COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Peterkin, 2015 ONCA 8
DATE: 20150112
DOCKET: C57756

Feldman, Watt and van Rensburg JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Mackel Peterkin

Appellant

Gary J. Grill and James M. Stevenson, for the appellant

Gillian Roberts, for the respondent

Heard: June 20, 2014

On appeal from the conviction entered on January 16, 2013 by Justice Kenneth L. Campbell of the Superior Court of Justice, sitting without a jury, with reasons reported at 2013 ONSC 165 (CanLII), 295 C.C.C. (3d) 87.

Watt J.A.:

[1] A dark backyard. A trespasser. A police search. A gun. Some ammunition. Drugs. Cellphones. Cash. Several charges. And convictions.

[2] The appellant, Mackel Peterkin, says the police had no authority to search him early that August morning. The things they found on his person should not have been admitted in evidence at his trial. He should not have been convicted. He wants another trial.

[3] As I will explain, Peterkin's convictions rest on solid ground. The police search was lawful. The evidence it yielded, admissible. I would dismiss his appeal.

THE BACKGROUND FACTS

[4] The circumstances that precede and accompany the search of Peterkin fall within narrow compass.

The 911 Call

[5] Early in the morning on August 14, 2011, a 911 operator received a telephone call. No one spoke. The operator called back. The line was busy. The operator was able to determine the call had originated from unit 132 at 296 Grandravine Drive in Toronto. The neighbourhood is one where police respond to a higher than usual number of violent radio calls, including reports of domestic disputes,

gunshots, and shootings. Two police officers were dispatched to check on the well-being of the occupants and otherwise investigate the call.

The Arrival of the Police

[6] Two uniformed police officers arrived at the scene. With their flashlights, they checked the front and back doors of the townhouse. The doors were locked. The unit was in darkness. No one answered the officers' knocks. They heard no sounds from within the unit. They saw no signs typical of an actual or attempted forced entry.

[7] The front door of the unit faced the interior of the housing complex. The rear yard was fenced and backed onto Grandravine Drive. The fence, about three feet high, had a gate that opened to a patio stone walkway. The gate was open when police arrived. The walkway led across a grassy boulevard to the sidewalk along Grandravine.

The Decision to Wait

[8] The police were concerned about the state of anyone who might be inside unit 132 as a result of the truncated 911 call. They decided to have the police dispatcher contact the landlord's security service to have a security guard sent to open the unit.

The Stranger in the Backyard

[9] As the officers waited for a security guard to arrive to let them into the unit, they noticed a man – Mackel Peterkin – walking along the sidewalk on Grandravine. The man turned from the sidewalk, walked across the patio stones, and entered the fenced backyard through the open gate. A few feet into the backyard, the man turned around and used his cellphone.

The Police Approach

[10] The police officers walked over to the man who had entered the backyard. They thought he might live in the unit or know something about the 911 call. If the man did not live there, the officers wanted to know what he was doing in the backyard of a house belonging to somebody else at three o'clock in the morning.

The Discussion

[11] In answer to the officers' questions, the man explained he did not live in unit 132. He said he was waiting for a ride and pointed to a vehicle driving along Grandravine towards the townhouse. The officers did not think his responses made sense. Why would anyone walk into a backyard to make a telephone call to get a ride, rather than stand on the street to be more visible to the driver?

[12] The officers thought further investigation was warranted.

The Investigative Detention

[13] At about 3:15 a.m., the officers told Peterkin he was under investigative detention in connection with the Trespass to Property Act, R.S.O. 1990, c. T.21. They wanted to find out who the appellant was and his connection, if any, to the townhouse.

[14] The evidence the officers gave at trial about the basis upon which they investigatively detained Peterkin differed from what they had said at the preliminary inquiry and recorded in their notes. Both made reference to the "check address" 911 call as the basis for the detention, but said nothing about the Trespass to Property Act.

