

RECEIVED MAY 19 2011

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

DAMIAN BUCKLEY

\*\*\*\*\*

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE P. TAYLOR  
on May 12, 2011 , at Toronto, ONTARIO

**- APPEARANCES:**

Ms. A. Stanford  
Mr. R. Rowe

Counsel for the Crown  
Counsel for Damian Buckley

ONTARIO COURT OF JUSTICE

T A B L E O F C O N T E N T S

5	<u>WITNESSES:</u>	<u>exam in-chief</u>	<u>cross-exam</u>	<u>re-exam</u>
---	-------------------	----------------------	-------------------	----------------

\*\*\*\*\*

E X H I B I T S

10	<u>EXHIBIT #</u>	<u>DESCRIPTION</u>	<u>ENTERED ON PAGE</u>
----	------------------	--------------------	------------------------

\*\*\*\*\*

- REASONS FOR JUDGMENT - page 3

LEGEND

- [sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.
- [ph] - Indicates preceding word has been spelled phonetically.

Transcript Ordered: May 12, 2011

Transcript Completed: May 19, 2011

Ordering Party Notified: May 19, 2011

R E A S O N S   F O R   J U D G M E N T

TAYLOR, Ont. C.J.      (Orally):

INTRODUCTION:

On the evening of December the 13<sup>th</sup>, 2008, Damian Buckley was standing outside the apartment building at 2415 Jane Street, where he lived with his mother. Four members of the Toronto Police Service, part of the Toronto Anti-Violence Intervention Strategy, commonly known as TAVIS, were conducting a sweep of an adjacent apartment building located on Exbury Avenue.

One of the officers, Constable Nelson Cheechoo, smelled marijuana and saw Mr. Buckley discard what he believed to be a marijuana cigarette. Constable Cheechoo went over to investigate and was joined by a second officer, Constable Judy Grant.

As they approached Mr. Buckley, Constables Grant and Cheechoo say that he refused to cooperate with them by answering questions about his identity and place of residence. Constable Cheechoo says that he arrested Mr. Buckley and a violent struggle ensued, in which it was alleged that Mr. Buckley attempted to disarm both Constable Grant and Constable Cheechoo.

Mr. Buckley was ultimately subdued by the police and there is no doubt that he was injured during the course of his apprehension.

5  
10  
Initially, Mr. Buckley was charged with two counts of attempting to disarm police officer, one count in relation to Grant, one count in relation to Cheechoo; two counts of assault with intent to resist the lawful arrest of himself, one again for each officer; and one count of possession of marijuana, contrary to the *Controlled Drugs and Substances Act*.

15  
20  
The Crown has conceded, in oral argument on February 22<sup>nd</sup> of this year, that there was no evidence upon which a conviction could be founded on the possession of marijuana charge or the attempt to disarm Constable Cheechoo. Those charges are formally dismissed.

25  
30  
Mr. Buckley has said that he has done nothing wrong, he was simply a young black man standing outside his place of residence when he was set upon by the police, who were engaged in an act of racial profiling. He says, through his counsel, that the police lacked the grounds to search him, to detain him. His essential position is that the officers committed serial violations of his *Charter* rights.

Mr. Buckley's trial began before me on January 12<sup>th</sup>

of last year. The Crown's case was completed the next day and the case was adjourned for approximately six weeks until the 26<sup>th</sup> of February for the defence case.

On the return date, Mr. Rowe, who acts for Mr. Buckley, brought an application to have all the field investigative report cards, or as they are commonly known, 208 cards, prepared by the police officers in question for the six month period prior to Mr. Buckley's arrest, produced to the defence.

Counsel's position was that an analysis of the cards would assist in showing that the officers had engaged in racial profiling. The application for the release of the documents was opposed by the Chief of the Toronto Police Service and the four police officers.

There was a lengthy adjournment to accommodate Counsel's schedule and to allow for an evidentiary hearing and then, ultimately, to allow me to prepare my reasons. The application was dismissed by me on the 15<sup>th</sup> of December.

The defence presented its case on February the 15<sup>th</sup>. I heard oral argument a week later on the 22<sup>nd</sup> and invited Counsel back to make further submissions on a narrow issue with respect to whether a marijuana roach or cigarette butt

5

10

15

20

25

30

had been placed in the exhibit envelope by Constable Douglas-Cook, the exhibits' officer in this case.

5  
Following that portion of the oral argument and submissions, the case was adjourned to today to allow me to rule on the several *Charter* applications and on the case proper.

10 POSITION OF THE PARTIES:

15  
The positions of the parties are straightforward. The Crown says that the police saw and smelled Mr. Buckley smoking a marijuana cigarette. They moved over to investigate him, he was arrested and during the course of his arrest, he resisted.

