

R. v. Omar, [2018] O.J. No. 6346

Ontario Judgments

Ontario Court of Appeal

R.J. Sharpe, D.M. Brown and D. Paciocco JJ.A.

Heard: June 29, 2018.

Judgment: December 4, 2018.

Docket: C64063

[2018] O.J. No. 6346 | 2018 ONCA 975 | 144 O.R. (3d) 1

Between Her Majesty the Queen, Respondent, and Omar Muhammad Omar, Appellant

(139 paras.)

Case Summary

Criminal law — Criminal Code offences — Weapons offences — Appeal by Omar from convictions for various firearms offences and possession of cocaine for purpose of trafficking allowed — Appellant acquitted — Appellant was found in possession of loaded handgun, ammunition and cocaine when police stopped him and another man as they walked along street — Trial judge found breaches of ss. 8, 9 and 10(b) of Charter but refused to exclude evidence on basis police acted in good faith and did not believe they had detained appellant — Trial judge erred in assessing seriousness of police's Charter-infringing conduct — Evidence should have been excluded.

Criminal law — Controlled drugs and substances — Possession for the purpose of trafficking — Other substances — Appeal by Omar from convictions for various firearms offences and possession of cocaine for purpose of trafficking allowed — Appellant acquitted — Appellant was found in possession of loaded handgun, ammunition and cocaine when police stopped him and another man as they walked along street — Trial judge found breaches of ss. 8, 9 and 10(b) of Charter but refused to exclude evidence on basis police acted in good faith and did not believe they had detained appellant — Trial judge erred in assessing seriousness of police's Charter-infringing conduct — Evidence should have been excluded.

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Protection against arbitrary detention or imprisonment — Protection against unreasonable search and seizure — Right to retain and instruct counsel without delay — Right to be informed of right to counsel — Remedies for denial of rights — Specific remedies — Exclusion of evidence — Appeal by Omar from convictions for various firearms offences and possession of cocaine for purpose of trafficking allowed — Appellant acquitted — Appellant was found in possession of loaded handgun, ammunition and cocaine when police stopped him and another man as they walked along street — Trial judge found breaches of ss. 8, 9 and 10(b) of Charter but refused to exclude evidence on basis police acted in good faith and did not believe they had detained

appellant — Trial judge erred in assessing seriousness of police's Charter-infringing conduct — Evidence should have been excluded.

Appeal by Omar from his convictions for various firearms offences and possession of cocaine for the purpose of trafficking. The appellant was found in possession of a loaded handgun, ammunition and cocaine when the police stopped him and another man as they walked along a street late at night. The police had shone a spotlight on the men and asked them to come over to their cruiser, where they asked for identification, asked several questions and demanded the appellant make his hands clearly visible. The trial judge found the stop was a breach of the appellant's s. 9 Charter right, the search violated his s. 8 Charter right, and he had had been denied his s. 10(b) Charter right to be informed of his right to counsel without delay. She refused to exclude the evidence on the basis the police acted in good faith and did not believe they had detained the appellant.

HELD: Appeal allowed; the appellant was acquitted on all counts.

The trial judge erred in assessing the seriousness of the police's Charter-infringing conduct. She gave unwarranted weight to the subjective good faith of the officers. It should have been apparent to a properly trained and legally informed police officer that the appellant was detained without lawful justification. Given the error in assessing the seriousness of the police's Charter-infringing conduct, the trial judge's ultimate balance of the R. v. Grant factors was not owed deference. On a fresh s. 24(2) analysis, the evidence against the appellant was excluded. The impact of the breaches on the appellant was significant. Society's interest in an adjudication on the merits favoured admission but a proper balancing of the Grant factors favoured exclusion. Dissenting reasons were provided.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 8, s. 9, s. 10(b), s. 24(2)

Criminal Code, R.S.C. 1985, c. C-46, s. 109(2)

Appeal From:

On appeal from the convictions entered on January 10, 2017 by Justice P.L. Hebner of the Superior Court of Justice, sitting without a jury.

Counsel

Catriona Verner, for the appellant.

Justin Reid, for the respondent.

Reasons for judgment were delivered by R.J. Sharpe J.A., concurred in by D. Paciocco J.A. Separate dissenting reasons were delivered by D.M. Brown J.A.

R.J. SHARPE J.A.

1 The appellant was convicted of various firearms offences and possession of cocaine for the purpose of trafficking. He was found to be in possession of a loaded handgun, ammunition and cocaine when the police stopped him and another man as they walked along a street in Windsor, Ontario late at night. The trial judge found that the stop amounted to a breach of the appellant's s. 9 *Charter* right not to be arbitrarily detained, that the search violated his s. 8 right to be secure against unreasonable search and seizure, and that the appellant had been denied his s. 10(b) right to be informed of his right to counsel without delay. However, she refused to exclude the evidence pursuant to s. 24(2) of the *Charter*.

2 On this appeal, the Crown does not contest that the appellant was detained and that his *Charter* rights were violated. The sole issue is whether the trial judge erred by refusing to exclude the evidence on the basis that the police acted in good faith and did not believe that they had detained the appellant.

3 The appellant challenges the finding of good faith police conduct. He submits that as the police acted in ignorance of or with disregard for well-established law limiting police powers, the finding of good faith cannot stand and the evidence should be excluded pursuant to s. 24(2).

4 For the reasons that follow, I agree that the trial judge erred in assessing the seriousness of the police's *Charter*-infringing conduct. I am satisfied that on a fresh s. 24(2) analysis, the evidence obtained against the appellant should be excluded. I would therefore allow the appeal and enter acquittals on all counts.

FACTS

5 The appellant, at the time 20 years old, was walking down a street in Windsor, Ontario at around 1 a.m. with a recent acquaintance, Morpheu Smith [*sic*]. The appellant had arrived in Windsor a few hours earlier. He was wearing a light grey hooded sweatshirt with the hood pulled up. There was no one else on the street, located in an area of Windsor that is not highly populated. In the immediate vicinity was a Beer Store, an abandoned industrial building and a vacant fire station. There was a Mac's Milk convenience store two or three blocks south.

6 Two Windsor police officers, Constables Ashton and Haidar, were on patrol in the neighbourhood. They had been advised of a "be on the look-out" ("BOLO") notice for a white male, 5'7", 200 pounds, 25-30 years old, who a week earlier had robbed two Mac's Milk stores armed with a six-inch hunting knife and wearing a black hooded sweatshirt and a black ski mask.

7 The appellant identifies as a black male. He is 5'8" tall and of slight build. There is no evidence that the police could see that the appellant is black before they stopped him and no suggestion that the stop was prompted by racial profiling.

8 When the officers saw the appellant and Smith walking along the street in the same direction they were driving, they pulled their marked patrol car over, shone a very bright "alley" light on the appellant and Smith and directed them to stop and come over to the patrol car. Constable Ashton said: "Hey guys what's going on?" The officers then got out of the patrol car, approached the two men, and asked them for their identification. The appellant handed over his wallet and informed the officers that he was headed to Mac's Milk with Smith.

9 The appellant's wallet had two health cards inside, one his own and a second belonging to someone else. Smith said he had no identification but told the officers who he was. Constable Haidar took the health cards to the patrol car to run the appellant's and Smith's names through the Canadian Police Information Centre ("CPIC").

10 Constable Ashton, 5'11" tall and wearing full uniform, remained with the appellant and Smith while Constable Haidar checked CPIC. Constable Ashton stood less than four feet from the appellant and asked a series of questions, such as:

- * "What are you doing here?"
- * "What are you up to?"
- * "Where do you live?"
- * "You guys work?"
- * "You guys go to school?"
- * "How did you get to Windsor?"

11 As he asked these questions, Constable Ashton told the two men to remove their hands from their pockets. He testified that he did so for officer safety. The appellant removed his hands but then put them back in his pockets. Constable Ashton told him to remove them again. The appellant removed only his left hand and Constable Ashton said "both hands". The appellant complied and removed his right hand from his pocket.

