Case Name:

R. v. Bramwell-Cole

Between
Her Majesty the Queen, and
Joel Bramwell-Cole

[2010] O.J. No. 5838

Ontario Superior Court of Justice
Toronto, Ontario

C.J. Horkins J.

Heard: July 5-8, 2010.
Judgment: August 30, 2010.

(188 paras.)

Criminal law -- Criminal Code offences -- Weapons offences -- Careless use or storage of firearms -- Carrying a concealed weapon -- Possession of prohibited or restricted weapon -- Offences against person and reputation -- Assault -- Assaulting a peace officer -- Trial of accused charged with various firearms offences and assaulting a police officer -- Accused convicted of all offences except possession of firearm obtained by crime -- Accused was stopped by officers to talk about community anti-violence initiative -- After checking accused's information with dispatch, officers learned accused was subject to two weapons prohibitions -- Officer noted bulge in accused's pants and during pat-down search discovered loaded firearm -- While officers attempted to restrain accused, he punched officer -- Walking around community with loaded firearm in one's pocket was careless use of firearm -- No evidence of where firearm came from.

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- 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 -- Trial of accused charged with various firearms offences and assaulting a police officer -- Accused was stopped by police to talk about community anti-violence initiative and was found in possession of loaded firearm -- No breach of accused's Charter rights -- Officers' decision to stop and talk to accused was spontaneous and not racial profiling -- Force used to restrain accused reasonable -- Prior to pat-down search, accused not detained, and police had reasonable grounds to suspect accused had gun when they conducted

pat-down search -- Accused advised of rights as soon as he was secured and placed in police vehicle.

Trial of an accused charged with possession of a loaded prohibited firearm, possession of a firearm without a licence, careless use of a firearm, carrying a concealed weapon, possession of a firearm contrary to an order, possession of a weapon obtained by the commission of an offence and assaulting a police officer. The accused was a 21-year-old black male. While walking along the street with an acquaintance, the accused encountered three police officers who were patrolling the area as part of an anti-violence initiative known as TAVIS. Two of the officers decided to approach the accused and his acquaintance to speak with them about the programs that TAVIS offered in the community. The accused indicated to the officers that he volunteered at a youth centre in the community, and they asked his name and contact information so that they could send him information about TAVIS. When the officers checked the accused's information with dispatch, they learned that there was a man with the accused's last name that had two previous firearm prohibition orders. When they confronted the accused, his demeanour changed and he became nervous, was stuttering, and turned away from the officers and tugged on his shirt as if trying to hide something. One of the officers then noticed a bulge in the accused's shorts. He did a pat down search of the accused and found a loaded gun in the accused's pocket. While one officer pulled the gun out of the accused's pocket, a second officer tried to secure the accused's arms. The accused struggled and punched one of the officers several times. The officers brought the accused to the ground and handcuffed him. The accused was arrested for possession of a firearm, cautioned and advised of his rights to counsel. At the time of the offences, the accused did not have a licence allowing him to carry a firearm. The accused alleged that he was arbitrarily detained, unlawfully searched, that the officers used excessive force to arrest him, and that they engaged in racial profiling, and he sought to exclude the gun as evidence.

HELD: Accused convicted. The evidence was clear that the accused was in possession of a loaded firearm, which he concealed in his pocket. Walking around the community with a loaded firearm in one's pocket was not only a careless use of a firearm, but was dangerous. Furthermore, at the time of the offences, the accused did not possess a licence permitting him to possess a firearm and he was ordered by a court, on two prior occasions, not to possess a firearm. In addition, the accused assaulted a police officer when he punched an officer while trying to escape. As there was no evidence of where the accused obtained the firearm, it could not be concluded that he knew that the firearm was obtained by the commission of an offence. None of the accused's Charter rights were breached. The officers' decision to stop and talk to the accused and his acquaintance was a spontaneous decision and not racial profiling. The force used by the police to restrain the accused once the gun was discovered was reasonable and necessary in the circumstances and did not result in injuries to the accused. Consequently, there was no breach of the accused's s. 7 Charter rights. Additionally, the accused was not arbitrarily detained. Prior to the pat-down search, the accused was not detained, and by the point where the police conducted the pat-down search, they had reasonable grounds to suspect that the accused had a gun and detain him. Furthermore, the accused was not subjected to an unlawful search and seizure as he had no reasonable expectation of privacy over the information the police discovered when they checked his name with dispatch and the pat-down search was lawful given the officers reasonably believed their safety was at risk, and the search was brief. Finally, there was no breach of the accused's s. 10 Charter rights as he was advised of his rights as soon as he was secured and placed in the police vehicle.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8, s. 9, s. 10, s. 10(b), s. 11, s. 15, s. 24(2)

Criminal Code, R.S.C. 1985, c. C-46, s. 86(3), s. 90(2), s. 92(3), s. 95(2), s. 96(1), s. 117.01, s. 270(2)

Highway Traffic Act, R.S.O. 1990, c. H.8,

Counsel:

Daniel Guttman, Esq.: for the Crown.

Selwyn Pieters, Esq.: for the Accused.

REASONS FOR JUDGMENT

C.J. HORKINS J.:--

INTRODUCTION

1 Joel Bramwell-Cole is charged with a number of firearms offences under the Criminal Code: possession of a loaded prohibited firearm contrary to s. 95(2); possession of a firearm knowing that he was not the holder of a licence for it contrary to s. 92(3); careless use of a firearm contrary to s. 86.(3); carrying a concealed weapon contrary to s. 90(2); possession of a firearm contrary to an order contrary to s. 117.01; possession of a weapon obtained by the commission of an offence contrary to s. 96(1). As well, he is charged with assaulting a police officer contrary to s. 270(2).

2 The charges arise from an interaction between Mr. Bramwell-Cole and three police officers that occurred on August 21, 2009, in the Keele and Eglinton area. During the interaction, the police discovered that Mr. Bramwell-Cole had a loaded gun in the right front pocket of his shorts.

3 Initially, Mr. Bramwell-Cole sought to exclude the gun as evidence based on the alleged breach of many Charter rights. During the voir dire, Mr. Bramwell-Cole narrowed his position submitting that he was arbitrarily detained (s. 9), unlawfully searched (s. 8), that the police used excessive force to arrest him (s. 7), and he was not informed of his right to instruct and retain counsel without delay.

4 Further, Mr. Bramwell-Cole has narrowed his position that the officers used excessive force. If find that the officer did use excessive force, he submits that it should be considered under s. 24(2). He is not seeking a stay if I find excessive force was used.

5 The reference in his counsel's factum to a s. 11 breach is an error.

6 Mr. Bramwell-Cole submits that the police racially profiled him. While he is no longer seeking an order that his s. 15 rights were breached, he submits that the act of racial profiling is relevant to his position that his s. 9 right was breached.

7 Mr. Bramwell-Cole elected trial by judge alone. The evidence was presented through a series of exhibits, an affidavit from Mr. Bramwell-Cole, his viva voce testimony and the testimony of the three officers.

8 Mr. Bramwell-Cole's affidavit together with a few questions formed his evidence in-chief. He was then cross-examined. His evidence was entered for the sole purpose of the voir dire. The rest of the evidence is relevant to the voir dire and trial.

THE FACTS

9 The facts as I find them are as follows. With the exception of Mr. Bramwell-Cole's evidence (affidavit and viva voce) that may only be used for determining the issues in the voir dire, all other evidence and facts as I find them apply equally to the trial.

10 In many serious respects, the evidence of Mr. Bramwell-Cole was unreliable. His testimony was often internally inconsistent and his complaint that the officers at the scene assaulted him causing facial injuries is simply not true. Where the evidence of the officers differs from that of Mr. Bramwell-Cole, I prefer the evidence of the officers.

11 Joel Bramwell-Cole is a 21 year old black man. He graduated from highschool in 2008 and in August 2009 he was not working or attending school.

12 The gun found in Mr. Bramwell-Cole's pocket was a loaded .22 long rifle rimfire calibre, six-shot, single and double action revolver. It is conceded that it is a firearm and that it was loaded.

