NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Bradley, 2008 NSCA 57

Date: 20080624
Docket: CAC 289448
Registry: Halifax

Between:

Jason Bradley

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Roscoe, Bateman and Hamilton, J.J.A.
Appeal Heard:	June 10, 2008, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is dismissed per reasons for judgment of Roscoe, J.A.; Bateman and Hamilton, JJ.A. concurring.
Counsel:	Lonny Queripel, for the appellant Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] The appellant seeks leave to appeal and, if granted, appeals from a decision of Justice Robert W. Wright dismissing his summary conviction appeal from the decision of Judge William B. Digby of the Provincial Court. The trial judge convicted the appellant of breaching the terms of a recognizance contrary to s. 145(3) of the **Criminal Code**. The decision under appeal is reported as 2007 NSSC 327; [2007] N.S.J. No. 461 (Q.L.); 259 N.S.R. (2d) 283. The appeal is brought pursuant to s. 839(1) of the **Code**.

[2] The sole issue on appeal to this court is whether the summary conviction appeal court judge erred in upholding the conclusions of the trial judge that the appellant was neither detained, nor deprived of his rights pursuant to ss. 9 and 10 of the **Charter** when the vehicle in which he was a passenger was stopped by police.

Facts:

[3] The facts are set out succinctly by Justice Wright, mainly quoting from Judge Digby:

> [4] The material facts of the case are not contentious. Rather than paraphrase, I will recite the following passage from the transcript of the oral decision of the trial judge which contains most of the material facts:
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> > The facts are that Cst. Roache, a 20-year veteran of the Halifax Regional Police Service, was on patrol alone in his marked police car. He was in uniform. He spotted a vehicle which appeared to him to be rather heavily laden in the sense that it was very low in the rear end.
> >
> > He used his computer in his police vehicle to check the license plate of the vehicle. During this time, he was following the vehicle but without lights or siren on. The information he received was that this particular vehicle was owned by an individual whose license had been suspended. Cst. Roache then determined that he wished to stop the vehicle for two reasons.
> >
> > One, the low rear end of the vehicle suggested to him possibly a mechanical problem, so he wished to stop the vehicle to check to see whether it had been safety inspected. The second reason was, of course, to

check and make sure that the owner of the vehicle was not, in fact, driving the vehicle because the owner's license was then under suspension.

Cst. Roache followed the vehicle and stopped it approximately 50 meters before the intersection of the Herring Cove Road and the Purcells Cove Road, both the suspect vehicle and Cst. Roache then being inbound towards what is known as the Rotary. Cst. Roache pulled the vehicle over.

There were four occupants of the vehicle. All four occupants of the vehicle were unknown to Cst. Roache. Another officer arrived in a second police vehicle as backup to Cst. Roache. That officer, according to the evidence of Cst. Roache, assumed the usual position of being on the passenger side of the stopped vehicle. That officer's purpose in being there, according to their training, was to keep an eye on the occupants of the vehicle while Cst. Roache dealt with the driver.

Cst. Roache received license, insurance and registration from the driver of the vehicle. The driver of the vehicle was not the registered owner. The registered owner was, however, in the vehicle in the front passenger seat. The driver and the registered owner were cooperative with Cst. Roache.

Cst. Roache explained to the driver the reason for the stop. Cst. Roache determined that the vehicle had a valid safety inspection. He took no further steps to examine the mechanical state of the vehicle indicating he felt that he had no expertise to go any further with that issue.

While he was dealing with the driver, Mr. Bradley, who was in the driver's side rear seat, queried Cst. Roache as to why they were being stopped and what the problem was. There was no problem with the words used, but Cst. Roache felt that the tone indicated some belligerence and hostility on behalf of Mr. Bradley.

Cst. Roache, at that time, noted that Mr. Bradley had somewhat glassy eyes and Mr. Bradley's speech appeared to be somewhat slurred. That would be consistent with consumption of alcohol. Cst. Roache indicated at that point he could smell alcohol coming from the car. He was satisfied it was not an issue as far as the driver was concerned, that the driver was sober and cooperative.