12 At that point, Constable Ashton saw the barrel of a gun in the appellant's pocket. Constable Ashton yelled "gun" and tackled the appellant, seized the .32 calibre loaded handgun and placed the appellant under arrest in handcuffs. The appellant was then searched. He had four .32 calibre rounds of ammunition in his vest pocket. When Constable Ashton yelled "gun", Constable Haidar left the patrol car, took control of Smith and arrested him for breach of the peace. Constable Haidar's notes indicated that he heard Constable Ashton advise the appellant of his right to counsel immediately after he seized the gun and placed the appellant under arrest. The appellant answered that he was "so stupid" and that he had a lawyer in London. The appellant was subsequently searched at the police station and a clear plastic bag containing cocaine was found on his person.

13 Less than five minutes elapsed from the time the police stopped the appellant and Smith to when Constable Ashton yelled "gun".

TRIAL JUDGE'S REASONS

14 The trial judge found that the appellant had been detained "at least by the time he was

asked for his identification." She observed a "very close" similarity between the appellant's encounter with the police and the facts of *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, a case I will discuss in greater detail later in these reasons. To explain her finding that the appellant had been detained, the trial judge relied upon:

- * the fact that the officers had shone their spotlight on the appellant;
- * the relative sizes of the appellant and Constable Ashton; and
- * the fact that Constable Ashton stood close to the appellant, asked him for identification, questioned him for a period of time while Constable Haidar checked CPIC, and repeatedly told him to remove his hands from his pockets.

15 The trial judge also noted that in his testimony on the *voir dire*, the appellant said that he was scared during his encounter with the police, was never told that he did not have to answer the officer's questions, and had not known that he could leave at any point.

16 The trial judge found the detention of the appellant to be arbitrary. The only possible justification for the detention was reasonable suspicion that the appellant was connected to the Mac's Milk robberies, based upon the BOLO notice: *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59. The trial judge found that the reasonable suspicion test had not been met. The Mac's Milk robberies, the trial judge noted, had occurred a week before the appellant's encounter with the police. There was no clear nexus between the appellant and those robberies, and the appellant's appearance did not correspond with the description of the perpetrator provided in the BOLO notice. Constable Ashton, moreover, testified that he did not consider the appellant and Smith to be suspects.

17 Based on her conclusion that the detention was arbitrary, the trial judge found that the search of the appellant was unlawful and contrary to s. 8 of the *Charter*: *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at paras. 54-55. Further, applying *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 42, the trial judge found that the appellant had not been informed of his right to counsel without delay. Although the appellant had been detained at least from the time he was asked for his identification, he had not been advised of his right to counsel until after he was handcuffed and arrested.

18 The trial judge then turned to the question of whether the evidence should be excluded under s. 24(2). She properly identified the three factors relevant to the s. 24(2) inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in an adjudication on the merits: *Grant*, at para. 71.

19 The trial judge's finding as to the seriousness of the *Charter*-infringing state conduct lies at the heart of this appeal. The trial judge found, at para 43, that:

... Constable Ashton and Constable Haidar acted in good faith. They had a subjective belief that they were not detaining Mr. Omar. The police conduct was not abusive. Although the officers went too far in detaining Mr. Omar and asking him questions, the point at which an encounter becomes a detention is not always clear. Although I have concluded that Constable Ashton and Constable Haidar were in error in detaining Mr. Omar, the detention is understandable. The police conduct in committing the *Charter*

breach was neither deliberate nor egregious and would not fall on the more serious end of the spectrum.

20 With respect to the impact of the breach on the *Charter*-protected interests of the appellant, the trial judge found, at para. 44, that the breach of the appellant's s. 9 right was "significant". She pointed out that the appellant, like "every other person in this country [has] the right to walk down the street without fear of being arbitrarily detained, whether the time is 1:00 in the morning or in the middle of the afternoon." The trial judge found that the s. 10(b) breach also had a "significant" impact on the appellant. He was scared and felt he could not walk away from the police. Had he been given an opportunity to consult counsel, he might have been advised differently.

21 With respect to the final factor, society's interest in the adjudication of the case on its merits, the trial judge observed that the evidence was crucial to the Crown's case and highly reliable.

22 Weighing and balancing the three *Grant* factors, the trial judge concluded that both the seriousness of the *Charter*-infringing state conduct and society's interest in an adjudication on the merits favoured admission, while the impact of the breach on the appellant's *Charter* rights favoured exclusion. On balance, she concluded that the fact that "the police subjectively believed that they were not detaining" the appellant and "acted in good faith", combined with the fact that the evidence was "highly reliable" and the charge "very serious", outweighed the "significant ... albeit not an egregious" impact on the appellant's *Charter* rights.

ISSUES ON APPEAL

23 There is no dispute on this appeal that the appellant's rights under ss. 8, 9 and 10(b) of the *Charter* were infringed when Constables Ashton and Haider stopped him as he walked along a Windsor street late at night. On the authority of *Grant*, the trial judge quite properly rejected the claim that the appellant had not been detained. The police offered no tenable legal justification for the detention. It followed that the searches that revealed the gun, ammunition and cocaine were unlawful, and that the police failed to inform the appellant of his right to counsel in a timely manner.

24 The central issues on appeal are whether the trial judge erred in principle in her assessment of the first *Grant* factor -- the seriousness of the *Charter*-infringing state conduct -- and, if she did, whether the evidence should be excluded. The appellant has abandoned his sentence appeal, having served his sentence of 40 months in custody, less 29 months' credit for pre-trial custody.

25 On the appeal from conviction, the appellant submits that the trial judge's finding that the police acted in "good faith" cannot be supported in the face of evidence of a clear detention and complete lack of justification for that detention. The appellant contends that as this case was "very close" to the facts of *Grant*, the police should have known they unlawfully detained the appellant, making their *Charter*-infringing conduct more serious. On a proper analysis of the first *Grant* factor, the evidence should have been excluded.

26 In the respondent's view, the trial judge's finding that the officers acted in good faith was neither unreasonable nor based on an error in principle. This was a "borderline" case of detention and the officers acted under an honest and reasonable belief that their actions were *Charter*-compliant. Even after *Grant*, the issue of when a psychological detention crystallizes is

nanced, flexible and contextual, and one on which police officers, members of the public, lawyers and judges frequently disagree. The trial judge properly found that the officers' judgment call, while ultimately incorrect, was "understandable". This finding is entitled to deference, as is the trial judge's ultimate balancing of the *Grant* factors.

ANALYSIS

27 One of the central features of the *Charter of Rights and Freedoms* is the explicit guarantee of effective remedies to redress violations of *Charter* rights. Section 24(2) provides a remedy for *Charter* breaches by allowing for the exclusion of evidence obtained in violation of a *Charter* right or freedom: *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 21. This section provides that where

evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

28 The trial judge correctly identified the three *Grant* factors used to determine whether evidence obtained in violation of the *Charter* should be excluded. Absent error in principle, palpable and overriding factual error or an unreasonable determination, a trial judge's weighing of those factors attracts deference on appeal: *McGuffie*, at para. 64; *Grant*, at para. 86; *R. v. Schulz*, 2018 ONCA 598, at para. 23.

29 In my respectful view, the trial judge erred in principle in her assessment of the seriousness of the police's *Charter*-infringing conduct. Her ultimate balancing of the *Grant* factors is therefore owed no deference. On a fresh analysis, I would exclude the evidence obtained against the appellant.

Seriousness of the Charter-infringing state conduct

30 For the following reasons, I conclude, on the authority of *Grant*, that the trial judge committed reversible error in situating the police's conduct on the "continuum of misconduct" that guides the inquiry into the first *Grant* factor: *R. v. Blake*, 2010 ONCA 1, 251 C.C.C. (3d) 4, at para. 23; *R. v. Rocha*, 2012 ONCA 707, 112 O.R. (3d) 761, at para. 31. She gave unwarranted weight to the subjective good faith of the officers. The trial judge's findings that the detention was "understandable" and that the police acted in "good faith" are also inconsistent with her finding that this case was on all fours with *Grant*. *Grant* was decided several years before Constables Ashton and Haidar detained the appellant. The Supreme Court made clear, at para. 133, that its decision would "render similar conduct less justifiable going forward." The trial judge erred by failing to take this guidance into account in determining the seriousness of the police's conduct, and by failing to assess whether there was a reasonable, case-specific basis for the police officers' subjective belief that no detention had occurred. In my respectful view, following *Grant*, it should have been apparent to a properly trained and legally informed police officer that the appellant was detained without lawful justification.