13 There is no dispute that on August 21, 2009, Mr. Bramwell-Cole did not have a licence allowing him to carry a firearm. In fact, he was subject to two firearm prohibition court orders. Therefore, if the firearm and ammunition are not excluded, it will follow that Mr. Bramwell-Cole is guilty of the firearm offences (with the exception of the charge under s. 96(1) that I will deal with later.)

14 The events in question took place around 7:45 p.m. on August 21, 2009. Mr. Bramwell-Cole was walking along Keele with an acquaintance when he encountered the three police officers.

15 Officers Tremblay, Rendon and Stevenson were in uniform on police bicycles. They started their shift at 7:00 p.m. and were patrolling the Keele and Eglinton area as part of the Toronto Anti-Violence Initiative Strategy ("TAVIS").

16 The role of the TAVIS officers was to go into a high-crime neighbourhood (such as the Keele and Eglinton area), interact with the community, learn about their concerns and problems in the area and build a relationship with them. The TAVIS Officers regularly spoke with members of the community regardless of their race.

17 That summer, TAVIS was focusing on the Keele and Eglinton area because there had been an influx of crime and the crime rate was high. It was hoped that the presence of TAVIS officers would help to lower the crime rate. As Officer Tremblay explained, they were always on the look-out for guns, drugs and gang related activities. They were trying to activate the community to assist them with policing criminal activity. The officers wanted people to feel comfortable calling the police if they saw any criminal activity. The officers believed that their presence helped to reduce the crime rate in the area.

18 To help get the children off the street, TAVIS officers offered programs for the children in theatre, basketball, soccer and bike tours. They organized picnics and a beautification project of a

building complex in the neighbourhood. When the officers interacted with the community, they encouraged the people to participate in the TAVIS events.

19 On the day in question, the TAVIS officers were cycling around the community on police bicycles, stopping to talk to people as they moved around. At approximately 7:45 p.m., they approached the intersection of Keele and Trowell and got off their bicycles. Officer Stevenson explained that they were on their way into a variety store to get a drink and talk to the store owner about what was going on in the neighbourhood. Officer Tremblay had already been in the store a couple times that summer to talk to the owner about crime and whether it had gone up or down.

20 The officers parked their bicycles on the edge of the sidewalk next to the street, and Officer Stevenson stayed to watch the bikes while Officers Tremblay and Rendon headed towards the store.

21 As Officer Rendon walked towards the store, he saw two men approaching. One was Mr. Bramwell-Cole and the other identified himself as Kumar Anglin (the police later learned that Kumar Anglin was not his real name). The two men were walking northbound toward the store on the same side of the street as the officers. Officer Rendon decided that he would go over and speak to them. He wanted to tell them about the programs that TAVIS offered to the community.

22 There was no conversation between the officers that led to a decision to talk to the two men. I find that it was a spontaneous decision that Officer Rendon made and Officer Tremblay simply followed along.

23 Officers Rendon and Tremblay introduced themselves as members of TAVIS. Officer Rendon talked to Mr. Kumar and Officer Tremblay spoke to Mr. Bramwell-Cole. (He identified himself as Mr. Bramwell.) Officer Stevenson remained at the edge of the sidewalk with the bicycles. Officer Stevenson was about eight feet away as the other officers talked to the two men. He could hear bits and pieces of the conversations.

24 In his affidavit, Mr. Bramwell-Cole states that the "officers blocked our path with their bicycles". Mr. Bramwell-Cole never explained how the bicycles were blocking the sidewalk. I reject Mr. Bramwell-Cole's evidence on this point. First, this affidavit evidence is not consistent with the evidence Mr. Bramwell-Cole gave in court. He stated in court that during the conversation with Officer Tremblay, he thought about leaving and turning around to go south on Keele Street. He agreed that his path southbound on the sidewalk was not blocked nor was his path into the convenience store blocked. The only path he claims to have been blocked was his path northbound on the sidewalk (the direction he was going in at the time).

25 It is clear that the officers were not blocking his path southbound or into the store if he had decided to go in. The evidence that I accept shows that the three bikes were parked on the edge of the sidewalk by the curb where Officer Stevenson was standing about eight feet away from the others. As well, two to three feet separated Officers Tremblay and Rendon as they talked to Mr. Bramwell-Cole and Kumar.

26 As Kumar and Mr. Bramwell-Cole were talking to the officers, Mr. Bramwell-Cole was facing the street (with his back to the store) and Officers Tremblay and Rendon were facing the convenience store. Officer Stevenson described his fellow officers standing in the middle of the sidewalk, facing the store. He placed Kumar and Mr. Bramwell-Cole ten feet from the front of the store, facing the street.

27 With this configuration, Mr. Bramwell-Cole claims that his path northbound on the sidewalk was blocked. Mr Bramwell-Cole Was given an opportunity to explain how his path northbound was blocked, but beyond making this statement, he did not elaborate. The evidence in my view does not support Mr. Bramwell-Cole's claim that his northbound path was blocked.

28 Mr. Bramwell-Cole and Kumar told the officers that they were both workers coming from a youth program down the street that was trying to help children in the community.

29 While Officer Tremblay was talking to Mr. Bramwell-Cole, Officer Rendon asked the second man for his name. He identified himself as Kumar Anglin. Kumar also gave the officer his date of birth. Officer Rendon explained to Kumar that there were problems in the area with guns and drugs and the TAVIS officers were present to help eliminate these crimes. The officer described Kumar as polite. Officer Rendon told him about the basketball and soccer programs that TAVIS offered and asked him if he was interested in attending the programs. The Officer told him that he could give him some more information if he wanted to pass it on to the children he was helping out. The conversation was brief.

30 Officer Rendon filled out a contact card ("208 card") with Kumar's name and date of birth. He explained that he prepared a 208 for every person he stopped to talk with.

31 Officer Rendon passed the 208 card back to Officer Stevenson. Officer Stevenson told Officer Rendon to turn off his radio so that no one could hear Officer Stevenson as he called the 208 information into dispatch.

32 While Officer Stevenson called dispatch to run a check on Kumar, Officer Rendon and Kumar continued to talk. When Officer Stevenson got the check back, he told Officer Rendon that it was okay, or in the words of Officer Stevenson: "he had no previous issue with us".

33 Officer Rendon thanked Kumar for talking with him. Kumar left and continued on his way walking northbound on the sidewalk. As Kumar left, Mr. Bramwell-Cole was still talking to Officer Tremblay. Officer Rendon found it "weird" that Kumar did not wait for his friend.

34 While Officer Rendon was talking to Kumar, Officer Tremblay and Mr. Bramwell-Cole were standing a few feet away on the sidewalk having a conversation. Officer Tremblay estimates that his conversation with Bramwell-Cole lasted about three to five minutes. Officer Tremblay admits that he did not tell Mr. Bramwell-Cole that he was free to walk away and that he did not have to talk to him. Nevertheless, the situation was not a threatening one. They proceeded to have a brief cordial conversation. The officer told Mr. Bramwell-Cole about the TAVIS programs and gave him one of his TAVIS business cards. Mr. Bramwell-Cole asked the officer questions about the basketball.

35 As Mr. Bramwell-Cole asked about the basketball program, Officer Tremblay thought to himself "perfect, here's a youth worker, he's part of the community, and chances are he will see a lot more kids than I will. I can give him a pamphlet ... or get him interested in the TAVIS programs."

36 Mr. Bramwell-Cole agrees that he told Officer Tremblay that he was coming from the community center where he worked as a volunteer. He told the officer that he had attended a barbecue at the community centre and was on his way home.

37 Mr. Bramwell-Cole testified that he was walking with Kumar, a man he had just met fifteen minutes ago. Mr. Bramwell-Cold testified that Kumar was on his way to a convenience store'. However, since leaving the community barbecue, Mr. Bramwell-Cole agreed that they had passed

by a few stores and Kumar had not gone inside one. Although a minor point, it is an example of Mr. Bramwell-Cole's story not making sense.

