CITATION: R. v. Plummer, 2011 ONCA 350
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# COURT OF APPEAL FOR ONTARIO

Laskin, MacPherson and Sharpe JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Andrew Plummer

Appellant

Michael Dineen and Emily Morton, for the appellant

Emile Carrington, for the respondent

Heard: April 4, 2011

On appeal from the convictions entered by Justice S. Bruce Durno of the Superior Court of Justice on July 13, 2007.

**MacPherson J.A.:**

## A. INTRODUCTION

[1] On July 13, 2007, Durno J. of the Superior Court of Justice in Brampton convicted the appellant, Andrew Plummer, of possession of a prohibited firearm, possession of a firearm in a motor vehicle, possession of a firearm in contravention of a prohibition order, and related offences. The trial judge sentenced the appellant to 16 months in custody in addition to 16 months of credit for pre-trial custody. The appellant appeals his convictions.

## B. FACTS

### (1) The parties and events

[2] The following summary of the facts is based on the Agreed Statement of Facts filed at the trial and the facts as found by the trial judge in his thorough review of the evidence.

[3] In the afternoon of September 12, 2006, the appellant met his girlfriend, Shevon Bennett, who had parked her car in the fire lane beside the appellant's apartment residence at 85 Orenda Court in Brampton. He brought with him Ms. Bennett's overnight bag, which she had left at his home the night before. The appellant wore a bulletproof vest and carried a handgun in his waistband. The appellant sat in the passenger seat of Ms. Bennett's car which was registered to her mother.

[4] Constables Michael Ratych and John Hunt were in a patrol car in the area. They saw the Bennett car parked facing the wrong way in a clearly marked no-parking zone. They knew that the door at 85 Orenda Court closest to the Bennett car was used for drug buys.

[5] As they passed by the Bennett car, the police officers saw an expression of surprise or shock on the appellant's face and they saw him make some movement downward in his seat. After they had passed the car, the officers saw the appellant bend forward and slouch down. Constable Hunt thought that the appellant's movements were consistent with concealing drugs.

[6] The officers made a u-turn and came back to investigate the Bennett car and its occupants. They exited the van, approached the Bennett car, and asked the occupants for their names. When the appellant provided his name to Constable Ratych, the officer went to speak to his partner out of earshot of the appellant because he immediately associated the name with an officer safety alert that had circulated a week before. The alert described the appellant as possibly armed with a handgun and in possession of a bulletproof vest.

[7] In fact, on August 29, 2006, the Peel Regional Police had issued an Officer Safety Alert regarding Andrew Plummer that included a picture and description of the appellant, and identified one of his "known hangouts" as 85 Orenda Court in Brampton.

[8] The alert continued:

> *** POSSIBLY ARMED WITH A HANDGUN ***
>
> ON 26 AUGUST 2006, UNIFORM PERSONNEL RECEIVED INFORMATION FROM A CONFIDENTIAL INFORMANT REGARDING ANDREW "BUBBA" PLUMMER. PLUMMER IS THE BROTHER OF ANDREW LAWRENCE – 1985-11-19 – THE INTENDED TARGET OF A SHOOTING ON ORENDA COURT ON 3 AUGUST 2006.
>
> INFORMATION RECEIVED IS THAT PLUMMER IS ACTIVELY ATTEMPTING TO AVENGE THE SHOOTING AND THAT HE IS IN POSSESSION OF A HANDGUN WHICH HE CARRIES IN HIS WAISTBAND. INFORMATION HAS ALSO BEEN RECEIVED THAT PLUMMER IS ALSO IN POSSESSION OF A BULLETPROOF VEST.
>
> ANY OFFICER DEALING WITH ANDREW PLUMMER SHOULD USE CAUTION AS HE IS PRESUMED TO BE ARMED AND DANGEROUS.

[9] Constable Ratych returned to the passenger side of the car and asked the appellant to exit. He believed that he had grounds to search the appellant on the basis of the alert, the appellant's reaction to seeing the police, and his apparent attempt to hide something.

[10] Once the appellant got out of the car, Constable Ratych conducted a pat-down search and felt the bulletproof vest. He informed Constable Hunt about what he had found and proceeded to the car with a view to searching it. The focus of his interest was determining if there was a gun and, if so, seizing it. The appellant remained standing outside the car near the officers.