31 I explain these conclusions in two related parts. First, I outline why this was a clear case of detention, partly because of the similarities it shared with the facts of *Grant*. Second, I explain why in light of the clear and arbitrary detention of the appellant, the trial judge's finding that the police acted in good faith cannot withstand scrutiny.

The Detention

32 This was not a close case of detention. As the trial judge observed, "[t]he facts in this case are very close to the facts in [*Grant*]." The respondent's submission that there are "significant distinctions" between the two cases, such that this incident amounts to a "borderline" detention, must be rejected.

33 *Grant* involved an encounter between Grant, a young black man, and three police officers monitoring an area near schools plagued by drugs, assaults, and robberies. Grant was walking along the street around mid-day. Two plain-clothed police officers drove past him in an unmarked car. Grant stared at the officers in an unusually intense manner and fidgeted with his coat and pants. The two officers became suspicious and suggested to a third officer, in uniform and driving a marked police car in the neighbourhood, that he have a chat with Grant. The uniformed officer got out of his car, stood on the sidewalk directly in Grant's path, asked Grant "what was going on" and requested his name and address. Grant produced his health card. He appeared nervous and adjusted his jacket. The uniformed officer told Grant to keep his hands in front. The two plain-clothed officers came up behind the uniformed officer, flashed their badges and blocked the way forward. The uniformed officer asked Grant "[d]o you have anything on you that you shouldn't?" Grant responded that he had a small bag of weed and a firearm. At that point, the officers arrested Grant, searched him and found marijuana and a loaded revolver.

34 The majority of the Supreme Court reiterated the basic principle that while a police officer may approach a person on the street and ask him or her questions, the person has the right to refuse to answer and walk away. Detention occurs when that choice to walk away is removed, "whether by physical or psychological compulsion" (para. 21). Detention requires more than "a fleeting interference or delay" but less than "where the police take explicit control over the person and command obedience" (para. 24). The majority agreed, at para 28, with the holding in an early *Charter* case, *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 644, that there is a detention when a person "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist." The test is an objective one, but the *Grant* majority noted at para. 32 that:

the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive.

35 In relation to neighbourhood policing, a distinction is made between general inquiries and focused suspicion which may lead the target of the suspicion to reasonably conclude that he or she has no choice "but to comply with a police officer's request" (para. 41).

36 The majority summarized the proper approach to assessing a s. 9 claim at para. 44:

1. 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.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
 - (a) The circumstances giving rise to the encounter as they 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 focussed investigation.
 - (b) 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.
 - (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication. [Emphasis Added.]

37 Applying that test to Grant's situation, the majority concluded that he had been detained, as did the two concurring judges (albeit for different reasons). The majority reasoned that Grant was not detained when the uniformed officer approached him and made general inquiries. However, what followed did amount to a detention. Grant was told to keep his hands in front. Two other officers flashed their badges and moved into position behind the first officer, who embarked upon a pointed line of questioning. At para. 50, the majority stated:

[i]n our view, the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct.

38 In the case at bar, the trial judge found that the appellant's interactions with the police fell within the *Grant* definition of detention. In my view, there can be no doubt about that conclusion. This was not one of the close cases referred to in *Grant*. The circumstances giving rise to the encounter, the nature of the police conduct and the characteristics of the appellant strongly support a finding that he was detained in a similar manner to the appellant in *Grant*.

39 First, the circumstances giving rise to the encounter. As in *Grant*, the police were not "providing general assistance, maintaining general order, or making general inquiries regarding a particular occurrence". The police were not simply engaging members of the public on the street in the course of their duties. They did not call out to the appellant and his associate for a talk. Rather, they trained their attention specifically on the appellant and Smith, in a remote part of Windsor late at night with no one else present after shining a bright spotlight on them and asking them to come over to their cruiser. These features of this case arguably make for an even clearer case of detention than in *Grant*.

40 Second, the nature of the police conduct. In this case, as in *Grant*, the appellant was stopped by police while walking down a street. The police, like in *Grant*, asked for identification, commenced questioning, and made multiple demands that the appellant make his hands clearly

visible. While the officers did not go so far as to ask whether the appellant "ha[d] anything ... [he] shouldn't", it is relevant that the questioning occurred after the police took away the appellant's identification for a period of time, leaving him standing in the street confronted by an officer standing four feet away to await its return: *R. v. Davidson*, 2010 ONSC 1508, 207 C.R.R. (2d) 34, at para. 78; *R. v. Solomon* (2009), 200 C.R.R. (2d) 323 (Ont. S.C.), at para. 28. During that questioning a uniformed peace officer was asking the young men to account for themselves -- "What are you doing here". "What are you up to", "Where do you live", "You guys work?", "You guys go to school?", "How did you get to Windsor". It would strain belief to suggest that in these circumstances, the appellant felt he was not singled out and free to walk away from the encounter and/or refuse to answer the police's questions.

41 Third, the characteristics of the appellant. In both *Grant* and in this case, the appellants were young black men confronted by physically larger officers dressed in uniform.

42 I add that while *Grant* holds that the subjective views of the accused and the police are not decisive, they may be considered: *Grant*, at para. 32; *R. v. N.B.*, 2018 ONCA 556, at para. 117. Indeed, so that they can identify when a detention is apt to be occurring, police officers are required to consider whether the point has been reached where the subject of their attention may reasonably conclude that they are not free to walk away or decline to answer questions: *Grant*, at para. 41. Yet there is no indication here that the officers did so. The appellant testified that he was "scared" and that, particularly as a racialized individual, he did not think he could simply walk away from the police and feared he would be shot if he did. He stated that "it's almost instilled in every coloured person's brain that if officers tell you to do something you'd better do it or else." There is no evidence that the police informed the appellant that he could leave, refuse to provide identification, or decline to answer their questions. This option was open to the officers had they been uncertain about whether their actions were having a coercive effect on the appellant: *Grant*, at para. 32. It enables officers to avoid triggering detentions in close cases or where officers do not intend to detain where objectively a detention is apparent. When Constable Ashton was asked what he would have done if the appellant had walked away, he replied: "I would have asked him to -- you know, why -- why are you leaving. I would have questioned him, maybe...follow them, see where they're going". This evidence of the subjective beliefs of both the appellant and the officer provides further support for the proposition that the appellant reasonably believed he was detained and that Constable Ashton did not intend to permit the appellant to simply walk away.

43 For these reasons, I do not accept the Crown's submission that this was a "borderline" incident of detention. The police conduct in this case bore strong similarities to the facts of *Grant*, resulted in a clear detention, and led to infringements of the appellant's ss. 8, 9 and 10(b) rights. Next, I explain how this conclusion impacts the assessment of the seriousness of the police's *Charter*-infringing conduct.

The Trial Judge's Finding of Good Faith

44 While the trial judge was entitled to find that Constables Ashton and Haider subjectively and honestly believed that they had not detained the appellant, she erred in law by concluding that a subjective honest belief was sufficient to support a finding of good faith. She found that the officer's belief that they were not detaining Mr. Omar meant that they acted in "good faith": "the police subjectively believed they were not detaining Mr. Omar. They acted in good faith." A subjective belief that no detention is occurring is a necessary condition to a good faith detention,

not a sufficient basis for finding good faith. Nor can a good faith finding prevail where an officer's belief that no detention is occurring is unreasonable.

45 While the police may not have acted in bad faith in this case, an absence of bad faith does not amount to good faith: *R. v. Mandziak*, 2014 BCCA 41, 305 C.C.C. (3d) 497, at para. 41, citing *R. v. Voong*, 2013 BCCA 527, 304 C.C.C. (3d) 546, at para. 94; Steve Coughlan, "Good Faith, Bad Faith and the Gulf Between: A Proposal for Consistent Terminology" (2011) 15 Can. Crim L. Rev. 197, at pp. 205-207. A purely subjective approach would encourage police ignorance, fail to provide the necessary incentive for the police to be well-informed about *Charter* rights, and pay insufficient attention to the "long-term repute of the justice system": *Grant*, at para. 61.