38 Mr. Bramwell-Cole testified that he is a "program coordinator" for youth in the community, and works at this volunteer position about twenty hours a week. He told Officer Tremblay that he worked with youth at the community center as a volunteer. According to Mr. Bramwell-Cole, he had been volunteering for about eight months so he could give back to the community. There is no evidence to confirm that Mr. Bramwell-Cole, in fact, worked as a volunteer. Whether true or not, this is what Mr. Bramwell-Cole told the officer and so it is no surprise that the officer was keen to engage him in a discussion about the TAVIS programs.

39 Officer Tremblay told Mr. Bramwell-Cole that he had pamphlets about the programs and went back to his bike to see if he had any in the saddlebag. The Officer explained that at this point Mr. Bramwell-Cole was free to go if he wanted to leave. The Officer did not have any pamphlets in the saddlebag. He walked back to where Mr. Bramwell-Cole was standing and told him that he did not have any pamphlets. Mr. Bramwell-Cole denies that he was interested in receiving more information about the basketball and what TAVIS was doing. Although this is what he stated in court, I find that he portrayed interest to Officer Tremblay. His decision to describe himself as a youth worker would logically lead him to demonstrating such interest to the officer (even if it was a lie).

40 Given that Mr. Bramwell-Cole had identified himself as a youth worker, and given the conversation the two men were having about the TAVIS programs, it was not unusual that the officer wanted to send Mr. Bramwell-Cole some information about the programs and he needed his name and address to do so. However, Officer Tremblay went further and asked for Mr. Bramwell-Cole's date of birth and telephone number. The officer did not ask for any paper, identification. Mr. Bramwell-Cole agrees that the officer never told him that he had to answer the officer's questions.

41 Officer Tremblay acknowledged that the information collected on the 208 card would be stored in a searchable police database. So, while the officer may have asked for Mr. Bramwell-Cole's name and address to send him information about the TAVIS programs, he also knew that what he was collecting would serve another purpose. At some later point, the officer recorded Mr. Bramwell-Cole's date of birth, what he was wearing, and a physical description of his body (skin colour, height, weight, colour of eyes). It became part of the searchable police database.

42 Officer Stevenson motioned for Officer Tremblay to pass the 208 card to him and so he did. Officer Tremblay continued to talk to Mr. Bramwell-Cole. Officer Tremblay testified that he did not know what Officer Stevenson was going to do with the 208 card, other than collect it from him. However, as noted above, he did know that the information would be stored.

43 Officer Stevenson explained that the officer who speaks to the person is the one who collects the information for the 208 card, and this typically includes name, address, telephone number and maybe a description of the person. The 208 cards are given to a clerk at the station and input into the police database.

44 Officer Stevenson explained that he took the 208 cards from Tremblay and Rendon. Why did he do this? He testified that when they speak to people, they like to confirm identities over the police radio. They become familiar with who lives in the community and when they are inviting someone to a TAVIS program they want to be comfortable with who they are inviting. They had found that people from outside the community were creating some of the problems in the community.

45 Mr. Bramwell-Cole saw Kumar leave and walk remember that you told me that this morning?

ANSWER: Yes.

QUESTION: Okay. But you decided not to leave; is that right?

ANSWER: That's right.

46 Mr. Bramwell-Cole's attempt to backtrack from his admission during re-examination is not compelling. He stated,

QUESTION: Did you feel you were free to go?

ANSWER: Could you rephrase your question?

QUESTION: Well, you were asked about your friend or the person who you met at the community center through the FYI Project. The Crown told you or put it to you that at some point your friend who was there interacting with one of the officers left, he walked away or was allowed to walk.

QUESTION: He doesn't go into the convenience store and he doesn't cross the street. So he either goes north or south on Keele and Eglinton; is that right?

ANSWER: Yes.

QUESTION: Okay. All right. And at that point, aah, does it occur to you that you can leave?

ANSWER: Yes, it occurs to me that I can leave.

QUESTION: Yes.

ANSWER: Meaning, can you reword it?

QUESTION: Sure. Well, you just saw that person you were with leaving the police, leaving the conversation and I'm asking you whether it occurred to you that you could also leave?

ANSWER: Yeah, yeah. Yes.

47 Later in the cross-examination, Mr. Bramwell-Cole was asked again if it occurred to him that he could leave as well when he saw Kumar leave. The following question was asked and answer given:

QUESTION: Before I play the video, Mr. Cole, I just want to ask you a few more questions about what we're discussing. You said that you saw your friend leave when you were talking with the officer. You were talking to one officer and he's

> talking to the other officer and you saw him leave and it occurred to you that you could leave as well You told me that, right? Is that right?
>
> ANSWER: Are you suggesting --
>
> QUESTION: Let me go a bit slower. Earlier today you told me that you saw your acquaintance leave. It occurred to you that you could leave as well. Do you away, whether you thought you could have walked away at that point in time, and you said yes, but you stayed. I'm asking you if you truly felt that you were free to walk away at any point in time and you chose not to.
>
> ANSWER: Yes, yes.
>
> QUESTION: You felt that you could have left, you did not?
>
> ANSWER: I felt that I had to stay. I felt that I had to stay.
>
> QUESTION: Excuse me?
>
> ANSWER: I felt that I had to stay because I wasn't told I could go anywhere. The questions he was asked during cross-examination were clear and he had amble opportunity to change his answer since the Crown asked the question three times.

48 While Mr. Bramwell-Cole was talking to Officer Tremblay, he saw the officer fill out the 208 card and he saw the third officer who standing behind Officer Tremblay take the card.

49 After Officer Stevenson called the information into dispatch, he was notified by dispatch that there was a man with the last name Bramwell-Cole who had two previous firearm prohibition orders. Officer Stevenson stepped forward and quietly passed the information to Officer Tremblay. Prior to receiving this information from Officer Stevenson, Officer Tremblay did not expect that he was going to have anything further to do with Mr. Bramwell-Cole, apart from trying to get the TAVIS pamphlets to him in the next day or so. During his conversation with the man whom he thought was Mr. Bramwell, Officer Tremblay testified that Joel Bramwell-Cole was free to go. Of course, the dynamics of this situation changed when Officer Stevenson told him that there was a man named Mr. Bramwell-Cole that was subject to two firearm prohibition orders.

50 Officer Stevenson wanted to confirm Mr. Bramwell's real last name. He stepped forward and asked him if his name was Joel Bramwell-Cole and asked him to confirm his address. Officer Tremblay stepped aside, Officer Stevenson recalls that the accused continued to say that his last name was Bramwell.

51 The accused testified that when Officer Stevenson confronted him about his name, he admitted that his last name was hyphenated, specifically Joel Bramwell Cole. I reject that he made this concession and accept the evidence of Officer Stevenson that he continued to identify himself as Joel Bramwell.

52 As this was happening, Officers Stevenson and Tremblay observed a change in Mr. Bramwell-Cole's demeanour. He appeared nervous and was stuttering. The accused kept turning the

right-side of his body away from the officers, tugging on his shirt as if he was trying to hide something.

53 Officer Stevenson observed Mr. Bramwell-Cole looking around and trying to turn away from Officer Tremblay. He also noticed that below Mr. Bramwell-Cole's right elbow his T-shirt was hanging over his shorts and here he noticed a bulge. Officer Stevenson explained that Mr. Bramwell-Cole kept turning the right side of his body away so that the bulge would not be visible. Officer Stevenson thought the bulge might be a gun and he was very concerned about their safety. Officer Tremblay was also concerned for their safety.

54 Officer Stevenson told Mr. Bramwell-Cole he was going to do a pat-down search for weapons and officer safety, and Mr. Bramwell-Cole told him to go ahead. While Mr. Bramwell-Cole denies that he told them to go ahead, I prefer the evidence of Officer Stevenson.