[11] Contrary to Constable Ratych's testimony that he saw the gun in plain view at the top of the open bag on the floor in front of the passenger seat, the trial judge described the search for, and seizure of, the gun in this fashion: "I find the officer probably first checked under the passenger's seat, and that the gun was likely under items in the bag."

[12] As Constable Ratych searched the bag in the car, the appellant fled from the scene. The trial judge made no factual findings about the police pursuit and apprehension because they were not germane to the legal issues he was required to resolve.

### (2) The *Charter* ruling

[13] The appellant made an application to exclude the evidence of the gun on the basis that his rights under section 8 (unreasonable search and seizure) and section 9 (arbitrary detention) of the *Charter* had been violated.

[14] The trial judge ruled that the detention of the appellant by the police was lawful. He referred to the alert relating to the appellant, the appellant's reaction to seeing the police, and his suspicious conduct in the car as if he were concealing something and concluded:

> With that constellation of factors, the officers were entitled to embark on an investigative detention. The detention was lawful having regard to the nature of the situation, the seriousness of gun crimes, the information known to the police about the applicant, and the detention was reasonably responsive to and tailored to the circumstances as he was asked to step out of the car. Balancing the seriousness of the risk to the public with the liberty interests of the applicant, the detention was no more intrusive of liberty interests than was necessary to address the risk. [Citation omitted.]

[15] The trial judge held that the pat-down search of the appellant was lawful. He reasoned:

> I accept Ratych's evidence that he was honestly concerned for the safety of the people in the vicinity, as well as his and Hunt's. Objectively, that was a reasonable conclusion. The applicant was seated in a parked car close to a door used by drug purchasers. He was surprised to see police, and acted suspiciously as if he was concealing something when the officers passed. The officers had some information, of unknown reliability, that the applicant was possibly armed and dangerous. Those factors made Ratych's decision to conduct a "pat-down" search reasonable and lawful.

[16] The trial judge held that once Constable Ratych found the bulletproof vest, he reasonably decided that it gave credence to the alert, raising the level of suspicion so as to entitle him to go into the car and search the very area where the police had seen the appellant acting suspiciously as if he was concealing something. The trial judge noted that trial counsel "conceded that if the officers saw the suspicious movements and knew of the alert, they could search the bag and car, at least in the area where Mr. Plummer was seated." The trial judge summarized his conclusion regarding the vehicle search as follows:

> [W]here the police see conduct consistent with concealing something in the area of the front passenger seat, have information the person may be carrying a gun and wearing a bullet proof vest, and confirm he is wearing a bullet proof vest, to find that the police had to stop their search once they found he was not carrying a gun on him, flies in the face of concerns for officer safety.

[17] Finally, the trial judge recorded that if he were wrong in his conclusion that there was no violation of ss. 8 and 9, he would nonetheless have admitted the evidence of the gun. In reaching the conclusion that he would not exclude this evidence pursuant to s. 24(2) of the *Charter*, the trial judge applied (because he made his ruling in 2007) the criteria in *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265 ("*Collins*") and *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607 ("*Stillman*").

[18] The appellant appeals his convictions. He contends that the trial judge erred in his analysis and conclusions relating to all three of the *Charter* issues described above. His submission is that the detention was unlawful, the search of the bag inside the car was unreasonable, and the evidence of the gun should have been excluded from the trial.

## C. ISSUES

[19] The issues are:

(1) Was the detention of the appellant arbitrary contrary to s. 9 of the *Charter*?
(2) Was the search of the bag inside the Bennett car and the seizure of the gun found in the bag unreasonable contrary to s. 8 of the *Charter*?
(3) If the answer to (1) and/or (2) is in the affirmative, did the trial judge err by not excluding the evidence pursuant to s. 24(2) of the *Charter*?

## D. ANALYSIS

### (1) Arbitrary detention – *Charter* s. 9

[20] The appellant contends that the trial judge erred by finding that Constable Ratych possessed the requisite reasonable suspicion to conduct an investigative detention. There are two components to the appellant's submission on this issue. First, the appellant submits that the trial judge's reliance on the appellant's "suspicious" conduct in the car did not provide the requisite suspicion for an investigative detention pursuant to *R. v. Mann*, 2004 SCC 52 (CanLII), [2004] 3 S.C.R. 59 ("*Mann*"). Second, the appellant argues that the trial judge relied improperly on an officer alert that had uncorroborated and vague information.

