

Case Name:

R. v. [REDACTED]

Between  
Her Majesty the Queen, and

[REDACTED]  
[2004] S.J. No. 501

2004 SKQB 321

Q.B.C.N.J. No. 3 of 2003 J.C.S.C.

Saskatchewan Court of Queen's Bench  
Judicial Centre of Swift Current

**MacDonald J.**

July 21, 2004.

(50 paras.)

*Constitutional law -- 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 -- Evidence seized in violation of rights of accused -- Accused acquitted -- Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2).*

*Constitutional law -- Canadian Charter of Rights and Freedoms -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Evidence seized in violation of rights of accused -- Accused acquitted -- Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2).*

*Criminal law -- Controlled drugs and substances -- Possession or trafficking -- Evidence seized in violation of rights of accused -- Accused acquitted.*

*Criminal law -- Powers of search and seizure -- Search -- Warrantless searches -- Evidence seized in violation of rights of accused -- Accused acquitted.*

Trial of the accused, [REDACTED], on six counts of possession for the purpose of trafficking -- Police pulled over the accused because his vehicle did not have a front licence plate -- Officers determined that there was something suspicious based on initial observations of

the accused, the passenger, and the cluttered contents of the vehicle -- Officers asked the accused to come to their vehicle -- Police questioned the accused about his muscular build and asked if he had used steroids in the past -- Accused answered affirmatively -- Officers asked if he had any steroids with him and accused became nervous and agitated -- Officers informed accused that he was being detained for drug offences searched him, and discovered a large amount of cash -- Officers then advised accused of his right to counsel -- Accused advised officers that he did not consent to detention -- Police searched vehicle and discovered a variety of narcotics in a bag in backseat and hidden in the trunk -- A subsequent search of the vehicle at the detachment revealed more narcotics -- Accused argued that the police obtained evidence without advising of his right to counsel, and through an illegal search contrary to the Canadian Charter of Rights and Freedoms -- HELD: [REDACTED] was acquitted -- Initial detention of accused was justified, but subsequent detention in officers' vehicle was arbitrary and thus violated s. 9 of the Charter -- Police acted on mere suspicion rather than on reasonable and probable grounds -- Questioning of accused was not related to original vehicular offence -- Accused should have been informed of right to counsel prior to questioning -- Accused never gave informed consent to questioning or search of the vehicle -- No exigent circumstances existed -- Warrantless searches contravened s. 8 of the Charter -- Impugned evidence was seized as a result of serious breach of Charter rights of accused and was thus excluded from evidence.

**Statutes, Regulations and Rules Cited:**

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

Controlled Drugs and Substances Act, S.C. 1996, c. 19 s. 5(2), s. 7, s. 11

Highway Traffic Act S.S. 1986, c. H-3.1

**Counsel:**

B.L. Galey for Her Majesty the Queen

P.C. Fagan for [REDACTED]

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**JUDGMENT**

**1 MacDONALD J.:**-- The accused, [REDACTED], stands charged that on or about the 30th day of May 2002 he did commit the following six offences contrary to the provisions of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 namely:

1. THAT the said Eric A. Anderson, on or about the 30th day of May, A.D. 2002, at Gull Lake District, in the Province of Saskatchewan, did unlawfully have in his possession a controlled substance to wit: Cocaine

- listed in Schedule I, item 2(2) for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.
2. FURTHER THAT the said Eric A. Anderson, on or about the 30th day of May, A.D. 2002, at Gull Lake District, in the Province of Saskatchewan, did unlawfully have in his possession a controlled substance to wit: Morphine listed in Schedule I, item 1(3) for the purpose of trafficking contrary to Section 5(2) of the Controlled Drugs and Substances Act.
  3. FURTHER THAT the said [REDACTED], on or about the 30th day of May, A.D. 2002, at Gull Lake District, in the Province of Saskatchewan, did unlawfully have in his possession a controlled substance to wit: Pantazocine (Talwin) listed in Schedule I, item 11(3) for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.
  4. FURTHER THAT the said [REDACTED], on or about the 30th day of May, A.D. 2002, at Gull Lake District, in the Province of Saskatchewan, did unlawfully have in his possession a controlled substance to wit: N-Methyl-3, 4-Methylenedioxyamphetamine (ecstasy) listed in Schedule III, item 1(9) for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.
  5. FURTHER THAT the said Eric A. Anderson, on or about the 30th day of May, A.D. 2002, at Gull Lake District, in the Province of Saskatchewan, did unlawfully have in his possession a controlled substance to wit: Diazepam listed in Schedule IV, item 18(10) for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.
  6. FURTHER THAT the said Eric A. Anderson, on or about the 30th day of May, A.D. 2002, at Gull Lake District, in the Province of Saskatchewan, did unlawfully have in his possession a controlled substance to wit: 3, 4-Methylenedioxyamphetamine (MDA) listed in Schedule III, item 1(5) for he purpose of trafficking contrary to Section 5(2) of the Controlled Drugs and Substances Act.

