

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R .v. Anderson*, 2019 NSPC 29

Date: 20190617

Docket: 8281102; 8281103; 8281104; 8281105; 8281106; 8281107; 8281108

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Rakeem Rayshon Anderson

LIBRARY HEADING

Judge: The Honourable Chief Judge Pamela S. Williams

Heard: May 13, 2019 in Dartmouth, Nova Scotia

Written Decision June 17, 2019

Delivered Orally:

Subject: Seizure of a loaded handgun at a random checkpoint following an investigative detention and search for officer safety concerns

Summary: The driver, stopped at a random checkpoint at night, is subject to an investigative detention as he is suspected of being a revoked or suspended driver. Following a police data query, police confirm he is not only a revoked driver, but has also been involved in serious violent offenses. For officer safety concerns, the driver is searched upon exiting the vehicle. A loaded handgun is located in the driver's waistband.

Issues: (1) Are there grounds for an investigative detention?

(2) Is the search lawful?

Result:

There are grounds for an investigative detention and the search, for officer safety reasons, is lawful. If mistaken, the evidence, a loaded handgun, is nonetheless admitted into evidence.

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Decision	June 17, 2019
Charge:	Section 86(1) of the Criminal Code of Canada Section 90(1) of the Criminal Code of Canada Section 91(1) of the Criminal Code of Canada Section 95(2)(a) of the Criminal Code of Canada Section 92(1) of the Criminal Code of Canada Section 94(1) of the Criminal Code of Canada Section 86(2) of the Criminal Code of Canada
Counsel:	Gayle Karding, for the Crown Attorney Drew Rogers, for the Defence

By the Court:

Introduction:

[1] Rakeem Anderson is charged with seven firearm related offences after a search during a motor vehicle checkpoint stop on November 2, 2018. At a blended *voir dire* the defence argues the detention is arbitrary, the search is illegal and that the evidence should be excluded pursuant to section 24 of the *Charter of Rights and Freedoms*. The Crown contends that the investigative detention is lawful and that the search, conducted for officer safety reasons, is justified. Alternatively, if the detention and search are deemed unlawful, the Crown maintains that the 22-calibre revolver should be admitted into evidence under section 24(2) of the *Charter*.

Facts:

[2] The facts are largely uncontested. Rakeem Anderson, the 23-year-old driver and sole occupant of a motor vehicle, is stopped by police at a random checkpoint at 10 pm at night. He is unable to produce a valid driver's license, saying that he left it at home. He hesitates a bit before producing an Nova Scotia ID card, and the car is not his. Constable Paul Bouchere, having some concerns that Mr. Anderson

might be a revoked or suspended driver, directs Mr. Anderson to pull to over to the shoulder of the road pending further inquiries for potential *Motor Vehicle Act* violations.

[3] After checking, Constable Bouchere determines Mr. Anderson is a revoked driver and that he has a history of being involved with serious violent offenses.

[4] Police ask Mr. Anderson to exit the vehicle and tell him he is being detained pending further investigation for being a revoked driver. A search for officer safety concerns results in the discovery of the loaded handgun in Mr. Anderson's waistband. Rakeem Anderson is arrested for firearm related offences and given his rights and caution.

Issues:

[5] Whether police have grounds for an investigative detention?

[6] Whether the search is justified for officer safety reasons?

[7] If not, should the evidence be excluded, given the *Charter* breaches?

Law:

[8] The burden of proof for a *Charter* violation rests with the Applicant on a balance of probabilities.

[9] Section 9 of the *Charter* protects Canadians from arbitrary detention. Police checkpoints are random stops which have been held to violate section 9 but are saved by section 1, so long as the stops are related to a valid highway safety purpose: *R. v. MacLennan*, [1995] NSJ No. 77. But random stop programs are not to be used as a means of conducting unfounded investigations or performing unreasonable searches: *R. v. Mellenthin*, [1992] 3 SCR 615 at para. 15.

[10] It is lawful for police, in limited circumstances, to detain for investigative purposes: *R. v. Mann* 2004 SCC 52. The police can detain if there are reasonable grounds to suspect, in all the circumstances, that the individual is connected to a crime and that the detention is reasonably necessary in the circumstances. In other words, there must be ‘a clear nexus between the individual to be detained and a recent or ongoing criminal investigation’: *Mann* at para. 34.

[11] Section 8 of the *Charter* protects citizens from unreasonable search and seizure. A check stop does not entitle police to search every vehicle, driver and passenger. Unless there are reasonable and probable grounds for conducting the search, the evidence obtained from such a search should not be admitted: *Mellenthin* at para. 27.

Pat down searches of a detainee are lawful if there are reasonable grounds to

believe officer safety is at risk. Justice Iacobucci elaborates in *Mann*, supra at para 41:

The officer's search 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.