55 As Officer Stevenson began to pat down the outside of his shirt on the right side, he came to the bulge and felt a hard object on the right side of Mr. Bramwell-Cole's body. He lifted up his T-shirt and saw the brown wooden butt end of a gun sticking out the right change pocket of his shorts. Mr. Bramwell-Cole agrees that all the Officer did to confirm the presence of the gun was lift up his T-shirt. Officer Stevenson immediately called out "gun" to alert his partners and shouted out for Officer Rendon to try and chase after Kumar who had left a minute or two before.

56 When the gun was discovered, Mr. Bramwell-Cole told the officers "it's not what you think" and "I don't do this."

57 Officer Tremblay saw the gun sticking out and immediately stepped forward to try and grab control of Mr. Bramwell-Cole's arm from behind so he would not be able to grab the gun. He told Mr. Bramwell-Cole to put his hands behind his back, but he refused.

58 Officer Stevenson was able to pull the gun out of the pocket and throw it to the ground. As Officer Tremblay tried to secure Mr. Bramwell-Cole's arms, Mr. Bramwell-Cole struggled to get away from the officers. It was like a tug of war. Officer Stevenson began to push Mr. Bramwell-Cole and Officer Tremblay towards the wall of the store. Officer Tremblay only had a grip on one of Mr. Bramwell-Cole's arms. He felt Mr. Bramwell-Cole punch him two times in the chest with the free arm. Mr. Bramwell-Cole continued to yank on the arm that Officer Tremblay was holding.

59 Officer Tremblay yelled at Mr. Bramwell Cole to get on the ground. Officer Stevenson radioed for help. The struggle continued. Officer Stevenson saw Mr. Bramwell-Cole punch Officer Tremblay several times in the chest. The officers struggled to get Mr. Bramwell-Cole on the ground.

60 Officer Rendon explained how he had gone off to try and stop Kumar. Officer Rendon chased after Kumar but never found him. The Officers later learned that this man had given Officer Rendon a false name.

61 Officer Rendon ended the chase of Kumar and rode back to find Officers Tremblay and Stevenson in a struggle with Mr. Bramwell-Cole. The officers had Mr. Bramwell-Cole up against the wail of the store and were trying to hold him. Mr. Bramwell-Cole was pushing, trying to get away from the officers. Officer Rendon jumped off his bike to help. Officer Rendon saw a gun on the ground.

62 Officer Rendon grabbed Mr. Bramwell-Cole's legs and the three officers were then able to bring him down to the ground and gain control. Officer Rendon held on to his legs as tight as he could and the other officers handcuffed him. Officer Rendon explained that Mr. Bramwell-Cole was strong and it took the three officers to get him under control.

63 Throughout this struggle, the officers used as much force as necessary to secure Mr. Bramwell-Cole. Mr. Bramwell-Cole was very strong. As Officer Tremblay explained, it was all he could do to hold onto Mr. Bramwell-Cole's arms. Mr. Bramwell-Cole kept pulling away, trying to break the officer's grip. Officer Tremblay felt Mr. Bramwell-Cole punching him with the other arm as he tried to pull away.

64 Clearly there was body contact between the officers and Mr. Bramwell-Cole as they struggled to control him. However, the officers never kicked or punched him during the struggle. When the struggle was over, the officers did not see any injuries on Mr. Bramwell-Cole and he was not complaining of being injured.

65 Officer Tremblay was injured during the struggle with Mr. Bramwell-Cole. He had muscle pain in his right thumb and left knee and both were bleeding. Officer Tremblay. filled out a report confirming that he was injured. Fortunately, these injuries did not last.

66 When the officers had Mr. Bramwell-Cole secured on the ground with handcuffs, other police cars had arrived on the scene to assist. Officer Tremblay told Mr. Bramwell-Cole that he was under arrest for possession of a firearm. He put Mr. Bramwell-Cole in the backseat of the Staff Sergeant's car and read him his rights to counsel and caution. Mr. Bramwell-Cole said that he understood. When asked if he wanted to call a lawyer or say anything in answer to the charge, he did not respond.

67 In several respects, the evidence of Mr. Bramwell-Cole is not reliable. A review of the reasons for characterizing his evidence in this fashion underscores why I prefer the evidence of the Officers.

68 Mr. Bramwell-Cole's evidence in-chief was presented by filing his affidavit and asking a few questions. He was asked if he wanted to amend or change the affidavit before marking it as an exhibit. The only change he requested was a correction to his age. The affidavit stated that he was 22 and he is 21.

69 In his affidavit, Mr. Bramwell-Cole states that he was walking down the sidewalk approaching the officers, and their path was blocked by the officers' bicycles. During cross-examination, he agreed that the bikes were parked on the side of the street. As I have already explained, the evidence does not support a finding that Mr. Bramwell-Cole's path was blocked by the bikes.

70 Early in his cross-examination, Mr. Bramwell-Cole agreed that the officer talked to him about what TAVIS did and that the subject of basketball came up. After agreeing that they talked about basketball, Mr. Bramwell-Cole then said he could not recall what they were talking about. Several questions later, he was asked if the officer explained what TAVIS did and he said "No," but on this occasion he agreed that they talked about basketball.

71 In his affidavit, Mr. Bramwell-Cole stated that the officers demanded his "personal information including identification documents". When cross-examined, he agreed that they did not ask for his identification documents.

72 During cross-examination, the Crown asked Mr. Bramwell-Cole if he was carrying a gun in the right front pocket of his shorts. He replied, "I don't recall". Given that the presence of the gun is admitted and the events happened last summer, this was a ridiculous answer. It's another example of the unreliability of the accused's evidence.

73 During his testimony in-chief, Mr. Bramwell-Cole said that when the officers were speaking to him he did not feel he was free to go. However, during cross-examination he said that when he saw Kumar walk away it occurred to him that he could also leave. Mr. Bramwell-Cole then changed his testimony on this point during re-examination. He said that he "felt he had to stay because he wasn't told he could go anywhere."

74 Mr. Bramwell-Cole's description of the injuries he says the officers inflicted on him is the most glaring example of willingness to lie.

75 In his affidavit and during his testimony in court, Mr. Bramwell-Cole described how he was tackled and violently forced to the ground by the officers. On the ground he says the officers punched and stomped on his back, face and head and stabbed him with an object. After he was handcuffed, he states that the officers continued to kick and punch his head and face. He states that he was barely able to move and that it was obvious he required immediate medical attention.

76 As a result, Mr. Bramwell-Cole testified that he suffered facial and optical injuries. He testified that his left retina was damaged and his left eye was swollen. Further, he stated that the swelling was so bad he could not see out of his left eye. This swelling and inability to see out of his left eye happened "instantly". The swelling lasted for "over a month and a half".

77 When Mr. Bramwell-Cole was taken to the police station and paraded before the booking officer, he complained about being injured and feeling nauseous. The video from this booking process records the complaint and the booking officer remarking that there was no injury apparent. The booking video also shows Mr. Bramwell-Cole complaining of nausea and being taken into a nearby room where he can be heard retching. Mr. Bramwell-Cole relies on this to support his claim of injury. Just because Mr. Bramwell-Cole felt nauseous and was retching, it does not follow that he was injured as he claims. The mere fact of his arrest might have brought on the nausea.

78 In his affidavit, Mr. Bramwell-Cole states that on arrival at the detention center he was checked by a health care nurse in the booking area, which he describes as standard procedure for all newcomers. If Mr. Bramwell-Cole was beaten and injured as he claims, I would expect that this health care nurse would have documented what Mr. Bramwell-Cole claims was so obvious. However, I was not provided with any such document. Furthermore, during cross-examination, Mr. Bramwell-Cole agreed that when the health care nurse looked at him in the booking area, she did not find any injury. Moments after giving this admission, he tried to backtrack stating "I can't recall back then".

79 The day after the arrest, Mr. Bramwell-Cole's picture was taken at the police station. This photograph was entered as evidence on consent. If Mr. Bramwell-Cole's face was injured as he explained, then I would expect to see some evidence of the injury in the photograph that gives a very clear frontal view of his face. Instead, there is absolutely no evidence of any injury. In fact, when confronted with this photograph during cross-examination, Mr. Bramwell-Cole agreed that "there is no swelling" apparent on his face in the photograph.