46 Accordingly, claims of good faith should be rejected if based upon ignorance or an unreasonable application of established legal standards. As the Supreme Court stated in *Grant*, at para. 74, "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith" (see also *R. v. Poirier*, 2016 ONCA 582, 131 O.R. (3d) 433, at para. 92). The Court has recently reaffirmed that "good faith errors must be reasonable": *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 44; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 65. See also, *R. v. Tsekouras*, 2017 ONCA 290, 353 C.C.C. (3d) 349, at para. 109, leave to appeal refused, [2017] S.C.C.A. No. 225; *R. v. Brown*, 2012 ONCA 225, 286 C.C.C. (3d) 481, at paras. 22-26; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59.

47 In this case, the police should have known that they were exceeding their powers in detaining the appellant. *Grant* clarified the law on what constitutes a detention. Its emphasis on consideration of contextual factors did not leave the officers without guidance. *Grant* gave the officers everything they needed to make a reasoned assessment. The Court explicitly warned, at para. 133, that having done so: "the Court's decision in this case will be to render similar conduct less justifiable going forward" and that "[w]hile police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is." In my view, the trial judge's failure to acknowledge these warnings, despite her recognition that this case was "very close" to *Grant*, led her to err in law in her characterization of seriousness of the *Charter*-infringing state conduct.

48 Of course, even after *Grant*, the "point at which an encounter becomes a detention is not always clear": Trial Judge's Reasons, at para. 43. By itself, however, that observation does not support the trial judge's cursory conclusion that the detention of the appellant was "understandable". There was no indication that the officers discharged their obligation to consider how things might appear to the two men they had stopped. Moreover, the trial judge was faced with the testimony of Constable Ashton that had the appellant walked away he would have asked him why he was leaving and followed him. The events unfolded in a way that, based on the *Grant* factors, should have made it obvious to the officers that the appellant was being detained. The trial judge was obliged to explain what specific features of *this* case caused the police to reasonably misunderstand their constitutional obligations. No such factors were identified, nor are any apparent to me. On the authority of *Grant*, and as explained above, this was a clear case of detention with strong similarities to the facts of *Grant* itself. *Grant* gave the police notice that as the law of detention was clarified, they were expected to act accordingly. While the police may not have acted maliciously or with the deliberate intention of violating the *Charter*, they did act in apparent ignorance of the appellant's well-defined *Charter* rights. That

makes the Charter-infringing state conduct serious: *R. v. Wong*, 2015 ONCA 657, 127 O.R. (3d) 321, at para. 88; *R. v. Gonzales*, 2017 ONCA 543, 136 O.R. (3d) 225, at paras. 168-169.

Should the evidence be excluded?

49 As the trial judge erred in law in assessing the seriousness of the *Charter*-infringing state conduct, her assessment of that factor and her ultimate conclusion on the admissibility of the evidence does not attract deference on appeal. It falls to this court to reconsider her assessment of the s. 24(2) issue: *Gonzales*, at paras. 162 and 166.

50 The first factor, the seriousness of the *Charter*-infringing state conduct, favours exclusion, for the reasons identified above.

51 The second factor, the impact of the breach on the appellant, also favours exclusion. As the trial judge found, the impact on the *Charter*-protected interests of the appellant was significant. He had every right to be walking down the street unimpeded by the police, and the police had no authority to detain him and search his person without justification and without informing him of his entitlements under s. 10(b). These are basic and fundamental rights that all individuals in this county enjoy and it is quite clear on the facts of this case that the police exceeded the established lawful limits of their powers in denying the appellant those rights. The trial judge's assessment of this factor discloses no error.

52 The third *Grant* factor, society's interest in an adjudication on the merits, favours admission. The evidence obtained was entirely reliable, the offences are serious, and the Crown's case will collapse if the evidence is excluded.

53 In balancing the three *Grant* factors, I am mindful that both *Grant* and *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 make clear that admission of evidence obtained in violation of a *Charter* right cannot be supported solely on the ground that the offence is serious and the evidence reliable and central to the Crown's case. As Doherty J.A. held in *McGuffie*, at para. 63: "[i]f the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility." This approach, although not a binding formula, has been widely followed because a strong case for exclusion supported by the first two grounds is apt to require the exclusion of reliable, even crucial evidence if the repute of the administration of justice is to be protected: see, for example, *R. v. Mhlongo*, 2017 ONCA 562, 355 C.C.C. (3d) 1, at para. 77; *R. v. Reeves*, 2017 ONCA 365, 350 C.C.C. (3d) 1, at paras. 99, 106, leave to appeal granted, [2017] S.C.C.A. No. 275, appeal heard and reserved May 17, 2018; *R. v. Davidson*, 2017 ONCA 257, 352 C.C.C. (3d) 420, at para. 53; *R. v. Dunkley*, 2016 ONCA 597, 131 O.R. (3d) 721, at para. 63; *Poirier*, at para. 90; *R. v. Villaroman*, 2018 ABCA 220, at para. 30; *R. c. Stevens*, 2016 QCCA 1707, 33 C.R. (7th) 1, at para. 89. The guidance in *McGuffie* also accords with the Supreme Court's statements in *Grant*, at paras. 68-70, and *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 108, that to strike the right balance under s. 24(2), the courts "are required ... to bear in mind the long-term and prospective repute of the administration of justice, focusing less on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused. "The negative effects of the loss of reliable, important evidence must be considered, but cannot be allowed to overwhelm the other considerations.

54 I am, of course, aware of the grave problem caused by illegal guns and drugs in our society. Everyone in the criminal justice system appreciates fully that the public is understandably

alarmed by the prevalence of gun violence that threatens public safety and the public looks to the police for protection. I certainly do not suggest that a community's desire to live free from the threat of illegal handguns is irrational or impulsive. The law must also recognize that the police have a very difficult and dangerous job to perform.

55 But it is also fundamental to our social order that the police, like all other state actors, perform their duties in accordance with the law and that they respect *Charter* rights. The *Charter* imposes clear limits on police authority, notwithstanding that those limits can inhibit the detection of gun crimes. *Grant* establishes that s. 24(2) analysis aims to protect the rule of law by ensuring that state authorities uphold *Charter* rights and respect the limits the *Charter* places on their authority: paras. 72-73. One of those limits is that the police cannot detain individuals without lawful justification. No doubt, being able to detain people at will would make the task of policing easier. However, our law provides that, in the absence of lawful grounds, individual liberty and the right to be able to walk down the street unimpeded prevails over law enforcement. *Charter* rights "apply to everyone, even those alleged to have committed the most serious criminal offences": *Harrison*, at para. 40. Condoning random unauthorized stops by the police in the interests of public safety would impact all citizens, threaten civil liberties, and put racialized individuals at particular risk: *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), at pp. 501-502; *R. v. Brown* (2003), 64 O.R. (3d) 161 (C.A.), at para. 9; David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006), at pp. 1-3, 73-82, 138-141. Admitting evidence obtained in violation of the *Charter* always undermines public confidence in the rule of law to some degree, even if that effect may be minimal in cases where violations of the *Charter* are minor in nature: *Grant*, at paras. 72-74.

56 It is also worth recalling that there is no "firearms exception" requiring that guns obtained in breach of *Charter* rights be admitted into evidence, for the reasons I have intimated. In *Dunkley*, this court, citing *R. v. Fountain*, 2015 ONCA 354, 324 C.C.C. (3d) 425, held that it is "clear that there is not a different test for admission where the impugned evidence is a firearm" (para. 53). Hourigan J.A. proceeded to exclude a handgun and Taser from evidence. Here, as in *Dunkley*, the police "acted negligently albeit not wilfully" and "the impact on the accused's rights was significant" (para. 64). As the British Columbia Court of Appeal held in *R. v. Reddy*, 2010 BCCA 11, 251 C.C.C. (3d) 151, at para. 108, "in the long-term, the repute of the administration of justice would be adversely affected by admitting the handguns" found as a result of an unlawful detention and search conducted contrary to the law laid down by the Supreme Court.

57 As my colleague states, it is appropriate for appellate judges to reflect on the limits of their experience. Judges should be encouraged to reflect on the experiences of "those whose lives reflect different realities" than their own: *Yukon Francophone School Board, Education Area # 23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 34. I agree with my colleague that appellate judges may well be personally insulated from the threat of illegal handguns.

