

Case Name:

R. v. [REDACTED]

Between

R., and  
[REDACTED]

[2005] O.J. No. 4180

[2005] O.T.C. 863

67 W.C.B. (2d) 290

Court File No. 04-054

Ontario Superior Court of Justice

E.W. Stach J.

September 15, 2005.

(48 paras.)

*Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against arbitrary detention or imprisonment -- Protection against unreasonable search and seizure -- Right to retain and instruct counsel without delay -- Right to be informed of right to counsel -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Rights of accused violated where, during roadside stop, warrantless search of accused's vehicle conducted -- Right to counsel breached where accused not asked if he wanted to speak with lawyer -- Evidence obtained during stop excluded -- Detention not unreasonable where accused was speeding, although officer had no intention of charging accused with highway traffic offence -- Canadian Charter of Rights and Freedoms, ss. 8, 9, 10(b).*

*Criminal law -- Controlled drugs and substances -- Possession or trafficking -- Powers of search and seizure -- Warrantless searches -- Evidence obtained during warrantless search of accused's vehicle excluded, where officer could have obtained tracking warrant -- Criminal Code, s. 492.1.*

Application by the accused, [REDACTED] to exclude evidence obtained during a roadside stop of his vehicle [REDACTED] was charged with possession of cocaine for the purpose of trafficking. He

was stopped by an Ontario Provincial Police officer when driving a rented car with two passengers. The officer seized four grams of marijuana from the glove box, a knife from the console, and 2000 grams of cocaine and long-bladed sword from the trunk. A highway technician earlier alerted police to suspicious behaviour by [REDACTED] including his possession of a large roll of cash and his excessive speed driving from a gas station the technician had helped him get to. The provincial officer who spotted the car, Sowyrda, thought it was speeding but did not intend to charge the driver with speeding when he radioed for backup and pulled the car over. One of the passengers had no identification. The second officer who arrived on the scene, Cull, began to question the passenger while Sowyrda returned to the vehicle to question the other occupants of the car. When Sowyrda leaned into the car to question [REDACTED] and to make sure the environment was safe from an officer safety standpoint, he saw a marijuana roach. Sowyrda arrested [REDACTED] for possession of a controlled substance, and told Cull to arrest the passengers. Sowyrda did not use a standard caution card to advise [REDACTED] of his rights but explained them in layman's terms. He did not ask [REDACTED] if he wanted to speak to a lawyer. He asked [REDACTED] if there were any more drugs and [REDACTED] responded there were four grams in the glove box, as well as a knife. Sowyrda found the marijuana, knife, and a wallet containing a wad of \$20 bills and a cheque payable to [REDACTED] for \$5000. The back seat was folded down, providing access to the trunk. There was no luggage in the trunk. Sowyrda opened the trunk and found the sword. He removed the spare tire and found the cocaine. Sowyrda arrested [REDACTED] for possession of cocaine for the purpose of trafficking. He read [REDACTED] his rights from the standard card this time. Another officer arrived and placed [REDACTED] in his cruiser to take him to the station. Sowyrda and Cull each took a passenger to the station. Sowyrda testified about a course he took to elevate his awareness regarding the highway transport of illicit substances, and common indicia of drug trafficking. These indicia were present during his stop of [REDACTED] vehicle.

HELD: Application allowed. The evidence seized was excluded. Sowyrda breached [REDACTED] right to be secure against unreasonable search and seizure and [REDACTED] right to be fully informed of his ability to consult counsel. These breaches ultimately led to the seizure of all the evidence, making the evidence conscriptive. [REDACTED] right not to be arbitrarily detained was not breached. The initial roadside stop was lawful. There was a valid reason for the check stop under highway traffic law, notwithstanding the fact Sowyrda stopped [REDACTED] vehicle because he suspected illicit drug activity. Sowyrda leaned into the car to question [REDACTED] for the purpose of finding additional indicia of drug involvement. Officer safety concerns did not necessitate Sowyrda leaning into the car, when he could have crouched by the passenger door to assess the situation. Sowyrda's conduct constituted a warrantless search. Sowyrda should have considered obtaining a tracking warrant rather than conducting a warrantless search, in the absence of exigent circumstances.

#### **Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, s. 8, s. 9, s. 10(b)

s. 24(2) C

Controlled Drugs and Substances Act, s. 5(2)

Criminal Code, s. 492.1

Highway Traffic Act,

**Cases cited:**

Brown v. Durham Regional Police Force (1996), 43 O.R. (3d) 223 (Ont. C.A.)