80 During cross-examination, Mr. Bramwell-Cole was shown the booking video. He agreed that the booking video did not show any apparent injury to his face, but he still insisted that his face was injured.

81 To support his claim that his facial area was injured, Mr. Bramwell-Cole attached various medical records to his affidavit. These documents do not confirm Mr. Bramwell-Cole's evidence that he suffered facial injuries because of the conduct of the officers on the night in question.

82 The medical records attached to Mr. Bramwell-Cole's affidavit, to the extent that they are legible, state the following:

1. A doctor whose name is illegible completed a "Referral History" form that is not dated. The reasons for referral are left "eye injury four days ago ... punched." This note also records complaints of diplopia. The word "swelling" is recorded with an "x" through a circle.
2. Two medical Order Sheets: Someone, presumably a doctor, recorded brief notes on August 26 and 17, 2009. The note on August 26 is in part legible and it states to ER ... photographs of injuries". Other than the photograph taken the day after arrest, no photographs were produced. An undated note states that Mr. Bramwell-Cole is "fit for unit" and on September 18 a CT scan was ordered. On September 22 the note states, "CT results? Done nothing."
3. A Health care record dated August 25, 2009 on Ministry form was completed by a doctor. Much of the writing is illegible. What can be deciphered is a complaint of back and shoulder pain, diplopia, a "weak" left eye, and being beaten up by police.
4. A physician and nurse treatment record consists of notes made by various unidentified people. There is a reference to double vision and making an appointment with Dr. Kahn. On September 1, 2009, the note states that Mr. Bramwell-Cole has been seen by "opth -- ct scan ordered". On the same day the author wrote what appears to say "no swelling seen". On September 2, the note records Mr. Bramwell-Cole's mother calling to request medical information about "injuries to her son prior to his incarceration".
5. On September 1, 2009, Mr. Bramwell-Cole signed a "Refusal of Treatment" form. He refused a CT scan and gave reasons for his refusal as follows: "Vision is off and give it a week to recuperate itself".
6. A CT scan was performed on October 9, 2009. It states "Provided History: Left Facial trauma. Rule out fracture.' The results confirmed that the facial area was intact and no fractures were noted.

These records do not support Mr. Bramwell-Cole's evidence that he was injured because of the police conduct on the night in question. The photograph taken the morning after leaves no doubt in my mind that if he was injured, it happened some time after the photograph was taken. Exactly what injury, if any, he suffered and when, is not relevant to the issues before me. What is relevant from this review is my conclusion that Mr. Bramwell-Cole is not an honest witness.

THE ALLEGATION OF RACIAL PROFILING

83 Since Mr. Bramwell-Cole submits that racial profiling informs the question of whether his s. 9 rights were breached, I will deal first with the question of whether Mr. Bramwell-Cole was racially profiled.

84 There is no dispute about what racial profiling means. In R. v. Richards (1999), 26 C.R. (5th) 286, at para. 24, Rosenberg J.A. endorsed the definition of racial profiling submitted by the African Canadian Legal Clinic:

> Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour, resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

85 Racial profiling is an attitude that "may be consciously or unconsciously held" (R. v. Brown (2003), 64 O.R. (3d) 161 (C.A.) at para. 8). Rarely can it be proven by direct evidence. "Accordingly, if racial profiling is to be proven, it must be done by inference drawn from circumstantial evidence" (R. v. Brown at para. 44).

86 Applying the approach in Brown, I must decide if the circumstances of Mr. Bramwell-Cole's interaction with the police correspond to the phenomenon of racial profiling. Do the circumstances provide a basis for this court to infer that the decision to stop and speak with Mr. Bramwell-Cole was based on racial profiling? The burden of proof rests on Mr. Bramwell-Cole to establish his claim on the balance of probabilities.

87 Mr. Bramwell-Cole was asked why he thought the police stopped him. He stated: "stereotype reasons and racial profiling". When asked why he came to that conclusion, he answered: "Walking while black in the community of Keele and Finch or Keele and Eglinton".

88 Mr. Bramwell-Cole submits that the decision to talk to him about basketball was not sincere and simply a ruse to investigate him. He says the police were on their way into the convenience store and instead turned to talk to him and his colleague. He argues that this was a decision to target two black men, collect their information, fill out a 208 card, run a search and depending on the results, search and arrest the men.

89 Counsel for Mr. Bramwell-Cole says that during cross-examination Officer Tremblay would not acknowledge a series of statements put to him that essentially stated that he was stopping young black men, filling out 208 cards and running searches on their identification info, and that he stopped Mr. Bramwell-Cole because he was black. He makes the same complaint about Officer Stevenson. The fact the Officers would not agree with defence counsel's statements, does not lend support to the argument that Mr. Bramwell-Cole was racially profiled. Officer Tremblay made it clear that he did not know how many people he stopped to talk to that night and how many were white, black or Hispanic.

90 Officer Stevenson acknowledged that while the men were black, skin colour had no bearing on who he may decide to talk to as a TAVIS officer, During summer, they spoke to a wide variety of people from different ethnic backgrounds, male and female.

91 Further, counsel says that it took too long to get the officers to admit that Mr. Bramwell-Cole and Kumar were black. They would not acknowledge obvious and so this, he says, is further evidence of the existence of racial profiling.

92 If there was any delay or hesitancy in answering questions, it does not follow that the existence of racial profiling can be inferred from this exchange. If the officers did not answer the questions as quickly as counsel expected, this can be explained by the manner of cross-examination. Often statements were made by counsel without asking the witness to agree or disagree. In my view, the officers answered the questions frankly and I see no reason to question the sincerity of their evidence.

93 Counsel says it is clear they always intended to do an investigation and, in fact, did one by collecting personal identification and running checks on the names. Once the check on Kumar came back and it was clear, he was free to leave. When the results came back on Mr. Bramwell-Cole, a different result followed. It is not disputed that the officers filled out the 208 cards and that Officer Stevenson ran a check on their names. They do this as part of their job.

94 As I have noted, the decision to stop and talk to the two men was a spontaneous decision made by Officer Rendon and Officer Tremblay simply followed along. There was no discussion in advance.

95 I reject Mr. Bramwell-Cole's position that the officers' decision to talk to him was racial profiling. As TAVIS officers, they routinely stopped and talked to people in the community. As Officer Rendon explained, the majority of people in the area are either Hispanic like himself or what he called "African American". Obviously the correct term is African Canadian and the reference though incorrect, was to black people living in the community. That night Officer Rendon said that they stopped and spoke with people who were black and white, both men and women. The officers did not keep track of how many people they stopped were black as opposed to white. There is no evidence that the officers targeted black people. Given that this is a community largely populated with black and Hispanic people, it was not unusual that people they stopped to talk with were black.

DID THE POLICE USE EXCESSIVE FORCE?

96 Section 7 states that everyone has the right to life, liberty and security of person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The onus is on the accused to prove a breach of s. 7 on the balance of probabilities.

97 As noted above, I reject Mr. Bramwell-Cole's evidence that he was injured as a result of the police force. His evidence is simply not credible. The force the police used to restrain Mr. Bramwell-Cole once the gun was discovered was reasonable and necessary in the circumstances. This force did not result in injuries as Mr. Bramwell-Cole alleges. There is no basis for finding that Mr. Bramwell-Cole's s. 7 rights were breached.

WAS MR. BRAMWELL-COLE ARBITRARILY DETAINED BY POLICE ON AUGUST 9, 2009?

98 Mr. Bramwell-Cole submits that he was detained the moment Officer Tremblay approached and engaged him in conversation. He argues that the officer's decision to speak to him was an act of racial profiling, and that the officer characterized the conversation about basketball to conceal his intention to conduct a criminal investigation. As noted above, I have rejected Mr. Bramwell-Cole's claim of racial profiling.

