised the appellant of his right to counsel when he arrested him. There was no evidence of the language used by Constable Greenwood when he advised the appellant of his right to counsel. Even on Constable Greenwood's evidence, the appellant had not been advised of his right to counsel until almost 40 minutes after he was first detained.

[20] According to Constable Greenwood, the appellant said he wanted to speak to a lawyer. Constable Greenwood did nothing in response to the appellant's request.

[21] Sometime after the appellant's arrest on the cocaine charge, Constable Greenwood transferred the appellant into his cruiser and drove him to the police station a few blocks from the scene of the arrest. Constable Greenwood and the appellant arrived at the station about 30 minutes after the appellant's arrest. It had now been over an hour since Constable Greenwood left the appellant handcuffed in the back of Constable McDonnell's cruiser.

[22] Constable Greenwood told the officer in charge at the station that he wanted to strip search the appellant because he was concerned the appellant might still be carrying a handgun, as well as more drugs. The sergeant approved

the request. When Constable Greenwood made the request, he knew that the firearm from the bar had been found. Nothing was said about giving the appellant an opportunity to speak to a lawyer before the search was conducted, despite Constable Greenwood knowing that the appellant wanted to speak to a lawyer. Nor did any of the officers allude to the possibility that the police should refrain from conducting the strip search until the appellant had an opportunity to speak with counsel.

[23] Initially, the appellant vigorously resisted the strip search. Several officers, including Constable Greenwood, assisted in overcoming his resistance. Constable Greenwood testified that he restrained the appellant's legs because the appellant had attempted to kick other officers. The trial judge described Constable Greenwood's participation in the following terms:

> His assistance consisted of standing on Mr. McGuffie's ankles with what was clearly an intention to cause Mr. McGuffie pain. It was a purely gratuitous act. While Cst. Greenwood might have gained satisfaction from needlessly standing on Mr. McGuffie's ankles for over a minute, he further breached Mr. McGuffie's rights to be free from the intentional infliction of pain while being in his custody.

[24] During the search, the police found a package of cocaine sewn into the waist of the appellant's underwear. After this cocaine was located, the appellant became more cooperative and produced a package of cocaine that he had secreted in his buttocks. The appellant was taken into another room so that the

strip search could be completed. The appellant cooperated during the strip search. While the search was being done, the door to the room was open and three police officers were in the room.

[25] After the strip search was completed at 3:54 a.m., the police gave the appellant an opportunity to speak to his lawyer.[1] About 90 minutes had passed since the appellant was first detained. An hour had passed since the appellant, in response to being told he had a right to a lawyer, had indicated he wanted to speak to a lawyer. After the appellant spoke with his lawyer, he told the police his real name and that there were warrants outstanding for his arrest.

THE TRIAL JUDGE'S REASONS

[26] The trial judge accepted that the initial detention of the appellant on the street in connection with Constable Greenwood's firearm-related investigation was a constitutionally appropriate investigative detention. He also accepted that the pat down search of the appellant was a reasonable safety-related search and complied with s. 8 of the *Charter*. The trial judge further held, however, that from the time Constable Greenwood put the appellant into Constable McDonnell's cruiser until he finally allowed him to speak to his lawyer about 90 minutes later, the police repeatedly violated the appellant's constitutional rights.

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[1] In his reasons, the trial judge inadvertently notes this time as 3:36 a.m. (see paras. 34, 45). It is clear from cell block surveillance footage that the appellant is not given an opportunity to consult counsel until 3:54 a.m. The accuracy of the time recorded on the cell block surveillance footage is not in dispute.

[27] The trial judge held that the detention of the appellant in the police cruiser while Constable Greenwood went back to the bar to assist in the investigation ignored the obligation to minimize the length of an investigative detention and thereby breached the appellant's right under s. 9 of the *Charter* to be free from arbitrary detention. The trial judge contrasted Constable Greenwood's approach to that of other officers who briefly detained other individuals suspected of having some connection to the firearm and released them when the detention provided no grounds for an arrest.

[28] The trial judge held that Constable Greenwood's failure to tell the appellant that he had a right to counsel when he detained him in the police cruiser violated the appellant's constitutional right under s. 10(b). A second s. 10(b) violation occurred when the appellant was not given an opportunity to speak to his lawyer for an hour after he indicated that he wanted to speak to a lawyer.