Chartier v. Quebec (Attorney General), [1979] 2 S.C.R. 474

Cloutier v. Langlois, [1990] 1 S.C.R. 158

R. v. Abraham (2004), 7 M.V.R. (5th) 128 (Man. Q.B.)

R. v. Backhouse, [2005] O.J. No. 754

R. v. Belnavis et al. (1996), 29 O.R. (3d) 321 (Ont. C.A.)

R. v. Buhay (2003), 174 C.C.C. (3d) 97 (S.C.C.)

R. v. Byfield, [2005] O.J. No. 228

R. v. Calderon (2004), 188 C.C.C. (3d) 481 (Ont. C.A.)

R. v. Caslake, [1998] 1 S.C.R. 51; (1998), 121 C.C.C. (3d) 97 (S.C.C.)

R. v. Cavdarov (2003), 106 C.R.R. (2d) 152 (B.C. Prov. Ct.)

R. v. Clayton, unreported [2004] Quicklaw cite (Ont. C.A.) per McMurtry, Doherty, Lang JJ.A.

R. v. Cox (1999), 132 C.C.C. (3d) 256 (N.B.C.A.)

R. v. Davis (2000), 76 C.R.R. (2d) 174 (Ont. S.C.J.)

R. v. Debot (1989), 52, C.C.C. (3d) 193 (S.C.C.)

R. v. Golub (1997), 117 C.C.C. (3d) 193 (Ont. C.A.)

R. v. Grant (1993), 84 C.C.C. (3d) 173 (S.C.C.)

R. v. Greaves, 2004 BCCA 484

R. v. Haldane, unreported [2001] Ont. S.C.J., 2001 CarswellOnt 5155

R. v. Ironeagle (1989), 49 C.C.C. (3d) 339 (Sask. C.A.)

R. v. Ladouceur, [1990] 1 S.C.R. 1257

R. v. Mann, [2004] 3 S.C.R. 59  
R. v. Mellenthin (1992), 76 C.C.C. (3d) 481  
R. v. Nguyen (2004), 184 C.C.C. (3d) 545 (B.C.C.A.)  
R. v. Orbanski, R. v. Elias, [2005] S.C.J. No. 37  
R. v. Polashek (1999), 134 C.C.C. (3d) 187 (Ont. C.A.)  
R. v. Pozniak (1994), 92 C.C.C. (3d) 472 (S.C.C.)  
R. v. Smith (1999), 64 C.R.R. (2d) 356 (Sask. Q.B.)  
R. v. Stillman (1997), 113 C.C.C. (3d) 321 (S.C.C.)  
R. v. Storrey, [1990] 1 S.C.R. 241  
R. v. Withrow, [2004] O.J. No. 5781

**Articles cited:**

Renee M. Pomerance, "Planes, Trains and Automobiles: Warrantless Search of Mobile Venues" (2000), National Criminal Law Program, University of Calgary

Tim Quigley, "Brief Investigatory Detentions: A Critique of R. v. Simpson" (2004), 41 Alta. L. Rev. 935-950

Peter Sankoff, "Articulate Cause Based Searches Incident to Detention - This Cooke May Spoil the Broth" (2002), 2 C.R. (6th) 41

Steve Coughlan, "Search Based on Articulate Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49

**Counsel:**

Paul A. Gordon, for the Crown

Patrick C. Fagan, for the Accused

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**REASONS FOR DECISION**  
(roadside stop)

E.W. STACH J.:--

### Factual background

1 After a roadside stop on the Trans Canada Highway near Ignace, Ontario, an Ontario Provincial Police officer seized the following items from an automobile, a rented Cadillac:

- 4 grams of marijuana (from the glove box);
- a prohibited weapon, i.e. a knife (from the console);
- 2 plastic Ziploc packages each containing 1000 grams of cocaine (from the trunk of the automobile);
- a long-bladed sword (also from the trunk of the automobile).

2 [REDACTED], the driver of the Cadillac, stands charged under s. 5(2) of the Controlled Drugs and Substances Act with possession of cocaine for the purposes of trafficking. The entire 'trial' to this point was conducted as a voir dire.

3 There is no dispute that the seized substance is cocaine. In an application before the court Mr. [REDACTED] seeks to exclude the evidence of cocaine under s. 24(2) of the Canadian Charter of Rights and Freedoms, alleging violations of his constitutional rights under ss. 8, 9 and 10(b) of the Charter.

4 The Cadillac and its three occupants first attracted notice some 2 1/2 hours earlier in the district of Kenora. A maintenance technician for the Ministry of Transportation and Communications was on patrol traveling west towards the Manitoba border when, at approximately 9:30 a.m., the technician (Clayton Lund) saw a recent model Cadillac bearing Alberta licence plates. The Cadillac was stopped, facing east on the road shoulder opposite him. One of its occupants flagged him down and told him they had run out of gas. One of the Cadillac's occupants also travelled with Mr. Lund to get a can of gas. Before doing so, Lund saw the driver of the Cadillac give the man a couple of \$20 bills from an impressively large wad of money the like of which Lund had seldom seen. En route to the gas station one of the Cadillac's occupants told Lund that they were headed to Kenora to visit relatives. After Lund returned to the stranded Cadillac and put gas into it, Lund followed the Cadillac and its occupants to the gas station. While the Cadillac was being filled with gas there, Lund overheard one of its occupants asking the gas attendant how long it would take to go to Thunder Bay, how long it would take to go to North Bay.