2 On March 31, 2004 the accused was arraigned on the said charges and entered a plea of not guilty to all of the above.

3 The trial commenced with the calling of evidence on the voir dire with respect to the information and exhibits obtained by the investigating officers during the course of their investigation and search of the accused's person and vehicle.

4 Counsel for the accused argues that the evidence obtained by the investigating officers was obtained without first giving the accused his right to counsel and, secondly, through an illegal search of the accused and his vehicle and accordingly, has applied for an order under s. 24(2) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 directing the exclusion of such evidence from being admitted at trial.

ISSUES:

5 Given the testimony of the officers there are three issues; was Mr. [REDACTED] detained by the officers when they asked him to accompany them to the police cruiser; was he denied his rights pursuant to s. 10 of the Charter; and were the resulting two searches and seizures unreasonable and in violation of s. 8 of the Act.

**FACTS:**

6 On May 30, 2002, Corporal Baulkham and Constable Posnikoff were on routine patrol on Highway 1 west of Gull Lake, Saskatchewan. In addition to the two officers Corporal Baulkham's dog, Jack, a trained RCMP narcotic detection dog, was enclosed in the back seat of the vehicle.

7 At approximately, 6:57 p.m. that evening the officers observed a teal coloured Pontiac Sunfire driven by the accused travelling east on the Highway. As the vehicle passed it appeared to be missing a front license plate. Being that it was a Saskatchewan vehicle and that it was a regulatory offence under The Highway Traffic Act S.S. 1986, c. H-3.1 at that time to carry only one plate, the officers activated their emergency lights and stopped the vehicle on the right hand shoulder of the highway just west of the approach into Gull Lake, Saskatchewan.

8 Corporal Baulkham approached the vehicle from the driver's side and observed the accused, [REDACTED], as the driver. The officer stated in his evidence that when he approached the vehicle he also observed an air freshener hanging from the mirror. In his evidence the officer further stated that when the vehicle passed the police cruiser the accused was wearing sunglasses and did not look at the police vehicle.

9 The officer asked the accused for his driver's license and registration and proceeded to check the front bumper, in order to confirm that the license plate was missing.

10 While Corporal Baulkham was speaking with the driver, Constable Posnikoff approached the right passenger side of the vehicle and asked the female passenger questions, none of which were related to the missing front plate.

11 After checking the front bumper, the officer returned to the driver's door and advised the accused of why he had been stopped. Inside of the vehicle he observed the young female on the passenger's side who was being questioned by Constable Posnikoff. In addition, he noticed considerable clutter in the interior of the car consisting of pop cans, McDonald's bags, a Subway bag and suitcases on the back seat.

12 He noticed the driver to be wearing a very tight grey muscle shirt and a pair of shorts. He said he also noticed that the driver appeared agitated and seemed to fumble when requested to hand the officer his driver's license and registration.

13 Upon receipt of the documents the officer returned to the police cruiser and conducted a computer search of the license plate and a 1029, CNI on the accused to confirm whether there were any outstanding warrants or a criminal record. The searches revealed nothing and the officer began to prepare the warning ticket.

**14** Constable Posnikoff returned to the police cruiser and the two officers then engaged in a conversation. Based on their independent observations about the condition of the interior of the vehicle and the appearance of the young passenger, they felt there was something suspicious. As a result, Corporal Baukham instructed Constable Posnikoff to ask the driver to come back to the police vehicle.