The *Charter* Advice

[15] The police officers confirmed with Peterkin that he understood what they meant by "investigative detention" and asked whether he wanted to speak to a lawyer. In providing the Charter advice, the officers made no mention of the toll-free number for duty counsel or the availability of immediate free legal advice. They did not explain why Peterkin might want to talk to a lawyer.

[16] Peterkin produced a driver's licence to confirm his identity. He declined to speak to a lawyer.

Peterkin's Conduct

[17] As the police officers waited for a response to their query, they noticed Peterkin tapped his right hip at waist level twice. He held his wrist at waist level. For them, these movements are characteristic of a person who is armed. They described Peterkin as "blading" away from them. He moved his right foot back and turned to his right so his left shoulder was towards and perpendicular to the officers. Peterkin appeared nervous to one of the officers. The officers did not know where Peterkin had put his cellphone after he ended his call. They acknowledged he could have put the phone in a holster on his hip.

[18] When the officers received confirmation that there were no "hits" for Peterkin on the police information system, one of the officers returned Peterkin's driver's licence. The officer passed the document to Peterkin's right side. Rather than reach out for the licence with his right hand, Peterkin kept his right elbow tucked tightly to his body and on his right hip. He turned his whole body and awkwardly extended only his right forearm to take the proffered licence.

The "Safety" Search

[19] Both officers suspected Peterkin had a firearm. They advised him they were going to give him a pat-down for their safety before he could be on his way. As one officer reached out towards him, Peterkin backed up quickly, grabbed at his right waist area, and yelled something. He struggled to escape. The officers wrestled him to the ground. He continued to reach for his right waist area, first with his right arm, then with his left. One of the officers felt the butt of a gun on the right side of Peterkin's waist and removed it. The struggle stopped.

The Arrest

[20] The officers arrested Peterkin for unlawful possession of a firearm. Peterkin confirmed the firearm was loaded with a bullet in the chamber. When the officers searched Peterkin incident to his arrest, they recovered 40 rounds of ammunition, some cocaine and marijuana, two cellphones, and $275.00 in cash.

The Defence Evidence

[21] Peterkin testified that at about 3:15 a.m. on August 14, 2011 he was walking along the sidewalk on Grandravine Drive towards Driftwood Avenue. He was talking on his cellphone and waiting for his girlfriend, Chereta Palmer, to pick him up and drive him home. Police stopped him on the patio stone

walkway between the public sidewalk and the backyard of unit 132. He never reached the backyard. He said he was stopped regularly by the police; about two to four times each week. He surrendered his driver's licence because he thought he had no choice but to comply with their demand for identification.

[22] Peterkin denied being told he was under investigative detention or advised of his right to counsel. When told he would be searched, he stepped away from the officers, probably into the backyard of the townhouse. As the officers reached for him, he struggled with them and all three men fell to the ground. The contraband belonged to a man, "Mike", who had given Peterkin marijuana in return for delivering the contraband to another person.

[23] Palmer confirmed she was on her way to pick Peterkin up when she saw him talking to two police officers on the sidewalk. She said Peterkin was nowhere near the back gate of the townhouse when he was taken down and arrested.

The Grounds of Appeal

[24] Peterkin advances two grounds of appeal. He says that the trial judge erred:

i. in holding the officers were lawfully entitled to conduct a safety search (i.e., a pat-down) incidental to his investigative detention; and

ii. in failing to exclude the gun, cocaine, and trafficking paraphernalia under s. 24(2) of the Charter.

Ground #1: The Lawfulness of the Safety Search

[25] On appeal, Peterkin no longer contests the lawfulness of his investigative detention in the backyard of unit 132. Peterkin's focus is on whether the warrantless safety search which followed the investigative detention was lawful.

The Relevant Circumstances

[26] A second recitation of the circumstances in which the safety search was conducted is unnecessary. Brief reference to some features of the encounter will suffice.