5 Lund left the gas station in his vehicle while the Cadillac was still being fuelled. He turned east towards Kenora. After he had driven east for approximately 2 to 3 kilometers, the Cadillac overtook Lund's Ministry half-ton on a hill, on a double solid line. Lund had then been travelling at 95 km per hour (in excess of the speed limit) and calculated that the Cadillac overtook him at a much higher rate of speed. He made note of the licence number and, upon arriving in Kenora, reported the incident to Cst. Rickaby at the Kenora OPP detachment. Cst. Rickaby issued a "zone alert" to other OPP detachments. That alert read as follows:

Received information from Auxiliary Cst. Clay Lund that he was west of Kenora at approx. 0930 30 Mar 04 and was working for MTO. He assisted stranded motorists that ran out of gas. There were three East Indian male

persons in a 2004 Cadillac (Blue). It was rented from Alamo. The vehicle had Alberta plate XXXXXX [Numbers replaced with X's by LexisNexis Canada]. It is easily recognizable by a blue air freshener hanging from the rear view mirror and it has Orange (bright) daytime running lights.

Only one of them had money for gas and he pulled out what Cst Lund believes was approx. 5 - 10 thousand dollars.

They were acting very suspicious and were asking how long it takes to drive to Thunder Bay and then to North Bay.

They passed Lund at a very high rate of speed.

The guy that Lund gave a ride to the gas station said that they were going from Calgary to Kenora to visit relatives and when Lund asked who he just went quiet and didn't want to talk anymore.

If located please check and possible interdiction stop

6 OPP Cst. Graham Sowyrda started his shift in Ignace at 7:00 a.m. He was in an unmarked cruiser. At 10:34 a.m. he received the information contained in the zone alert. He testified that his usual practice was to keep a lookout for vehicles which had been the subject of a complaint and to stop them if he had time. While Sowyrda was on patrol west of Ignace at approximately 12:15 p.m., he saw the blue Cadillac bearing Alberta plates. It was travelling eastbound and in the process of attempting to overtake another eastbound vehicle. He had the impression it was speeding, but had no means of determining its exact speed at that time. He turned around and also proceeded eastbound, positioning himself behind the Cadillac. He eventually activated his lights signaling the Cadillac to pull over. Sowyrda had no intention of charging the driver with speeding.

7 The Cadillac pulled partly onto the road shoulder and came to a stop. Cst. Sowyrda approached it on foot on the driver's side. He noticed three occupants, two of them in the front seat and a single passenger in the rear seat. The rear seat passenger was not wearing a seat belt. The back support of the rear bench-style seat had been folded down and the rear seat passenger was lying down with his legs extending into the trunk area.

8 The accused, [REDACTED], was the driver of the vehicle. At the request of Cst. Sowyrda, he produced his driver's licence, the registration of the vehicle and insurance particulars. The Cadillac was owned by Alamo Rent-a-Car in Alberta.

9 The unbelted rear seat passenger had no identification. Cst. Sowyrda asked him to exit the vehicle to permit Cst. Sowyrda (who was standing alongside the highway) to

inquire into his identification in a safer environment. The rear seat passenger exited the vehicle. Despite further enquiry, he was unable to provide any document that would identify him. He said he lived on Applefield Drive in Calgary, but could not provide a street address.

10 When Cst. Sowyrda had signaled the Cadillac to pull over, he also advised the Ignace detachment that he stopped the vehicle. Indeed, as Sowyrda was speaking to the rear seat passenger, Cst. Cull arrived at the scene in a marked police vehicle. Sowyrda told Cull that he was not satisfied with the identification of the rear seat passenger and asked Cull to speak to him. Sowyrda then returned his attention to the Cadillac and its two remaining occupants.

