IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: R. v. D.S., 2007 NSPC 41

Date: 20070524
Docket: 1655203, 1655204,
1655213, 1655214
Registry: Kentville

Between:

Her Majesty the Queen

v.

D.S.

Her Majesty the Queen

v.

M.R.

Restriction on publication

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Judge:	The Honourable Judge Alan T. Tufts
Heard:	January 1, 2007; February 15, 2007, in Kentville, Nova Scotia
Charge:	5(2) CDSA 5(1) CDSA
Counsel:	David Greener, for the Crown Chris Manning, for the defendant M.R. Stephen Mattson, Q.C., for the defendant D.S.

By the Court (orally):

[1] Before I begin I would like to thank counsel for their very thorough and helpful submissions. Mr. R. and Mr. S., are both charged under s. 5(1) and 5(2) of the **CDSA**.

[2] Each of these young persons challenged the admission into evidence of items seized after they were arrested on the night in question. Each argues that he was detained by the police and was not advised of his right to counsel. Furthermore both argue that the detention was arbitrary. It is argued that the young persons' s. 10(b) and s. 9 **Charter** rights were violated and the resulting evidence should be excluded under s. 24(2).

[3] The primary issue is whether these young persons were “detained”. I will review the facts: two police officers from the Kentville Police Service—one in full uniform, the other not—travelled to nearby New Minas to get something to eat. When they arrived at the restaurant the lineup was too long so they decided to drive around to a nearby car lot. As they entered the car lot they noticed a vehicle leaving. It was approximately 11 p.m. As they travelled around the car dealership building at the rear and headed to the east end of the building they noticed two young men facing each other or standing together as if they were exchanging money. One in fact had bills or currency in his hand. The officers found this suspicious and as a result they approached the two young men, slightly built and aged fourteen and fifteen, respectively, at the time.

[4] The officers initially asked, “What's going on?” as they were curious and suspicious of the young persons presence in the car parking lot late at night. They asked the young men where they were going. Each gave a different answer, although a reasonable response, for each. The young men seemed nervous. This heightened the officers' suspicions. Constable MacNeil, the driver, then exited the vehicle. The officers then approached and confronted the young men with their suspicions. They suggested various reasons to explain their suspicious behaviour. They suggested the young men were involved in breaking and entering, breaking into cars, doing “ATM deposits” or conducting a drug transaction.

[5] Constable MacNeil testified that although he did not intend to “invoke a response” he did expect that Mr. R. would talk to him and “at least maybe try to straighten out what they were doing”. Both officers testified that they did not

detain the young men up to this point and each agreed that the young men could have left, although Constable Sehl said that he would have chased these boys if they ran away to see why they were running as this would have further "tweaked" his suspicions.

[6] Constable MacNeil said that after he confronted Mr. R. with these "suspicions" Mr. R. responded, "We just sold marihuana to a guy in the car that just left the parking lot". He said Mr. R., "just came out and said it". Constable MacNeil insisted that Mr. R. used the words "marihuana" rather than the street slang such as "dope" or "weed". Mr. R. was then arrested as was Mr. S., the other boy. Each was searched incident to arrest and a number of small baggies of marihuana were seized from each boy.

[7] Mr. R. testified at the **Charter** *voir dire*. Mr. S. did not. Mr. R. denied ever telling Constable MacNeil that he sold drugs. His sequence of events were different from that of the officers. He had the arrest occurring much sooner after the police exited the vehicle and almost immediately upon that event.

[8] There is some resolution of the factual issues necessary. The applicants both agree that the burden is upon the young persons— in this case on a preponderance of evidence— to establish the factual basis for the **Charter** violation. To that end the burden rests with the applicant regarding whether the impugned statement allegedly made by Mr. R. was <u>not</u> uttered. Clearly if those words were not stated the arrest would be without any basis and the **Charter** violation clear.