**15** Constable Posnikoff returned to the driver and asked him to come back to the police cruiser advising him that because they were in the middle of the highway it was safer to talk to him in the cruiser. The Constable then followed the accused back to the police cruiser and invited him to sit in the front passenger side, between Corporal Baukham and himself.

**16** At that point Corporal Baukham was still writing out the warning ticket and they, as Constable Posnikoff states, began to have a conversation with the accused.

**17** The conversation began with Corporal Baukham asking the accused about lifting weights, told him he looked in great physical shape and at one point asked the accused whether he had ever used drugs or steroids. The accused said he had in the past. Constable Posnikoff then asked the accused whether he had any steroids on him.

**18** The evidence of the officers is that the accused then became very nervous and agitated. Noting the agitation the Corporal advised the accused that he was being detained and charged with an offence under the Controlled Drugs and Substances Act. The accused was searched and he was placed in the back seat next to the dog cage.

**19** The accused was then advised that he had the right to retain and instruct counsel and arrangements were made for him to use the RCMP cell phone to call his lawyer. The accused advised the officers that he did not consent to the detention.

**20** The search revealed a "wad" of cash and the accused was again advised that he was being arrested for having possession of proceeds of crime and an attempt was made to give him the police warning.

**21** The accused was then handed the police cell phone, the officers left the vehicle and approached the passenger and advised her that they were going to search the accused's vehicle pursuant to the Controlled Drugs and Substances Act. They asked her for permission to search her purse. She consented and they searched her back pack. The search revealed nothing.

**22** The passenger was then asked to leave the vehicle and the officers searched the interior of the car. At this point although the officers both gave evidence that the age of the passenger was of concern to them, they did not ask the passenger her age, only her name.

**23** In the car they found a black-nylon bag containing several small vials which appeared to be steroids. The accused was then advised that he was being arrested for the possession for the purposes of trafficking in steroids.

**24** The officers proceeded to search the trunk of the vehicle and discovered an STP container with a screw off bottom, that contained small baggies of blue pills. The accused is again advised he is being arrested for possession of ecstasy for the purposes of trafficking.

**25** No warrant was obtained for the searches.

**26** Corporal Baukham advised Constable Posnikoff that they needed to continue the searches for drugs back at the detachment. Constable Posnikoff then drove the accused's vehicle, with the female passenger inside, and Corporal Baukham drove the police cruiser containing the accused and the dog back to the detachment in Gull Lake.

**27** Thirty nine minutes elapsed from the time of the initial observation of the vehicle to the arrival in Gull Lake.

**28** Upon arrival at the detachment Constable Posnikoff parked the Sunfire. In his evidence he says he parked and secured it and locked the doors. He did not remember leaving the windows open. Corporal Baukham parked the police cruiser. The accused was removed from the cruiser and taken into the detachment by Constable Posnikoff. Corporal Baukham took the exhibits and placed them on the coffee table in the detachment office.

**29** Corporal Baukham then made several phone calls to the Drug Section in Regina. He then went outside to let Jack, his dog, out of the police vehicle so the dog could relieve himself.

**30** Corporal Baukham's evidence is that as soon as Jack was let out of the cruiser he became agitated and headed for the Pontiac Sunfire where he engaged in a search on his own of the car, going from bumper to bumper and then jumping in the open driver's window of the car. At which point the dog focussed on the dash and console of the car. Corporal Baukham then commanded Jack to "show me" and the dog went to the passenger's side console and bumped his nose.

**31** The area behind the console disclosed a bag containing white powder, pills and \$5,000.00 cash.

**32** The accused and the exhibits were then transported to the detachment in Swift Current for transfer and to await the arrival of the Regina Drug squad.

#### DECISION

1. Was there a detention and was it arbitrary?

**33** Section 9 of the Charter guarantees that "everyone has the right not to be arbitrarily detained or imprisoned". In the situation before the court it is clear that a detention occurred. R. v. Therens, [1985] 1 S.C.R. 613 defines detention as "a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for

the constitutional guarantee.

**34** The case goes on to say that "In addition to the case of deprivation of liberty by physical constraint, there is in my opinion a detention within s. 10 of the Charter when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel.