[21] I do not accept these submissions. I begin with two preliminary observations. First, the threshold of reasonable grounds for an investigative detention must be determined through an examination of the totality of the circumstances: see *Mann* at para. 34 and *R. v. Clayton*, 2007 SCC 32 (CanLII), [2007] 2 S.C.R. 725, at para. 30

("*Clayton*"). Second, the trial judge's assessment of the evidence and findings of fact must be accorded substantial deference by a reviewing court: see *R. v. Cornell*, 2010 SCC 31 (CanLII), [2010] 2 S.C.R. 142, at paras. 22-25. More specifically, the ultimate findings by the trial judge that there were reasonable grounds to detain are also owed some measure of deference because of the significant factual element involved in this determination.

[22] Turning to the appellant's first submission on this issue, I do not think it was improper for the trial judge to consider both the appellant's reaction to seeing the police and his movements consistent with attempting to conceal something as factors amongst the totality of the circumstances.

[23] There is abundant authority for observations of reactions by suspects to police presence permissibly forming part of the constellation of factors that may determine the legality of an investigative detention. The value of such evidence, if any, will inevitably be determined by its intersection with the myriad of other circumstances in play: see, for example, *Clayton* at paras. 9-10 and 44-46; *R. v. Nesbeth* (2008), 2008 ONCA 579 (CanLII), 238 C.C.C. (3d) 567 (Ont. C.A.), at paras. 5 and 17-18 ("*Nesbeth*"); and *R. v. Dene*, 2010 ONCA 796 (CanLII), at para. 4. The trial judge's analysis in this case of the police officers' perceptions of the appellant's body language and movements is entirely consistent with these authorities.

[24] With respect to the appellant's second submission on this issue, I see nothing wrong with the trial judge's treatment of the Officer Safety Alert. Although the information in the alert was stated to have come from a confidential informant (I regard this as a neutral, not a negative, factor), the trial judge properly focused on several features of the alert to find it deserving of weight in the reasonable suspicion calculus: the alert provided recent information, it provided considerable detail about the suspect, and it provided information of motive. His analysis in this respect was consistent with the framework enunciated by this court in *R. v. Simpson* (1993), 1993 CanLII 3379 (ON CA), 79 C.C.C. (3d) 482 at 503-04 and *R. v. Lewis* (1998), 1998 CanLII 7116 (ON CA), 122 C.C.C. (3d) 481 at para. 16-17.

[25] For these reasons, I conclude that the trial judge did not err by determining that the investigative detention of the appellant was lawful.

**(2) Unreasonable search and seizure – *Charter* s. 8**

[26] In relation to the *Charter* s. 8 issue, there are two matters to consider, one raised by the Crown and the second advanced by the appellant.

[27] The Crown contends that the appellant had no reasonable expectation of privacy in the Bennett car or in the bag in which he hid the firearm and, therefore, he had no standing to make a *Charter* s. 8 challenge. The Crown submits that the trial judge erred by ruling otherwise.

[28] The appellant contends the trial judge erroneously created an ancillary police power to conduct a vehicle search incident to an investigative detention. The only search

permitted in the context of an investigative detention, asserts the appellant, is a limited pat-down search of the person being detained.

[29] I will deal first with the standing issue and second with the validity of the search.

**(a) Standing**

[30] The trial judge stated that "[t]he first step in advancing a claim alleging a breach of s. 8 is for the applicant to establish that he or she had a reasonable expectation of privacy in the thing searched or seized". In this case, "the thing searched" was Ms. Bennett's overnight bag inside her car; "the thing seized" was the gun the appellant placed inside the bag because, as he testified on the *voir dire*, "I thought they would never search a woman's bag."

[31] In determining the standing issue, the trial judge considered the factors set out by the Supreme Court of Canada in three leading cases: whether the accused was present at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation of privacy, and the reasonableness of the expectation: see *R. v. Buhay*, 2003 SCC 30 (CanLII), [2003] 1 S.C.R. 631, at para. 18; *R. v. Edwards*, 1996 CanLII 255 (SCC), [1996] 1 S.C.R. 128, at para. 45; and *R. v. Belnavis*, 1997 CanLII 320 (SCC), [1997] 3 S.C.R. 341, at para. 20.

