NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Cooper***, 2005 NSCA 47

Date: 20050317
Docket: CAC 232964
Registry: Halifax

Between:

Michael Anthony Cooper

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s): Oland, Freeman & Fichaud, JJ.A.

Appeal Heard: February 7, 2005, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Fichaud, J.A.; Freeman and Oland, JJ.A. concurring.

Counsel: Donald C. Murray, Q.C., for the appellant
Dana Giovannetti, Q.C., for the respondent

Reasons for judgment:

[1] After Mr. Cooper's detention by police, a search of his person found a weapon, and Mr. Cooper then gave a false name to the officer. Mr. Cooper was convicted by Provincial Court Judge Alanna Murphy of possessing a weapon for a purpose dangerous to the public peace contrary to s. 88 of the *Criminal Code*, and public mischief by giving a false name to mislead police contrary to s. 140(1)(b) of the *Code*. Mr. Cooper says that his detention was arbitrary, contrary to s. 9 of the

Charter, and the search which located the weapon violated s. 8 of the *Charter*. He submits that, under s. 24(2), the trial judge should have excluded evidence concerning the knife and his misleading statement.

1. Background

[2] At about 2:00 a.m. on November 27, 2003, Constables Chediac and McCormack of the Halifax Regional Police were on general patrol in a marked police vehicle on Wyse Road in Dartmouth. They noticed a Grand Am travelling in the opposite direction on Wyse Road. They decided to conduct a traffic stop to check compliance with the *Motor Vehicle Act*. Constable McCormack, the driver, performed a three point turn to follow the Grand Am, and activated the police vehicle lights and siren.

[3] The trial judge related the testimony of Constable Chediac that the Grand Am:

> . . . accelerated, did a hard left on Howe Street with a lot of body roll and then another hard left onto Windmill Road, and then a hard left onto Wallace Street, which is a dead end street . . .

Howe and Wallace Streets are residential. The trial judge noted:

> . . . the driver and the passenger on Wallace Street, opened the doors to the vehicle before the vehicle came to a complete stop and then ran out of the vehicle, leaving the vehicle on Wallace Street, in different directions.

The trial judge found:

> . . . the driver and the passenger both opened the doors while the vehicle was still travelling at approximately 20 kilometers an hour.

[4] Constable McCormack pursued the driver. Constable Chediac pursued the passenger, Mr. Cooper.

[5] Constable Chediac had no idea why the individuals were fleeing from the police. Constable Chediac yelled clear commands for Mr. Cooper to stop. Mr. Cooper ignored these commands. Constable Chediac took Mr. Cooper's flight and failure to comply as resistance to an officer's lawful execution of duty to conduct a traffic stop.

[6] Constable Chediac chased after Mr. Cooper through several backyards. He located Mr. Cooper crouching in a corner of an apartment building's lobby, between the outer and security doors.

[7] Constable Chediac handcuffed Mr. Cooper. He walked Mr. Cooper back to the Wyse Road area where there were other police officers. Constable Chediac did this for safety reasons because he was alone, and wished to be in the company of other officers before dealing further with Mr. Cooper.

[8] When he had returned with Mr. Cooper to the proximity of other officers, Constable Chediac arrested Mr. Cooper for resisting and obstruction, then performed a protective safety search of Mr. Cooper. Constable Chediac felt an

object in Mr. Cooper's pant leg pocket, which turned out to be a butterfly knife, a prohibited weapon under the *Criminal Code*.

[9] Constable Chediac asked Mr. Cooper's name. Mr. Cooper identified himself as William Buffett. At the police station it was later determined that his real name was Michael Cooper, and that William Buffett was an alias which he had used on other occasions.

[10] Mr. Cooper was charged with:

> (a) misleading a police officer by giving a false name contrary to s. 140(1)(b) of the Code;
>
> (b) resisting an officer in the lawful execution of his duty contrary to s. 129(a) of the Code;
>
> (c) possessing a weapon dangerous to the public peace contrary to s. 88 of the Code;
>
> (d) possessing a prohibited weapon contrary to s. 91(2) of the Code;
>
> (e) possessing a prohibited weapon knowing that he did not hold a license contrary to s. 92(2) of the Code.