Cst. Roache asked Mr. Bradley his name as well as asking or inquiring of the name of the fourth individual who was in the rear passenger side seat. He received a name from that individual. Mr. Bradley indicated that, he, Mr. Bradley, had not done anything wrong and so why should he have to give his name.

> Cst. Roache did not specifically address that query of Mr. Bradley with either a "yes" or "no" answer. He simply responded to Mr. Bradley saying, well, if you haven't done anything wrong, why won't you give me your name? Mr. Bradley then reluctantly gave Cst. Roache his name.
>
> Mr. Bradley testified that he did so reluctantly because he knew that he had a court order dealing with consumption of alcohol and he was aware that he had been drinking and he knew what the likely result would be of giving his name to the officer.

[5] Later in his decision, the trial judge interspersed further findings of fact which are set out as follows:

- The only target of the initial motor vehicle stop was the driver for the purpose of investigating possible motor vehicle infractions. Therefore, Cst. Roache had little, if any, interest in the other occupants of the motor vehicle when it was initially stopped. This was not a situation where the police were taking advantage of a traffic stop to question its occupants who might be suspects in relation to other criminal activity.

- Any contact between the two was initiated by the accused asking the question of Cst. Roache as to why they were being stopped and whether there was a problem. Cst. Roache indicated to the accused at that point that he was dealing only with his investigation of the driver.

- Once he was subsequently asked to give his name, the accused was never told by Cst. Roache that he was compelled to provide his name nor was he told that he could not leave the car or otherwise have his movements controlled.

- It was clear that Cst. Roache eventually wanted the name of all of the occupants of the vehicle so that he could run them on the Canadian Police Information Centre Data System ("CPIC").

[6] What Cst. Roache learned from his CPIC check, of course, was that the accused was then at large under a recognizance dated August 30, 2005 under which he was prohibited from possessing, using or consuming any alcoholic beverages. Once Cst. Roache confirmed that that recognizance was still in effect, he arrested the accused for breach of his recognizance and read him his Charter rights and police caution.

Decision under appeal:

[4] After considering the law relating to detention as formulated in **R v. Therens**, [1985] 1 S.C.R. 613, **R. v. Mann**, [2004] 3 S.C.R. 59 and **R. v. Lewis**, 2007 NSCA 2, Justice Wright noted that the application of the principles depends on the facts and all the surrounding circumstances including whether the person engaged by the police was a pedestrian, driver or passenger in a motor vehicle. He continued:

> [26] In the present case, it was obviously a key finding of the trial judge that Cst. Roache made the traffic stop purely for purposes of investigating two possible infractions of the **Motor Vehicle Act**. Indeed, Cst. Roache concerned himself only with the driver until the accused himself initiated a conversation with Cst. Roache in a hostile tone of voice that led to the police officer asking for his name, primarily for purposes of running a CPIC check on his status but also for purposes of assessing officer safety in the situation. The trial judge accepted the latter as a reasonable basis for Cst. Roache to have asked the accused for his name in the existing circumstances.
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> [27] The trial judge also noted that when asked his name, the accused indicated some awareness that he did not have to give his name, given the way he responded initially to the police officer as recited above.
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> ...
>
> [31] Although I recognize that there are decisions from other provinces to the contrary, it is my opinion that the accused was not in detention merely by reason of being a passenger of a vehicle that was the subject of a lawful traffic stop. The distinction is mainly this. In most of the cases going the other way, the traffic stop was made with an alternate purpose of investigating some other form of criminal activity (see, for example, **R. v. Simpson** (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) and the earlier decision of this court in **R. v. Kane,** [1998] N.S.J. No. 553). Here it was not, on the evidence accepted by the trial judge. Rather, the traffic stop was made initially purely for purposes of investigating two possible infractions of the **Motor Vehicle Act**.
>
> [32] I do not accept the blanket proposition that once the driver of a motor vehicle is detained under a lawful traffic stop, all of its passengers are likewise detained automatically within the meaning of the Charter. In the case of the driver, the detention is made in the context of the police officer carrying out his statutory duties and powers under the **Motor Vehicle Act**. It is the driver who is being investigated. The presence of a passenger, on the other hand, is simply