[32] Applying these factors, the trial judge concluded that several supported a privacy finding and several counted against it. In the end, he concluded that "[o]n the totality of the evidence, I am persuaded the applicant has standing to bring his s. 8 argument."

[33] In my view, it is clear that the appellant had no privacy interest in "the thing searched". He was not the owner of the car – that was Ms. Bennett's mother. He was not the driver of the car – that was Ms. Bennett. He was not even a passenger in the car – he was simply sitting in the front passenger seat with the door open and his feet dangling outside.

[34] Nor did the appellant have a privacy interest in the bag – it was Ms. Bennett's bag, it contained only her personal effects, and the appellant's connection to it was simply carrying it from his apartment to her car when she came to retrieve it.

[35] The real privacy issue relates to "the thing seized", the gun. There is no question that the gun belonged to the appellant; he admitted as much on the *voir dire*.

[36] The question is: did the appellant abandon the gun, thereby dissolving his privacy interest in it? On this question, the trial judge reasoned:

> I am not persuaded the applicant abandoned the gun. I accept his evidence that had the police not come back to the Honda, he would have left with the gun. Even if they did not come back, I am not prepared to find he was giving up the gun to Ms. Bennett.

[37] With respect, I do not accept this conclusion. In my view, it is inconsistent with two recent decisions of this court, both of which were decided after the trial judge's ruling in this case.

[38] In *R. v. B.(L.)* (2007), 2007 ONCA 596 (CanLII), 227 C.C.C. (3d) 70 (Ont. C.A.) ("*B.(L.)*"), two police officers on patrol decided to speak to two young men engaged in suspicious activity. When first noticed by the police, one of the young men, L.B., was holding a black bag in his hand. By the time the officers joined the two young men, one of the officers noted that L.B. was no longer carrying the black bag. Moldaver J.A. described the ensuing events at para. 25:

> At the top of the stairs, Officer Purches quickly located the black bag. He found it "on the grass with some litter". As he did so, he called down to L.B. and F, who were "at the bottom with Detective Constable Reimer", and asked "whose bag is this". F did not respond; L.B. replied "I don't know". In view of L.B.'s response and the fact that he had distanced himself physically from the bag, Officer Purches treated the bag as abandoned property and he opened it. Inside, he located school work with L.B.'s name on it; he also discovered a loaded .22 calibre handgun. At that point he shouted "gun, gun, gun" and he and his partner arrested L.B. and F at gunpoint.

[39] The trial judge concluded that L.B. had not abandoned the bag. This court disagreed. On the facts set out above, Moldaver J.A. conluded at para. 71, that "the search of the bag was legally justified in the circumstances. Having disclaimed any privacy interest in the bag, the respondent effectively precluded himself from relying on s. 8 of the *Charter* to impugn the lawfulness of Officer Purches's search."

[40] Similarly, in *Nesbeth*, a man who had not been detained ran away as police approached him. As he ran, he threw away his knapsack. The police retrieved the knapsack, which contained cocaine.

[41] On the *Charter* s. 8 issue, Rosenberg J.A. discussed *B.(L.)* and concluded, at para. 23:

> The same may be said here. By his conduct in intentionally throwing away the knapsack, the respondent had precluded himself from relying on the s. 8 protection.

[42] In my view, *B.(L.)* and *Nesbeth* are determinative of the privacy issue in this appeal. Indeed, the abandonment in this case of "the thing seized", the gun, was even stronger than those in *B.(L.)* and *Nesbeth*. What the appellant did in this case amounts to a form of double abandonment. First, he removed the gun from his person and hid it in his girlfriend's bag. Second, he then ran away from the scene. Taken together, the

appellant first distanced himself from the gun, by placing it in the bag, and then distanced himself from the bag by running away. In these circumstances, his potential privacy interest in the gun evaporated.

**(b) The search of the bag**

[43] Strictly speaking, it is not necessary to address this issue in light of the resolution of the privacy issue above. However, since this issue was fully argued in the parties' facta and at the hearing – indeed it was the principal focus of the hearing – I think it appropriate to consider it. I begin with two preliminary observations.