[29] The trial judge referred to the second search of the appellant after Constable Greenwood removed him from Constable McDonnell's vehicle as raising "some serious questions". The trial judge did not make a specific finding that the second search of the appellant breached his s. 8 rights. For reasons I will explain below, there is no doubt that it did.

[30] The trial judge was also critical of the search conducted at the police station. He described Constable Greenwood's intentional and gratuitous infliction

of pain by standing on the appellant's ankles for about a minute as a breach of the appellant's "rights to be free from intentional infliction of pain while being in custody". He also found that the police failed to adequately respect the appellant's privacy rights when they conducted the strip search with the door open and in the presence of officers who were unnecessary for the proper conduct of the strip search. I read these findings cumulatively as an implicit finding that the search of the appellant at the police station was conducted in an unreasonable manner and breached the appellant's rights under s. 8.

ANALYSIS

[31] This appeal is about the application of the exclusionary rule in s. 24(2) of the *Charter*. The Crown does not, and could not, seriously challenge the finding that the appellant's rights under ss. 9, 10(b) and 8 were infringed by the conduct of Constable Greenwood. Before I turn to the s. 24(2) analysis, it is helpful to clearly identify the various constitutional breaches revealed by this evidence. In doing so, I do not intend to depart from the trial judge's factual findings. I do, however, attempt to connect those findings more specifically to the *Charter* breaches that arise from them.

The Section 9 Breach

[32] An individual's right to be left alone by the police and the police duty to investigate crime and protect the public will inevitably come into conflict. That

conflict often plays out in street level encounters like the one involving Constable Greenwood and the appellant. Section 9 provides the constitutional imperative against which the competing interests of the individual and the state, as represented by the police, must be balanced and resolved. The section reads:

> Everyone has the right not to be arbitrarily detained or imprisoned.

[33] The appellant was detained from the moment Constable Greenwood stopped him on the street. The detention was made all the more obvious when Constable Greenwood handcuffed the appellant. The appellant was entirely under Constable Greenwood's control from that point forward: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 44.

[34] When Constable Greenwood detained the appellant, he had reasonable grounds to suspect that the appellant was involved in the illegal possession of a handgun. He had information from the doorman, he had seen the appellant quickly leaving the area of the bar and the location of the handgun was unknown as far as Constable Greenwood was aware. Constable Greenwood's investigation raised legitimate and immediate public safety concerns. While Constable Greenwood did not have grounds to arrest the appellant, he did have a duty to investigate the gun-related incident and the appellant's potential connection to it.

[35] An individual may be detained for investigative purposes if the police are acting in the exercise of their duty and the detention is justified as reasonably necessary in the totality of the circumstances: *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 34; *R. v. MacKenzie,* 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 35. As explained in *Mann*:

> The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference….

[36] In my view, the appellant's initial detention on the street was a lawful exercise of the police power to detain persons in the course of a criminal investigation.[2]

[37] In *Mann*, at para. 35, Iacobucci J. stressed that an investigative detention was not the same thing as an arrest and could not be allowed to become "a *de*

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[2] Constable Greenwood handcuffed the appellant when he detained him on the street. Counsel did not argue that the handcuffing of the appellant rendered his initial detention arbitrary under s. 9 of the *Charter*. These reasons do not address that issue: see *R. v. Ahmed-Kadir*, 2015 BCCA 346, 327 C.C.C. (3d) 33.

facto arrest". The significant interference with individual liberty occasioned by an arrest is justified because the police have reasonable and probable grounds to believe that the arrested person has committed an offence. Investigative detention does not require the same strong connection between the detained individual and the offence being investigated. The detention contemplated by an investigative detention cannot interfere with individual liberty to the extent contemplated by a full arrest.

[38] The duration and nature of a detention justified as an investigative detention must be tailored to the investigative purpose of the detention and the circumstances in which the detention occurs. A brief detention on the street to question an individual implicated in a criminal investigation involving ongoing events may be justifiable under the *Mann* criteria, but under those same criteria imprisonment in a police cruiser while handcuffed for some indefinite period while an officer carries out other aspects of a criminal investigation could not be justified. The police cannot use investigative detention as an excuse for holding suspects while the police search for evidence that might justify the arrest of the suspect. Nor does investigative detention mean that the police can detain suspects indefinitely while they carry out their investigation.