[27] Peterkin walked into the backyard of an apparently unoccupied townhouse sometime after 2:30 a.m. as officers were responding to a static line 911 call from the unit. Brief questions from the officers quickly established Peterkin had no connection to the townhouse. He properly identified himself, but explained his presence with a reason the officers considered implausible.

[28] Several features of Peterkin's behaviour caused the officers to be concerned about their safety. Peterkin appeared nervous. He avoided eye contact. He tapped his right hip twice and held his right wrist there. He "bladed" his body so only his left side was visible to the officers. When an officer proffered Peterkin his driver's licence on his right side, the appellant reached awkwardly for the document, holding his right elbow tight to his hip, turning his whole body and extending only his right forearm to take the licence. When the officers told Peterkin they were going to pat him down, he backed away and began to run.

The Findings of the Trial Judge

[29] The trial judge was satisfied the police had a sufficient legal basis to investigatively detain Peterkin in the backyard of the townhouse unit.

[30] The trial judge then considered whether the police had sufficient grounds to conduct a safety search incident to the lawful investigative detention. Three paragraphs of the trial judge's reasons reflect his analysis and determination of this issue:

> [92] While completing their investigation, the accused conducted himself in a way that caused the police to reasonably suspect that he was armed with a weapon. In this regard, the observed conduct of the accused in relation to his right hip area – tapping his right wrist on this area of his hip, holding his right wrist on this location, and oddly maintaining his elbow on his right hip area when receiving his driver's licence – together with the "blading" of his body so as to turn the right side of his body away from the police, reasonably caused the police to suspect that the nervous accused might well be armed with a weapon. All of this activity was strangely suspicious conduct by the accused that the police had been trained to observe and understand. Constable O'Neil interpreted this conduct by the accused – quite accurately as it turned out – as indicative of someone with a concealed weapon in the waistband of his pants.
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> [93] At this point, if not before, the police were lawfully entitled to conduct a brief "pat-down" search of the accused in order to ensure and preserve their own physical safety. When the accused refused to permit this search and sought to escape their custody, the police officers were entitled to employ the necessary force to physically subdue the accused and conduct this search. Accordingly, the physical search of the accused, which resulted in the discovery of the loaded firearm, ammunition and illicit drugs, was not in violation of s. 8 of the Charter.
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> [95] Accordingly, as in R. v. Amofa, in my view, the proposed "pat down" search of the accused for weapons was fully justified as incidental to the investigative detention of the accused given that the reason for the search was officer safety, and the officers reasonably believed that their safety was at risk. Of course, when the accused refused to permit this incidental "pat down" search for weapons and instead tried to flee, the police were entitled to use reasonable and proportional force to prevent the accused's escape, and to conduct the necessary weapons search to protect themselves and the general public in the vicinity. See: R. v. Mann, 2004 SCC 52 (CanLII), [2004] 3 S.C.R. 59, at para. 36-45; R. v. Clayton and Farmer, 2007 SCC 32 (CanLII), [2007] 2 S.C.R. 725, at para. 40-49; R. v. Dene, 2010 ONCA 796 (CanLII), at para. 4-5; R. v. Amofa, at para. 8-10, 18-26; R. v. Plummer (2011), 2011 ONCA 350 (CanLII), 272 C.C.C. (3d) 172 (Ont. C.A.) at para. 44, 48-61; R. v. Byfield, [2012] O.J. No. 2440 (S.C.J.) at para. 78-81; 110-114.

The Positions of the Parties

[31] For the appellant, Mr. Grill begins with a reminder that a warrantless safety search is presumptively unreasonable. This presumption is only rebuttable where the Crown establishes, on a balance of probabilities, that the police had reasonable and probable grounds to believe, at the time the search was conducted, their own or public safety was at risk. Reasonable belief is synonymous with reasonable and probable grounds.