[44] First, the appellant concedes that if there were grounds for an investigative detention, the pat-down search of his person following his detention was a lawful search. This is an appropriate concession. *Mann* stands for the proposition that where a police officer has reasonable grounds to believe that his or her safety or the safety of others is at risk, the officer may engage in a protective pat-down search of the detained individual.

[45] Second, trial counsel conceded that once the bulletproof vest was found during the pat-down search, the officers were then entitled to search the bag and car, at least in the area where the appellant was seated. Appellate counsel resiled from this concession and sought to argue the opposite. Crown counsel did not object. In my view, this was a fair response from the Crown, especially in light of the dearth of jurisprudence on the point.

[46] Turning to the merits, the appellant submits that the trial judge erred in law by creating a power to search a vehicle incident to an investigative detention. Constable Ratych did not arrest the appellant upon feeling what he thought was a bulletproof vest; had he done so on adequate grounds, the police arguably would have been entitled to search the vehicle as a search incident to the arrest. However, since no arrest was made, the only basis on which Constable Ratych could have legally entered the vehicle to search the bag was if there was a common law power to search a vehicle and its contents incidental to an investigative detention of a person. The appellant submits that there is no such recognized common law power and the trial judge erred by creating the power in the factual circumstances of this case.

[47] In support of this position, the appellant makes three submissions. First, *Mann*, the case that created the power to search incidental to an investigative detention, supports his position. Second, a 'bright line' interpretation limiting *Mann* to a search of the detained person is the preferred interpretation. Third, on the facts of this case, there was no immediate safety risk justifying a search beyond the pat-down search of the appellant permitted by *Mann*.

[48] With respect to the appellant's first submission, he is correct to focus on *Mann*. In *Mann*, the Supreme Court of Canada held that there is a limited common law power of protective search incidental to an investigative detention. Such a search will only be justified if it is reasonably necessary, reasonably executed, and based on a reasonable belief by the police that officer safety or the safety of others is at risk in the totality of the circumstances.

[49] In defining the search power in *Mann*, Iacobucci J. relied on the decades of American jurisprudence emanating from the decision of the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), which held at p. 27:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

[50] In *Mann*, Iacobucci J. described the power to search incidental to an investigative detention in similar fashion at para. 45:

> To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case.

[51] The appellant contends that the search authorized by *Mann* has three components: it is (1) a pat-down search of the person detained, (2) for weapons, (3) for reasons of police and public safety.

[52] I agree that a *Mann* search is anchored in safety concerns and is limited to weapons.

[53] However, there is nothing in *Mann* confining a search incidental to an investigative detention to only the person detained. Indeed, in *Mann*, the court actually considered both a pat-down search of the person detained, which it upheld, and a search inside the detainee's pockets, which it found to be unreasonable. Accordingly, I agree with this court's interpretation of *Mann* in *R. v. Batzer* (2005), 2005 CanLII 33026 (ON CA), 200 C.C.C. (3d) 330 at para. 16: "the [Supreme Court of Canada] leaves the clear inference that on the right facts, a search incidental to a lawful stop could comply with the common law and pass constitutional muster even though it went beyond a pat down."

[54] The appellant's second submission is that, as a matter of policy, the common law power to conduct a search incidental to an investigative detention should be confined to the person detained. As expressed concisely in his factum at para. 40:

> The Appellant submits that in the absence of legislation from Parliament, the Court should refrain from creating yet another expanded police search power. Rather, a bright line test is the best approach: when the *Mann* "pat-down" search of the person reveals no weapon, the detainee must be allowed to leave unencumbered by any other search.

[55] In support of his position that a bright line test is the right approach, the appellant asserts that the problems of a more flexible test are manifested in this case by the fact that the trial judge provided no definition of the expanded common law power to search a car incident to an investigative detention when no weapon is found on the person after a pat-down search.

[56] I disagree with both components of this submission.

[57] The principle enunciated in *Mann* is that s. 8 *Charter* rights must give way to the specific, articulable and reasonable safety concerns that an officer harbours for him/herself and nearby members of the public. The balance between the right to be free from unreasonable searches and legitimate safety concerns is at the core of *Mann*. The appellant's bright line approach shifts the focus from this balance to a different factor, the location of the search.