[12] Section 24 of the *Charter* affords anyone, whose rights have been violated, to apply for an appropriate remedy. Where a court concludes that evidence is obtained in a manner that infringed charter rights, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute.

[13] The framework for a section 24(2) analysis under *R. v. Grant*, 2009 SCC 32 requires the Court to examine the seriousness of the Charter-infringing state conduct, the impact of the breach on the protected interest of the accused and society's interest in the adjudication of the case on its merits.

Analysis:

Are there Grounds for an Investigative Detention?

[14] Constable Bouchere, a 15-year member of the RCMP, has been in the traffic unit for 5 years and has had in excess of 100 occasions when he has suspected a person to be driving while being a revoked or suspended driver. He is concerned that Mr. Anderson may be a revoked or suspended driver, given his interaction with him. The officer turns off the motor vehicle and places the keys under the wipers on the windshield, as is his practice, pending further inquiries. He explains that he adopted this practice after having been almost struck by a vehicle operated by a driver trying to leave the scene.

[15] The constable clearly has reasonable and probable grounds to suspect that Mr. Anderson may be a revoked driver and subject to a charge under section 287(2) of the *Motor Vehicle Act* and/or section 259(4) of the *Criminal Code*. The fact that the officer is investigating a motor vehicle infraction rather than a crime, does not diminish his valid safety concerns: *R. v. Thibodeau* 2007 BCCA 489. The driver's detention is justified, both subjectively and objectively, pending further investigation. The constable says that his assessment of risk does not warrant Mr. Anderson's removal from the car at this point, given Mr. Anderson maintains a normal tone of speech, is relaxed and is not abusive. This is nonetheless an investigative detention to determine if Mr. Anderson is a revoked or suspended driver.

[16] In the normal course, if the driver is revoked or suspended from driving and there are no other concerns, the officer's practice is to inform the driver they are revoked/suspended and advises the car will be seized. The officer completes the seizure form, advises Access Nova Scotia, gives the driver a ticket for driving while revoked/suspended and arranges a tow. The driver is given the option to leave, to call someone to pick them up or wait for the tow truck. If the driver chooses to remain, they are asked to step out of the vehicle once the tow truck arrives. No searches are conducted.

[17] In this case Officer Bouchere determines not only is Mr. Anderson a revoked driver but he also has a concerning history for violence. This elevates officer safety concerns, causes him to alert his partner Constable Pottie and leads him to conduct a search of Mr. Anderson upon him exiting the vehicle.

Is the Search Lawful?

[18] The search is conducted for officer safety concerns. There must be reasonable grounds to believe the search is necessary, having regard to all the circumstances.

[19] Once Constable Bouchere returns to his police car and accesses data on his mobile computer terminal he sees that Mr. Anderson, despite his youth, has an

‘extensive interaction count’ with police. There are several screens of data which show that Mr. Anderson has had 60-70 police interactions including:

- Links to criminal files involving serious offences of violence, including murder;
- A record of criminal convictions, including convictions for violence

[20] Mr. Anderson is the ‘subject’ of an ongoing murder investigation, meaning that he is considered a subject of interest or is directly involved in a November 2016 murder investigation. He is also a suspect in an attempt murder as well as weapons, threats, fraud, drug trafficking, domestic violence and break and enter offences. He admits that if Mr. Anderson is a witness rather than an accused in the attempt murder file, that reduces the risk, somewhat. However, Mr. Anderson is charged with possession of a weapon in November 2018. As well, he has 9 known associates with serious criminal histories involving violence and drug crime.

[21] Constable Bouchere also runs Mr. Anderson’s criminal record and although he does not recall all convictions from memory, he remembers that Mr. Anderson has served jail time. The Court is told that Mr. Anderson has the following convictions:

November 2009	Common Assault Property Damage	Youth Conviction Youth Conviction
April 2011	Assault with a Weapon	Youth Conviction

	Breach of Court Order	Youth Conviction
July 2011	Breach of Court Order	Youth Conviction
	Assault with a Weapon	Youth Conviction
	Possession of Weapon	Youth Conviction
January 2012	Possession of a Schedule II Drug	Youth Conviction
October 2014	Break, Enter Theft	Adult Conviction

[22] Mr. Anderson received a 2-year federal sentence of incarceration for the last offence.

[23] Constable Bouchere is very concerned about this information which raises ‘a huge red flag’ for him. According to the officer, ‘this is off the charts for a revoked driver’. He concludes that he needs to inform his partner Constable Pottie, some 20 feet away, of the safety risk. Having done so, the officers decide to ask Mr. Anderson to exit the car and pat him down for officer safety reasons prior to issuing a ticket and having the vehicle towed. Given the elevated risk, it is not feasible to allow Mr. Anderson to remain in the car pending the arrival of a tow truck.

[24] The officers approach the vehicle occupied by Mr. Anderson, ask him to step out of the car and determine that Mr. Anderson agrees to be searched. Mr.