[11] The trial proceeded before Judge Murphy of the Provincial Court. The defence applied for a ruling that (1) Mr. Cooper was detained contrary to s. 9 of the *Charter* (arbitrary detention), (2) the search which discovered the butterfly knife violated s. 8 of the *Charter* (unreasonable search and seizure), and (3) the knife and

subsequent misidentification statement be excluded under s. 24(2) because admission would bring the administration of justice into disrepute. After hearing the testimony of Constable Chediac and another officer who booked prisoners, Judge Murphy ruled that there was no breach of either ss. 8 or 9. I will discuss her reasons later. So no evidence was excluded under s. 24(2).

[12] Judge Murphy convicted Mr. Cooper of possessing a weapon dangerous to the public peace contrary to s. 88 of the *Code*, and stayed the other two weapons charges under the *Kienapple* principle. Judge Murphy acquitted Mr. Cooper of resisting under s. 129(a) and convicted Mr. Cooper of public mischief by misleading an officer under s. 140 (1)(b) of the *Code*.

2. Trial Judge's Reasons for the Charter Rulings

[13] The trial judge referred extensively to *R. v. Mann*, [2004] 3 S.C.R. 59, where Justice Iacobucci for the majority discussed the meaning of arbitrary detention in s. 9 of the *Charter*. The trial judge also considered the principles stated by the Ontario Court of Appeal in *R. v. Simpson* (1993), 12 O.R. (3d) 182 and the English Court of Appeal in *R. v. Waterfield*, [1963] 3 All E.R. 659, which were adopted and reformulated in *Mann*. From these authorities, the trial judge summarized the following principles:

> Ultimately, the Court concluded in *Mann* that the evolution from the *Waterfield* through the *Simpson* articulable cause requirement from the *Waterfield* test resulted in investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances

> in forming the officers[’] suspicion that there is a clear nexus between an individual to be detained and a recent or ongoing 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 be further assessed against all the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duties, the liberty interfered with, the nature and extent of the interference in order to meet that second prong of the *Waterfield* test.
>
> While it is recognized that the police have certain powers, they do not have carte blanche in which they exercise these powers, including the power to detain people. Detentions cannot, according to *Mann*, be based on a hunch nor can they be in actual fact arrests.

[14] The trial judge found:

> I accept the evidence of Cst. Chediac that the intention of the police was to initiate a traffic stop on the vehicle.

[15] She stated that the police officers noticed the driver and passenger were young, that this was 2:00 a.m., and:

> . . . the driving age in this province is 16 and there is a graduated licensing scheme in Nova Scotia which does not permit new drivers to drive at certain times, after midnight.

She then concluded that the officers were "within their rights to conduct a traffic stop." She continued:

> . . . In fact, no traffic stop was ever done. The driver of the vehicle clearly took evasive action to elude the police once the police had made the indication that they were turning around their vehicle.

[16] The trial judge found that, though Constable Chediac did not have reasonable grounds to arrest Mr. Cooper, he had a reasonable basis to detain Mr. Cooper under the first prong of the *Waterfield* test:

> The actions of the passenger, Mr. Cooper, in my view, provided Cst. Chediac reasonable grounds to detain, especially the actions which followed. Mr. Cooper bailed out of the vehicle, fled into residential backyards and into a parking lot and then into the foyer of a security apartment to which he could not gain entrance then secreted himself in a nook of that foyer which could not be seen by the officer.
>
> I am satisfied that the police officer was acting reasonably when he took up the chase of Mr. Cooper and would have been ignoring his duty to prevent crime and protect property if he had let Mr. Cooper run into the backyards and into the apartment building without pursing him.