[32] Mr. Grill submits that a reasonable suspicion of the presence of a weapon is not sufficient to discharge this obligation. A reasonable suspicion standard for a safety search incidental to an investigative detention would not fulfil the purposes of the Charter. The safety risk must be identifiable, reasonably imminent, and relate to police or public safety. Reasonable suspicion of possession or even concealment of a weapon is insufficient. The evidence must give rise to a reasonable belief, reflective of a standard of probability, not just suspicion, which reflects a standard of possibility.

[33] According to Mr. Grill, the evidence adduced at trial fails to satisfy even the more modest reasonable suspicion test. Neither officer said he felt his safety was at risk. Peterkin's conduct – nervousness in the presence of the police officers, checking his waist area, and turning in a different direction – was essentially neutral. Peterkin had been cooperative throughout.

[34] For the respondent, Ms. Roberts contends the relevant standard by which the lawfulness of a safety search incidental to an investigative detention is to be determined is that of reasonable suspicion, not reasonable belief. This standard requires demonstration of reasonable grounds for a belief that police or public safety is at risk. This standard relates to reasonable possibility of harm, not a reasonable probability.

[35] Ms. Roberts says there is no logical reason why a concomitant power to conduct a limited safety search incidental to a lawful investigative detention should require a higher standard than for the detention itself. She also argues that even if the higher reasonable and probable grounds standard for which Peterkin contends applies, the evidence adduced at trial satisfied that standard.

[36] Ms. Roberts also reminds us about the standard of review we are to apply to the decision of the trial judge on this issue. Our task, she says, is to determine whether the totality of the circumstances is capable of supporting the conclusion reached by the trial judge. His findings of fact are to be accorded deference. His legal conclusions are reviewed on a standard of correctness. Ms. Roberts submits that neither reflects error.

The Governing Principles

[37] The principles that define the basis upon and scope within which police may conduct a safety search incidental to an investigative detention control our decision on this ground of appeal.

[38] In R. v. Waterfield, [1964] 1 Q.B. 164, the English Court of Criminal Appeal articulated the test for whether a police officer has acted within his or her common law powers. Under the Waterfield analysis, to determine whether an officer's prima facie unlawful interference with an individual's liberty or property falls within his or her common law powers, a court must engage in two steps of analysis:

1. Does the police conduct in question fall within the general scope of any duty imposed on the officer by statute or common law?

2. If so, in the circumstances of this case, did the execution of the police conduct in question involve a justifiable use of the powers associated with the engaged statutory or common law duty?

See *Waterfield*, at pp. 170-171; *R. v. Mann*, 2004 SCC 52 (CanLII), [2004] 3 S.C.R. 59, at paras. 24-26.

Investigative Detention

[39] The Waterfield analysis has been applied to bestow on police officers a limited power to detain a person for investigative purposes: Mann, at paras. 23-24, 34.

[40] The test for determining whether an investigative detention is justifiable under the second prong of Waterfield is one of reasonable suspicion. An investigative detention must be viewed as reasonably necessary on an objective view of all the circumstances informing the officer's suspicion that there is a clear nexus between the prospective detainee and a recent or ongoing criminal offence: Mann, at para. 34. To conduct this analysis, we must assess the overall reasonableness of the detention decision, testing it against all the circumstances, most notably:

i. the extent to which the interference with individual liberty is necessary to perform the officer's duty;

ii. the liberty that is the subject of the interference; and

iii. the nature and extent of the interference.

See Mann, at para. 34.

[41] To be justifiable, the investigative detention must also be executed in a reasonable manner. The investigative detention should be brief and does not impose an obligation on the detained individual to answer questions posed by the police: Mann, at para. 45.

Searches Incidental to Investigative Detention

[42] The Waterfield analysis has also been applied to recognize a power of search incidental to investigative detention.

[43] Under the first prong of Waterfield, the interference clearly falls within the general scope of the common law duty of police officers to protect life and property: Mann, at para. 38. However, the power to search incidental to an investigation does not exist as a matter of course: Mann, at para. 40. Nor can the power to conduct a safety search of an investigatively detained person be equated with the power to conduct a search incident to lawful arrest: Mann, at para. 45.