11 Cst. Sowyrda, now on the passenger side of the Cadillac, asked the front seat passenger to get out in order that he could be questioned (ostensibly about the identity of the rear seat passenger) in isolation from the other occupants. Sowyrda also turned this passenger over to Cull. The front passenger door remained open and Cst. Sowyrda looked in to speak to the driver. As he leaned into the interior of the Cadillac, Cst. Sowyrda looked about its interior. He saw fast food garbage, a map, loose rolling papers, a packet of DuMaurier cigarettes. On the edge of the rear bench seat, he saw what appeared to him to be a "roach." It was, from his vantage point then, in plain view. He reached further into the interior of the automobile, picked up the "roach," and put it to his nose. In his 4 1/2 years in the OPP Sowyrda had come to know the smell of marijuana. After smelling the item he concluded that it was probably marijuana and so advised the driver. At the same time Sowyrda told [REDACTED] (the driver) that he was under arrest for possession of a controlled substance. Cst. Sowyrda then withdrew from the passenger side and made his way round the Cadillac. As he did so, he asked Cull to arrest the other passengers for possession of a controlled substance.

12 On approaching the driver's door, Sowyrda asked [REDACTED] to get out of the vehicle. [REDACTED] complied. Sowyrda then led him to the rear of the Cadillac and handcuffed him. He patted [REDACTED] down, checking for a weapon. He advised him of his right to call a lawyer and his right to silence. Sowyrda did not read from the standard caution card. Rather, he explained the right to counsel and the right to silence in lay terms, concluding with the words, "like on TV." [REDACTED] said he understood. Sowyrda conceded on cross-examination that in 'explaining' [REDACTED] rights, he did not mention the 9-1-1 number and did not ask [REDACTED] if he wanted to speak to a lawyer. Cst. Sowyrda then asked, "Are there any more drugs?" [REDACTED] told him there were 4 grams in the glove box. "Anything else," asked Sowyrda. After some hesitation, the driver said there was a knife in the glove box or console. At this point Cst. Sowyrda turned the driver over to Cst. Cull who placed him in the front seat of his marked cruiser. Cst. Sowyrda returned to the Cadillac. He opened the glove box where he found and seized a small quantity of marijuana and papers. On opening the console, he found and seized a small knife with a blade that opened and locked. Sowyrda also saw a wallet on the front seat of the Cadillac. He found a wad of \$20 bills and a certified cheque payable to [REDACTED] in the sum of \$5,000.00. Sowyrda seized the cheque and the knife. Sowyrda found more rolling papers in the rear map pocket.

13 When folded down, the rear of the back seat provided access to the trunk area.



Sowyrda popped the trunk button to open it and searched the trunk. He found no luggage in the trunk, only an object that appeared outwardly to be a cane with a sculpted handle. Upon closer examination, it turned out to be a long sword with a blade that extended from the ground up to Sowyrda's waist. The trunk matting appeared to Sowyrda to be somewhat askew near the spare tire. He removed the tire. Underneath the tire he saw two packages in saran-wrap, each in a plastic Ziploc bag approximately 10 inches long and 8 inches wide. Each of the packages contained a compressed white powder which Sowyrda believed to be cocaine. Sowyrda seized the packages. Their contents were subsequently analyzed. There is no dispute that the substance is cocaine.

14 Sowyrda called for a tow truck to transport the Cadillac back to the detachment. Because there were only two officers then present and three persons arrested, Sowyrda arranged for a third officer, Sgt. Greaves, to attend the scene. In the interim, he advised the front seat passenger, who was now situated in the back of Sowyrda's unmarked police vehicle, that he was charged with possession of cocaine for the purpose of trafficking and read him his rights respecting this charge. In doing so, Sowyrda read the rights from the standard caution card, including the reasons for his arrest, the right to counsel, the right to telephone a lawyer, free duty counsel and the right to speak to a lawyer right now.

15 When Sgt. Greaves arrived at the scene, Cst. Sowyrda briefed him [REDACTED] was placed in the marked cruiser of Sgt. Greaves and taken to the detachment. The two passengers were taken separately, one in Sowyrda's unmarked cruiser and the other in Cst. Cull's marked cruiser. The materials seized from the Cadillac by Sowyrda were transported to the OPP detachment in Ignace. There is no contest over continuity.

16 During cross-examination Cst. Sowyrda indicated that he had taken a highway drug interdiction course, a period of study approximately 40 hours in length whose purposes included providing officers with a heightened awareness as to the transport of illicit substances and heightened awareness of issues of officer safety on roadside stops. Cst. Sowyrda indicated that in performing interdiction, he did not look for any one thing in particular, but rather a combination of things: whether the vehicle shows any indications of being lived in, the lack of luggage, the stated reason for the trip, maps, and any items that mask the interior odour of a vehicle.

17 Sowyrda conceded that he did not ask anyone in the Cadillac about speeding. Sowyrda says he originally asked the rear passenger to exit the vehicle because he thought it an easier way of getting identification from him more quickly. He acknowledged that the rear seat passenger provided his first name and surname and date of birth without hesitation and said that he lived in Calgary. Sowyrda concedes it was a possible alternative for him to have radioed an inquiry for the existence of an Alberta driver's licence for this individual. He knew from examination of the Alberta licence of the driver, [REDACTED] that it provided photo I.D. He subsequently passed him off to Cull for the purpose of ascertaining identity. Sowyrda testified, nevertheless, that his focus remained on the seat belt violation and the identification of the passenger. He also agreed that a seatbelt violation is not an arrestable offence.