> incidental or happenstance in situations where a traffic stop is made solely for purposes of investigating possible **Motor Vehicle Act** infractions.
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> [33] As the trial judge said in his decision in the present case, the reason for the traffic stop here had nothing to do with the passengers where Cst. Roach had no reason to suspect that any offence had been committed by any of the occupants of the vehicle. The trial judge expressly stated that he was satisfied on the evidence that the only target of the motor vehicle stop was the driver for possible motor vehicle infractions.
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> ...
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> [39] In the present case, the accused did testify at his voir dire and in his rather disjointed testimony, maintained that he felt that he had to answer the officer's request for his identification and had no other choice but to do so. It appears that that evidence was not accepted by the trial judge, at least not to the point where he was prepared to conclude that the accused was then under any significant physical or psychological restraint as a form of detention.

[5] After further analysis of **Lewis**, *supra* and **R. v. Harris**, [2007] O.J. No. 3185 (C.A.), Justice Wright concluded:

> [45] The approach thus taken by the Ontario Court of Appeal [in **Harris**] underscores the uncertainty of the law in this area. In my view, no absolute rule can be laid down as to whether a passenger in a motor vehicle is detained within the meaning of the Charter as soon as the vehicle in which he is an occupant is pulled over for purposes of a traffic stop. The outcome of each case must depend on a fact driven inquiry.
>
> [46] To come full circle, the trial judge in the present case engaged in a fact specific examination of all the surrounding circumstances of the traffic stop. Essentially, he concluded that the accused was not under any significant physical or psychological restraint, without demand or direction, nor did he fall under any of the other types of detention articulated in **Therens**. In my judgment, the trial judge made no palpable and overriding error in reaching that conclusion, or in axiomatically concluding that the accused's s. 10 Charter rights were not engaged.
>
> [47] Even if I am wrong in making that judgment, I would otherwise adopt the reasoning of the Ontario Court of Appeal in **Harris** in finding that the accused

> was not arbitrarily detained in any event when asked for identification and was not denied the right to counsel. ...

Issue:

[6] There is one issue on the appeal: whether the summary conviction appeal court judge erred in law in upholding the decision of the trial judge that the appellant was not detained, and that therefore the appellant's rights under ss. 9 and 10 of the **Charter of Rights and Freedoms** were not violated.

[7] Essentially, the appellant submits that he was detained when the police officer asked his name, that the detention was arbitrary within the meaning of s. 9 of the **Charter**, and furthermore the police officer failed to advise him of his right to counsel pursuant to s. 10 (b) of the **Charter**. Therefore the evidence of his name and the information received by the police officer on CPIC as a result of having the appellant's name should be excluded under s. 24(2) of the **Charter**. The appellant does not claim a breach of either ss. 7 or 8 of the **Charter**.

Standard of Review:

[8] The test to be applied by this court on a summary conviction appeal was set out by this court in **R. v. Cunningham**, [1995] N.S.J. No. 313; (1995), 143 N.S.R. (2d) 149, at page 152:

> [11] An appeal of the decision of a summary conviction appeal judge, pursuant to s. 839 of the **Criminal Code**, requires leave of the court and is limited to questions of law.
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> [12] Such an appeal is not a second appeal against the judgment at trial, but rather an appeal against the decision of the judge of the summary conviction appeal court. (**R. v. Emery** (1981), 61 C.C.C. (2d) 84 (B.C. C.A.)) The error of law required to ground jurisdiction in the Court of Appeal is that of the summary conviction appeal judge, not the trial judge.

See **R. v. Croft**, 2003 NSCA 109, ¶ 8 as well.

Analysis:

[9] The analysis of whether there was a detention must begin with **Therens**, *supra*, the pertinent parts of which were summarized in **Lewis**, as:

> [20] In **R. v. Therens**, [1985] 1 S.C.R. 613, Justice LeDain, dissenting on another issue, defined detention under the Charter as follows:
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> > 49 In addition to the case of deprivation of liberty by physical constraint, there is in my opinion a detention within s. 10 of the **Charter** when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.
> >
> > 50 In **Chromiak** this Court held that detention connotes "some form of compulsory constraint". There can be no doubt that there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action that amounts to a detention within the meaning of s. 10 of the **Charter**. The issue, as I see it, is whether that compulsion need be of a physical character, or whether it may also be a compulsion of a psychological or mental nature which inhibits the will as effectively as the application, or threat of application, of physical force. The issue is whether a person who is the subject of a demand or direction by a police officer or other agent of the state may reasonably regard himself or herself as free to refuse to comply.
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> > ...
> >
> > 53 Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected

> without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

To similar effect: **R. v. Thomsen**, [1988] 1 S.C.R. 640 at p. 649 and **R. v Feeney**, [1997] 2 S.C.R. 13 at ¶ 56 per Sopinka, J. for the majority.