[39] Constable Greenwood was justified in briefly detaining the appellant to question him about his knowledge of the handgun. However, after that brief detention, he was required to release the appellant unless he had grounds to

arrest him. There is no suggestion that he had the grounds to arrest the appellant. Constable Greenwood was therefore required to release the appellant. Instead, he imprisoned the appellant while he pursued his investigation elsewhere. In doing so, he completely disregarded the appellant's right to liberty and rendered him vulnerable to further police investigation. The appellant's right to be free from arbitrary detention was infringed by Constable Greenwood when he confined the appellant in the back of Constable McDonnell's cruiser.

The Section 10(b) Breaches

[40] Section 10(b) of the *Charter* reads:

> Everyone has the right on arrest or detention…
>
> (b) to retain and instruct counsel without delay and to be informed of that right;

[41] Section 10(b) creates the right to retain and instruct counsel without delay, and the right to be informed of that right without delay. If a detained person, having been advised of his right to counsel, chooses to exercise that right, the police must provide the detained person with a reasonable opportunity to exercise that right and must refrain from eliciting incriminatory evidence from the detained person until he has had a reasonable opportunity to consult with counsel: *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 38; *Grant*, at para. 58; *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at paras. 20-26.

[42] The rights created by s. 10(b) attach immediately upon detention, subject to legitimate concerns for officer or public safety: *Suberu*, at para. 42. On the facts of this case, the appellant should have been told by Constable Greenwood that he had a right to speak to his lawyer no later than immediately after Constable Greenwood had handcuffed the appellant and conducted the pat down search while standing on the street. The appellant should have been asked if he wanted to speak with counsel and, if he did, Constable Greenwood should have afforded him that opportunity without delay.

[43] In *Suberu*, at para. 40, the court described the rationale for the rights guaranteed by s. 10(b):

> [T]he purpose of s. 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees to regain their liberty, and guard against the risk of involuntary self-incrimination.

[44] The purpose animating s. 10(b) applied with full force in this case. The appellant was under the control of the police. He was effectively imprisoned from the moment he was handcuffed and placed in the cruiser. Constable Greenwood took advantage of that control to subject the appellant to an unconstitutional detention and two intrusive unconstitutional searches, both of which yielded incriminatory evidence. The appellant was in serious legal jeopardy. He needed

legal advice. More importantly, he was constitutionally entitled to it. The conduct of the police, and specifically Constable Greenwood, ensured that he would not receive that advice until after the police were done with the appellant and had the evidence they needed to convict him. The appellant's rights under s. 10(b) were breached.

[45] Crown counsel did not attempt to defend the police failure to comply with virtually all of their obligations under s. 10(b) of the *Charter*. He did, however, in an attempt to mitigate those failures, suggest that had Constable Greenwood given the appellant his right to counsel when he was initially detained, and had the appellant exercised his right to counsel, it would have resulted in a lengthier detention of the appellant as Constable Greenwood would have been required to take the appellant back to the police station so that he could exercise his right to counsel.

[46] Counsel did not press this submission. It is clearly based on speculation. There is no way of knowing what Constable Greenwood might have done had he complied with s. 10(b) when he first detained the appellant and had the appellant demanded the opportunity to consult with counsel. The evidence of Constable McDonnell suggests that Constable Greenwood intended all along to hold the appellant while he assisted in the search for the handgun and to take the appellant back to the police station unless the handgun had been located. If this

was Constable Greenwood's plan, it left no room for a trip back to the station to allow the appellant to consult with counsel.

[47] There is no need to address this hypothetical. It does, however, highlight the tension between the relatively brief duration of investigative detentions and the exercise of the right to counsel by persons being held under investigative detention. The submission assumes that the police can significantly prolong the detention if necessary to afford the detained person an opportunity to speak with counsel. I do not necessarily accept that submission. It may be that, if a police officer can afford a detained person an opportunity to exercise his s. 10(b) rights only by significantly prolonging an investigative detention, the police officer must release the detained person rather than breach s. 9 of the *Charter*. I leave that question for another case.