[17] The second prong of the *Waterfield* test, restated by Justice Iacobucci in **Mann**, requires that the court consider whether the extent of the detention was proportionate to the requirements of the police officer's duties. The trial judge ruled that Mr. Cooper's detention was proportionate:

> The behaviour of the accused, in my view, merited his being handcuffed and being brought to the area where there were other police officers to do the protective search.
>
> His previous attempt to evade the police merit that precautions be taken to prevent further flight, and that includes the search for weapons while the officer placed him in the car.
> . . .
>
> In this case, based on the evidence that I have before me, I conclude that Cst. Chediac was acting within the general scope of his duty in pursuing and detaining Mr. Cooper, and that the initial detention of Mr. Cooper was proportionate in restraint to the circumstances that were being encountered.
>
> The use of handcuffs, the removal of Mr. Cooper from the apartment building and the officer's safety search of Mr. Cooper in my view were all justifiable in the circumstances.
>
> In my view, the interference of Mr. Cooper's liberty and the nature and the extent of the interference survives assessment in all the circumstances of that particular morning.

[18] The trial judge concluded that Mr. Cooper's detention did not breach s. 9 of the *Charter*.

[19] In *Mann*, Justice Iacobucci stated that a reasonably performed pat down search of a detained person, for the purpose of officer safety, generally will not violate s. 8 of the *Charter*. On this point, the trial judge stated:

> . . . But I conclude, based on the principles set out in *Mann* in relation to the tentative individuals, that the detention of Mr. Cooper by Cst. Chediac was not arbitrary and that the protective search, which revealed the butterfly knife, was justified, and that after

> location of the knife in question, the police then had the right to learn his identity. Any false information that Mr. Cooper may have given the police in that regard should be admissible in support of the charges against him.

[20] Accordingly, there was no *Charter* breach which could trigger the exclusionary remedy in s. 24(2). The evidence was admitted.

3. Issues

[21] Mr. Cooper appeals under s. 675(1)(a) of the *Code*. His grounds of appeal are that the trial judge erred in law by finding that there was a basis for an investigative detention of a passenger in the vehicle, and by failing to rule that Mr. Cooper's search and detention violated ss. 8 and 9 of the *Charter*. Mr. Cooper requests that this court quash his convictions and remit the matter to the trial judge, who would then consider whether evidence should be excluded under s. 24(2). Mr. Cooper raises no issue under s. 10 of the *Charter*.

4. Standard of Review

[22] The trial judge's factual findings are entitled to deference, absent manifest or palpable and overriding error. The correctness standard governs the trial judge's application of legal principles: *R. v. P.S.B.*, 2004 NSCA 25 at ¶ 37; *R. v. Johnson*, 2004 NSCA 91 at ¶ 12; *R. v. Calderon* (2004), 188 C.C.C. (3d) 481 (O.C.A.), at ¶ 71.

5. Was the Detention Arbitrary Under Section 9?

[23] Whether a detention is arbitrary under s. 9 requires careful attention to the principles in *Mann*.

(a) The *Mann* Principles

[24] Justice Iacobucci prefaced his comments by stating (¶ 15) that "absent a law to the contrary, individuals are free to do as they please" whereas police "may act only to the extent that they are empowered to do so by law." But (¶ 16):

> . . . Given their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively and flexibly to a diversity of encounters experienced daily on the front lines of policing.

From that perspective, and recognizing the court's limited role in matters better left to legislators, Justice Iacobucci outlined the analytical parameters:

> 17. . . . It is for that very reason that I do not believe it appropriate for this Court to recognize a general power of detention for investigative purposes. . . . Here, our duty is to lay down the common law governing police powers of investigative detention in the particular context of this case.
>
> 18. . . . The recognition of a limited police power of investigative detention marks another step in that measured development.

[25] During the analysis it is important to recall this point of reference. There is no general power of investigative detention. There is, at common law, a limited police power of investigative detention. The principles in *Mann* describe those limitations.

[26] The detention's status usually is litigated in the context of s. 9 of the *Charter*. Justice Iacobucci (¶ 20) noted that a lawful detention at common law is not arbitrary under s. 9.

[27] Justice Iacobucci (¶ 24) referred to the two-pronged test from *Waterfield*, which is the basis of the common law limited police power of investigative detention:

> . . . In those situations, courts must first consider whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or at common law. If this threshold is met, the analysis continues to consider secondly whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

[28] After considering the case law which has reviewed the *Waterfield* test, Justice Iacobucci concluded:

> 34 The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. ***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, in order to meet the second prong of the Waterfield test.