58 However, the limited perspective of appellate judges ultimately cuts both ways in s. 24(2) cases. As Binnie J. recognized in his concurring opinion in *Grant*, visible minorities and marginalized people disproportionately experience "unjustified 'low visibility' police interventions in their lives": at para. 154. Appellate judges may lack direct experience of such police interventions. The limits of the judicial perspective also require judges to recognize that many unlawful police detentions and searches never come before the courts. As the Supreme Court explained 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.

Placing excessive weight on the fact that a firearm was found in a particular case before the court risks neglecting the reality that many cases of unlawful detentions and searches do not produce incriminating evidence.

59 These factors require that judges be conscious of how admitting evidence in cases of such unjustified police interventions could affect the long-term repute of the justice system from the perspective of "long-term community values": *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 283.

60 I recognize that the exclusion of a firearm from evidence may be seen from one perspective as producing an unpalatable result. But a difficult result in one case is sometimes an acceptable price to pay for ensuring respect for *Charter* rights: *Harrison*, at para. 42.

61 Ultimately, I am convinced that a proper balancing of the *Grant* factors favours exclusion of the evidence obtained in violation of the appellant's *Charter* rights. The police had no lawful justification to detain the appellant. They have no excuse for not knowing that they violated his *Charter* rights when they did so. Having found that the facts of this case were very close to *Grant*, the trial judge erred by following the specific result in *Grant* to admit the evidence. The majority of the Supreme Court characterized *Grant* as a "close case" and upheld the decision to admit the evidence despite the *Charter* breach because the police "were operating in circumstances of considerable legal uncertainty" (para. 133). The same cannot be said about the police conduct in this case. Like in *Wong*, at para. 88, "the police conduct, while not deliberate, was unacceptable" and "[t]o admit the evidence would be to condone ignorance of *Charter* standards and a casual approach to the protection of *Charter* values."

DISPOSITION

62 Accordingly, I would allow the appeal, exclude the evidence and enter acquittals on all counts. The appellant has served his sentence and his sentence appeal is dismissed as abandoned.

R.J. SHARPE J.A.

D. PACIOCCO J.A.:— I agree.

D.M. BROWN J.A. (dissenting)

I. OVERVIEW

63 I respectfully disagree with my colleague's interference with the trial judge's decision under s. 24(2) of the *Canadian Charter of Rights and Freedoms* to admit the handgun, ammunition, and cocaine into evidence. Unlike my colleague, I see no legal error in the trial judge's assessment of the first factor in the s. 24(2) framework set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 -- the seriousness of the state conduct -- that would justify appellate intervention.

64 In this dissent, I explain why I have reached that conclusion and why certain aspects of my colleague's s. 24(2) balancing exercise give me cause for concern.

II. THE FACTS

65 To my colleague's summary of the facts, I would only add the following.

66 Mr. Omar was arrested for drug and firearms offences as a result of his encounter with two police officers on a street in Windsor in the early morning hours of November 19, 2015. Mr. Omar was carrying, in a concealed fashion, an operational, loaded Hopkins & Allen .32 calibre revolver, together with four loose rounds of ammunition. At the time, Mr. Omar was subject to a 2013 order made pursuant to s. 109(2) of the *Criminal Code* that prohibited him from possessing any firearm for a period of ten years and from possessing a prohibited or restricted firearm or ammunition for life.

III. SERIOUSNESS OF THE STATE CONDUCT

A. The trial judge's reasons

The findings of infringements of *Charter* rights

67 The trial judge found that Mr. Omar was detained at least by the time Constable Ashton told him to keep his hands out of his pockets, asked for his identification, and embarked on a line of questioning: at paras. 22 and 24. In her view, the BOLO, or "be on the lookout", notice was insufficient to constitute reasonable suspicion to justify an investigative detention, even given the lateness of the hour, in light of the differences between the description of the suspect in the BOLO notice and Mr. Omar. There was no clear nexus between Mr. Omar and the two robberies that had occurred the week before. For those reasons, the trial judge found his detention to be arbitrary.

68 From that finding flowed the trial judge's decision that the seizure of the handgun from Mr. Omar was unreasonable, even though the gun barrel was in plain sight: at paras. 30, 32 and 34. As well, the trial judge concluded the police breached Mr. Omar's s. 10(b) right to retain and instruct counsel: at para. 38.

The trial judge's s. 24(2) analysis of the seriousness of the state conduct

69 At the start of her s. 24(2) analysis, the trial judge recalled the governing principles articulated in *Grant* and *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494. Specifically, she referred to *Harrison's* adoption, at para. 23, of this court's reminder that "[p]olice conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights ... What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct."

70 The trial judge concluded that the conduct of the two officers "would not fall on the more serious end of the spectrum." She explained why, at para. 43:

I find that Constable Ashton and Constable Haidar acted in good faith. They had a subjective belief that they were not detaining Mr. Omar. The police conduct was not

abusive. Although the officers went too far in detaining Mr. Omar and asking him questions, the point at which an encounter becomes a detention is not always clear. Although I have concluded that Constable Ashton and Constable Haidar were in error in detaining Mr. Omar, the detention is understandable. The police conduct in committing the *Charter* breach was neither deliberate nor egregious and would not fall on the more serious end of the spectrum.

71 When she conducted the balancing required by *Grant's* s. 24(2) framework, the trial judge characterized the state conduct factor as one favouring admission because "the police subjectively believed they were not detaining Mr. Omar. They acted in good faith": at para. 49.

B. The error committed by the trial judge identified by the majority

72 My colleague disagrees with where the trial judge placed the police conduct along the fault spectrum. He concludes the *Charter*-infringing state conduct was "serious", which favoured the exclusion of the hand-gun, ammunition, and cocaine: at paras. 48 and 50.

73 As I read my colleague's reasons, he does not see error in the trial judge's finding that the police officers "subjectively and honestly believed that they had not detained the appellant": at para. 44. However, he concludes that such belief was not sufficient to support a finding of good faith because the officers' conduct was based upon ignorance or an unreasonable application of "established legal standards": at para. 46. In his view, since *Grant* clarified the law on what constitutes a detention, the police should have known they were exceeding their powers in their interaction with Mr. Omar. Even if *Grant* did not bring such clarity, my colleague takes the view that the trial judge failed to explain what specific features of this case caused the police to reasonably misunderstand their constitutional obligations: at para. 48. As a result, while the police may not have acted maliciously or with the deliberate intention of violating the *Charter*, the trial judge committed a legal error in finding they acted in good faith. That error permits appellate intervention, which leads my colleague to substitute his conclusion that the police conduct fell at the serious end of the fault spectrum because they acted in apparent ignorance of Mr. Omar's well-defined *Charter* rights.

C. Did *Grant* bring clarity to street interactions between the police and the public?

74 I do not share my colleague's view that *Grant* brought practical, on-the-street clarity to the issue of when a psychological detention occurs within the meaning of s. 9 of the *Charter*.

75 *Grant* offered general guidance at the conceptual level about when a psychological detention occurs. However, the jurisprudence reveals that the application of *Grant's* conceptual principles to the reality of street-level interactions stills leaves us in the situation described by the trial judge -- "the point at which an encounter becomes a detention is not always clear."

***Grant's* conceptual level generality**

76 Uncertainty about when a detention occurs has existed throughout *Charter* jurisprudence, in large part because of the inclusion of the psychological element in the concept of detention. Going back to 1990, the Supreme Court in *R. v. Schmautz*, [1990] 1 S.C.R. 398, recognized, at p. 415, that when dealing with the concept of detention, "it is not always easy to determine in given circumstances whether and when it legally occurs."

77 That difficulty could be mitigated, although not eliminated, if the law required police officers to remain in their cars or stations unless responding to the specific report of a criminal event or executing a judicially authorized warrant. But that is not our law. In *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, the Supreme Court stated, at para. 3, that "[s]ection 9 of the *Charter* does not dictate that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime."