[44] The main issue on this appeal is what test properly applies under the second prong of Waterfield to determine when a safety search incidental to an investigative detention is justifiable. The Supreme Court of Canada has held safety searches incidental to investigative detentions are justified where the officer believes on reasonable grounds that his or her own safety, or the safety of others, is at risk: Mann, at para. 40. The search must be grounded in objectively discernible facts to prevent fishing expeditions on the basis of irrelevant or discriminatory factors: Mann, at para. 43.

[45] The Supreme Court articulated two further reasonableness criteria that must be established for a safety search incidental to an investigative detention to be justified. First, the officer's decision to search must be reasonably necessary in light of the totality of the circumstances: Mann, at para. 40. 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: Mann, at para. 40. Second, the safety search must be exercised in a reasonable manner: Mann, at para. 45.

[46] In R. v. Clayton, 2007 SCC 32 (CanLII), 220 C.C.C. (3d) 449, the Supreme Court again addressed the issue of safety searches incidental to investigative detention. Police received an early morning 911 call reporting that four of approximately ten “black guys” in a parking lot in front of a strip club were openly displaying handguns. The caller described four vehicles in the parking lot. Police responded to the call. Among other things, two officers stopped a vehicle as it approached a rear exit. The vehicle did not fit the description of any of the four vehicles mentioned in the 911 call.

[47] One officer asked the driver, Farmer, to step out of the car. Farmer protested twice before getting out. The officer, concerned for his safety in light of Farmer’s protests, told Farmer to put his hands on top of the car. When asked questions by another police officer, Clayton, a passenger in the car, gave strange and evasive answers and stared straight ahead. He was wearing gloves, which struck the officer as inappropriate given the weather conditions. The officer asked Clayton to step out and put his hands on the trunk of the car. Clayton blocked the officer’s view of the interior of the car and bolted when directed to the rear of the car. Other officers subdued Clayton, searched him, and found a loaded prohibited handgun in his pocket.

[48] A majority of the Supreme Court concluded the police had acted within the scope of their common law powers when they investigatively detained Clayton and Farmer: Clayton, at paras. 22-23. The investigative detention was justified because they had a reasonable suspicion Farmer and Clayton could be in possession of the handguns reported in the 911 call and that, as a result, the lives of the officers and the public were at risk: Clayton, at para. 46.

[49] Citing Mann, the Supreme Court unanimously held a safety search incident to an investigative detention is justified if the officer believes on reasonable grounds that his or her safety, or that of others, is at risk: at paras. 29, 104. Applying this test to the facts of Clayton, the court held that the same safety concerns that justified the investigation detention justified the incidental safety search: paras. 48-49.

[50] More recently, the Supreme Court considered the authority for safety searches in R. v. MacDonald, 2014 SCC 3 (CanLII), 303 C.C.C. (3d) 113. However, MacDonald did not involve a safety search incidental to an investigative detention.

[51] In MacDonald, police responded to a noise complaint. They knocked on MacDonald’s door. MacDonald opened the door a short distance. The officers could see into the room but were unable to get a full view of the interior. Macdonald had something black and shiny in his hand, hidden behind his pant leg. The officer twice asked MacDonald what he had in his hand. MacDonald said nothing. To get a better look, the officer pushed the door open a few inches further. He saw the object was a gun. The officer quickly forced his way into the unit, disarmed MacDonald, and seized the loaded, restricted firearm.

[52] The trial judge found no Charter breach. A majority of the Nova Scotia Court of Appeal agreed: the officer had validly exercised the authority to conduct a safety search. The Supreme Court concluded that pushing the door open amounted to a safety search, and went on to consider whether the search was justifiable.