99 The Crown denies that Mr. Bramwell-Cole was arbitrarily detained as alleged, but rather he was lawfully detained when the pat-down search was conducted for officer safety reasons.

100 It is clear in this case that Mr. Bramwell-Cole was not physically detained until the pat-down search occurred. The question to be determined is whether he was psychologically detained before this point in time. The legal framework for answering this question follows.

101 Everyone has the right not to be arbitrarily detained, and if detained or arrested, a person has the right to be informed promptly of the reasons for the detention and the right to retain and instruct counsel.

102 The onus is on the accused to prove a Charter breach on a balance of probabilities: see R. v. Collins [1987] 1 S.C.R. 265.

103 The standard for investigative detention that is not arbitrary was articulated by the Supreme Court of Canada in R. v. Mann (2004), 185 C.C.C. (3d) 308 (S.C.C.) at para. 33-34 and reaffirmed in Grant, supra at para. 54-55.

104 In Mann, supra, the Court confirmed the existence of a common law police power for a brief investigative detention on reasonable grounds when all of the circumstances, viewed objectively, indicate that the detention is reasonably necessary. Such detention is lawful and authorized by law:

> ... investigative detentions [must] be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test, [1963 3 All E.R. 659. [para. 34].

105 Obviously, not every interaction with police will amount to a detention. In Grant, at para. 44, the Supreme Court clarified the law of detention, stating that detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

106 Further, it is clear that "general inquiries by a patrolling officer present no threat to freedom of choice". (Grant at para. 41).

107 Implicit in the job of neighbourhood policing, which is what the TAVIS officers were doing, is the right of the police to speak to citizens. R. v. Graffe (1987), 36 C.C.C. (3d) 267 (Ont. C.A. and R. v. Hall (1995), 22 O.R. (3d) 289 (Ont. C.A.) confirm that police, may in the course of their

duties, request identification from people in circumstances where the police have no reason to suspect the person of any misconduct.

108 In Graffe the court stated at page four:

> The law has long recognized that although there is no legal duty, there is a moral or social duty on the part of every citizen to answer questions pit to him or her by the police and, in that way to assist the police. See, for example, Rice v. Connolly [1966] 2 All E.R. 649 at p. 652, per Lord Parker C.J. Implicit in that moral or social duty is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed. To be asked questions, in these circumstances, cannot be said to be a deprivation of liberty or security.

109 Two recent OCA decisions confirm that Graffe and Hall remain a correct statement of the law: R. v. Harris [2007] O.J. No. 3185 at para. 42 and R. v. L.B. [2007] O.J. No. 3290 at para. 52.

110 However, in the context of neighbourhood policing, when the police are not responding to any specific occurrence, a complex situation may arise because "the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may he brought to justice." (Grant at para. 40).

111 As in Grant, this is the situation that arose between the TAVIS officers and Mr. Bramwell-Cole. The TAVIS officers were in the course of their general community oriented work. During the discussion with Mr. Bramwell-Cole, the officers became suspicious of him. However, as the court stated in Grant at paragraph 41, police suspicion alone will not turn the encounter into a detention.

> 41 ... Focused suspicion, in and of itself, does not turn the encounter into a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the Charter does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions.

112 In summary, Grant states that the court may consider the following factors to determine if the person was psychologically detained:

> 1. The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.

2. The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
3. The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

113 Before turning to apply the law to the facts in this case, I wish to note that defence counsel placed considerable reliance on a decision that is no longer an accurate statement of the law: R. v. Ferdinand [2004] O.J. No. 3209 (S.C.J.).

114 To determine if the accused had been arbitrarily detained, the judge in Ferdinand adopted and applied the legal framework formulated by the trial judge in R. v. Powell [2000] O.J. No. 2229 (S.C.J.). Moldaver J.A. determined in L.B. that Powell was incorrectly decided because the judge applied the law in R. v. Mellenthin, [1992] 3 S.C.R. 615 (dealing with the random stop of a motorist) to the random stop of a pedestrian.

115 I will now apply the law to the facts in this case.

116 The encounter between Mr. Bramwell-Cole and the police was a spontaneous decision triggered by Officer Rendon. As TAVIS officers on duty, they spoke to people in the community about the role of TAVIS and the community services that TAVIS provided. Mr. Bramwell-Cole did not exhibit any suspicious behaviour to prompt the officers to approach him. The officers approached the men to talk as they did with many citizens of the community every day.

117 The officers did not surround Mr. Bramwell-Cole or block his path. The conversation between Mr. Bramwell-Cole and Officer Tremblay was short: in duration; it was not threatening and was about TAVIS and the TAVIS community programs.

118 Mr. Bramwell-Cole engaged in conversation with Officer Tremblay and told the officer about his work with youth in the community. As the conversation progressed, he saw Kumar leave and he admits that it occurred to him that he could leave as well.

119 The fact that the officers asked Mr. Bramwell-Cole for his name and identification details particularly in these circumstances, does not mean that he was detained. In reaching this conclusion, it is helpful to consider the facts in Grant and how the Supreme Court of Canada characterized the events that evolved between the police and Mr. Grant.

120 In Grant the initial police questioning was described as a "legitimate exercise of police powers" (paragraph 47). This "legitimate" exchange started with the officer asking Mr. Grant "What's going on" and asking for his name and address. In response, Mr. Grant gave the officer his health card. Up to this point, there was no detention. The court described this initial stage of the interaction: "At this stage, a reasonable person would not have concluded he or she was being deprived of the right to choose how to act and for that reason there was no detention."

121 After this point, when the officer told Mr. Grant to "keep his hands in front of him" and other officers approached flashing their badges and taking tactical adversarial positions, the situation changed. The court stated:

> Two other officers approached, flashing their badges and taking tactical adversarial positions behind Constable Gomes. The encounter developed into one

> where Mr. Grant was singled out as the object of particularized suspicion, as evidenced by the conduct of the officers. The nature of the questioning changed from ascertaining the appellant's identity to determining whether he had anything that he shouldn't. At this point, the encounter took on the character of an interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the appellant and were attempting to elicit incriminating information.

122 Up until the officers did a pat-down on Mr. Bramwell-Cole, a reasonable person would not have concluded he was being deprived of the right to choose how to "act". The TAVIS officers were conducting neighbourhood policing and the discussion between Officer Tremblay and Mr. Bramwell-Cole was a "legitimate exercise of police powers".

123 In conclusion, I reject the defence position that Mr. Bramwell-Cole was detained before the pat-down search.

124 By this point, the police had reasonable grounds to detain Mr. Bramwell-Cole and conduct a pat down search. The situation was rapidly evolving. Mr. Bramwell-Cole admitted that he had not given the officer his full name, the officers learned that a Joel Bramwell-Cole was subject to two weapons prohibition orders, there was a bulge in his pocket and he appeared to be trying to coverup an object in his pocket that Officer Stevenson thought might be a gun. There was no time for reflection. Mr. Bramwell-Cole's body language had changed and he was stuttering. Officer Stevenson thought the bulge may be a gun and officer safety was a real concern. In these circumstances, the officers had reasonable grounds to suspect that Mr. Bramwell-Cole had a gun. The threat to officer safety was real and the pat-down search was clearly necessary. Throughout the process, the officers acted reasonably.

125 As the court stated in R. v. Mann at para. 45:

> ... 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.

126 In summary, Mr. Bramwell-Cole's detention was not arbitrary. It was "reasonably necessary on an objective view of the totality of the circumstances". (Mann para. 34).

WAS MR. BRAMWELL-COLE SUBJECT TO AN UNREASONABLE SEARCH AND SEIZURE?

127 Section 8 of the Charter states that everyone has the right to be free from unreasonable search and seizure.

128 Mr. Bramwell-Cole argues that he was subject to an unlawful search at two points: when dispatch ran a CPIC search on his identification and when he was subjected to a pat-down search.

129 As explained above, Mr. Bramwell-Cole was detained with the pat-down search was done and not before. At this point in the timeline, he was under investigative detention and the law as stated in Mann applies.