The Section 8 Breaches

[48] Section 8 declares:

> Everyone has the right to be secure against unreasonable search or seizure.

[49] Section 8, like s. 9, is reflective of an individual's right to be left alone by the state absent justification for state interference with the individual. The constitutional protection in s. 8 rests on the fundamental belief that privacy, in its various manifestations, is an essential precondition to individual liberty and security of the person. State intrusion upon privacy must be reasonable; that is,

any law authorizing an intrusion must be reasonable and the manner in which the intrusion is effected must be reasonable: *R. v. Fearon,* 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 12; *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408, at para. 30.

[50] In the modern world, notions of privacy are evolving and becoming more nuanced and complex in the face of relentless technological change: see e.g. *R. v. Spencer,* 2014 SCC 43, [2014] 2 S.C.R. 212. The privacy interests engaged in this case involve no subtleties or nuances. The initial pat down search of the appellant, the second more intrusive search of his person beside the cruiser, and the very intrusive strip search at the police station all struck at the core of the appellant's most basic right to personal privacy.

[51] The pat down search of the appellant on the street at the time of his initial detention was, in my view, reasonable and justified as an incident of his investigative detention. In *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, the court recognized that the police could, in some circumstances, conduct safety searches as an incident of the exercise of their duty to investigate crime and protect the public. Two passages from *MacDonald* are helpful:

> [40] I am convinced that the duty of the police officers to protect life and safety may justify the power to conduct a safety search in certain circumstances. At the very least where a search is reasonably necessary to eliminate an imminent threat to the safety of the public

> or the police, the police should have the power to conduct the search.
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> …
>
> [44] This common law power to conduct searches for safety purposes is the reasonably lawful authority for the search carried out by Sgt. Boyd. The power was engaged because Sgt. Boyd had reasonable grounds to believe that there was an imminent threat to the safety of the public or the police and that the search was necessary in order to eliminate that threat.

[52] As discussed by the dissent in *MacDonald*, the majority's reference to "reasonable" grounds could be confusing. However, in the circumstances of this case, there is no doubt that Constable Greenwood had sufficient grounds to believe there was an imminent threat to his safety should he confront and detain the appellant on the street for investigative purposes. That reasonable belief of an imminent threat could, in my view, be based on the reasonable suspicion that the appellant had the handgun. A cursory pat down search of the appellant was justified to eliminate that concern.

[53] Constable Greenwood also attempted to justify the second more thorough search of the appellant as a safety search. This search occurred when the appellant had been unlawfully detained for 30 minutes. Setting aside the trial judge's understandable doubts about the veracity of this part of Constable Greenwood's evidence, and assuming the second search was a "safety" search, it was nonetheless unlawful and unconstitutional.

[54] The police power to conduct a "safety" search as described in *MacDonald* assumes that the officer is engaged in the execution of their lawful duty: *MacDonald*, at paras. 33-35. Constable Greenwood was not engaged in any lawful exercise of his duty when he confined the appellant in Constable McDonnell's cruiser. The appellant was unlawfully detained and remained so when Constable Greenwood returned from the bar and decided to conduct the second search. The further intrusion upon the appellant's privacy by way of the second search of his person could not be justified by Constable Greenwood on the grounds that he reasonably suspected that his safety was in jeopardy. If there was any danger to Constable Greenwood when he conducted the second search, it flowed directly from his unlawful detention of the appellant and not from anything Constable Greenwood was doing in the lawful exercise of his duty. In my view, the police cannot, through unlawful conduct, create a circumstance said to justify a safety search of an individual.

[55] I would draw an analogy between searches that are said to be lawful as an incident of an arrest and safety searches which are said to be lawful as an incident of a lawful investigative detention. If the arrest is unlawful, the search incidental to the arrest is unlawful and contrary to s. 8: see *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 27; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 91; *R. v. Loewen*, 2011 SCC 21, [2011] 2 S.C.R. 167, at para. 3. Similarly, if an investigative detention is unlawful, a safety search said to be justified on the

basis of that detention must be unlawful and contrary to s. 8. The second search of the appellant's person infringed his rights under s. 8 of the *Charter*.