Anderson is asked if he has any 'guns, knives or nuclear bombs' to which he replies 'No'. Constable Bouchere conducts the pat down search, starting at Mr. Anderson's centre front waistband. The officer puts his hand on what feels like a gun and asks, 'What's this'? Mr. Anderson says, 'a gun'. Constable Bouchere says he is 'very shocked'. The officers hold Mr. Anderson's hands down to the trunk with a firm grip to prevent Mr. Anderson from grabbing for the gun until they bring his arms back and handcuff him. All the while Mr. Anderson is very respectful, polite and calm. Constable Pottie removes the gun safely, which is fully loaded. Mr. Anderson is arrested for firearm related offences and given his rights and caution. The entire incident takes approximately 10 minutes.

[25] I caution myself about second-guessing a police officer's concern for officer safety but I am mindful of the subjective and objective components in determining whether a pat-down search is reasonably necessary as set out in *Mellenthin*, supra and *R. v. Crocker* 2009 BCCA 388. The officer's subjective belief in the risk to safety is established if he can articulate a basis for his suspicions. I am satisfied that Constable Bouchere has done that. Mr. Anderson is a risk for violence, given the information obtained. Constable Bouchere has genuine concern for both his safety and the safety of his partner.

[26] From an objective standard, I find that the officer's subjective belief to be reasonable in all the circumstances. Police are entitled, as noted in Mann at para 43 to minimize risks in carrying out their duties. As noted in Crocker at para 63, there is potential risk to police officers, in approaching a stationary, occupied vehicle, even when a risk is not readily observable. We have here an experienced police officer dealing with a stopped motorist, after dark, in reduced visibility. The detainee has a record for weapons and violence, is associated with 9 persons with violent criminal backgrounds and is a subject in a murder investigation. Constable Bouchere intends to issue a ticket to the revoked driver who must exit the vehicle prior to towing. It is entirely reasonable for the police to conduct a quick pat-down search to satisfy themselves that Mr. Anderson has no weapons. I agree with the Crown that the officer does what is necessary, and no more, in the circumstances.

Section 24(2) of the Charter

[27] If I am mistaken and the conduct constitutes a breach of the *Charter*, I must consider whether the evidence obtained, that is the loaded revolver, should nonetheless be admitted into evidence.

[28] The Grant analysis requires that I consider the seriousness of the *Charter* breach, the impact of the breach on Mr. Anderson and society's interest in the adjudication of the matter on its merits.

The Seriousness of the Charter Infringement

[29] Constable Bouchere's assessment of risk is made in good faith. He is thorough, thoughtful, and measured in both his response and his actions. Based on his experience as a police officer, the circumstances surrounding the stop and the information he has, I agree with the Crown that he does what is minimally necessary to satisfy himself that he and Constable Pottie are safe as they continue their investigation.

The Impact of the Breach on Mr. Anderson

[30] The pat-down search over Mr. Anderson's clothing is a minimal intrusion on his privacy. The officer is respectful and professional throughout. He tells Mr. Anderson what he is going to do and why it is necessary. I note that the Supreme Court of Canada considers pat-down searches at the lower end of intrusiveness and there is a lower burden to justify them: *R. v. Golden* 2001 SCC 83 at para. 88.

Society's Interest in the Adjudication on the Merits

[31] Society has an expectation that cases will be decided on their merits unless there is compelling reason to do otherwise.

[32] Constable Bouchere locates a fully loaded .22 calibre revolver concealed in Mr. Anderson's waistband. I agree that this is highly reliable evidence, critical to the Crown's case.

[33] Moreover, this is a highly dangerous situation. One cannot overstate the public interest in prosecuting cases involving the illegal possession of loaded restricted firearms. To exclude the firearm and ammunition in these circumstances would indeed bring the administration of justice into disrepute.

Conclusion

[34] The evidence is therefore admissible, and I find Mr. Anderson guilty of the offences as follows:

- Count 1 - Transporting a restricted weapon, that is a .22 calibre revolver in a careless manner contrary to section 86(1) of the *Criminal Code*
- Count 2 - Carrying a concealed weapon, that is a .22 calibre revolver, not being authorized under the *Firearms Act* to carry it concealed contrary to section 90(1) of the *Criminal Code*

- Count 3 - Possession of restricted weapon, that is a .22 calibre revolver for which he did not have a registration certificate issued to him contrary to section 91(1) of the *Criminal Code*
- Count 4 - Possession of a loaded restricted weapon, that is a .22 calibre revolver with ammunition contrary to section 95(2)(a) of the *Criminal Code*
- Count 6 – Being the occupant of a motor vehicle in which he knew there was a restricted weapon, that is a .22 calibre revolver, contrary to section 94(1) of the Criminal Code.

[35] After hearing submissions from Counsel, the Court issues judicial stays on counts 5 and 7.

Pamela S. Williams, CJPC