Case Name:

R. v. Rover

Between
Her Majesty the Queen, Respondent, and
Adrian Rover, Appellant

[2018] O.J. No. 4646

2018 ONCA 745

Docket: C63274

Ontario Court of Appeal

D.H. Doherty, S.E. Pepall and I.V.B. Nordheimer JJ.A.

Heard: June 6, 2018.
Judgment: September 12, 2018.

(50 paras.)

Appeal From:

On appeal from the convictions entered on July 25, 2016 by Justice Robert Charney of the Superior Court of Justice.

Counsel:

Kathryn Wells, for the appellant.

Jeremy Streeter, for the respondent.

I

The judgment of the Court was delivered by

D.H. DOHERTY J.A.:--

OVERVIEW

1 The appellant was charged with various drug-related offences. He initially elected trial by judge and jury. On a pretrial motion, the appellant challenged the admissibility of the drugs seized from his residence, alleging various *Charter* violations. The trial judge dismissed the motion, with reasons reported at *R. v. Rover,* 2016 ONSC 4795. The appellant re-elected trial by judge alone and the evidence heard on the motions was taken as introduced at the trial. The appellant did not offer any other defence to the charges. He was convicted of three counts of possession of different drugs for the purpose of trafficking, including one count of possession of fentanyl for the purpose of trafficking. The appellant received a sentence of 20 months on top of a credit of 3 years, 6 months for pretrial custody.

2 The appellant appeals his convictions only.

3 I would allow the appeal. I would hold that the trial judge erred in finding that the police, having chosen to arrest the appellant before they had obtained a warrant to search his residence, were entitled to delay the appellant's right to speak to counsel for several hours while they applied for, obtained, and executed the search warrant. I would also hold that, on a proper appreciation of the nature of the s. 10(b) breach, the evidence discovered in the search of the appellant's residence should have been excluded under s. 24(2) of the *Charter*.

II

FACTS

4 The police received an anonymous tip that an unknown black male was dealing drugs from a residence in Whitby. The tipster reported seeing vehicles arriving at the residence, staying for a few minutes and then leaving. He described the drug dealer as 6'2", with dark skin, a slim build, and wearing a jacket.

5 The police set up surveillance at the residence. Over the next five hours, they saw a pattern of traffic coming and going at the residence, which they believed confirmed the tip provided by the anonymous informant. The police also arrested two women shortly after they drove away from the residence. One of the women admitted to the police that she had purchased cocaine from the occupant of the residence. The police found cocaine in the vehicle.

6 Based on the tip, their observation of the traffic at the residence, and the woman's admission, the police decided they had reasonable and probable grounds to arrest the occupant and obtain a warrant to search the residence.

7 The occupant, who matched the general description given by the tipster, turned out to be the appellant. The police arrested him later the same evening. Early the next morning, they obtained and executed a search warrant at the residence. They found the drugs that are the subject matter of the convictions under appeal.

8 The appellant renews the *Charter* arguments made at trial. The first two are related and allege arbitrary detention and a breach of s. 9 of the *Charter*. The third argument arises out of the police refusal to allow the appellant to speak to his lawyer until several hours after his arrest.

9 I would reject the first two arguments substantially for the reasons given by the trial judge. I would, however, accept the third. The appellant's constitutional right to speak to his lawyer upon arrest was breached and the evidence should have been excluded.

III

A: The Section 9 Claims

10 The appellant submits that the police did not have reasonable and probable grounds to arrest him, and that his detention was therefore contrary to s. 9 of the *Charter*. The appellant submits that this violation triggers s. 24(2) and warrants the exclusion of the evidence seized from the residence.

11 The appellant also submits that the police did not have reasonable and probable grounds to arrest the two women who were arrested shortly after driving away from his residence. The police had observed the vehicle drive up to the residence. One of the women had gone into the residence and exited a short time later. Based on their other observations and experience, the police officers believed that the woman had gone into the residence to purchase drugs. They followed the car,

pulled it over, and arrested both occupants. They found cocaine, and one of the occupants confirmed that she had purchased the cocaine from the occupant of the residence.