[56] *Aucoin* is also instructive. In that case, the officer chose to place the accused in the rear of his police cruiser and to conduct a pat down search as a prelude to doing so. Moldaver J. explained that in the circumstances, detention in the cruiser was unlawful rendering the pat down search preliminary to that detention unlawful and contrary to s. 8. He explained, at para. 44:

> Because detaining the appellant in the back of the cruiser would have been an unlawful detention – given there were other reasonable means by which Constable Burke could have addressed his concern that the appellant might flee – it cannot constitute the requisite basis to support a warrantless search. Therefore the pat-down search was unreasonable within the meaning of s. 8…. [Citations omitted.]

[57] In the present case, the detention of the appellant in the back of Constable McDonnell's cruiser was unlawful and on the reasoning in *Aucoin* cannot provide a basis for the warrantless search of the appellant's person.

[58] At trial, it was not argued that the strip search itself was unreasonable and contrary to s. 8. It was argued that the manner in which the strip search was conducted violated s. 8. The trial judge concluded that the manner in which the strip search was conducted unreasonably compromised the appellant's physical integrity and his personal privacy. The former occurred when Constable Greenwood gratuitously assaulted the appellant during the efforts to subdue him.

The latter occurred when the police failed to take reasonable steps to minimize the inherently humiliating and degrading impact on the appellant of the strip search. On the authority of *Golden*, at paras. 99-103, the manner in which the police strip searched the appellant violated his rights under s. 8 of the *Charter*.

The Section 24(2) Analysis

[59] Section 24(2) directs that where evidence is obtained in a manner that infringes a right guaranteed by the *Charter*, "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

[60] Section 24(2) recognizes that the admission of constitutionally tainted evidence and the use of that evidence to convict persons may bring the administration of justice into disrepute. As observed in *Grant*, at paras. 67-71, s. 24(2) is premised on the assumption that there must be a long-term negative impact on the administration of justice if criminal courts routinely accept and use evidence gathered in violation of the legal rights enshrined in the *Charter*. At the same time, however, s. 24(2) accepts that the exclusion of evidence can also bring the administration of justice into disrepute. In *Grant*, the Supreme Court provided the framework for differentiating between those cases in which the exclusion of the evidence would promote the proper administration of justice and

those cases in which the proper administration of justice would be further harmed by the exclusion of otherwise relevant and probative evidence.

[61] After *Grant*, at paras. 71-86, the admissibility of evidence under s. 24(2) is approached by examining:

- the seriousness of the *Charter*-infringing state conduct;
- the impact of the breach on the *Charter*-protected interests of the accused; and
- society's interest in an adjudication on the merits.

[62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case: see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34.

[63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: see e.g. *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v.*

Jones, 2011 ONCA 632, 107 O.R. (3d) 241, at paras. 75-103; *Aucoin*, at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: see e.g. *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 81-89; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 98-112. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: see e.g. *Grant*, at para. 140.

[64] The three inquiries identified in *Grant* require both fact-finding and the weighing of various, often competing interests. Appellate review of either task on a correctness standard is neither practical, nor beneficial to the overall administration of justice. A trial judge's decision to admit or exclude evidence under s. 24(2) is entitled to deference on appeal, absent an error in principle, palpable and overriding factual error, or an unreasonable determination: see *Grant*, at paras. 86, 127; *Côté*, at para. 44; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 82; *Jones*, at para. 79; *R. v. Ansari*, 2015 ONCA 575, 330 C.C.C. (3d) 105, at para. 72.

The Trial Judge's Errors

[65] As outlined above, at para. 4, I think the trial judge made three errors in law in his s. 24(2) analysis. Those errors require appellate intervention and a re-appraisal of the admissibility of the evidence.

[66] The trial judge's first error appears in the course of his brief consideration of the seriousness of the police misconduct. He observed:

> I am encouraged by the text book detention and search conducted by the other officers. Cst Greenwood's infringing conduct was not typical of a systemic problem in the Ottawa Police Force.

[67] The trial judge's description of the investigative detentions conducted by the other officers is accurate. Their conduct does not, however, mitigate the seriousness of the unconstitutional detention and searches of the appellant, much less the denial of the appellant's right to counsel. Systemic or institutional abuse of constitutional rights may be an aggravating factor rendering police misconduct more serious. The absence of evidence of systemic non-compliance with *Charter* requirements by the police is not a mitigating factor. The police are expected to comply with the law, especially the *Charter*. As observed in *Harrison*, at para. 25:

> [W]hile evidence of a systemic problem can properly aggravate the seriousness of the breach and weigh in favour of exclusion, the absence of such a problem is hardly a mitigating factor.