20  
The Crown says that the police then responded with lawful force to subdue Mr. Buckley and during the course of that struggle, Mr. Buckley attempted to disarm Police Constable Grant. Three of the four police officers involved, Constables Cheechoo, Grant and Douglas, were asked and categorically denied engaging in any form of racial profiling. 25  
The fourth officer, Constable Kennedy, was not asked if she had engaged in that prohibited activity.

30  
Mr. Buckley's position is that he was outside the apartment building where he lived with his mother. He was going to go out with a woman friend, Keshia

Weise, and was waiting for her arrival.

5 He says he was approached by Constable Cheechoo and Constable Grant. He said they said nothing to him. He then told them that they had to run his name to see if he had a record. He says Grant reached forward into his pocket and grabbed out marijuana stalks.

10 He says he was taken to the ground by Cheechoo, whereupon he put his hands behind his back, indicating he was submitting to his arrest and submitting to being handcuffed. He says that he was brutally pummelled by the police.

15 Mr. Buckley's position, as articulated by his Counsel, is that he was the victim of racial profiling and that there were no grounds to detain or search him. He says his right to fundamental justice, his right to be free from unreasonable search and seizure, his right to not be  
20 arbitrarily detained, his right to be advised promptly of the reason for any detention or arrest, and his right to retain and instruct  
25 counsel without delay were violated by the police officers.

30 In addition, he alleged that the failure to provide him with medical attention following his arrest violated his right to fundamental justice.

5  
Counsel's position, as expressed in oral argument,  
was that the evidence on the *Controlled Drugs and*  
*Substances Act* charge, that is the possession of  
marijuana, ought to be excluded on the basis that  
it was obtained through a series of *Charter*  
violations. That issue is now moot, given that  
the charge has been dismissed.

10  
With respect to the charge of assault with intent  
to resist the lawful arrest of himself, Counsel  
has argued that there were no grounds for the  
arrest and, therefore, the arrest was not lawful  
and the police were not acting in the execution of  
their duties.

15  
With respect to the charge of attempting to disarm  
Police Constable Grant, Counsel has argued that  
the Crown has not proved the mental element of  
that offence and while it is possible that Mr.  
20 Buckley may have touched the officer's firearm,  
there is no proof, beyond a reasonable doubt, that  
he in fact was attempting to disarm Constable  
Grant.

25  
Mr. Rowe's final argument is that the failure  
of the police to provide medical treatment to  
Mr. Buckley resulted in a violation of his right  
to fundamental justice. The remedy he seeks  
30 for that alleged violation is a stay of  
proceedings.



Given my view on the ultimate disposition of the case, I will only refer tangentially to the Charter applications. I propose to decide the case on a far more narrow basis.

5  
ANALYSIS:

10  
Mr. Buckley was charged with assault with intent to resist arrest. A citizen is not obliged to submit to an arrest if he does not know the reason for it.

15  
The law in this area was canvassed by the Ontario Court of Appeal in their decision of *R. v. Nguyen*, [2008] O.J. No. 219. A convenient summary of the law begins at paragraph 16:

20  
25  
30  
"The right to be informed of the reasons for detention as enshrined in the *Charter* and the *Canadian Bill of Rights* is a codification of the common law described most famously in the case of *Christie v. Leachinsky*. In *Christie*, the common law right was essentially described as follows: A person is entitled to be informed of the reason why he or she is being restrained, unless the circumstances are such that he or she knows why. The reasons do not need to be expressed in technical or precise language, but must, in substance, inform the person as to the reason why the restraint is being imposed.

5 Canadian jurisprudence has since generally affirmed that s.10(a) of the *Charter* captures that common law definition. In *R. v. Kelly*, this court had occasion to comment on s.10(a) and its relationship to s.10(b). This court noted that:

10 The interest protected by paragraphs a) and (b) are not the same. With respect to paragraph 10(a), a person is not obliged to submit to an arrest if he does not know the reason for it."

The court referred to *Christie and Leachinsky*.

15 "It is, accordingly, essential that he be informed promptly or immediately of the reasons."

The Court of Appeal continued, at paragraph 18:

20 "This court's pronouncement in *Kelly* was later affirmed and expanded by the Supreme Court of Canada in *R. v. Evans*:

25 The right to be promptly advised of the reason for one's detention embodied in s.10(a) of the *Charter* is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it."

30 The court continued at paragraph 19:

5  
"Most recently, Iacobucci J. made it clear  
in Mann that detention, for purposes of  
s.10(a) of the Charter, includes individuals  
who are detained for investigative  
purposes:

10  
15  
Section 10(a) of the Charter provides  
that everyone has the right on arrest  
or detention to be informed promptly  
of the reasons therefore. At a  
minimum, individuals who are  
detained for investigative purposes  
must therefore be advised, in clear  
and simple language, of the reasons  
for detention."