12 The appellant submits that this unlawful arrest is relevant to the case against him because the police relied on the discovery of the cocaine and the admission made by one of the women after the arrest to obtain the warrant to search the appellant's residence. The appellant maintains that, because the women's arrest was unconstitutional, any information obtained by the police as a consequence of that arrest must be excised from the affidavit used to obtain the search warrant. The appellant further argues that, absent the information obtained as a consequence of the women's arrest, the affidavit did not contain adequate grounds upon which a warrant could be issued. The search of the residence was therefore warrantless and a breach of s. 8 of the *Charter*.

13 The court did not call on the Crown on either of the first two grounds of appeal. There is a simple answer to both. The police had reasonable and probable grounds to arrest the occupants of the vehicle and the appellant. The trial judge thoroughly reviewed the applicable law and set out the factual basis upon which he was satisfied that the police had grounds to make the arrests: see *Rover*, at paras. 28-35 and 53-54. I would defer to that assessment.[1]

B: The Section 10(b) Claim

(i) The trial proceedings

14 The police arrested the two women in the car with the cocaine at around 8:45 p.m. They subsequently decided to arrest the appellant, charge him with trafficking in narcotics, and search his residence for narcotics. For safety reasons, the police did not want to arrest the appellant in his residence. They waited until he left at 10:33 p.m., and arrested him a short distance from his residence at 10:41 p.m. At almost the same time as the appellant was being arrested, another officer involved in the investigation was submitting a search warrant application. There was no evidence that the police turned their mind to whether they should obtain the warrant to search the residence before arresting the appellant.

15 The officer who arrested the appellant at 10:41 p.m. advised him of his right to counsel, as required by s. 10(b) of the *Charter*. The appellant immediately exercised that right and indicated that he wished to speak to his lawyer. The arresting officer had been told by one of the investigators that the appellant should not be allowed to speak to counsel until after the warrant had been executed. Various officers referred to this as the "customary" or "standard" practice. No formal written policy to that effect was produced at trial.

16 The appellant was taken into custody. He was not told why he was not being allowed to speak to counsel or when he would be allowed to speak to counsel.

17 The police received the signed telewarrant at 12:50 a.m. At 2:55 a.m., a special entry team, assembled after the warrant was issued, entered the residence and secured the scene. The search began at 3:01 a.m. At 4:20 a.m., the arresting officer was told by the investigators that he could allow the appellant to contact his lawyer. For various reasons, the appellant did not speak to counsel until 5:45 a.m. The police did not attempt to speak with the appellant before he had an opportunity to speak with counsel.

18 At trial, the appellant argued that the police breached his right to counsel when they did not immediately give him access to a lawyer upon request. The trial judge accepted that a detainee who asserted their right to counsel was entitled to contact counsel without delay. He further held, however, that in some circumstances public and police safety concerns or concerns about the preservation of evidence could justify a delay in allowing access to counsel. The trial judge held that a search of a suspected drug dealer's residence engaged sufficient concerns about officer safety and the preservation of evidence to justify some delay in providing the arrested individual

with access to counsel: *Rover*, at paras. 66-70. The trial judge went on, however, to find that there was no justification for the delay after the residence had been secured at 3:01 a.m. He concluded that the delay between 3:01 a.m. and 4:20 a.m. when the appellant was told he could contact counsel constituted a breach of s. 10(b): *Rover*, at para. 71.