[58] There is no logic in this shift. If, as the appellant concedes, a pat-down search for safety reasons is permissible, why should a broader search (for example of a bag in a car) not be available if the result of the pat-down search (for example, discovery of a bulletproof vest) continues to present a reasonable safety concern? In my view, *Mann* answers this question at the level of principle. *Mann* circumscribes police conduct by reference to a valid protective purpose, not by whether the search is of the person, or of a particular place or object in the vicinity.

[59] A similar logic and similar answer govern the United States jurisprudence on this issue. In *Terry v. Ohio*, the United States Supreme Court enunciated the power to search the person incidental to an investigative detention. Fifteen years later, in *Michigan v. Long*, 463 U.S. 1032 (1983), the court expanded the power, still anchored in safety concerns, to a search of the interior of a vehicle driven by the person detained. Justice O'Connor explained the logic of the extension at p. 1050:

> Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or

> hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. See *Terry*, 392 U.S., at 21.

[60] Finally, with respect to the appellant's second submission, I do not agree that the trial judge provided no definition of the search power in this case. He identified and applied the leading cases relating to investigative detentions, including *Mann*, and concluded:

> [W]here the police see conduct consistent with concealing something in the area of the front passenger seat, have information the person may be carrying a gun and wearing a bullet proof vest, and confirm he is wearing a bullet proof vest, to find that the police had to stop their search once they found he was not carrying a gun on him, flies in the face of concerns for officer safety.

[61] In my view, this conclusion is an admirable mix of a correct understanding of the law – the "concerns for officer safety" anchor of *Mann* – and an application of the law to the facts presented by the case.

[62] This brings me to the appellant's third submission. He contends that at the point the car was searched, the police had the appellant within their control and had found no weapon on his person. Accordingly, this was not a situation where there was any immediate risk to officer or public safety. Thus the search of the bag in the car was unreasonable.

[63] The central problem with this submission is that it runs head-on into the trial judge's factual finding that he accepted the police evidence that, having seen the appellant apparently conceal something in the car, and upon finding that he was wearing a bulletproof vest, they had an honest concern that the appellant had immediate access to a weapon that was a threat to their safety and the safety of people in the vicinity.

[64] Constable Ratych's testimony was replete with references to safety issues and concerns:

> Q. Can you just describe whether or not you were aware of this area being, I guess, a high crime area – I'll put it that way.
>
> A. That's correct. Leading up to that – the day of the incident and within recent months of that time there had been a previous shooting with regards to a

> taxicab, a homicide in the complex, a previous gun arrest with regards to two individuals being arrested with bulletproof vests and in possession of loaded handguns, as well as a shooting with regards to a male susp – sorry, a male being shot in the face in the complex as well.
>
> …
>
> Q. Okay. What kind of neighbourhood is it? Can you describe what kind of people would be out and about at that time of day?
>
> A. There were actually a lot of children walking through the complex, finished school at the end of the day.
>
> …
>
> Q. Well, what if any concerns did you have with respect to safety? Let's detail that for us so that we understand that.
>
> A. My concern is that there is possibly a firearm in Mr. Plummer's possession.
>
> Q. Who were you concerned about when you make reference to safety?
>
> A. Concern for my safety, my partner's safety, as well as any children or anyone else in the area.

[65] Against this backdrop, I do not see why, once Constable Ratych discovered the bulletproof vest, he should be required to reject a further search for the gun in the immediate vicinity, including the passenger side area of the car in which the appellant had been seated moments before. To expect the police officer to abandon his search, release the appellant and, in effect, turn his back on the appellant as he walks back to the police cruiser is, in my view, both unrealistic and unreasonable: see *Clayton* at paras. 43-44 and *Michigan v. Long*, at pp. 1049-50.

[66] In the end, I can put it no better than did the trial judge:

> [W]here the police see conduct consistent with concealing something in the area of the front passenger seat, have information the person may be carrying a gun and wearing a bullet proof vest, and confirm he is wearing a bullet proof

> vest, to find that the police had to stop their search once they found he was not carrying a gun on him, flies in the face of concerns for officer safety.

[67] In my view, at the levels of common sense and proper legal analysis, the trial judge was correct.

**(3) Exclusion of evidence – *Charter* s. 24 (2)**

[68] The trial judge said that if he had found a *Charter* violation he would have admitted the evidence of the gun. In reaching this conclusion, he applied the s. 24(2) analysis from *Collins* and *Stillman*.