78 Nevertheless, neighbourhood policing gives rise to a "complex situation": *Grant*, at paras. 38 and 40. Part of that complexity lies in ascertaining when a police interaction with a member of the public crosses the line to create a psychological detention. The complexity inherent in that line-drawing exercise was described by the Supreme Court in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at paras. 15-16 and 19:

As stated earlier, the issues in this case require the Court to balance individual liberty rights and privacy interests with a societal interest in effective policing...

Nowhere do these interests collide more frequently than in the area of criminal investigation. *Charter* rights do not exist in a vacuum; they are animated at virtually every stage of police action. Given their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing.

...

"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

See also: *Suberu*, at para. 23.

79 In *Grant*, the Supreme Court attempted to give guidance on how to conduct the line-drawing exercise. However, the court recognized that notwithstanding the guidance it gave, the difficulty inherent in the psychological detention line-drawing exercise would remain: "where there is no physical restraint or legal obligation [to comply with a restrictive request or demand], it may not be clear whether a person has been detained": at para. 44. A state of affairs the court echoed contemporaneously in *Suberu*, at para. 29: "The line between general questioning and focussed interrogation amounting to detention may be difficult to draw in particular cases."

80 Several years later, this court in *R. v. Atkins*, 2013 ONCA 586, 310 O.A.C. 397, at para. 10, acknowledged the persistence of uncertainty in the line-drawing exercise: "The question of what qualifies as a psychological detainment is fraught with difficulty."

81 Given the opaqueness of the concept of psychological detention, *Grant* did not offer -- and really could not offer -- a "bright-line" solution for the problem of telling when a psychological detention begins. Instead, *Grant* provides a conceptual methodology. It identifies 13 discrete

"factors", aggregated into three categories, to guide the determination of "whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice": at para. 44. Practical simplicity and predictability are not hallmarks of *Grant's* conceptual framework for identifying a psychological detention; the uncertainty associated with multi-factor analysis is. As a result, *Grant* did not offer a conceptual "bright-line" to which police officers could look in order to guide their on-the-street actions.

Grant's street-level uncertainty

82 The interaction between the officers and Mr. Omar took place in the early morning hours of November 19, 2015. What should the officers reasonably have known at that time about the established legal standards concerning street-level interactions, the benchmark against which my colleague measures their conduct?

83 My colleague points to a number of decisions, including *Grant*, to conclude that the officers "should have known that they were exceeding their powers in detaining the appellant" and that they were not involved in a "borderline" detention. There are other decisions, however, that suggest the waters of psychological detention are somewhat murkier than my colleague describes.

84 I start with *Grant*, the facts of which my colleague has recited. When did the point of detention occur? Not with the officer approaching Mr. Grant and making general inquiries: "Such preliminary questioning is a legitimate exercise of police powers": at para. 47. What were the preliminary inquiries made in *Grant*? "The officer asked the appellant 'what was going on', and requested his name and address. In response, the appellant provided a provincial health card": at para. 6.

85 The officer then told Mr. Grant to "keep his hands in front of him." A psychological detention? Not necessarily. It depends on the "context": "This act, viewed in isolation, might be insufficient to indicate detention, on the ground that it was simply a precautionary directive": at para. 48. However, in *Grant*, "consideration of the entire context of what transpired from this point forward leads to the conclusion that Mr. Grant was detained": at para. 48.

86 The message to police officers? Telling a person to keep his hands in front of him may, or may not, create a psychological detention. It depends on what you do next -- the ensuing "context".

87 When in *Grant* did the police cross the psychological detention line? Para. 49 of the majority's reasons appears to provide the answer:

Two other officers approached, flashing their badges and taking tactical adversarial positions behind Cst. 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 should not". 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. [Emphasis added.]

88 In her concurring reasons in *Grant*, at para. 191, Deschamps J. also pinpointed the police

conduct that amounted to a detention as the point of time when the constable "asked Mr. Grant if he had committed a crime."

89 A police officer could walk away from reading *Grant* thinking that engaging a person in conversation on the street, asking for identification, and telling the person to keep his hands in front of him does not necessarily create a state of psychological detention. In *Grant*, it was what happened after that point which crossed the line.

90 Such a reading of *Grant* may explain why the trial judge, having found the police were in error in detaining Mr. Omar, nonetheless commented that "the detention is understandable." Such a reading certainly would support the trial judge's ultimate conclusion that the police conduct "would not fall on the more serious end of the spectrum."

91 Before leaving *Grant*, I would note that several of the factors relied upon by the court in *Grant* to conclude that a psychological detention had arisen are not found in the present case:

- * Additional officers did not take "tactical adversarial positions" behind Mr. Omar -- Constable Haidar took the identification provided by Mr. Omar back to the cruiser while Constable Ashton continued to talk with the two men;
- * In that conversation, Constable Ashton did not single out Mr. Omar and ask him whether he had anything that he should not or "if he had committed a crime";
- * It was in that context that Constable Ashton asked both men to remove their hands from their pockets.

92 *Suberu* was a companion case to *Grant*. The analysis in *Suberu* illustrates the fluidity of the contextual psychological detention line-drawing exercise. There, one officer followed Mr. Suberu out of a retail store where the police were investigating the use of a stolen credit card. The officer said: "Wait a minute. I need to talk to you before you go anywhere"; at para. 9. The Supreme Court concluded that this constituted preliminary questioning in the circumstances, not a detention: at para. 33.

93 Two decisions of this court -*Atkins* and *R. v. Fountain*, 2015 ONCA 354, 324 C.C.C. (3d) 425, -- considered similar conduct by police officers that initiated interactions with young men walking along city streets. In *Atkins*, the officers were in a van when they called to the young man -- "hey", "hey buddy" -- and waved at him to come over. In that case, the appellant argued that he was arbitrarily detained when the officer commanded him to come to the van with her verbal calls and when she waved. The trial judge rejected that submission. This court upheld the trial judge.

94 *Fountain*, decided two years later, involved a young man who was walking past a police car when an officer called him over for questioning. The officer had dealt before with the young man or his brother and believed that a warrant was out for one of them. In *Fountain*, this court concluded that the officer had unlawfully detained the young man "from the moment he called out to him," from "the outset of their conversation": at paras. 17 and 21.

95 *Atkins* and *Fountain* considered very similar initiating conduct by the police, yet they reached different conclusions about whether that conduct amounted to a psychological detention, no doubt driven by different "contextual" analyses.

96 More recently in *R. v. Le*, 2018 ONCA 56, 360 C.C.C. (3d) 324, leave to appeal granted, [2018] S.C.C.A. No. 34, appeal heard and reserved October 12, 2018, this court considered circumstances where officers entered the backyard of a townhouse from a paved pathway running through the complex. They asked a group of young men in the backyard what they were doing and whether any of them lived there. During the course of the interaction one officer turned to the accused, who was standing, and asked him for identification. The accused replied that he did not have any. From the way the accused was standing, the officer thought he was blading his body to conceal something. The officer asked what the accused had in his bag. At that point, the accused fled. The accused argued that a psychological detention arose from the moment the police had entered the backyard. The majority of this court disagreed, finding that a detention did not arise until the police asked the accused what was in his bag: at paras. 62-65.

97 I have reviewed these cases to illustrate that the conceptual certainty of *Grant's* established legal standards, which underpins my colleague's critique of the trial judge's approach to the first *Grant* factor, in reality becomes fuzzy when applied to the specifics of a particular case. The conflicting results of this court in *Atkins* and *Fountain*, decided only two years apart, exemplify the lack of certainty and practical "on-the-street" guidance offered by the s. 9 jurisprudence in the context of community policing interactions.

Application to the present case

98 My colleague finds legal error in the trial judge's conclusion that the police officers acted in "good faith". He writes that claims of good faith should be rejected if based upon ignorance or an unreasonable application of established legal standards. Respectfully, that puts the proposition too broadly.

99 True, in *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, the majority of the Supreme Court cautioned, at para. 44, that "negligence in meeting *Charter* standards cannot be equated to good faith." Yet, five years earlier, in *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408, the Supreme Court concluded that notwithstanding an officer was manifestly mistaken about his authority to put a person in the rear of his cruiser, thereby erring in his understanding of the law, the court was satisfied that, having regard to all the trial judge's findings of fact, the officer was acting in good faith: at paras. 46 and 49. *Aucoin* suggests that any review of a trial judge's good faith conclusion must take into account all her findings of fact about the police conduct.