[53] Citing Mann at paragraphs 40 and 45, a majority of the court concluded safety searches are authorized by law only if the officer believes on reasonable grounds his or her safety is at stake and that, as a result, it was necessary to conduct a search: MacDonald, at para. 41.[1]

[54] A minority of the court concurred in the result (that the safety search was justified), but held the majority had been unfaithful to the teachings of Mann and the subsequent case law by positing a new standard of reasonable grounds to believe a person was armed and dangerous rather than reasonable grounds to suspect such was the case: MacDonald, at paras. 66, 77. The minority maintained that although Mann employed the language of "reasonable grounds to believe", pairing this language with the concept of safety being "at risk" inherently built in the standard of a possibility: MacDonald, at para. 69. By using the language of reasonable grounds to believe a person is armed or dangerous (at paras. 39, 42), and reasonable belief in an imminent threat to safety (at paras. 40, 43-44), the majority replaced what was in essence a reasonable suspicion standard with one of reasonable belief: MacDonald, at paras. 66-71.

Other Related Applications of the Waterfield Analysis

[55] The two-stage Waterfield test also governs an assessment of police conduct in response to a 911 call: R. v. Godoy, 1999 CanLII 709 (SCC), [1999] 1 S.C.R. 311, at para. 16.

[56] The principles governing investigative detention and the conduct of searches incidental to investigative detention set out in Mann have also been applied to investigative detentions and incidental searches under the Trespass to Property Act: R. v. Amofa, 2011 ONCA 368 (CanLII), 85 C.R. (6th) 265, at paras. 15-21.

The Principles Applied

[57] I would not give effect to this ground of appeal.

[58] It is worth remembering that the focus of Peterkin's challenge at trial to the lawfulness of the police conduct was not that the safety search was not up to the Waterfield and Mann standards. His claim at trial was that he was arbitrarily detained. The detention was based on racial profiling. He argued the requisite reasonable grounds were lacking.

[59] A second preliminary point concerns the decision in MacDonald. We need not decide whether, as the MacDonald minority argues, the majority, without overruling the prior decision in Mann, has recalibrated the standard to be applied in determining the lawfulness of a safety search. This is because the evidence in this case satisfies the test as articulated in MacDonald: reasonable belief an individual's safety is at stake. Further, in my respectful view, we need not determine whether the decision in MacDonald is distinguishable because the safety search with which the court was concerned in MacDonald was not incidental to an investigative detention, but free-standing.

[60] To be lawful, the investigative detention and safety search incidental to it must satisfy the two-stage Waterfield test. The conduct must fall within the general scope of a statutory or common law duty imposed on the officer, and must also involve a justifiable use of powers associated with that duty: Mann, at para. 24; MacDonald, at paras. 35-36.

[61] When Peterkin entered the backyard of unit 132 at 296 Grandravine Drive, the officers were investigating a static line 911 call from the unit. In doing so, they were discharging their common law

duty to preserve the peace, prevent crime, and protect life and property. Peterkin's entry into the fenced rear yard also entitled the officers to detain him to investigate a potential breach of the Trespass to Property Act, an arrestable offence under s. 9(1) of that Act.

[62] As the interaction with Peterkin continued, the officers noticed several movements they considered to signal possession of a gun. Taps to the waistband of the appellant's pants. "Blading" to obstruct their view of the appellant's right side. Awkward receipt of the driver's licence when the officers returned it to the appellant. An indication by the officers of a pat-down search for the officers' safety. Resistance. An attempt to flee. Apprehension and only then a search. This accumulation of factors fully supported a reasonable belief on the part of the officers that their safety was at stake and justified the search.

Ground #2: Admissibility of the Evidence under s. 24(2)

[63] Peterkin advances a second argument. He challenges the correctness of the trial judge's ruling to admit the evidence obtained during the search after the attempt to flee.

The Reasons of the Trial Judge

[64] Despite finding no violation of s. 8 of the Charter, the trial judge found two other Charter breaches preceded the search of Peterkin.

[65] The first was a breach of s. 10(a). The police advised Peterkin he was being detained for investigation for breaching the Trespass to Property Act, but failed to tell him they were also investigating a 911 call in connection with the townhouse where he appeared.