19 The trial judge then turned to s. 24(2) of the *Charter*. He agreed that the breach of s. 10 (b), which he calculated as a delay of about 1 hour and 20 minutes in allowing the appellant to access counsel, was a serious breach "reflecting the police's disinterest in [the appellant's] rights": *Rover*, at para. 77. In considering the impact of the breach on the appellant's rights, the trial judge noted that the police did not question the appellant while he was detained without access to counsel. The trial judge found no causal connection between the breach and the obtaining of the evidence during the search. He characterized the interference with the appellant's *Charter*-protected interests as "moderate": *Rover*, at para. 80. Lastly, in addressing society's interest in an adjudication on the merits, the trial judge noted that the evidence in issue was real, reliable, and crucial to the Crown's case: *Rover*, at para. 83.

20 Balancing the various considerations, the trial judge determined that the police misconduct made "a strong case for exclusion", the nature of the interference with the appellant's rights made "a moderate case for exclusion" and society's interest in an adjudication on the merits "tip [ped] the balance in favour of admissibility": *Rover*, at para. 84. He dismissed the motion to exclude the evidence.

(ii) The arguments

21 Counsel for the appellant accepts that if the trial judge properly characterized the nature of the s. 10(b) breach, she cannot successfully challenge his s. 24(2) analysis. Counsel submits, however, that the trial judge misconstrued the breach, both quantitatively and qualitatively. Counsel argues that the breach began when the appellant asserted his right to counsel and was not given the opportunity to speak with counsel. She submits that the police refusal to allow the appellant to speak to counsel was not precipitated by anything specific to the police investigation of the appellant, but was the direct consequence of the police practice of refusing access to counsel until the search of the appellant's residence was completed. Counsel argues that the breach of the appellant's s. 10(b) right to consult with counsel is made all the more serious because it is the result of a police practice that routinely sacrifices a detainee's constitutional right to immediate access to counsel in favour of the police interest in the efficient use of its resources.

22 The respondent submits that the trial judge correctly determined that the appellant's s. 10 (b) rights were denied when he was not allowed access to counsel at 3:01 a.m. The respondent further submits that the trial judge's s. 24(2) analysis is impeccable and reminds the court that it must defer to that assessment, absent errors in legal principle or an unreasonable finding: *R. v. Beaulieu*, 2010 SCC 7, [2010] 1 S.C.R. 248, at para. 5.

23 Alternatively, the respondent submits that even if the breach of s. 10(b) occurred at the time of the arrest, the s. 24(2) analysis remains unchanged. The breach had virtually no impact on the appellant's *Charter*-protected interests, as there was no connection between the violation and the evidence obtained. The police did not attempt to take advantage of the appellant's inability to access counsel and made no effort to obtain a statement from him. The respondent submits, as the trial judge observed, that there is no reason to believe that anything would have occurred any differently had the appellant been given an opportunity to speak to counsel at the outset: *Rover*, at para. 80.

(iii) Analysis

24 Section 10(b) of the *Charter* guarantees to anyone arrested or detained the right "to retain and instruct counsel <u>without delay</u> and to be informed of that right" (emphasis added).

25 Section 10(b) obliges the police to advise a detained person of the right to speak with counsel without delay and, if the detained person exercises that right, the police must immediately provide the detainee with a reasonable opportunity to speak to counsel: *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at paras. 38, 42; *R. v. Bartle*, [1994] 3 S.C.R. 173, at pp. 191-92.

26 The s. 10(b) jurisprudence has, however, always recognized that specific circumstances may justify some delay in providing a detainee access to counsel. Those circumstances often relate to police safety, public safety, or the preservation of evidence. For example, in *R. v. Strachan*, [1988] 2 S.C.R. 980, the court accepted that the police could delay providing access to counsel in order to properly gain control of the scene of the arrest and search for restricted weapons known to be at the scene. Subsequent cases have accepted that specific circumstances relating to the execution of search warrants can also justify delaying access to counsel until the warrant is executed: see e.g. *R. v. Learning*, 2010 ONSC 3816, 258 C.C.C. (3d) 68, at paras. 71-75.