100 Therein lies my primary disagreement with my colleague's critique of the trial judge's reasons -- its focus is too narrow. While the trial judge found that the officers acted in good faith, her key finding in regard to the first *Grant* factor was that the conduct of the police "would not fall on the more serious end of the spectrum." I cannot agree that when the trial judge's reasons are read as a whole, that key finding amounts to reversible legal error sufficient to set aside her s. 24(2) analysis.

101 As I read his reasons, my colleague does not take issue with several of the findings underpinning the trial judge's decision:

- * The police had a subjective belief they were not detaining Mr. Omar;
- * Their conduct was not abusive; and

* The *Charter* breach was not deliberate.

Those findings are not tainted by error. Accordingly, this court cannot disregard them and "simply embark on its own assessment of the seriousness of the breach": *R. v. MacMillan*, 2013 ONCA 109, 114 O.R. (3d) 506, at para. 44.

102 My colleague focuses on what he considers to be the officers' ignorance of the law. As I attempted to show earlier in these reasons, although the after-the-fact 13-factor "contextual" analysis to determine whether a person is detained psychologically constitutes an established legal standard, it hardly offers certain, real-time guidance to police officers about where the line demarcating a psychological detention begins. I would not characterize the inherent difficulty in applying a 13-factor analysis as ignorance of the law.

103 The portions of *Grant* to which I have referred in paras. 84 to 89 above make it debatable whether a psychological detention occurred in the present case, as submitted by the respondent Crown in its factum. Arguably, it could have gone either way. The trial judge made her call. It was a reasonable one, entitled to deference.

104 My colleague finds support for his conclusion in the trial judge's failure to elaborate in her reasons about why "the detention is understandable". In my view, when the paragraph in which that statement is found is read a whole, her meaning is apparent. I explained my understanding of what the trial judge meant in para. 90 above. In any event, I do not think anything turns on that single phrase; the trial judge's reasons must be read in their entirety.

105 In sum, the trial judge faced a situation where: she found the officers' testimony to be credible -- indeed, she preferred their evidence about what had transpired during the interaction over that of Mr. Omar; she accepted their evidence that they subjectively believed that they were not detaining Mr. Omar; she found that their conduct was not abusive; she found that they did not deliberately breach Mr. Omar's *Charter* rights; and she quite accurately stated that the law is not always clear about the point at which an encounter becomes a detention. Moreover, as I pointed out in para. 91 above, material differences exist between the circumstances in *Grant* and those in the present case. Unlike in *Grant*, the police did not engage in tactical adversarial positioning and did not ask Mr. Omar whether he had committed a crime. In those circumstances, I see no legal error in the trial judge's finding that the officers' conduct "would not fall on the more serious end of the spectrum."

106 Yet, my colleague not only concludes that Mr. Omar was "detained in a similar manner to the appellant in *Grant*," but that certain features of this case "arguably make for an even clearer case of detention than in *Grant*", specifically: the police engaging Mr. Omar and his companion late at night in a remote part of Windsor; shining a spotlight on them; and asking them to come over to their cruiser. With the utmost respect to my colleague, I have great difficulty reconciling that conclusion with the jurisprudence on the power of the police to engage members of the public on the street in the course of their duties that I set out earlier in these reasons.

D. Conclusion

107 Consequently, I do not agree with my colleague's conclusion that "the trial judge erred in law in assessing the seriousness of the *Charter*-infringing state conduct." I see no legal error in the trial judge's treatment of the first *Grant* factor. My colleague does not point to any other legal error in the trial judge's consideration and balancing of the s. 24(2) factors. Accordingly, I see no

justification for appellate interference with her s. 24(2) analysis and admission of the handgun, ammunition, and cocaine into evidence. It follows that I would dismiss the appeal.

IV. THE BALANCING OF THE *GRANT* FACTORS

108 Although my determination that the trial judge did not err in her application of the *Grant* factors is sufficient to deal with the appeal, I wish to comment on two aspects of my colleague's s. 24(2) balancing exercise: (i) the way in which he applies certain statements in this court's decision in *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643; and (ii) his treatment of the third *Grant* factor.

A. Treatment of *McGuffie*

109 One can read my colleague's s. 24(2) balancing analysis as promoting an approach that risks re-injecting into the s. 24(2) analysis a rigidity that *Grant* professed to reject. Specifically, my concern lies with para. 53 of my colleague's reasons where he writes:

In balancing the three *Grant* factors, I am mindful that both *Grant* and *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 make clear that admission of evidence obtained in violation of a *Charter* right cannot be supported solely on the ground that the offence is serious and the evidence reliable and central to the Crown's case. As Doherty J.A. held in *McGuffie*, at para. 63: "[i]f the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility." This approach has been widely followed [citations omitted]. The guidance in *McGuffie* also accords with the Supreme Court's statements in *Grant*, at paras. 68-70, and *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 108, that to strike the right balance under s. 24(2), the courts are "are required ... to bear in mind the long-term and prospective repute of the administration of justice, focusing less on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused."

110 Recall that *Grant's* s. 24(2) analysis was formulated in reaction to the perceived rigidity of the s. 24(2) framework that emerged from *R. v. Collins*, [1987] 1 S.C.R. 265, and *R. v. Stillman*, [1997] 1 S.C.R. 607, as well as the inconsistency of that framework with the constitutional language of s. 24(2). The Supreme Court described the problem with the *Collins/Stillman* framework at paras. 64 and 65 of *Grant*:

Stillman held that conscriptive evidence is generally inadmissible -- because of its presumed impact on trial fairness -- unless if it would have been independently discovered. Despite reminders that "all the circumstances" must always be considered under s. 24(2) ... *Stillman* has generally been read as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence, broadening the category of conscriptive evidence and increasing its importance to the ultimate decision on admissibility.

This general rule of inadmissibility of all non-discoverable conscriptive evidence, whether intended by Stillman or not, seems to go against the requirement of s. 24(2) that the court determining admissibility must consider "all the circumstances". [Citations omitted; Emphasis added.]

111 In reaction against the "all-but-automatic exclusionary rule" for certain evidence under the *Collins/Stillman* framework, the Supreme Court in *Grant* articulated the three-category approach for any s. 24(2) analysis and stated, at para. 71, that "[t]he 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 administration of justice into disrepute."

112 That any s. 24(2) analysis must be open to "all the circumstances", as mandated by the constitutional text, was emphasized by the Supreme Court at para. 86 of *Grant*:

In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2). [Emphasis added.]

113 I recognize that portions of *Grant* and, more recently, *Paterson*, could be read as placing constraints on just how open any subsequent s. 24(2) analysis really can be to "all the circumstances":

- * In *Grant*, the court identified certain "patterns" with respect to "particular types of evidence" that "serve as guides to judges faced with s. 24(2) applications in future cases": *Grant*, at paras. 86, 92, 111 and 127;
- * It went on to describe the balancing exercise as "qualitative in nature and therefore not capable of mathematical precision": *Grant*, at para. 140. Presumably, it is not open to a court to place the three *Grant* factors on scales of one through ten and, having assigned a score for each factor, proceed to calculate the net result;
- * In respect of the third *Grant* factor, the court stated that "while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways": *Grant*, at para. 84; and
- * Finally, in *Paterson*, the majority stated that "it is... important not to allow the third *Grant* 2009 factor of society's interest in adjudicating a case on its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant's *Charter* right": at para. 56.

114 Nonetheless, I read the Supreme Court's post-*Grant* jurisprudence as continuing to apply the "in all the circumstances" approach to a s. 24(2) analysis; it has not discarded the direction that "[n]o overarching rule governs how the balance is to be struck": *Grant*, at para. 86.

115 The trial judge followed *Grant's* direction to consider "all the circumstances"; she referred specifically to the summary of those directions contained in *Harrison*, at para. 36.

116 In contrast, my colleague starts his balancing of the *Grant* factors by stating that the admission of evidence obtained in violation of a *Charter* right cannot be supported solely on the ground that the offence is serious and the evidence reliable and central to the Crown's case. He

then proceeds to rely on the statement made by Doherty J.A. in *McGuffie*, at para. 63, that "[i]f the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility."