18 Sowyrda says he asked the front seat passenger ([REDACTED]) to exit the vehicle and to



attend him at the rear of the Cadillac so that he could speak to him in isolation. Once there, however, he turned the front seat passenger over to Cull, thus enabling Sowyrda to speak to the driver alone. Sowyrda admits that he never questioned [REDACTED] (the driver) about the name of the rear seat passenger. Sowyrda says he stuck his head inside the car for two reasons - to enable him to speak to the driver more easily and secondly, to ensure that the environment was safe from an officer safety standpoint. Sowyrda indicates that a significant part of a vehicle stop is officer safety. In the course of looking about for anything potentially hazardous to him, Sowyrda indicates he was also looking for anything suspicious. In doing so Sowyrda saw what appeared to be a "roach" on the forward edge of the back seat near the middle. He saw a rolled paper with some discolouration and staining suggesting to him that it had at some stage been burned. Sowyrda confirmed that he did not see the "roach" until after he actually stuck his head and upper torso inside the vehicle. The item on the rear seat "looked like" a roach, but Sowyrda could not actually determine what it was until he reached in further, grabbed it, held it to his nose and smelled it. He readily agrees that it was the seizure of this item and the smelling of it which formed the basis for arresting all three occupants of the Cadillac. All were initially arrested for possession of a controlled substance. Sowyrda also agreed that prior to picking it up and smelling it, the "roach" could also be described as similar in appearance to the remnant of a roll-your-own cigarette.

**19** Although it formed the basis for the arrest and the subsequent search of the automobile as an incident of arrest, the "roach" was never sent for analysis. There was not enough 'material' in it to permit chemical analysis.

**20** Having arrested [REDACTED] Sowyrda asked him if there were any more drugs in the car. Sowyrda said he asked the question to facilitate a search as an incident of arrest. In his testimony Sowyrda characterized the seizure of the "roach" and the arrest as a "found committing" offence. Sowyrda concedes that at no time did he seek the consent of the driver or of the passengers for any search.

**21** On re-examination Cst. Sowyrda testified that he did not issue a speeding ticket every time he stopped someone for speeding. As for his looking around the vehicle after he poked his head in, he ascribes that to a number of factors: a heightened awareness for concerns of personal safety in a roadside stop, the instincts of a trained investigator and natural curiosity. He described his approach as that of "a trained observer of everything going on around me."

**22** Jason Cull has been an OPP officer for 14 years. He too was aware of the zone alert through the OPP Command Centre. He confirmed he was directed to attend the area where the stop had taken place. On approaching the scene, Cull saw Cst. Sowyrda talking to an occupant of the vehicle on the road shoulder. Sowyrda told him that he had a problem identifying the individual and wanted Cull to assist. Cull took the rear seat passenger to his marked cruiser. The passenger identified himself to Cull verbally, saying he was from the Calgary area, but had no fixed address. Cull called in on his radio to perform a CPIC check on the rear seat passenger. As Cull did so, Sowyrda approached his cruiser and told him he had found a drug in the Cadillac. He therefore asked Cull to arrest the rear seat passenger and then to assist him. As Cull approached the Cadillac,

Sowyrda advised him that he would like to move the front seat passenger who, Cull says, was at that point already under arrest. Cull handcuffed the passenger and placed him in Sowyrda's unmarked police vehicle. Cull's evidence on this aspect is at variance from that of Cst. Sowyrda. Sowyrda testified that he (Sowyrda) asked the front seat passenger to exit the vehicle, that he turned the front seat passenger over to Cull and that only after removing the passenger did Sowyrda find the "roach" (the basis for the arrests) in the back seat of the Cadillac.

**23** During his testimony, Cull made extensive reference to his notes. He confirmed from his notes that Sowyrda said he was still following the Cadillac (before pulling it over) when he asked for officer assistance. On cross-examination, Cull confirmed - again from his notes - that the front seat passenger was still seated in the front seat of the Cadillac at the time Cull heard Sowyrda tell the front seat passenger he was under arrest for possession of a controlled substance. Cull did not witness what Sowyrda based the arrest upon. He does recall later seeing "a partial joint," probably a half-inch in length. He said it looked like a leftover joint. Nevertheless, Cull also agreed that it would be difficult to tell from a distance of a few feet whether it was a home-made tobacco-based cigarette, or a marijuana joint. He agreed that "you would have to pick it up and smell it" before making that determination.