35 Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.

. . .

45 To summarize, as discussed above, ***police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner.*** In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case. [emphasis added]

[29] Under the first prong of the test, the "front-end" determination is as of the moment of detention. Later acquired information, such as the knowledge that Mr. Cooper possessed a prohibited weapon, is immaterial. Whether a police officer detained on reasonable grounds, or just a "hunch", is assessed based on the

information known to the officer when he detained the individual. Justice Iacobucci defined “detention” as follows:

> 19 "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

[30] Still under the first prong, the reasonable grounds to justify a detention need not attain the threshold required for an arrest under s. 495 (1) of the *Code*: *Mann*, at ¶ 27; *R. v. Greaves*, [2004] 189 C.C.C. (3d) 305 (B.C.C.A.), at ¶ 41. I will discuss this point in more detail later (¶ 43), respecting the application of the test to Mr. Cooper.

[31] The second prong of *Waterfield*, as restated in *Mann*, is a proportionality test measuring the circumstances of the detention against the practical requirements of the officer’s performance of his duties.

[32] Several appeal courts since *Mann* have applied these principles: *Calderon*, at ¶ 69; *Greaves* at paragraphs 31-37, 41-42, 47-49, 62-64, 82-84; *R. v. Nguyen*, 2004 BCCA 546, at ¶ 14; *R. v. Byfield*, [2005] O.J. No. 228 (C.A.) at ¶ 20-21.

[33] I have referred earlier to the trial judge’s legal synopsis. In my view, the trial judge referred to the appropriate principles from *Mann*. She committed no error of

law in that respect. It remains to consider whether the trial judge properly applied those principles to Mr. Cooper's circumstances.

(b) First Prong of Test:
Reasonable Grounds to Detain -
Clear Nexus to an Offence

[34] The trial judge found that the police officer's intent was to conduct a traffic stop. This was supported by Constable Chediac's testimony:

> Q. . . . What were you and Cst. McCormack going to do?
>
> A. Basically to initiate a traffic stop. Pull the vehicle over, check for compliance such as valid driver's licence, registration, proof of insurance. And check parties - you know, usually take names, check them for warrants and CPIC, that type of thing. Just a general compliance and a road check.

The trial judge committed no reviewable error with that finding.

[35] The trial judge then noted that the occupants of the vehicle were young, operating a vehicle after the midnight curfew for new drivers and concluded that the officers were "within their rights to conduct a traffic stop". The curfew refers to s. 70A(5)(c) of the *Motor Vehicle Act* R.S.N.S. 1989 c. 293:

> **Newly licensed driver**

70A . . .

(5) A person issued a driver's license as a newly licensed driver in accordance with subsection (1) may drive a motor vehicle upon the highways subject to the following conditions:

. . .

(c) between midnight and five o'clock in the morning only when accompanied by a person who

(i) is an experienced driver,

(ii) holds a valid driver's license of class 1, 2, 3, 4 or 5 as set out in regulations made pursuant to Section 66 and the driver's license class is the required class for the vehicle being operated, and

(iii) is seated in a front seating position.

[36] On this point, I note that the police officers did not require objective justification to conduct a traffic stop. A genuine traffic stop which is authorized by law to check matters such as sobriety, licensing which includes curfew conditions of license, ownership, insurance and mechanical fitness of the vehicle, though it may be arbitrary, is justified under s. 1 of the *Charter*. A detention loses its justification if the police conduct surpasses these "traffic stop" objectives to become a pretext for criminal investigation. *R. v. Hufsky*, [1988] 1 S.C.R. 621, at pp. 636-37; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, at pp. 1288-9; *R. v. Mellenthin***,** [1992] 3 S.C.R. 615, at pp. 622, 624; *R. v. MacLennan* (1995), 97 C.C.C. (3d) 69 (N.S.C.A.), at ¶ 46; *Byfield* at ¶ 15-19.