130 Mann states at paragraph 36 that many search incidental to the limited police power of investigative detention is necessarily, a warrantless search. Such searches are presumed to be unreasonable unless they can be justified, and hence found reasonable, pursuant to the test established in R. v. Collins [1987] 1 S.C.R. 265. Under Collins, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable."

131 Further, Mann (at para. 40) recognizes that a pat-down search incident to an investigative detention my be justified:

> The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk ... The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.

132 The law as stated in Mann was confirmed in R. v. Clayton (2007), 220 C.C.C. (3d) 449 (S.C.C.). Thus, a detention which is found to be lawful at common law is, necessarily, not arbitrary under s. 9 of the Charter. A search done incidentally to that lawful detention will, similarly, not be found to infringe s. 8 if the search is carried out in a reasonable manner and there are reasonable grounds to believe that police or public safety issues exist.

133 Finally, the burden rests on the Crown to prove on a balance of probabilities that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner: R. v. Buhay [2003] 1 S.C.R. 631, 2003 SCC 30, at para. 32.

THE CPIC SEARCH

134 Mr. Bramwell-Cole does not dispute the taking of his identification information. However, he states that running a CPIC search of his identification information is a breach of his s. 8 rights.

135 Taking the identification information is a lawful exercise of police power as discussed above. Obviously the police. take the identification particulars for a reason. If taking Mr. Bramwell-Cole's identification particulars is lawful, as it was in this case, why would the MC search be unlawful? Surely the CPTC search is simply an extension of the lawful taking of the identification particulars in this case.

136 I was provided with very little law on this point. Counsel for Mr. Bramwell-Cole referred me to Ferdinand.

137 In Ferdinand the accused claimed that his s. 7, 8, 9 and 10 rights were breached. However, the judge only dealt with s. 9 and the issue of investigative detention and whether it was arbitrary.

While the judge criticized the use of 208 cards, he did not conclude that a CPTC search on information collected in a 208 card was a breach of s. 8.

138 In R. v. Johnson [2010] O.J. No. 975 at para. 25, the police asked the accused for his identification particulars. The accused gave them and the police ran a CPIC search. Without explaining why, the court simply stated that the CPIC search was an 'unlawful search, but in that case the results did not lead to the discovery of the handgun or any additional police interest in the accused.

139 The only case that discusses this issue in any depth is R. v. Harris where O'Connor CA in concurring reasons considers the specific question of whether running a CPIC search on identification details collected from a passenger in a motor vehicle is an unreasonable search and seizure. I acknowledge that Harris was a Highway Traffic Act stop and not a case involving a pedestrian. However, the direction that O'Connor JA provides on this issue is not limited to a Highway Traffic Act stop.

140 Mr. Harris was a passenger in the motor vehicle and the police asked all occupants to identify themselves. The police then checked their names on CPTC and learned that Harris was on bail and was out past curfew, breaching a term of his bail. Harris was arrested. During a search of the motor vehicle, cocaine was discovered and Harris was charged with possession for the purpose of trafficking.

141 After confirming the law in Graffe, that police have the right to ask citizens to identify themselves, O'Connor JA discussed the legality of checking the identification information in the OPTC system and the importance of the CPIC system to law enforcement. I adopt the following discussion of the law at paragraph 93-96:

> (93) Second, in my view, Lipkus the officer did not conduct an unreasonable search and seizure by obtaining the information about Harris contained in the CPI degrees system. This information, which included the details of a bail order, had been entered into the system on an earlier date. As a national repository of police information, CPIC is a vital shared resource within Canada law enforcement. As such, maintaining the CPIC system is a normal law enforcement function. There is nothing improper for law enforcement agencies to maintain these types of records. Rather, doing so is an essential and important part of legitimate law enforcement activities. The information that is in issue on this appeal, information about a bail order, originated in a public court process and as such, would be available in the court files. The hail order is the paper record of the court reflecting the order made in a public courtroom. Once entered in the CPIC system, this information was to made available to law enforcement officers who had access to that system.
>
> (94) In my view, an individual such as Harris, does not have a reasonable expectation of privacy with respect to information in CPIC, at least insofar as police officers are concerned. A reasonable and prudent individual would assume that information about him or her emanating from a public court process will be available to police officers through an information data system such as CPIC.
>
> (95) The issue arises in this case, however, because Lipkus was only able to access the CPIC information after Harris had identified himself. Thus, the argument goes, by asking his name, Lipkus was in effect conducting a search and seizure

> With respect to the information in the system. Had he not asked Harris' name, he would not have been able to make the link to that information.
>
> (96) That may be so, however, I do not think that it changes the fact that Harris did not have a reasonable expectation of privacy with respect to the information about the bail order, at least insofar as police officers were concerned. The fact is that the information was available to law enforcement officers and access to it by a police officer could not result in an intrusion upon a reasonable privacy interest so as to constitute a search within the meaning of s. 8 of the Charter.

142 Applying this to Mr. Bramwell-Cole, I draw the following conclusions. Two court orders prohibiting him from possessing firearms were entered into the CPIC system. These court orders originated in a public court process in a public courtroom. Mr. Bramwell-Cole did not have a reasonable expectation of privacy over this information in CPIC, at least insofar as police officers are concerned. A reaSonable and prudent individual would assume that information about him emanating from a public court process will be available to police officers through an information data system such as CPIC. Searching Mr. Bramwell-Cole's identification in CPIC and learning about the firearm prohibition orders did not result in an "intrusion upon a reasonable privacy interest so as to constitute a search within the meaning of s. 8 of the Charter.

THE PAT-DOWN SEARCH

143 The pat-down search was not triggered by a vague concern for safety, a hunch or intuition. Officers Tremblay and Stevenson had reasonable grounds to believe that their safety was at risk. The officers thought the bulge in the pocket was a gun. Mr. Bramwell-Cole started to stutter and appear nervous. He kept turning his body away from the officers to effectively hide the pocket area from their view. He denied his name was hyphenated and the officers knew that someone with the name Bramwell-Cole was subject to two weapons prohibition orders. The search was brief. The gun was discovered as soon as the T-shirt was lifted. In these circumstances, the search was lawful and it cannot be said that Mr. Bramwell-Cole's s. 8 rights were breached.

144 As well, it can be said that Mr. Bramwell Cole consented to the pat-down search. Officer Stevenson told Mr. Bramwell-Cole that he was going to do a pat-down search and Mr. Bramwell-Cole said "go ahead".

WAS THERE A BREACH OF S. 10(B)?

145 Was Mr. Bramwell-Cole given his rights to counsel as required by s. 10(b)?

146 Section 10(b) provides that everyone has the right to retain and instruct counsel without delay and to be informed of that right. According to R. v. Suberu, 2009 SCC 33, [2009] 2 S.C.R. 460, the phrase "without delay" in s. 10(b) must he interpreted as "immediately," subject to concerns for officer or public safety (at para. 42). Part of this informational component of s. 10(b) requires that detainees be informed of the existence and availability of applicable systems of duty counsel and legal aid in the jurisdiction (R. v. Brydges, [1990] 1 S.C.R. 190).

147 In addition to this informational duty, s. 10(b) imposes two other duties on police: to provide a detainee with a reasonable opportunity to exercise that right and to refrain from eliciting evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel (R. v. Manninen, [1987] 1 S.C.R. 1233).

148 The right to counsel imposes a correlative duty on an accused to be reasonably diligent in attempting to obtain counsel if he or she wishes to do so. Failure to be diligent in exercising this right may result in a suspension of the police duty to refrain from questioning the accused (R. v. Tremblay, [1987] 2 S.C.R. 435).

149 It is clear from the facts that there was no breach of Mr. Bramwell-Cole's s. 10(b) rights. When the officers had Mr. Bramwell-Cole secured on the ground with handcuffs, other police cars had arrived on the scene to assist. Officer Tremblay told Mr. Bramwell-Cole that he was under arrest for possession of a firearm. He put Mr. Bramwell-Cole in the backseat of the staff sergeant's car and read him his rights to counsel and caution. Mr. Bramwell-Cole said that he understood. When asked if he wanted to call a lawyer or say anything in answer to the charge, he did not respond.