27 These cases have, however, emphasized that concerns of a general or non-specific nature applicable to virtually any search cannot justify delaying access to counsel. The police may delay access only after turning their mind to the specifics of the circumstances and concluding, on some reasonable basis, that police or public safety, or the need to preserve evidence, justifies some delay in granting access to counsel. Even when those circumstances exist, the police must also take reasonable steps to minimize the delay in granting access to counsel: see e.g. *R. v. Patterson*, 2006 BCCA 24, 206 C.C.C. (3d) 70, at para. 41; *R. v. Soto*, 2010 ONSC 1734, at paras. 67-71; *Learning*, at para. 75; *R. v. Wu*, 2017 ONSC 1003, 35 C.R. (7th) 101, at para. 78.

28 *Wu*, at para. 78, provides a helpful summary of the law. That summary includes the following:

> The assessment of whether a delay or suspension of the right to counsel is justified involves a fact specific contextual determination. The case law on this issue reveals some general guiding principles that provide a framework for this assessment:
>
> a. The suspension of the right to counsel is an exceptional step that should only be undertaken in cases where urgent and dangerous circumstances arise or where there are concerns for officer or public safety.
>
> ...
>
> e. Police officers considering whether circumstances justify suspending the right to counsel must conduct a case by case assessment aided by their training and experience. <u>A policy or practice routinely or categorically permitting the suspension of the right to counsel in certain types of investigations is inappropriate</u>. [Emphasis added.]

29 In the present case, the evidence demonstrates that the officers involved in this investigation followed a practice that routinely prevented arrested persons from accessing counsel if the police intended to obtain a warrant to search a place for drugs and believed that the place had a connection to the arrested person. The rationale behind this practice appears to be that there is always a possibility that allowing an arrested person to speak to their lawyer could put the officers executing the warrant at risk or jeopardize the preservation of evidence. Under this practice, the appellant, as the occupier of the place to be searched, was prevented from contacting his lawyer, as were the two women who had been arrested earlier that evening.

30 Various officers who testified acknowledged the practice. Constable Massey, the officer who

told the arresting officer to deny the appellant access to counsel, testified as follows:

> Q. So, any time -- is it -- I mean, correct me if I'm wrong, is it accurate to say then that any time this team is contemplating getting a warrant, you don't let an accused speak to a lawyer?
>
> A. Correct.
>
> Q. No matter how long it might take?
>
> A. Correct.
>
> Q. Okay. And that's part of what you have been trained to do?
>
> A. Correct.
>
> Q. All right. Now, you gave that information to Constable Hoover and said, "Don't let him speak to a lawyer."?
>
> A. Correct.
>
> Q. And, did you indicate that you would stay in touch with him and tell him when he could have him speak to a lawyer?
>
> A. I said when we were finished the entry then he could -- I would let him know. [Emphasis added.]

31 Officer Sigmann, another officer involved in the investigation, gave the following evidence:

> Q. Now, you testified that you had nothing to do with telling anyone to prevent those two girls from speaking to counsel.
>
> A. No.
>
> Q. You had no knowledge of that?
>
> A. Not that I recall, no. It's -- it's a standard practice that people's -- that rights get withheld for certain reasons.
>
> Q. And where do you learn that?
>
> A. I learn it from members of the drug unit.
>
> Q. Umm, okay.
>
> A. That's where you seek advice from -- from the drug unit. I think they discuss it on -- when you do like, plain clothes course. It's -- it's kind of a general -- a general practice.
>
> Q. So are you taught that if you're even gonna' consider writing a warrant nobody gets to speak to a lawyer 'til that's done, it's submitted, it's signed back as approved and then executed. Is that how it works?