**24** Sowyrda was recalled to testify after the court expressed an interest in seeing the seized remnant described by Sowyrda as a roach. Sowyrda identified the "roach" from the contents of an exhibit envelope. He confirmed that this is what he saw when he stuck his head into the interior of the Cadillac. I describe the item, for the record, as a remnant of smoking material, in tightly wound rolling paper, 1/4" to 1/2" in length.

#### Discussion

**25** I have little difficulty in concluding the initial roadside stop of the Cadillac near Ignace was both lawful and within constitutional parameters. The continuum of events that followed the stop, however, merits careful analysis.

**26** It is true that courts across Canada have repeatedly recognized that privacy interests attaching to automobiles are much reduced as compared to one's physical person, to homes, offices, and some other locations<sup>1</sup>. Courts, however, have not declared 'open season' on automobiles; nor should they. As Cory J. cautioned in *R. v. Mellenthin*<sup>2</sup>:

Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search.

**27** Accordingly, the law places limits, both under the Charter and under the common law, on the authority of police officers to detain and investigate motorists. More recently, the Supreme Court of Canada, in *R. v. Mann*<sup>3</sup>, has circumscribed more narrowly the scope of investigative detention. The court's statement of the law applies equally to investigative detentions involving motorists. Specifically, the court declined recognition of a general power of detention for investigative purposes. To the extent such a power exists in the roots of the common law, it can neither be arbitrarily nor broadly invoked by public

authorities:

- the circumstances must disclose reasonable grounds to suspect that the individual is connected to a particular crime and that such a detention is necessary;
- at a minimum, individuals who are detained for investigative purposes must be advised in clear and simple language of the reasons for the detention;
- the investigative detention should be brief in duration;
- investigative detention imposes no obligation on an individual to answer questions asked by the police;
- any search incidental to the limited police power of investigative detention is necessarily a warrantless search;
- warrantless searches are presumed to be unreasonable unless the Crown can demonstrate on a balance of probabilities that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner;
- the power of investigative detention is clearly less expansive in breadth and clearly to be distinguished from arrest and the power to search as an incident of arrest.

**28** There is no evidence in the case before me upon which the police could found a reasonable suspicion that the individuals in the Cadillac were connected to a particular crime which made detention necessary. The 'stopping' of this vehicle on the highway, if justified, must initially have been for purposes related to the Highway Traffic Act.

**29** Constable Sowyrda gave testimony respecting the highway drug interdiction course he had taken, its purpose in elevating the awareness of police officers respecting the highway transport of illicit substances, and several indicia which commonly turn up in such cases of drug trafficking.

**30** A line of developing lower court and appellate authority on highway interdictions signals the need for police officers to exercise restraint and sound judgment before embarking upon or pursuing a course of investigative conduct that interferes unduly with the right of motoring citizens to carry on with their journey free from unnecessary interference. In part, the need for caution arises in the modern age from the fact that many motorists regularly carry in their automobiles the kind of gadgets, paraphernalia and detritus that police officers also see in the automobiles of drug traffickers.

**31** In *R. v. Calderon*<sup>4</sup>, for example, cell phones, a pager, a map, fast food wrappers and two duffel bags seen on the back seat of an expensive automobile were regarded as neutral and unreliable indicators of drug trafficking; they did not constitute reasonable grounds for detention. In *Calderon*, multiple Charter breaches by police officers in the course of the motorists' detention - including violation of the motorists' right to be free from unreasonable search and seizure - resulted in the exclusion of evidence.

**32** Many supposed indicia of drug trafficking activity either alone or in combination may

on broader examination be seen as 'neutral' or to put it another way - of little weight. I think it a matter of common sense, however, that as those indicia increase in number and, particularly where they are supplemented by additional information from a reliable source, they may reach a critical mass where investigative detention is both indicated and justified. I hasten to add that, even where justified, investigative detention must conform to the narrow limits that the Supreme Court of Canada prescribed in *R. v. Mann*<sup>5</sup>.

**33** In the case before me, the 'constellation of objectively discernible facts'<sup>6</sup> available to Cst. Sowyrda (at the time he directed the Cadillac to pull over) had been supplemented by information from a reliable source.

**34** To be sure, there was a valid reason under the Highway Traffic Act for a check-stop of the Cadillac. Nevertheless, the impression I have from the testimony of Constables Sowyrda and Cull (and the tenor of the 'zone alert') is that the suspicion of illicit drug activity was the primary reason for directing the roadside stop. At bottom, highway safety concerns were not the decisive basis. A multi-purpose stop is not necessarily improper:

A legitimate police interest beyond highway safety concern does not taint the lawfulness of a stop and detention as long as the additional police purpose is not improper and does not entail an infringement on the liberty of the person beyond that contemplated for the purpose of s. 216(1) of the Highway Traffic Act<sup>7</sup>.