**35** It is very clear from the evidence on the voir dire that the accused was detained by the officers on two occasions. The first detention was when the accused was pulled over for the regulatory infraction under The Vehicle Administration Act, S.S. 1986, c. V-2.1. The second detention occurred when the officer asked the accused to go back to the police cruiser and they began to question him.

2. Was the detention arbitrary?

**36** The accused was initially pulled over by the police because he was in contravention of a provincial statute. The purpose of the stop was supported by the Corporal's initial actions, he checked the front of the accused's car for the license plate to ensure that it was not there, asked for his license and registration and proceeded to write out a warning ticket for the infraction. This detention of the accused is justified.

**37** Where the situation changes is when the Corporal instructs Constable Posnikoff to bring the accused back to the police cruiser for further questioning.

**38** At that point the missing license plate has been completely dealt with and the officers, by their own evidence, decided to investigate the matter further by asking the accused some very incriminating questions.

**39** Although, the Crown argued that the evidence of the officers regarding their observations of the accused, the young passenger and the interior of the car constituted reasonable and probable grounds that an offence had been committed, I am convinced from the evidence that at that point the police only had a mere suspicion of the commission of an offence.

**40** The positioning of the accused in the car with two officers and a police dog, the questioning of the passenger, the questioning of the accused about his use of steroids, were all intended to illicit incriminating evidence from the accused. The questions were in no way related to the original offence.

**41** All of this behaviour constituted a second detention by the police of the accused and was contrary to s. 9 of the Charter. As soon as the accused was placed in the police cruiser and the questioning began he should have been advised of his rights pursuant to s. 10 of the Charter. This did not happen, instead what happened was that the police obtained information from the accused which led to the charges before this Court.

**42** The accused never gave informed consent to answer the questions posed to him or

to the subsequent searches of his person and vehicle.

3. Were the searches legal or a violation of s. 8 of the Charter?

43 Section 8 of the Charter guarantees that "everyone has the right to be secure against unreasonable search or seizure."

44 In the case at bar none of the searches were obtained by warrant.

45 Where there is no warrant the onus is on the Crown to demonstrate that the search was reasonable in the circumstances.

46 Section 11 of the Controlled Drug and Substances Act, governs search and seizure for most narcotics. Under s. 7, a warrant is only unnecessary where exigent circumstances exist. According to the Supreme Court of Canada in R. v. Grant, [1993] 3 S.C.R. 223 exigent circumstances generally exist only where there is imminent danger that the evidence will be lost, removed, destroyed or will disappear if the search or seizure is delayed. The court also found that warrantless searches will not be authorized where it was feasible to obtain a warrant. The Saskatchewan Court of Appeal supported this ruling in R. v. Keshane, [1995] S.J. No. 687, CA95158, November 9, 1995 (oral judgment) (Law Society of Saskatchewan Website) and stated that because s. 10 of what was then the Narcotic Control Act allowed for telephone warrants, officers must not assume that a warrantless search will be admitted but must prove that they could not have obtained a telephone search and that exigent circumstances existed which made it necessary to carry out the search immediately.

47 In the situation at hand there was no reason given by the officers as to why they did not obtain a warrant prior to searching the accused or his vehicle. There was no emergency here, the evidence would not have been lost or destroyed. The officers had a working cell phone available to them.

48 As to the search by the dog at the detachment, I do not believe the evidence of Corporal Baulkham as to how this search came about. To suggest that it was merely serendipitous that when he let his dog out for a break that the dog hopped in the open window of the car is completely inconsistent with the evidence given by Constable Posnikoff and does not properly explain why this search was conducted without obtaining a warrant.

4. Does s. 24(2) of the Charter apply in this circumstances?

49 Section 24(2) states:

24(2) Where, in proceedings under subsection (1), a court concludes that 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.

**50** All of the evidence related to the charges against the accused was obtained in violation of his rights under ss. 8, 9 and 10 of the Charter. Accordingly the evidence is hereby excluded. To do otherwise would certainly bring the administration of justice into disrepute, especially given the seriousness of the breach, the improper questioning by the police and the bad faith exhibited by them in not obtaining a warrant for the searches either at the roadside or at the detachment office.

MacDONALD J.

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