[9] The initial factual issue is whether the applicants have established those words were not uttered. In my opinion Mr. R's testimony about the events and in particular his assertion he never uttered the impugned phrase or words to a similar effect is not credible. I say this because I found his explanation for counting the paper currency in his pocket, the $60.00 in all in five, ten and twenty dollars bills to see if he had enough money to buy snacks simply unbelievable. His testimony in this regard made no sense and seemed concocted. His credibility as to the remainder of his testimony was accordingly weakened substantially.

[10] I also found his reason for leaving his home that evening unusual given the late hour; although at the time that he was encountered by the police, I do accept that the two boys were travelling through the well-lit car lot to the residential area behind the dealership property. I do agree with the defence that the statement

referred to by Constable MacNeil did seem very unusual given that it came unsolicited and used the word “marihuana” rather than the more familiar street slang. However, I am not prepared to find that the words or words to a similar effect were not said.

[11] I will continue my analysis on the basis that the police did have proper grounds to effect an arrest and that these grounds came from statements made by young Mr. R. The focus of my analysis is therefore on the period of time up to that point and whether the young men were detained at any time prior to the grounds to arrest being present.

[12] The following is my analysis. Essentially the issue is: was there a detention? I will just review the law and then apply that to the facts before the Court today.

[13] Not every delay, stop or circumstance where a person is “kept waiting” amounts to a detention for the purposes of s. 10(b) or s. 9. Constitutional rights are not engaged unless there is a significant physical or psychological restraint, see **R. v. Mann** [2004] 3 SCR 59.

[14] LeDain, J. in **R. v. Therens** [1985] 1 SCR 613 sets out the constitutional framework for the elements of detention under the **Charter**. The same test applies under s. 9 and s. 10(b), see **R. v. Hufsky** [2005] OJ No. 3759 (C.A.). Justice LeDain describes three situations amounting to detention, the third being psychological detention, the argued situation here. At para. 57 he sets out his analysis:

> 57. 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. . . . 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. ... if the person concerns submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

[15] Tarnopolsky, J.A. in **R. v. Bazinet** [1986] OJ No. 187 (C.A.) found that LeDain's psychological restraint, compulsion or coercion is predicated on two requirements:

> 1. A demand or a direction in response to which,
> 2. The person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

Other courts have characterized this as three elements, the third being the reasonable belief, see **R. v. K.B** [2004] M.J. No. 239, (C.A.) and **R. v. Grant** [2006] O.J. No. 2179, (C.A.), which I will discuss later.

[16] A “demand”, Justice Tarnopolsky found, means a “strong, authoritative request” and that “direction” connotes “authoritative command similar to the word demand”. Regarding the second requirement, there needs to be evidence of a submission or acquiescence to a deprivation of liberty and a reasonable belief that there was no choice to do so–see. **R. v. Hawkins** [1993] 2 SCR 157, on the need for evidence of a sense of compulsion.

[17] It is clear the police may approach any person and ask questions, **R. v. Calder** [2004] O.J. No. 451, **R. v. Esposito** 24 CCC (3d) 88 (C.A.) and **R. v. Grafe** 36 CCC (3d) 267. Compulsion cannot be inferred simply from the police presence, the fact the police are asking questions, the authoritative nature of the police duty or the inherent power imbalance between police and citizens, see **R. v. C.R.H.** [2003] M.J. No. 90 (C.A.). There is no presumption of “demand” or “direction” because police are asking questions, see **R. v. Lewis** 2007 NSCA 2, para. 23. There must be evidence of compulsion and submission or evidence of facts from which an inference to that effect can be drawn, see **R. v. K.B. ,** *supra* and **R. v. C.R.H. ,** *supra***.**

[18] The jurisprudence is replete with cases touching on the issue of detention and whether it is present in different circumstances. Whether a given situation amounts to detention is an issue of mixed law and fact and is ultimately an objective standard, see **R. v. Grant**, *supra*. Even if the accused does not testify

inferences can be drawn to find the required constitutional elements necessary for detention, see **R. v. Lewis**, *supra*, para. 26. In **R. v. Moran** 36 CCC (3d) 225 at pp. 258-9 Martin, J.A. sets out seven factors (I will not list them here), relevant to the existence of detention, noting that the presence of any one or combination of factors or their absence would not be determinative.