**35** In practical terms, Constable Sowyrda's suspicions may well have been heightened when (after Sowyrda detected the seatbelt infraction) the rear seat passenger could not or would not produce documentary evidence of his identity or his residence address. In my view the roadside detention would not be arbitrary nor of undue length to the extent it permitted the officer a reasonable opportunity and reasonable means of identifying the rear seat passenger and ascertaining his address. In my view however, that was neither the focus of Cst. Sowyrda's attentions nor the basis for his further investigatory conduct.

Did Constable Sowyrda's subsequent conduct amount to a search?

**36** Cst. Sowyrda did not question the front seat passenger (████) about the identity of the Cadillac's rear seat passenger. Nor, after effectively isolating the driver (████) did Sowyrda ever ask the driver such questions. The opinion I form from the evidence is that the predominant focus of Cst. Sowyrda when he intruded his head and upper torso into the passenger compartment of the automobile was directed toward finding additional indicia of drug involvement. Sowyrda had effectively formed the intention to search.

**37** Concerns over officer safety in the course of a roadside stop cannot be ignored. Indeed, Cst. Sowyrda invoked this concern to explain why he acted as he did in intruding his person into the interior of the Cadillac through its then open front passenger door. I find this explanation unpersuasive. This detention took place during hours of daylight. The front passenger door was open because Sowyrda had asked the passenger to exit the vehicle. Two occupants of the Cadillac had already been handed over to Cst. Cull. One of them, indeed, was locked inside the rear section of Cull's marked cruiser. The Ignace

detachment of the OPP was aware of the stop. In short, Cst. Sowyrda could easily have accomplished his stated objectives by crouching in front of the open passenger door.

**38** Case law in the United States supports several propositions that, in my view, also obtain in Canada:

- \* there is no privacy invasion when police search an abandoned automobile;
- \* nor is there a legitimate expectation of privacy in areas of an automobile that are plainly visible;
- \* on the other hand, if a police officer must lean into the vehicle, peer through a crack in its rear doors, or open the door to make an observation, the police action constitutes a search.<sup>8</sup>

**39** There is a divergence between the trial testimony of Cst. Cull and Cst. Sowyrda on a significant matter. Cull testified that the front seat passenger (Omar) was already "under arrest" when Sowyrda handed Omar over to him. Sowyrda testified to a quite different sequencing particularly as to the timing of Omar's arrest. Cull is the more experienced officer. His testimony was supported by reference to specific entries in his notebook. I prefer the testimony of Cst. Cull on this point. The result casts some doubt on the circumstances leading to the arrest of [REDACTED] and [REDACTED] respectively as explained by Sowyrda.

**40** I am satisfied that the conduct of Cst. Sowyrda constituted a search in these circumstances. As it was a warrantless search, the crown bears the burden of demonstrating on a balance of probabilities that the warrantless search was authorized by law and was carried out in a reasonable manner. In my respectful view the crown has failed to discharge that burden.

**41** In all of the circumstances described here the reasonable and well-informed citizen will understand why vigilant police officers might have elevated suspicions: highway traffic laws were ostensibly broken; one of the Cadillac's occupants arguably lied about Kenora as a destination; some of the indicia common to drug traffic were noted, and when one of the vehicle's adult, out-of-province occupants proved unwilling or unable to provide suitable identification consequent to the seatbelt infraction, Cst. Sowyrda might well have had grounds to seek a tracking warrant for the automobile under s. 492.1 of the Criminal Code. Such warrants may be obtained where the peace officer has reasonable grounds to suspect that an offence<sup>9</sup> has been or will be committed.

**42** To be sure, a tracking warrant is also an intrusive device. It is, however, far less intrusive than an unjustified search; the Criminal Code, moreover, outlines a process for obtaining such a warrant; the tracking warrant may, in fact, be obtained upon reasonable suspicion as opposed to the more stringent test of reasonable and probable grounds. The point here is that Cst. Sowyrda never considered seeking a warrant of any kind despite the total absence of exigent circumstances.

**43** The finding that Cst. Sowyrda's initial search of the automobile cannot be justified

under the law is pivotal here. It impacts directly on the lawfulness of the initial arrest. If the initial arrest is invalid, no power to search as an incident of arrest can be claimed, and Cst. Sowyrda's failure properly to advise [REDACTED] of his rights under the Charter takes on more serious implications and consequences. In essence, there is a 'domino effect' here. The unlawfulness of the initial search brings down the crown's case much like a house of cards is upset by the removal of a foundation card.