[69] There is now a new s. 24(2) test: see *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353. Since I have concluded that the appellant had no standing to make a *Charter* s. 8 claim and that the appellant's s. 8 and s. 9 rights were not violated, in my view it is not necessary in this appeal to embark on a hypothetical s. 24(2) analysis using a test unavailable to the trial judge.

## E. DISPOSITION

[70] I would dismiss the appeal.

"J. C. MacPherson J.A."

**Sharpe J.A. (Concurring):**

[71] I agree with MacPherson J.A. that the police had reasonable grounds to conduct an investigative detention of the appellant. It is conceded that if such grounds existed, the police could conduct a protective pat-down search of the appellant to ensure officer safety.

[72] I also agree with MacPherson J.A. that the appellant lacked standing to allege that the search of his girlfriend's bag violated his s. 8 *Charter* right, as the appellant had no reasonable expectation of privacy in the bag in the circumstances of this case.

[73] I would dismiss the appeal on the standing point. In my respectful view, as the appeal can readily be decided on this ground, we should not deal with the difficult and contentious issue of whether the limited power to conduct a pat-down search to ensure officer safety should be extended to permit the search of bags and vehicles. However, my colleague has dealt with that issue, and as I take a somewhat different approach, I will explain why I would find that, on the particular facts of this case, the search did not violate the appellant's s. 8 *Charter* right.

[74] *R. v. Mann*, 2004 SCC 52 (CanLII), [2004] 3 S.C.R. 59 establishes "a limited power of protective search", defined, at para. 45, to be "a protective pat-down search of the detained individual." *Mann* represented a modest but significant expansion of police powers. No Canadian case extends that power to cover additional searches of vehicles or

items in vehicles. *Mann* states, at para. 17, that the courts "must tread softly" when asked to expand police powers, and that the creation of new police powers is "better accomplished through legislative deliberation than by judicial decree". It was "for that very reason" that the Court refused "to recognize a general power of detention for investigative purposes" referring, at para. 18, to the need for the court to exercise "its custodial role" to control and constrain "the unregulated use of investigative detentions in policing…and the potential for abuse inherent in such low-visibility exercises of discretionary power."

[75] The cautionary note sounded in *Mann* is rooted in the historic role of the courts, standing between the individual and the state, and reluctant to grant or recognize new police powers that encroach on individual liberty: see James Stribopolous, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2007) 52 Crim. L.Q. 299. In my view, we should follow *Mann*'s caution in a case like the present, when we are asked to expand the scope of a search incidental to an investigative detention.

[76] A search incidental to an investigative detention is defined and limited by the immediate concerns of officer safety. This reflects an important difference between the narrowly focussed and strictly limited protective search that may accompany an investigative detention, and the broader power to search consequent to a lawful arrest. It is necessary to maintain that distinction and to confine the scope of a search incidental to an investigative detention within strict limits. Here, the police did not arrest the appellant, presumably because they did not think they had grounds for an arrest. As the appellant points out, there is an understandable tendency to expand a narrow rule to endorse the police conduct being challenged, since the case before the court will always be one where the search actually yielded a weapon or some other valuable evidence. This is a tendency that the courts should resist.

[77] However, on the facts as found by the trial judge, I agree that a modest extension of the *Mann* pat-down search was justified in this case. Although the officers had the appellant under their temporary control, the situation was fluid. The appellant's earlier actions, when he appeared to conceal something in the vehicle, combined with the Officer Safety Alert indicating that he might be carrying a gun, gave rise to a legitimate serious concern that he had immediate access to a weapon that he could use if the officers were to simply release him and return to their own vehicle.

[78] On those specific facts, I agree that the officers were entitled to search the bag in the car as an incident of the investigative detention to ensure their own immediate safety. While this does represent a modest extension of the protective pat-down search in *R. v. Mann*, it is limited by the concern for immediate officer safety that underpins *Mann*.

[79] However, I would emphasize that this should not be read as giving the police *carte blanche* power to permit searches of bags or vehicles incident to investigative detention. Such a search demands satisfactory proof of a serious concern for officer safety that requires something more than the initial pat-down.

RELEASED: MAY 05 2011 ("J.I.L")

"Robert J. Sharpe J.A."
"I agree. J. I. Laskin J.A."