117 *McGuffie* involved findings of very serious *Charter* breaches: (i) a breach of s. 9 rights, where an initial lawful investigative detention turned into a lengthy (90 minute) *de facto* arrest when no grounds to arrest existed; (ii) a lengthy denial of s. 10(b) rights; and (iii) several unlawful searches of the accused, including an unreasonably conducted strip search. It was in that context that Doherty J.A., stated, at para. 63:

In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence... If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility... Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence. [Citations omitted.]

118 A considerable distance exists between the nature of the police conduct in *McGuffie* and that in the present case. In *McGuffie*, Doherty J.A. held that: there was "an overwhelming case for exclusion"; the police misconduct fell "at the very serious end of the continuum"; the police breaches had a "profound impact" on the appellant's *Charter*-protected interests; and, the search was "highly intrusive": at paras. 75-76, 79, 82. Overall, the police demonstrated a "blatant disregard for the appellant's constitutional rights": at para. 83. By contrast, in the present case there was a brief detention before Mr. Omar revealed his handgun when he removed his hands from his pockets, no physical contact and, as the trial judge found, the officers' conduct was not abusive.

119 I am concerned that if the statements in *McGuffie* are taken out of the context in which they were made - findings of very serious, intrusive breaches of *Charter* rights amounting to a "blatant disregard" of constitutional rights -- and applied to police conduct that stands at the less serious end of the fault spectrum, courts risk turning those statements in *McGuffie* into a kind of "two-strikes-and-the-evidence-is-out" rule. That, in turn, would create three risks:

- * A return to the days of a kind of "all-but-automatic exclusionary rule", which the Supreme Court rejected in *Grant* by directing that "[n]o overarching rule governs how the balance is to be struck": at para. 86;
- * Ignoring *Paterson's* recognition, at para. 54, that s. 24(2) involves balancing "mutually incommensurable" factors, thereby necessitating the consideration of all three factors; and
- * Effectively subordinating the third *Grant* factor to a position where it would play no practical role in the balancing exercise; it would be neutered.

120 I would note that in *Paterson* the majority described the result of their s. 24(2) balancing as a "close call": at para. 54. Although in that "close call" case the majority referred to the *McGuffie* decision, it did not refer to or comment on the statements from *McGuffie* relied upon by my colleague.

121 I think the s. 24(2) balancing exercise must remain open to the Supreme Court's direction

to follow the constitutional text -- "in all the circumstances" -- and eschew any overarching rule as to how the balance is to be struck.

B. The treatment of *Grant's* third factor in gun cases

122 In dealing with the third *Grant* factor in his s. 24(2) balancing exercise, my colleague states, at para. 56, that "[i]t is also worth recalling that there is no 'firearms exception' requiring that guns obtained in breach of *Charter* rights be admitted into evidence."

123 I do not quarrel with that proposition, put that way. However, I would respectfully submit that to fail to give some recognition to the distinctive feature of illegal handguns -- which are used to kill people or threaten them with physical harm, nothing else -- and, instead, to treat them as fungible with any other piece of evidence risks distorting the *Charter's* s. 24(2) analysis by wrenching it out of the real-world context in which it must operate.

124 As interpreted by the jurisprudence, the legal rights and freedoms enumerated in the *Charter* attach to an autonomous person. However, both the text of the *Charter* and the jurisprudence recognize that the legal (and philosophical) construct of the autonomous person must bend to the reality that we all depend upon and interact with others as we go about living our daily lives. Most of us live in community with others, many in dense urban environments. Few of us live in the splendid solitude of the notionally autonomous person.

125 In the *Charter*, the "I" of the autonomous rights-bearing person meets up with the "We" of the community in ss. 1 and 24(2). Under both sections, the *Charter* vests in the judiciary the job of striking some sort of balance between the construct of the autonomous person and the reality of living together in community.

126 In the case of s. 24(2), the judiciary must determine whether evidence obtained in a manner that infringed or denied any *Charter* right or freedom should be admitted or excluded from a criminal proceeding: more specifically, whether "having regard to all the circumstances" the admission of such evidence in the proceedings "would bring the administration of justice into disrepute."

127 To do so, the case law instructs that a judge is required to view the matter through "the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case", grounding his or her discretion in the "long term community values", and ensuring that he or she does "not render a decision that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events": *Collins*, at pp. 283-84.

128 Although *Collins* puts judges into the position of acting as the reasonable person fostering "long term community values" when deciding under s. 24(2) whether to admit or exclude evidence, such as an illegal handgun, practical limits exist on the perspective judges bring to that task.

129 Why is that?

130 Because the lethal problem posed by illegal handguns often seems remote from our daily judicial lives: we tend to live in safe residential areas; and we work in highly secure courthouses. The problem may directly touch others in the community; but for most of us it is a problem only

read about in the media. As a result, we judges can be tempted to conceptualize issues under 24(2) in a somewhat abstract fashion, making decisions in an environment some distance removed from that where their real-life impact will be felt.

131 The risk of remoteness is even greater for appellate judges. The distance that separates us from the community in which we live was pointedly described by Doherty J.A. in *R. v. R.R.*, 2008 ONCA 497, 90 O.R. (3d) 641, where he stated, at para. 16, that "[d]ispositions in criminal matters made in the detached, rarefied climate of the appeal court, years after the relevant events, by a court with virtually no connection to the place or people affected by the allegation are not the ideal way to resolve criminal cases."

132 Accordingly, when we review decisions made under s. 24(2) by trial judges, appellate judges need to be alive to the limits of the perspective offered by the "rarefied" and "detached" environment in which we operate. The perspective we bring to a s. 24(2) analysis is one formed in a lived environment quite different from that of most of our fellow citizens. Recalling the range of circumstances in which members of our community live and work is particularly important when the security of the larger community is one issue in play, as it always is when the s. 24(2) analysis considers the admission or exclusion of an illegal handgun.

133 My colleague, faithful to the jurisprudence, points to language from the Supreme Court directing that when judges conduct s. 24(2) exercises they must focus on the "long-term repute of the justice system": *Grant*, at para. 84. Indeed, in *Grant* the majority used even more colourful language stating, at para. 84, that: "The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice."

134 In the present case, there was no evidence of any "short-term public clamour" for a conviction of Mr. Omar. I suspect that it was a media "non-event": just another young drug-dealer carrying a concealed illegal handgun. A chronic, everyday event in most Ontario urban centres.

135 However, a community's desire to live free from the lethal threat of illegal handguns is not the product of a community "wrought with passion" or "otherwise under passing stress due to current events." It is a most rational desire for a necessary component of the rule of law - the existence of a safe and ordered community in which individuals have the ability to exercise their liberty rights free from fear and threat of harm to their persons. As *Grant* teaches, the term "administration of justice" in s. 24(2) is not limited to "the processes by which those who break the law are investigated, charged and tried", but it more broadly "embraces *maintaining the rule of law* and upholding *Charter* rights in the justice system as a whole": at para. 67 (emphasis added).

136 We judges must never forget the impact that our decisions have on the day-to-day reality in which most of our fellow Canadians live -- and from which we are by and large insulated.

137 I completely agree with my colleague that it is "fundamental to our social order that the police, like all other state actors, perform their duties in accordance with the law and that they respect *Charter* rights": at para. 55. At the same time, it is equally fundamental to our social order that Canadian citizens can walk their public streets and exercise their *Charter* liberty rights without finding themselves at the wrong end of an illegal handgun. In *R. v. Chan*, 2013 ABCA 385, 561 A.R. 347, the Alberta Court of Appeal put the matter as follows, at para. 49: "[W]e

consider society's interest in the adjudication of the merits to be greater where the offence is one that so literally involves the safety of the community."

138 It is, of course, a matter of balance under s. 24(2). But the balance necessary to offer Canadians a peaceful community in which to live is not achieved by neutering the third *Grant* factor and treating illegal handguns as fungible with any other kind of evidence for the purposes of a s. 24(2) analysis.

V. DISPOSITION

139 For the reasons set out above, I would dismiss the appeal.

D.M. BROWN J.A.