[66] The second was a breach of the informational component in s. 10(b). The officers failed to tell Peterkin about the availability of duty counsel for immediate legal advice and provide him with the toll-free number to call to receive that advice.

[67] The trial judge followed the three lines of inquiry mandated by R. v. Grant, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353, in deciding whether to admit as evidence the items found in Peterkin's possession on arrest: the seriousness of the Charter-infringing state conduct; the impact on the accused's Charter-protected interests; and society's interest in the adjudication of the case on its merits.

[68] The trial judge found the police had been negligent, but not wilful or deliberate in their failure to fully advise Peterkin of the reasons for his detention and his right to counsel. The trial judge was not prepared to characterize the officers' omissions as having been made in good faith, but did not conclude their conduct reflected bad faith. The first line of inquiry under Grant favoured exclusion of the evidence.

[69] Turning to the second line of inquiry, the trial judge concluded the infringements did not have a serious impact on Peterkin's Charter-protected interests. Peterkin made no statement to police. Neither breach was directly linked or causally connected to the discovery of the evidence, which inevitably would have been discovered when the police searched Peterkin incident to his arrest. This line of inquiry favoured admission of the evidence.

[70] The final line of inquiry also favoured admission of the evidence. Society's interest in the adjudication of charges on the merits was furthered by the admission of reliable real evidence, critical to

proof of the Crown's case. Exclusion of the evidence would undermine society's justifiable expectation of an adjudication of the allegations on their merits.

[71] The trial judge weighed the results of the three lines of inquiry and concluded the balance favoured admission of the evidence.

The Arguments on Appeal

[72] Mr. Grill contests the correctness of the trial judge's s. 24(2) analysis. He submits the trial judge undervalued the seriousness of the s. 10(a) and s. 10(b) Charter violations and their impact on the Peterkin's Charter-protected interests. These errors, he says, skewed the s. 24(2) analysis. The evidence should have been excluded.

[73] For the respondent, Ms. Roberts says the trial judge got it right. No errors in principle. No reliance on irrelevant factors. A proper assessment of relevant considerations. Deference due.

The Governing Principles

[74] For present purposes, two brief points about the Grant analysis will suffice.

[75] First, where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review: Grant, at para. 86; R. v. Beaulieu, 2010 SCC 7 (CanLII), [2010] 1 S.C.R. 248, at para. 5; R. v. Côté, 2011 SCC 46 (CanLII), [2011] 3 S.C.R. 215, at para. 44.

[76] Second, discoverability of the evidence sought to be excluded remains a relevant factor under the current s. 24(2) analysis. It weighs in favour of admissibility: R. v. Nolet, 2010 SCC 24 (CanLII), [2010] 1 S.C.R. 851, at para. 54; Côté, at para. 69. However, despite its relevance to the first two lines of inquiry under Grant, discoverability is not determinative: Côté, at para. 70.

The Principles Applied

[77] I would not give effect to this ground of appeal.

[78] The trial judge considered each line of inquiry as directed by Grant. His factual findings and analysis are entitled to deference in the absence of demonstrated error or unreasonable findings. Peterkin has established neither.

[79] The infringements that occurred here, of both s. 10(a) and s. 10(b) of the Charter, were aptly characterized as the product of negligence, not the result of wilful or deliberate misconduct. The information the officers provided Peterkin about the reasons for the investigative detention and his right to counsel was incomplete. However, the information did alert Peterkin to the extent of his jeopardy. Nothing omitted yielded any response of evidentiary value. The items recovered would have been discovered in any event on a search incident to arrest under the Trespass to Property Act. They afforded reliable real evidence central to the demonstration of guilt.

CONCLUSION

[80] For these reasons, I would dismiss the appeal.

Released: January 12, 2015 (KF)

"David Watt J.A."
"I agree K. Feldman J.A."
"I agree K. van Rensburg J.A."