[37] Traffic stops are authorized by statute in Nova Scotia. The police power focuses principally on s. 83(1) of the *Motor Vehicle Act*. The leading authority is *MacLennan,* where this court stated (pp. 77-79):

> . . . It is also necessary to comply with the provincial motor vehicle legislation. Relevant provisions of the Nova Scotia *Motor Vehicle Act* R.S.N.S. 1989 c. 293 must be examined. It was first necessary for Constable Byrne to bring the respondent's motor vehicle to a stop. Her authority to do so is found in s. 83(1) (formerly s. 74(1)) which provides:
>
> 83(1) It shall be an offence for any person to refuse or fail to comply with any order, signal or direction of any peace officer.
>
> When this is read in the context of the common law authority of police to control traffic on the highways, other provisions of the *Motor Vehicle Act* and provisions of the *Criminal Code,* and note is taken of long standing customary practices, I am left in no doubt that s. 83(1) authorizes peace officers to require vehicles on the highway to come to a stop in response to an appropriate order, signal or direction.
>
> Comparable provisions in other provinces have been held not merely to impose a duty upon drivers but to provide peace officers with a corresponding authority. Section 119 of the *Alberta Highway Traffic Act* [R.S.A. 1980, c. H-7] was considered by the Supreme Court of Canada in *R. v. Wilson***,** [1990] 1 S.C.R. 1291, where it was argued that it did not grant statutory authority for random stops. The court did not accept that contention.
>
> . . .
>
> In my view the authority of peace officers in Nova Scotia under ss. 83(1), 78(2) and s. 18 of the *Motor Vehicle Act* is equivalent to that of peace officers in Alberta under s. 119 of

the *Highway Traffic Act*. Therefore I consider *Wilson* to be binding authority in Nova Scotia.

[38] In this case, the officers activated their police lights and siren to signal the Grand Am to stop. Instead of stopping, the Grand Am accelerated and made hard rolling turns, in what the trial judge found was an attempt to evade the traffic stop. Constable Chediac testified that his chase and eventual detention of Mr. Cooper were the result of the resistance to the attempted traffic stop.

[39] The behavior of the Grand Am gave the officers a reasonable basis to conclude that there had been an offence of resisting a traffic stop. This would be an offence under s.83(1) of the *Motor Vehicle Act*, as discussed in *MacLennan*. The officers, in attempting the traffic stop, were engaged in the execution of their duty under the *Motor Vehicle Act.* The resistance to the signalled traffic stop justified their conclusion that there had been an offence of resisting a peace officer in the execution of his duty contrary to s. 129(a) of the *Code*.

[40] Judge Murphy eventually acquitted Mr. Cooper of the charge under s. 129(a). I do not comment on that ruling which is not appealed. The issue argued on this appeal was whether there was a lawful detention under s. 9 of the *Charter*. I am saying only that the evasion of the signalled traffic stop gave to the officers a reasonable basis, under the front-end analysis and standard required for *detention*, to suspect that an offence of resisting a signalled traffic stop had occurred either under s. 83(1) of the *Motor Vehicle Act* or under s. 129(a) of the *Code*.

[41] The next question is whether there is a clear nexus or connection between Mr. Cooper and these reasonably suspected offences. Counsel for Mr. Cooper

submits that only the driver of the vehicle is implicated in the resistance to the traffic stop and that Mr. Cooper, a passenger, necessarily is unconnected to such a driving offence. Mr. Cooper's factum says:

> The only basis of interest in Michael Cooper established through the evidence of Cst. Chediac appears to be that Michael Cooper was not interested in having any interaction with Cst. Chediac. In the absence of an existing basis for investigative detention, grounds for such a detention cannot be established by the chase itself.