[19] The police belief, suspicion or motives in my opinion is not determinative, although it may be a factor in determining the nature or context of the interaction between the police and the accused. However the primary focus is the actual conduct or behaviour of the police which needs to be examined and the objective belief of the accused flowing from that conduct. Police approaching and talking to a young person, entering his name into CPIC for example, where the tone of the conversation was casual and the police do not exit the vehicle is not a detention, for example, in **R. v. C.R.H.,** *supra***.** Where the police attend at a person's home and make enquiries about an ongoing fraud investigation this does not amount to detention where there was no evidence that the accused felt constrained nor was any demand made of him, see **R. v. Esposito**, 24 CCC (3d) 88 (Ont. C.A.). See also **R. v. VanWyk** [1999] O.J. No. 3515, **R. v. Nicholas** [2004] O.J. No. 725 (C.A.) and **R. v. Groat** [2006] BCJ No. 109 (C.A.) to a similar effect. Casual conversation which takes only a few minutes which involves no giving of directions is not a detention, see **R. v. Pangman** [2000] M.J. No. 203 (Q.B.) However , where the police are looking for specific evidence of a specific crime from a suspect during an investigation for the purposes of obtaining incriminating statements, questions can amount to a detention, see **R. v. Dolynchuk** [2004] M.J. No. 135 (C.A.).

[20] In **R. v. Rajaratnam** [2006] A.J. No. 1373 (C.A.), the accused was stopped at a bus depot, asked to identify himself and to produce his ticket. He was asked if he had drugs or large amounts of money. The accused was told he was free to go at any time and that he was not in any trouble. Notwithstanding the accused testified he felt detained, the Alberta Court of Appeal upheld the trial judge's ruling that there was no detention.

[21] The Crown relies on **R. v. Lewis**, *supra*. There the RCMPolice Criminal Interdiction Team encountered the accused at a train station, similar to the previous case. The police were careful to ask the accused, “if you minded answering some questions” and the accused agreed. He was told he was not under arrest and had

done nothing wrong. Similar words were used in the previous case. The Nova Scotia Court of Appeal upheld the trial judge's ruling that there was no physical constraint, no demand or direction, or no reasonable perception of compulsion and declined to draw an inference that there was any psychological detention. The accused was asked for identification which confirmed he had a drug record, while the police dog sniffed his luggage and detected a narcotic.

[22] In my opinion these last two cases can be distinguished. In both instances the police were clear in advising the suspect that he was free to go and was not under arrest and had done nothing wrong. The police were obviously mindful of the constitutional boundaries. This was not surprising given the very organized operation which was being conducted. Those elements are not present here. Accordingly, while the principles set out in the cases apply the factual context is not comparable.

[23] There are two cases from the Ontario Court of Appeal and the Manitoba Court of Appeal, regrettably not cited by counsel, which are remarkably similar to this case, but which have some distinguishing features which highlight the critical or determinative areas around which I believe the case before us today turns.

[24] In **R.v. Grant**,[2006] O.J. No. 2179 (C.A.), the facts are succinctly described in para. 2:

> Two plainclothes officers patrolling the Greenwood and Danforth area of Toronto noticed the appellant walk past them in a manner they considered suspicious. They asked a uniformed officer in the area to have a “chat” with him. The uniformed officer stood in the appellant's path, told him to keep his hands in front of him and began questioning him. The two plainclothes officers arrived and stood behind the other officer. Initially the appellant was asked only for identification but then the questioning turned to whether he had been arrested and whether he had anything on him that he shouldn't. In response to the latter question the appellant said that he had a small amount of marihuana. . .

As an aside the accused used the word “weed” which was included in a later reference to the transcript,

> . . . and then, after being asked if he had anything else he admitted that he had a loaded revolver. The police arrested the appellant, seized the revolver from his waist pouch and charged him with five firearms offences.