[68] Apart altogether from the trial judge's improper characterization of the absence of institutional failings as a mitigating factor in the s. 24(2) analysis, I agree with counsel for the appellant that the evidence shows that the failings of the Ottawa Police Service went beyond the actions of Constable Greenwood. When Constable Greenwood finally got the appellant to the police station, his superiors did not express any concern about the appellant's s. 10(b) rights or, more specifically, any concern about whether the appellant had been given the opportunity to speak to his lawyer before undergoing the proposed strip search. Similarly, whoever was in charge of the strip search, and it was not Constable Greenwood, seemed unconcerned about the excessive use of force by Constable Greenwood and the failure to minimize the intrusiveness and humiliation inherent in that kind of search.

[69] Constable Greenwood's conduct is properly front and centre in the s. 24(2) analysis. He was, however, not alone in his disregard for the appellant's constitutional rights.

[70] The trial judge's second error is found in his failure to consider the impact of the *Charter* breaches on the appellant's *Charter*-protected interests. Although the trial judge identified the impact of the breaches on the appellant's interests as a relevant consideration under s. 24(2), he made no further mention of that factor in his reasons. The trial judge proceeded directly from a very brief consideration of the seriousness of the police misconduct to a somewhat longer, but still brief,

consideration of the seriousness of the drug crimes with which the appellant was charged. At no point did he address the impact of the breaches on the appellant's liberty, privacy, or security of the person.

[71] A trial judge's failure to expressly refer to an applicable legal principle, or a factor relevant to a decision, does not necessarily mean that the judge did not consider that principle or factor. In this case, however, I am satisfied that the trial judge's failure to refer to the impact of the breaches on the appellant's *Charter*-protected rights does demonstrate a failure to consider that impact. The trial judge never identified the *Charter*-protected interests affected by the multiple *Charter* breaches. He made no assessment of the extent to which those interests were compromised by the specific breaches. In my view, the trial judge failed entirely to consider the impact of the breaches on the appellant in assessing whether the admission of the evidence would bring the administration of justice into disrepute.

[72] The third error made by the trial judge in his s. 24(2) analysis arises from his treatment of the seriousness of the drug charges as a factor strongly favouring the admissibility of the evidence. The trial judge's description of the seriousness of the drug charges dominated his brief s. 24(2) analysis. I think it is fair to say that it was his assessment of the seriousness of the charges, and nothing else, that led the trial judge to admit the evidence, despite his finding of significant police misconduct.

[73] The seriousness of the charges to which the challenged evidence is relevant, does not speak for or against exclusion of the evidence, but rather can "cut both ways": *Grant*, at para. 84. On the one hand, if the evidence at stake is reliable and important to the Crown's case, the seriousness of the charge can be said to enhance society's interests in an adjudication on the merits. On the other hand, society's concerns that police misconduct not appear to be condoned by the courts, and that individual rights be taken seriously, come to the forefront when the consequences to those whose rights have been infringed are particularly serious: see *Grant*, at para. 84; *R. v. Dhillon*, 2010 ONCA 582, 260 C.C.C. (3d) 53, at para. 60.

[74] The trial judge allowed his view of the seriousness of the drug charges to effectively overwhelm the other factors relevant to the s. 24(2) inquiry. As observed in *Harrison*, at para. 40, *Charter* protections apply to everyone, including persons charged with serious criminal offences. I adopt the observation of Frankel J.A. in *Ahmed-Kadir*, at para. 111:

> The importance of maintaining respect for *Charter* rights and ensuring that the justice system remains above reproach outweighs the collective cost of his acquittal. To admit the handgun in the face of the breaches that occurred here would send the message that when the charges are serious, individual rights count for little. [Emphasis added.]

Should the Evidence have been Excluded?