[42] Whether there are reasonable grounds for the detention is a "front end" assessment, as stated in *Mann*. The determination is made based on the information available to the police officer at the moment of detention. This is analogous to the principle that, whether there are reasonable grounds for an arrest is determined from the information available to the police officer at the time of the arrest, regardless of the later verdict on the charge for which the arrest was made: *R. v. Biron*, [1976] 2 S.C.R. 56 at pp. 72-77; *R. v. Anderson* (1996), 111 C.C.C. (3d) 540 (B.C.C.A.) at ¶ 43, leave to appeal denied 114 C.C.C. (3d) (b)(i) (S.C.C.). The detention occurs when the police officer stops the individual in a manner that involves significant physical or psychological restraint (*Mann*, ¶ 19). In my view, this occurred when Constable Chediac apprehended Mr. Cooper in the lobby of the apartment building after the chase. Whether there were reasonable grounds for this detention depends on the information known to Cst. Chediac at that moment. This includes the facts related to the flight after the signalled traffic stop. It is not limited, as suggested by Mr. Cooper's counsel, only to the facts known to the officers when they initiated the attempted traffic stop on Wyse Road.

[43] As discussed earlier (¶ 30), the standard of reasonableness for detention differs from the standard for an arrest under s. 495(1) of the *Code* (*Mann* ¶ 27; *Greaves* ¶ 41). The difference is reflected in the different wordings used in s. 495(1) for an arrest and the Supreme Court's formulation for detention. Section 495(1) states that there must be reasonable grounds that the accused "committed" or is "about to commit" an indictable offence or has been found "committing" a criminal offence. For detention, it is sufficient if there is a "clear nexus" or "connection" between the individual and the recent or current offence, or that the individual is "implicated in the criminal activity"(*Mann* ¶ 34 and 45). The different wordings recognise that the police power of detention, limited though it may be, is an investigative and not necessarily a charging power. The "nexus", "connection" or "implication" acknowledges that, at this investigatory stage, there may be a margin, spanned by the connection, between the individual and commission of the offence.

[44] Against that background, I consider Mr. Cooper's circumstances. He was a passenger. His foot did not press the accelerator, and his hands were not on the steering wheel to negotiate the hard rolling turns, while evading the police vehicle. If, while the operator of the Grand Am evaded the police and then ran away, Mr. Cooper had done nothing implicative, then there would have been no objective basis upon which an officer could infer reasonable grounds to detain Mr. Cooper. The objective indicators would be neutral. Any suspicion of Mr. Cooper's role would be a "hunch" and insufficient for detention: See *Calderon* at ¶ 71-74; *R. v. Perello*, 2005 SKCA 8, 2005 Carswell SASK. 77, at ¶ 29-39, 41; *Mann* at ¶ 35. But that is not what happened. Mr. Cooper did not act neutrally. The trial judge found that, while the Grand Am was travelling at 20 kilometers per hour, Mr.

Cooper opened the passenger door, “bailed out” and ran away through backyards to evade the police. Mr. Cooper’s conduct gave police an objective basis to suspect that Mr. Cooper was connected or implicated in what the police reasonably believed to be an offence of resisting a signalled traffic stop.

[45] During the curfew check on a traffic stop, the officer would be entitled to inquire whether the passenger satisfied the conditions of s. 70A(5)(c) quoted above. After Mr. Cooper took flight, Cst. Chediac instructed Mr. Cooper to stop. Mr. Cooper did not do so. Section 83(1) of the *Motor Vehicle Act* states that it is an offence for “any person” to fail to comply with an order of a peace officer respecting a traffic stop. This differs from s. 83(2), which states that it is an offence for the “driver of any vehicle” to disobey traffic signs. Section 83(1) does not expire just because the individual runs off the highway during the police chase.

[46] Although my reasons differ somewhat from those of the trial judge, I agree with her conclusion that Cst. Chediac had reasonable grounds to suspect that there was a clear nexus or connection between Mr. Cooper and a recent or ongoing offence under either s. 83(1) of the *Motor Vehicle Act* or s. 129(a) of the *Code*.