[25] The Ontario Court of Appeal acknowledged that this was a difficult case. It found that there was a detention, holding that the three requirement of **Therens** could be inferred from the evidence, notwithstanding that the accused, an eighteen-year-old, did not testify. The Court pointed to the actions of the police in blocking the accused's movements, the directions regarding his hands, their questions inviting inculpatory answers, the accused's youth and length of encounter as factors which allowed those inferences to be drawn. The Court of Appeal overruled the trial judge's contrary ruling but it refused to exclude the evidence of drugs and the firearm.

[26] In **R. v. K.B.**, [2004] M.J. No 239, the Manitoba Court of Appeal considered a case where a sixteen-year-old was walking down the street in the early a.m. with friends, one of which was known to the police, apparently a gang member. They were approached by the police and asked to provide their names and dates of birth. When the police observed a bulge in the young person's pocket he was searched. The Court of Appeal upheld the trial judge's ruling that there was a detention. The young person testified and stated he felt he had no choice about staying or answering the questions. At para. 19 the Court of Appeal says:

> When two uniformed officers in a marked police car call a sixteen-year-old over to their car, ask for his name and birthdate and enter the data in the computer and do not tell him he is free to walk away without complying it is reasonable to conclude as the judge did that such a request is tantamount to a demand or direction.

and further at para. 22, the Court says,

> Being asked by a police officer for a birthdate would in my opinion reasonably result in a considerable degree of apprehension on the part of any person, perhaps particularly a youth out early in the morning, similar to being asked for identification, which in some circumstances could reasonably be regarded as a demand or direction.

[27] Here, in the case at bar, I would not categorize the officers' assertions about the possible criminal activities which these boys may be engaged in as “mere statements of the officers' belief” as the Crown submits. Constable MacNeil was in

effect accusing these boys of doing something criminal. While he did not specifically ask for a response it was his intention to promote some kind of explanation. It is possible to find that these questions in this context amounted to a police direction or demand. Clearly Mr. R. at least “complied” and provided some incriminating statement—although I am not prepared to find that he did not make the statement alleged—which did result in serious legal consequences.

[28] Whether Mr. R. had a reasonable belief that he had no choice but to comply in these circumstances is more difficult to assess. In **K.B**. the accused testified and specifically said he did not believe he had a choice about staying or answering questions. In **Grant**, while the accused did not testify, the particular circumstances of that case: the blocking the pathway each time the accused moved, asking him to keep his hands in front of him and questions about ever being arrested, amounted to demands being made by the police. Furthermore, the accused's nervousness, his age and the length of the encounter suggested that he did not feel he had a choice but to answer. Justice Laskin of the Ontario Court of Appeal in that case found that to be a difficult and close case.

[29] This is also a difficult and close case, however I believe I am not able to make or draw the inferences particularly that Mr. R. felt that he had no choice but to provide some incriminating statements in these circumstances. I say this because:

1. He never testified that he ever felt that he was in that position.
2. While I was not prepared to accept his evidence on the details of the encounter with the police, he did not acknowledge that the police ever accused him after Constable MacNeil got out of the car. He said he was arrested almost immediately upon the police exiting the police car.
3. Given there is little evidence on the nature or atmosphere created by the police assertion from the young person's point of view or accusations that were being made by the police again from the young persons' point of view, I cannot conclude that this amounted to compulsion or make an inference to that effect.

It may in some circumstances even when the accused does not testify, be possible to draw inferences to find the essential elements of a psychological detention or to make a finding to that effect where the accused testifies directly to those requirements. However, when the accused does testify and does not testify that he felt psychologically detained or describe circumstances which the Court accepts,

which would constitute such detention it is difficult to infer that he did. In this case I am not prepared to make that inference.

[30] The more direct demand or command by the police evidenced in the **Grant** case are not present here and the direct evidence of the accused that he felt he had no choice but to cooperate with the police as in the **K.B.** case is also absent here. Given that the burden rests on the young persons to establish that they were detained they have not, in my opinion, met that burden. There has been no detention established such that s. 10 (b) or s. 9 is engaged. There is no **Charter** violation. The application is dismissed.

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ALAN T. TUFTS, J.P.C.