150 On the facts of this case, there was no breach of Mr. Bramwell-Cole's s. 10 rights. If there was any delay in complying with s. 10, it was caused by the struggle that ensued after the gun was discovered. As soon as Mr. Bramwell-Cole was secured and placed in the police car, the police complied with s. 10 immediately. Such a short delay is permissible in these circumstances.

MR. BRAMWELL-COLE'S UTTERANCES

151 When the gun was discovered, Mr. Bramwell-Cole told the officers: "it's not what you think" and "I don't do this". He asks that these utterances be excluded. The basis for the exclusion was not made clear. The facts indicate that Mr. Bramwell-Cole made these utterances voluntarily. In any event, I do not rely on these utterances to make any of the decisions in this case, and consider the issue to be irrelevant.

CONCLUSION

152 In summary, I conclude that none of Mr. Bramwell-Cole's Charter rights were breached as alleged. However, should a higher court disagree and conclude that one or more of his Charter rights were breached, I will proceed to consider the s. 242) analysis.

S. 24(2) ANALYSIS

153 In R. v. Grant, (2009), 245 C.C.C. (3d) 1 (S.C.C.), the court sets out the analytical framework for a s. 24(2) analysis:

> When faced with an application for exclusion under s.24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the, admission of justice into disrepute.

SERIOUSNESS OF BREACH

154 Given that I have not found any breach, it is difficult to imagine how these facts might result in Charter-infringing conduct. If am wrong, then such conduct was clearly not serious. The of-

ficers acted in good faith. The interaction between the officers and Mr. Bramwell-Cole was short in duration and cordial until the officers suspected he had a gun.

THE IMPACT ON THE APPLICANT

155 The duration of the contact between the officers and Mr. Bramwell-Cole was exceedingly short. For the most part, they talked about youth in the community and the programs that TAVIS offered. Before the discovery of the gun, it was not threatening in any way. When Mr. Bramwell-Cole saw Kumar leave, it occurred to him that he could also leave. Mr. Bramwell-Cole was not racially profiled. He was stopped as a legitimate part of the TAVIS operation. Any impact this had on Mr. Bramwell-Cole's Charter interests, was minimal at best.

SOCIETY'S INTEREST IN THE ADJUDICATION OF THE CASE ON THE MERITS

156 The handgun is highly reliable evidence and is essential to the Crown's case. Without the evidence of the gun, the Crown's case is over. The Court of Appeal as recently as last month remarked, in R. v. Blake, [2010] O.J. No. 48 (Ont. C.A.) at para. 31, "Society's interest in an adjudication on the merits is seriously undercut where highly reliable and important evidence is excluded".

SUMMARY

157 Having conducted the inquiries mandated by R. v. Grant [2009] S.C.J. No. 32, if I had found that Mr. Bramwell-Cole's Charter rights were breached, I would have found that the nature of the state's conduct and society's interest in an adjudication on the merits militate strongly in favour of admitting the evidence.

THE CHARGES

158 I now turn to deal with the charges against Mr. Bramwell-Cole. I exclude from consideration the affidavit and viva voce evidence of Mr. Bramwell-Cole. That was only admissible for use on the voir dire.

159 Mr. Bramwell-Cole is charged with possession of a loaded prohibited firearm contrary to s. 95(2); possession of a firearm knowing that he was not the holder of a licence for it contrary to s. 92(3); careless use of a firearm contrary to s. 86(3); carrying a concealed weapon contrary to s. 90(2); possession of a firearm contrary to an order contrary to s. 117.01; possession of a weapon obtained by the commission of an offence s. 96(1). As well, he is charged with assaulting a police officer contrary to s. 270(2).

160 I will deal first with the firearm charges. There is no evidence I can look to that would raise a reasonable doubt as to Mr. Bramwell-Cole's guilt. In fact, the defence did not seriously contest a finding of guilt, assuming the loaded gun was not excluded from evidence.

161 The evidence is clear that Mr. Bramwell-Cole was found in possession of a loaded firearm and he concealed this firearm on his body in his pant pocket. Walking around a community with a loaded firearm in your pocket is not only a careless use of a firearm, it is dangerous. It is also clear that Mr. Bramwell-Cole meant to conceal this gun. The tact that the gun was hidden in his pocket together with Mr. Bramwell-Cole's body actions (i.e. the turning away of his body from the police) demonstrates that he meant to conceal the gun. As well, a person subject to court orders prohibiting the possession of a firearm is obviously going to conceal his possession when walking down a street in the early evening hours.

162 On two prior occasions, a court ordered Mr. Bramwell-Cole not to possess a firearm and yet he proceeded to do so in breach of these orders. Lastly, he did not possess a licence permitting him to possess the firearm.

163 In conclusion, I am satisfied that Mr. Bramwell-Cole is guilty of the following firearm offences beyond a reasonable doubt, and enter findings of guilt: possession of a loaded prohibited firearm contrary to s. 95(2); possession of a firearm knowing that he was not the holder of a licence contrary to s. 92(3); careless use of a firearm contrary to s. 86(3); carrying a concealed weapon contrary to s. 90(2); possession of a firearm contrary to an order contrary to s. 117.01.

164 I have no evidence to show where Mr. Bramwell-Cole obtained the firearm and ammunition. While Mr. Bramwell-Cole possessed a prohibited firearm, i am unable to conclude that he knew that the firearm was obtained by the commission of an offence contrary to s. 96(1). As a result, an essential element of this last firearm offence is not proven. This specific charge is dismissed.

165 The charge of assaulting a police officer contrary to s. 270(2) is made out beyond a reasonable doubt based on the evidence of Officer Tremblay. Mr. Bramwell-Cole punched Officer Tremblay as he tried to escape the officer's grip. This occurred while the officer was engaged in the course of his duties. The gun had been discovered and it is clear that Mr. Bramwell-Cole was trying to escape. I find him guilty of this offence.

166 That is my decision and my reasons.

167 We will have to fix a date for bringing the matter back for sentencing. What would counsel like to consider?

168 MR. PIETERS: Your Honour, we will need a presentence report.

169 THE COURT: What date would you like?

170 MR. PIETERS: Well, I mean, it takes about a month or so for the presentence report.

171 THE COURT: Late November?

172 MR. PIETERS: Yes. For him, late November. I'll just check my schedule.

173 THE COURT: Okay. I'm tied up for the first three weeks of November. I have the week of the 22nd. That week I'm available. I'm not available the week after that.

174 MR. PIETERS: That's fine.

175 THE COURT: The week of the 22nd is available?

176 MR. PIETERS: I'm available that week.

177 THE COURT: I'd rather not do it on the Monday. Is everyone available on the Tuesday?

178 MR. PIETERS: Maybe we could start on the Wednesday?

179 THE COURT: The Wednesday, that's fine. How is the Wednesday for the Crown's office?

180 MR. GUTTMAN: That's fine, Your Honour.

181 THE COURT: All right. So, we're then over to November the 24th. I would appreciate if counsel could on the 22nd make available caselaw that you intend to rely upon. I'm not going to ask the Crown at this juncture that range of sentence you're looking at, but if you could give me a brief

written submission and have it available, delivered to my office on the Monday. This will give me ample opportunity to prepare to deal with this fully then on the Wednesday. Any evidence to be called on this?

182 MR. GUTTMAN: Not on my side.

183 MR. PIETERS: There may be some evidence.

184 THE COURT: Okay.

185 MR. PIETERS: There may be some evidence called.

186 THE COURT: Okay.

187 MR. PIETERS: But if there are to be any evidence to be called, with the written submissions, you'll have their will-says or whatever.

188 THE COURT: Okay. All right. Thank you, counsel.

qp/s/qlrxg/qljzg/qljxr/qlana

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Email Request: Current Document: 21
Time Of Request: Tuesday, September 18, 2012 14:31:57