[75] I have no doubt that on a proper s. 24(2) analysis the evidence of the drugs seized from the appellant must be excluded. The seriousness of the police misconduct and the strong negative impact of the breaches on the appellant's *Charter*-protected interests combine to make out an overwhelming case for exclusion. While society no doubt has a significant interest in a trial on the merits and the evidence in issue is both reliable and crucial, society's immediate interest in an adjudication of the merits of this particular case must yield to the more important long-term interests served by excluding the evidence in this case.

[76] The police misconduct falls at the very serious end of the continuum described in *Grant*, at para. 74. Constable Greenwood and, to a lesser extent, other officers, totally disregarded the appellant's rights under ss. 8, 9 and 10(b) of the *Charter*. Constable Greenwood seemed wholly unaware of, or worse yet, wholly unconcerned with, the limits of his powers to detain and search individuals. He was equally oblivious to his obligations under s. 10(b). Constable Greenwood's conduct during the search at the police station goes beyond a wilful disregard of the appellant's rights. On the trial judge's findings, he deliberately restrained the appellant in a manner intended to gratuitously inflict pain on the appellant.

[77] I can find little, if anything, that might be said to mitigate the police misconduct. This was not a situation in which the police conduct slipped barely over the constitutional line, or in which legal uncertainty could reasonably be said to have blurred that line. Finally, there is nothing by way of extenuating circumstances that might offer some excuse for the police disregard of the appellant's constitutional rights.

[78] Courts, as representatives of the community, cannot be seen to condone the blatant disregard of the appellant's rights that occurred in this case. The only way the court can effectively distance itself from that conduct is by excluding the evidentiary fruits of that conduct.

[79] The serious negative impact of the *Charter* breaches on the appellant's *Charter*-protected interests also compels exclusion. None of the *Charter* breaches could be characterized as technical or minor. The appellant's arbitrary detention effectively negated his personal liberty. Not only was he in imprisoned, but he was imprisoned in a manner that left him vulnerable to further police misconduct. The police took advantage of the appellant's arbitrary detention to unlawfully search the appellant. That conduct led directly to the discovery of incriminating evidence. The strong causal connection between the denial of the appellant's liberty, the unconstitutional search of his person, and the subsequent obtaining of the incriminating evidence speaks to the profound impact of the breaches on the appellant's *Charter*-protected interests.

[80] The appellant's interests protected by s. 10(b) of the *Charter* were completely compromised by the police conduct. Detained persons are constitutionally entitled to know of their right to that advice, and to a reasonable opportunity to access that advice. Access to legal advice while detained is fundamental to individual liberty and personal autonomy in a society governed under the rule of law.

[81] The appellant was not made aware of his right to speak to counsel until after Constable Greenwood had searched him and found drugs. Even then, the appellant was not given an opportunity to exercise his right to counsel, despite expressing his desire to do so. Instead, he was subjected to a second unconstitutional search which discovered yet further evidence. Had the appellant been afforded an opportunity to speak to counsel before the strip search, it may well be that the strip search would have been unnecessary.

[82] The significant negative impact of the unconstitutional strip search on the appellant's privacy rights is obvious. The police misconduct was highly intrusive and struck at the core of even the most restrictive notion of personal privacy.

[83] In summary, the police conduct demonstrates a blatant disregard for the appellant's constitutional rights. That conduct all but negated several of the appellant's *Charter*-protected interests. The court can only adequately disassociate the justice system from the police misconduct and reinforce the

community's commitment to individual rights protected by the *Charter* by excluding the evidence. In doing so, the court acquits a person who is clearly guilty of serious criminal offences. In my view, the long-term interests of the due administration of justice require the exclusion of the evidence. This unpalatable result is a direct product of the manner in which the police chose to conduct themselves.

The Appropriate Order

[84] The exclusion of the drugs means that the appellant must be acquitted on the two counts of possession of cocaine for the purpose of trafficking (counts 1 and 2). There is an argument that one of the breach of recognizance charges (being in an establishment that served alcohol contrary to the appellant's bail conditions) does not depend on evidence gathered after the various *Charter* violations. I do not propose to make that distinction. Had Constable Greenwood complied with the *Charter*, the appellant would have been on his way after a brief detention. He would never have been identified to the police and none of the charges would have been laid.

[85] I would enter acquittals on all counts.

Released: "DD" "MAY 13 2016"

"Doherty J.A."
"I agree Janet Simmons J.A."
"I agree K. van Rensburg J.A."