(c) Other Submissions on Reasonable

Grounds to Detain

[47] Counsel for Mr. Cooper submits that to infer grounds for detention only from the individual’s choice not to cooperate with police, contravenes the individual’s fundamental rights of silence and to decline self-incrimination. I disagree with the premise and conclusion of this submission, for the following reasons:

(a) In *Mann* Justice Iacobucci noted that the principles stated by Justice Doherty in *Simpson,* were adopted from American Fourth Amendment jurisprudence, in particular the "stop and frisk" doctrine in *Terry v. Ohio,* 392 U.S. 1 (1968). In a recent "*Terry* stop" case, *Illinois v. Wardlow*, 528 U.S. 119 (2000); 120 S.Ct. 673., Chief Justice Rehnquist for the majority stated (U.S. at pp. 124-5):

> Headlong flight - wherever it occurs - is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behaviour, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. See *United States v. Cortez*, 449 U.S. 411, 418 (1981). We conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.
>
> Such a holding is entirely consistent with our decision in *Florida v. Royer*, 460 U.S. 491 (1983), where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. *Id.*, at 498. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or a seizure". *Florida v. Bostick*, 501 U.S. 429, 437 (1991). But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

(b) To this I add that Mr. Cooper did not merely choose to remain silent, or even just run away from a police officer. He fled on an occasion where resistance to the police direction could reasonably be suspected as an offence, as discussed earlier. *Mann's* requirement that a detention be clearly connected to a recent or ongoing offence is a safeguard against the concern that detention may be a pretext for prying. This is not a case of police using a general power of detention to satisfy their curiosity. Mr. Cooper fled from a reasonably suspected offence, and his flight gave to the police an objective basis to suspect that he was connected to that offence.

(c) During the investigative detention the police may well ask questions, but the detainee need not answer. In *Mann* Justice Iacobucci (¶ 45) stated that the limited police power of investigative detention "does not impose an obligation on the detained individual to answer questions posed by the police". See also *R. v. Moore*, [1979] 1 S.C.R. 195; *R. v. Bonnycastle*, [1969] 4 C.C.C. 198 (B.C.C.A.), at 201; *Greaves*, at ¶ 47-49. The detention did not invade Mr. Cooper's rights to silence and to resist self-incrimination.

[48] From the other side of the "reasonable grounds" issue, the Crown submits that the police have a duty to prevent crime, and therefore were entitled to detain Mr. Cooper if the police had a reasonable basis to believe that Mr. Cooper might commit a crime in the future. The Crown says that *Mann's* reference to a clear nexus between the individual "and a recent or ongoing criminal offence" should be expanded to include a foreseeable future offence. I do not comment on this submission. Mr. Cooper's detention was based upon Cst. Chediac's reasonable

basis for suspecting a clear nexus or connection between Mr. Cooper and a recent or ongoing offence, namely failure to comply with a signalled traffic stop under s. 83(1), and resisting an officer in the execution of his duty to direct such a traffic stop under s. 129(a). It is unnecessary to consider whether, or the extent to which, the *Mann* principle may extend to permit detention when there is no recent or ongoing offence, but an anticipation that the individual might commit a future offence.

(d) Second Prong of Test:

Detention Proportionate

to Officer's Duty

[49] Under the second prong of the *Waterfield* test, as restated in *Mann*, it is necessary to determine whether the extent and circumstances of Mr. Cooper's detention were proportionate to the requirements of Cst. Chediac's performance of his police duties.

[50] The trial judge concluded that, when Cst. Chediac took up the chase and then detained Mr. Cooper, the officer was acting in the course of his duty. I agree. Cst. Chediac's police duties, at common law, included:

> ... the preservation of the peace, the prevention of crime, and the protection of life and property.

Dedman, at p. 32; *Mann*, at ¶ 26. Cst. Chediac's chase and detention of Mr. Cooper were within the scope of those duties.

[51] The trial judge concluded that the detention was proportionate to the requirements of Cst. Chediac's police duties. There is no error in that conclusion. In particular, I refer to the following findings of the trial judge. Mr. Cooper's conduct led Cst. Chediac to conclude that it would be prudent to handcuff Mr. Cooper, to prevent a repetition of his earlier flight. Cst. Chediac was alone with Mr. Cooper, in the foyer of the apartment building. Cst. Chediac reasonably believed that, for reasons of officer safety, it would be prudent to bring Mr. Cooper to the Wyse Road location where other police officers were present, before dealing further with Mr. Cooper.

(e) Conclusion - Section 9

[52] The trial judge committed no reviewable error in her conclusion that Mr. Cooper's detention did not violate s. 9 of the *Charter*.