Should the seized evidence be admitted or excluded?<sup>10</sup>

44 I conclude that, in the course of detaining [REDACTED], Cst. Sowyrda not only breached [REDACTED] 8 Charter right to be secure against unreasonable search and seizure but, in addition, violated his right under s. 10(b) to be fully informed of his ability to consult counsel without delay. In view of the fact that the initial detention pursuant to the Highway Traffic Act was overtaken by and promptly absorbed into a broader narcotics investigation, it is, indeed, arguable that there was also a violation of [REDACTED] 9 right not to be arbitrarily detained. On the evidence before me, however, I am not satisfied that a breach of s. 9 of the Charter has been established.<sup>11</sup>

45 The unlawful search by Cst. Sowyrda was the linchpin which led ultimately to the discovery of all the seized items here. It was compounded by Cst. Sowyrda's haphazard and incomplete outline of [REDACTED] right to counsel. [REDACTED] was entitled under the information component of s. 10(b) to be advised of whatever system for free and immediate, preliminary legal advice existed in Ontario and how such advice could be accessed.<sup>12</sup> Serious omissions by Sowyrda in providing the necessary information component deprived [REDACTED] of a reasonable opportunity to exercise his rights to counsel. Compounding these omissions, Sowyrda rushed headlong into eliciting incriminating information from [REDACTED]. In my view this introduces a conscriptive element into the mix.<sup>13</sup> Derivative evidence is, after all, a sub-category of conscriptive evidence.

46 All of the items seized are real evidence. All existed independently of the Charter breaches and prior to them. The admission of the cocaine as evidence in this trial is critical to the crown's case on a serious charge. I am persuaded, however, that its discovery was brought about through serial breaches of two Charter rights. I am similarly persuaded that, absent multiple violations of the Charter here, none of the items would have been discovered by alternate non-conscriptive means. All of the seized items must therefore be excluded.

47 Exclusion of the evidence will perforce result in the acquittal of the accused on the charge. Counsel may contact the court via teleconference to discuss how the indictment should be endorsed and whether a further court attendance is required.

E.W. STACH J.

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Appendix  
Cases cited



- Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (Ont. C.A.)
- Chartier v. Quebec (Attorney General)*, [1979] 2 S.C.R. 474
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- R. v. Abraham* (2004), 7 M.V.R. (5th) 128 (Man. Q.B.)
- R. v. Backhouse*, [2005] O.J. No. 754
- R. v. Belnavis et al.* (1996), 29 O.R. (3d) 321 (Ont. C.A.)
- R. v. Buhay* (2003), 174 C.C.C. (3d) 97 (S.C.C.)
- R. v. Byfield*, [2005] O.J. No. 228
- R. v. Calderon* (2004), 188 C.C.C. (3d) 481 (Ont. C.A.)
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- R. v. Clayton*, [2005] O.J. No. 1078 (Ont. C.A.), per McMurtry, Doherty, Lang JJ.A.
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R. v. Stillman (1997), 113 C.C.C. (3d) 321 (S.C.C.)  
R. v. Storrey, [1990] 1 S.C.R. 241  
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Renee M. Pomerance, "Planes, Trains and Automobiles: Warrantless Search of Mobile Venues" (2000), National Criminal Law Program, University of Calgary

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Peter Sankoff, "Articulable Cause Based Searches Incident to Detention - This Cooke May Spoil the Broth" (2002), 2 C.R. (6th) 41

Steve Coughlan, "Search Based on Articulable Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49

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1 Renee M. Pomerance, "Planes, Trains and Automobiles, Warrantless Search of Mobile Venues"; and see R. v. Caslake (1998), 121 C.C.C. (3d) 97 per Lamer C.J.C. at para. 34;

2 R. v. Mellenthin (1992), 76 C.C.C. (3d) 481 at p. 487 (S.C.C.);

3 R. v. Mann (2004), 185 C.C.C. (3d) 308 (S.C.C.);

4 R. v. Calderon (2004), 188 C.C.C. (3d) 481 (Ont. C.A.);

5 Supra, note 3;

6 The phrase used by Doherty J.A. in R. v. Simpson (1993), 12 O.R. (3d) 182 at p.

202 (Ont. C.A.);

7 *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.);

8 Professor Wayne Lefave, *Search and Seizure: A Treatise on the Fourth Amendment*, (3rd ed.) vol. 1, cited in the Pomerance article at footnote 1, *supra*, at p. 5;

9 An "offence" in this context means an offence under the Criminal Code or any other Act of Parliament; I express no opinion whether a tracking warrant would issue on the facts here.

10 Before embarking upon the s. 24(2) analyses, I think it appropriate to note that, although the accused here is darker-skinned and bears an eastern surname, there is no indication in the evidence that his detention was racially or ethnically motivated.

11 See *Brown v. Durham Regional Police Force*, *supra*, note 7.

12 *R. v. Pozniak* (1994), 92 C.C.C. (3d) 472 (S.C.C.);

13 See *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.);