A. That's my understanding of how it works. Yes. [Emphasis added.]

32 The police practice described by the officers replaces the narrow, case-specific exception to the constitutional right to speak to counsel without delay upon arrest with a protocol that routinely delays an arrested person's access to counsel for an indeterminate time, usually hours, whenever the police, for whatever reason, deem it appropriate to arrest them before applying for a search warrant. There is no evidence that any of the officers turned their mind to the specific circumstances of this case before deciding that the appellant would be arrested and denied access to counsel for several hours while the police sought, obtained, and executed a search warrant. On the evidence of the police, there was no need to consider the specifics of this case. For them, the decision to arrest the appellant before seeking the search warrant dictated that the appellant would not be allowed to contact a lawyer until the warrant was executed.

33 In my view, to fall within the exception to the requirement that an arrested person be allowed to speak to counsel without delay, the police must actually turn their mind to the specific circumstances of the case, and they must have reasonable grounds to justify the delay. The justification may be premised on the risk of the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance. Furthermore, if the police determine that some delay in allowing an arrested person to speak to counsel is justified to permit execution of the warrant, then they must consider whether it is necessary to arrest the individual before they execute the warrant. The police cannot create a justification for delaying access to counsel by choosing, for reasons of convenience or efficiency, to arrest an individual before seeking, obtaining, and executing a search warrant. Police efficiency and convenience cannot justify delaying an arrested person's right to speak with counsel for several hours.

34 The effective implementation of the right to counsel guaranteed by s. 10(b) depends entirely on the police. The police must understand that right and be willing to facilitate contact with counsel. The practice under which the officers involved in this case operated demonstrates a disregard of a fundamental constitutional right. The appellant's right to speak with counsel was denied at the time of his arrest, when the police refused his request to speak with counsel.

(iv) Should the evidence be excluded?

35 While there was no causal connection between the discovery of the drugs and the s. 10(b) breach, there was a close temporal connection. The parties acknowledge that the connection is sufficient to engage s. 24(2): see *R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561.

36 The exclusionary rule in s. 24(2) operates on the assumption that the routine admission of constitutionally tainted evidence must have a long-term negative effect on the repute of the administration of criminal justice. As explained in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 70:

> Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24 (2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

37 The rationale for the exclusionary rule identified in *Grant*, as applied in these circumstances, requires a consideration of the long-term impact on the reputation of the administration of justice caused by the admission of evidence obtained in an investigation conducted under a police practice that inevitably and routinely denies detained persons their constitutional right to access counsel. The systemic nature of the violation plays a central role in assessing its long-term impact on the proper administration of justice.

38 The three-pronged line of inquiry under s. 24(2) established in *Grant* is well-known. A court

looks to the seriousness of the *Charter*-infringing state conduct, the impact of that conduct on the *Charter*-protected interests of the accused, and society's interest in an adjudication on the merits: *Grant*, at paras. 72-86. The first two factors, taken in combination, represent the case for exclusion. The third provides the counterbalance favouring admission of the evidence.

(a) The seriousness of the state misconduct

39 The trial judge described the state misconduct as "serious" and reflective of the police disinterest in the appellant's rights. Those observations are fully justified. Apart entirely from never turning their mind to the actual need to delay the appellant's access to counsel, the officers showed no interest in mitigating the delay. For example, there is no evidence that the police considered obtaining a search warrant before arresting the appellant. I see nothing in the circumstances that would have prevented the police from obtaining the warrant first. This would have avoided, or at least substantially minimized, any delay in affording the appellant his constitutional right to speak with counsel. Even if the police wanted the appellant out of the residence before executing the warrant, they could have obtained the warrant, watched the residence, arrested the appellant when he left, and proceeded to execute the warrant. Had the police followed that procedure, they could have allowed the appellant immediate access to counsel. Instead, by arresting the appellant before obtaining the warrant, the police ensured that he would be held without access to his lawyer for hours.