> [21] Justice LeDain described three types of detention: (1) deprivation of liberty by physical constraint; (2) assumption by an officer of the state of control over a person's movement by a demand or direction connoting a significant legal consequence and impeding access to counsel; (3) psychological compulsion when, following a demand or direction by an officer, the individual acquiesces because he reasonably believes that he has no choice but to submit. The common denominator is that there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action.

[10] Here, as noted, the trial judge found as a fact that the appellant was not under any physical or psychological restraint as a form of detention and that no direction or demand was given to the appellant by the police officer. With respect to the reasons for the stop, Judge Digby said:

> These reasons for stopping the vehicle have nothing to do with the passengers except circumstances of this particularly relates indirectly with one passenger who happened to be the registered owner. If the officer goes to the car, he is obligated to advise the driver of the vehicle the reasons for the stop, but that is the reason for stopping a motor vehicle.
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> This is not a situation where the police are taking advantage of and believed or perceived infraction of the **Motor Vehicle Act** to stop and query people who are suspects in relation to other criminal activity. For example, it is not a situation where a vehicle is driven with a light out and, yet, the police are suspicious of the occupants, so they take advantage of that stop fully intending to investigate all occupants of the vehicle of criminal activity.
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> In that case an argument can be made, and has been made, successfully that all of the occupants of the vehicle are being detained because, in fact, they are suspected of criminal activity which the police are investigating at that point. I am satisfied on the evidence that that is not the case here, that the only target, if you will, of the motor vehicle stop was the driver for possible motor vehicle infractions.

> Therefore Constable Roache had little, if any, interest in the other occupants of the motor vehicle. They just happened to be there by chance. Granted, they are delayed in their progress to their destination by the stop, but that is really no more significant than delays that are occurred by officers directing traffic or directing vehicles on other routes because certain roads are closed or around events. That is just one of those facts of life that you possibly encounter when you become a passenger or driver in a motor vehicle.

[11] The appellant submits that the summary conviction appeal court judge erred by considering the reasons the police officer stopped the vehicle in determining whether there was a detention, by failing to follow cases such as **R. v. Simpson** (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) and **R. v. Pinto**, [2003] O.J. No. 5172 (Ont. Sup. Ct. J.) and by relying on cases involving pedestrians, such as **Lewis** and **Mann**.

[12] The appellant is correct that generally the reasons the police have for stopping a vehicle are more relevant to the issue of whether there was an arbitrary detention, as in **Simpson** for example, than to the question of whether there is a detention. However, I am not persuaded that it is necessarily an error of law in the case of the passenger, to consider the reasons for and the manner in which the stop is handled, as part of the overall circumstances that must be weighed when deciding whether there is a psychological or physical restraint.

[13] In **R. v. Grant**, [2006] O.J. No. 2179 (C.A.)(Q.L.)(leave to appeal granted: [2007] S.C.C.A. No. 99), Justice Laskin emphasizes that whether a police-citizen encounter amounts to a detention is a fact-specific and context-sensitive inquiry and that the reasons for stopping a citizen for questioning is one of the relevant factors. (¶ 15 - 29)

[14] There is further support for this reasoning in **H. (C.R.)** (2003), 174 C.C.C. (3d) 67 (Man. C.A.) where Steel, J.A. concluded:

> [67] I agree with the court in the **Powell** case [**R. v. Powell** (2000), 35 C.R. (5th) 89 (Ont. C.J.)] that the relatively simple facts of this case raise "very sharply the conflicting values at stake between individual freedom of movement in the community and proactive policing for the prevention of crime" (at para. 2). The answer lies, however, not with inferring a presumption of compulsion into the relations between police and citizens, but rather, with taking police purpose and motive into account as a factor when determining whether there is sufficient