6. Did the Search Violate Section 8 of the Charter?

[53] Mr. Cooper's conviction for possessing a weapon dangerous to the public peace is based on the seizure of the butterfly knife while he was searched shortly after his detention. Was the search unreasonable under s. 8?

[54] A warrantless search, without a valid consent, is unreasonable unless justified under the test stated in *R. v. Collins*, [1987] 1 S.C.R. 265. In *Mann*, Justice Iacobucci (¶ 36) stated:

> . . . Under *Collins*, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable (p. 278). The Crown bears the burden of demonstrating, on the balance of probabilities, that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner: *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, at para. 32.

[55] A warrantless search, without valid consent, may be authorized at common law as incidental either to a lawful arrest, or to a lawful detention: *Mann*, ¶ 37; *Calderon*, ¶ 78. The trial judge found that the police had no reasonable ground to arrest Mr. Cooper. The issue argued in this court was whether the search was incidental to what the trial judge determined, and I have agreed, was a lawful detention.

[56] In *Mann*, Justice Iacobucci stated:

> 40 The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances: see S. Coughlan, "*Search Based on Articulable Cause: Proceed with Caution or Full Stop?*" (2002), 2 C.R. (6th) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.
>
> . . .

> 43 The importance of ensuring officer safety has been recognized in *obiter* by this Court in *R. v. Mellenthin*, [1992] 3 S.C.R. 615. Police officers face any number of risks everyday in the carrying out of their policing function, and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible. As noted by L'Heureux-Dubé J. in *Cloutier, supra*, at p. 185, a frisk search is a "relatively non-intrusive procedure", the duration of which is "only a few seconds". Where an officer has reasonable grounds to believe that his or her safety is at risk, the officer may engage in a protective pat-down search of the detained individual. The search must be grounded in objectively discernible facts to prevent "fishing expeditions" on the basis of irrelevant or discriminatory factors.
>
> 45. . . . In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. . . .

[57] If the protective search for officer safety becomes an investigative search to locate evidence, the search will lose its lawful character as incidental to detention: eg. *Calderon*, at ¶ 78-85; *Byfield* at ¶ 21.

[58] In this case, the trial judge found that Cst. Chediac located the butterfly knife in Mr. Cooper's pocket while engaging in a genuine protective search. This finding is without manifest error and is supported by Cst. Chediac's testimony that he conducted a search "for officers' safety" reasons:

> Q. And what sort of things are you looking for when you conduct that kind of search?

A. Basically anything that's going to be a harm to ourselves before placing him in the back of a vehicle, guns, knives, needles, anything that, you know, could be a possible danger to put them in the back of the vehicle while we're driving or transporting them somewhere, for officers' safety.

Q. Alright. And what was the result of that search?

A. Upon the right hand side of the body along the pant leg in a pocket there was a silver knife, I guess they call it a butterfly style knife . . .

[59] The frisk of Mr. Cooper and seizure of a prohibited weapon clearly is within the police entitlement to "go about their work secure in the knowledge that risks are minimized to the greatest extent possible" (*Mann* ¶ 43). The trial judge committed no reviewable error in the conclusion that the protective search was justified. In my view, the three conditions of *Collins* for a valid warrantless search without consent, are satisfied. The trial judge committed no error in her ruling that the search was incidental to the lawful detention, and did not violate s. 8 of the *Charter*.

7. Conclusion

[60] The butterfly knife was seized after a detention and search which complied with ss. 8 and 9 of the *Charter*. There is no basis for excluding admission of the knife under s. 24 (2).

[61] After locating the knife, the officer asked Mr. Cooper his identity. Mr. Cooper gave a false identity, which led to the conviction of public mischief for misleading an officer. As there was no violation of Mr. Cooper's constitutional

rights under ss. 8 or 9 before he gave the false information, no issue arises respecting the exclusion of that evidence under s. 24(2) of the *Charter*.

[62] I would dismiss the appeal.

Fichaud, J.A.

Concurred in:

Freeman, J.A.

Oland, J.A.