40 Although the trial judge recognized that the police misconduct was serious, he understated its seriousness by failing to connect it to a police practice that routinely denied detainees access to counsel in situations in which the police were intending to apply for search warrants. Constitutional breaches that are the direct result of systemic or institutional police practices must render the police conduct more serious for the purposes of the s. 24(2) analysis. A police practice that is inconsistent with the demands of the *Charter* produces repeated and ongoing constitutional violations that must, in the long run, negatively impact the due administration of justice. This is so even if many of the breaches are never exposed in a criminal court. As noted in *Grant*, at para. 75:

> It should also be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.

41 The same sentiment appears in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 25, released concurrently with *Grant*, and in subsequent appellate decisions: see e.g. *R. v. Jones*, 2013 BCCA 345, 298 C.C.C. (3d) 343, at para. 46; *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 67.

42 The *Charter*-infringing state conduct in this case must be viewed as very serious. A police practice that routinely holds detained individuals *incommunicado* while the police go about obtaining and executing a search warrant must, over time, bring the administration of justice into disrepute.

(b) The impact on the appellant's *Charter*-protected interests

43 The trial judge described the negative impact of the breach on the appellant's right to access counsel as "moderate". That description was based largely on his finding that the delay of about 1 hour and 20 minutes in allowing the appellant to access counsel had no causal connection to the obtaining of the evidence discovered in the search of the appellant's residence, and that the police had refrained from questioning the appellant during that time. The trial judge was correct in considering the absence of any causal connection between the s. 10(b) breach and the

obtaining of the evidence as a factor mitigating the impact of the breach on the appellant's *Charter*-protected interests: *Grant*, at para. 122.

44 For the reasons set out above, I calculate the unconstitutional delay in allowing the appellant to speak to his lawyer at almost six hours (10:41 p.m. to 4:20 a.m.). A delay of that length, even when the police do not attempt to question the arrested person, has a significant impact on the arrested person's rights.

45 The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

46 In this case, instead of providing the appellant with the lifeline to counsel when he requested it, the police put him in the cells. The appellant was held for several hours without any explanation for the police refusal of access to counsel, and without any indication of when he might be allowed to speak to someone. His right to security of the person was clearly compromised. The significant psychological pressure brought to bear on the appellant by holding him without explanation and access to counsel for hours must be considered in evaluating the harm done to his *Charter*-protected interests.

47 Having regard to the security of the person interest protected by s. 10(b), and the risk posed by the police practice to the maintaining of the appellant's right against self-incrimination, I would hold that the s. 10(b) breach had a significant negative impact on the appellant's *Charter*-protected rights. While that impact was certainly not as serious as it would have been had there been a causal connection between the breach and the obtaining of the evidence, it was nonetheless significant.

48 The final consideration identified in *Grant*, the impact of excluding the evidence on society's interest in a trial on the merits, clearly favours admitting this evidence. The evidence of the seized drugs is reliable and crucial to the prosecution of serious crimes. To exclude the evidence is to allow a guilty person to go free.

49 In my view, however, this is one of those cases in which the long-term repute of the administration of justice requires the sacrifice of the short-term benefit of an adjudication on the merits of this case. The seriousness of the police misconduct points very strongly toward exclusion. The negative impact of the breach on the appellant's constitutionally-protected rights also points, although less strongly, to exclusion. The two together make a strong case for exclusion. Society's interests in an adjudication on the merits does not tip the balance in favour of admissibility: *McGuffie*, at paras. 61-64. I would exclude the evidence.

IV

CONCLUSION

50 I would allow the appeal, quash the convictions and enter acquittals.

D.H. DOHERTY J.A.
S.E. PEPALL J.A.:— I agree.
I.V.B. NORDHEIMER J.A.:— I agree.

1 As I am satisfied there were reasonable and probable grounds to arrest the occupants of the vehicle, I need not consider whether the appellant, in challenging the validity of a warrant, is entitled to seek the excision of material from the affidavit relied on to obtain the warrant on the basis that the information was obtained in violation of the constitutional rights of third parties: see *R. v. Vickerson*, 2018 BCCA 39, 358 C.C.C. (3d) 441.