> evidence from which a court can infer compulsion. Police purpose and motive can impact on an individual's reasonable expectations.
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> [68] Thus, while the legal standard set out in **Therens** for psychological detention remains good law, as can be seen from a review of the jurisprudence, the application of the facts to that law is a complex balancing exercise. There are no bright lines. As Gonthier J. expressed it in **R. v. Schmautz**, [1990] 1 S.C.R. 398 (at p. 415):
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> > The concept of detention has evolved since the **Charter** came into force and it is not always easy to determine in given circumstances whether and when it legally occurs. From the mere investigation to which a person wilfully collaborates to the custodial arrest of that person, there is a wide spectrum encompassing the varying degrees of legal jeopardies in which the state can put individuals; in some cases, the precise moment when detention arises is by no means easy to ascertain.
>
> [69] The overall situation must be evaluated having regard to what is said and done, in what manner, in what location and for what purpose.
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> [70] There can be a range of circumstances in which a person is detained, and in certain circumstances, even a brief interference with a person's liberty by asking someone to identify themselves or to produce identification may constitute a detention. However, in the circumstances of this case, I have concluded that, on the balance of probabilities, a detention has not been established. In particular, the accused has not shown that he had a reasonable belief that he had no option but to comply.

[15] Although in **Simpson** and **Pinto**, motor vehicle passengers were found to be detained in circumstances similar to that in this case, in **Harris**, *supra*, the Ontario Court of Appeal declined to rule that the passenger was detained when the vehicle was stopped. Instead, the case was determined on the basis of the fact that the occupants were detained because the officer told them to keep their hands where he could see them.

[16] Based on **Harris**, I see no error in the conclusion of Justice Wright, that it is not an absolute rule that every passenger in a motor vehicle is automatically detained as soon as the vehicle is pulled over by police.

[17] Furthermore, based on the following explanation by Iacobucci, J. in **Mann**, it cannot be said that every person stopped by police and asked to identify himself is detained:

> 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. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so.

[18] The appellant argues that it is wrong to apply **Mann**, a pedestrian case, to this case where the issue involves a passenger in a motor vehicle and cites **R. v. H.(C.R.)**, *supra*, in support of his position. **H. (C.R.**) which pre-dates **Mann**, involved a late night spot check by police of a group of young people, one of whom was walking with a beer bottle. As in this case, their names were obtained and checked on CPIC, which led to a charge of breach of probation due to a curfew violation. The court of appeal upheld the decision of the summary conviction appeal court judge who determined that there was no violation of s. 8 of the **Charter**. Steel, J.A. for the court agreed that on the facts there was no proof of a deprivation of liberty of the young person. She distinguished the line of cases following **R. v. Mellenthin**, [1992] 3 S.C.R. 615 which determined that a driver of a motor vehicle was detained as soon as he was stopped by police, saying that control of the movements of a pedestrian is not assumed by police. The court did not state that passengers in motor vehicles were automatically detained when the vehicle was stopped by police or that cases dealing with pedestrians were not applicable to passengers.

[19] I disagree with the appellant's contention that the description of detention in **Mann** should be limited to application only in pedestrian cases. Although **Mann** involved a pedestrian, there is no factual differentiation drawn or suggestion that its application should be limited to police stops of pedestrians. The issue for both pedestrians and passengers in motor vehicles is whether there has been a "significant physical or psychological restraint".

[20] In this case the trial judge heard the testimony of the police officer and the appellant and concluded that on the facts of this case there had been no direction or demand given by the police officer and that the appellant was not under any significant physical or psychological restraint and therefore not detained when he was asked to state his name. The summary conviction appeal court judge was not persuaded that the trial judge committed palpable or overriding error in reaching that conclusion. My review of the record satisfies me that Justice Wright's decision discloses no error of law.

[21] Since there was no detention it is unnecessary to address the question of whether there was an arbitrary detention, or a violation of the appellant's rights pursuant to ss. 9 and 10 of the **Charter**. Therefore there is no need to discuss the s. 24(2) issue.

[22] Accordingly I would grant leave to appeal but dismiss the appeal.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.