20  
25  
If Mr. Buckley was not advised of the reasons  
for his arrest, he does not have to submit to  
the police and may resist physical actions on  
their part. If the police did not advise him of  
the reasons for his arrest, they would no longer  
be acting in the execution of their duty. (See  
*R. v. Pelletier*, a decision of the Ontario Court  
of Appeal, [1999] O.J. No. 37, 38 at paragraph  
three).

30  
The fundamental question, therefore, is was Mr.  
Buckley ever arrested by the police? If he was  
not, then the police were not acting in the  
execution of their duty and his resistance to  
their actions would not constitute an assault with  
intent to resist arrest.

5  
For the reasons that follow, I am not satisfied, beyond a reasonable doubt, that Mr. Buckley was ever arrested by Constable Cheechoo, or any of the police officers who interacted with him.

10  
I will deal with the evidence in greater depth, but the position of the four officers is, even at first instance, at best confusing and inconsistent.

15  
20  
Constable Cheechoo says he told the accused he was under arrest, but made no move to take physical control of Mr. Buckley until he says Mr. Buckley shoved Constable Grant. Constable Grant, who is standing right beside Cheechoo, does not say that Buckley was arrested, but rather that Cheechoo said to her, "He is arrestable," and she then moved forward to take physical control of the accused. On her evidence, no words of arrest are spoken.

25  
30  
Police Constable Douglas-Cook says that she was within one metre of Constables Cheechoo and Grant and that she heard Cheechoo arrest Mr. Buckley. She says she is not sure what he was arrested for. Police Constable Kennedy, the fourth officer, says it was Grant who arrested the accused.

The arrest of a citizen is a serious matter, but it is straightforward and uncomplicated. It involves two actions: the pronouncement of the

words of arrest; plus a physical taking of control of the arrestee. The latter phase can involve a simple touching or an acquiescence on the part of the arrestee to the control of the officer.

5  
10  
15  
At the outset, it is perplexing that this simple commonplace police activity could be the subject of such utter confusion on the part of the officers. I am driven inexorably to the conclusion that an arrest was not made and that the officers' evidence is a series of after the fact rationalizations of what might have occurred. I will refer to portions of the evidence to illustrate how I have come to this conclusion.

20  
25  
Constable Cheechoo says that he smelled marijuana smoke and saw the accused discard what he believed to be a marijuana cigarette. If his evidence is accepted, he had reasonable and probable grounds to believe that Mr. Buckley was guilty of a *Controlled Drugs and Substances Act* offence, specifically, possession of marijuana.

30  
He approached Mr. Buckley and detained him. There can be no doubt that Mr. Buckley was detained. The police officers were in uniform. Police Constable Cheechoo said he was going up to investigate Mr. Buckley. This was not a situation where the officers were engaged in a "meet and greet" situation with a citizen.

5  
Constable Cheechoo says Mr. Buckley was told to stop. He did stop. According to Mr. Buckley, he told the police officers they had to run his name. He was told by the police officers to get his hands out of his pockets. Clearly, his liberty was restrained and he was acquiescing to the restraint on his liberty. (See *R. v. Grant*, [2009] 2 S.C.R. 353, at paragraph 44).

10  
Cheechoo did not, as he is required to do by s.10(a) and (b) of the *Charter of Rights and Freedoms*, advise Mr. Buckley of the reason for his detention or of his right to retain and instruct counsel without delay. (See *R. v. Mann*, [2004] 3 S.C.R., 59 at paragraph 117; *R. v. Suberu*, [2009] 2 S.C.R. 460, at paragraph 37; *R. v. Grant*, [2009] 2 S.C.R. 353, at paragraph 58).

15  
20  
Instead, he embarked on a series of questions as to who Mr. Buckley was, whether he lived in the apartment building, all the while telling Mr. Buckley to take his hands out of his pockets. He says that when Mr. Buckley stood mute, he told him he was under arrest.

25  
30  
He did not make any motion to physically control Mr. Buckley until after Mr. Buckley had pushed Police Constable Grant and then, as Constable Cheechoo put it, "the fight was on."

After Mr. Buckley was subdued and taken to a

5  
nearby police station, Constable Cheechoo was asked by the booking sergeant what charges were pending against Mr. Buckley. Cheechoo's answers are recorded for posterity on a DVD recording. He says the accused was arrested for assault police and attempting to disarm a police officer. No mention is made of the marijuana charge.

10  
15  
In cross-examination, Cheechoo says he forgot that charge due to the tumult of the arrest. How could he forget the marijuana charge? It was the foundation for what occurred after; it was what led to the tumult of the arrest; it was what after all he was investigating from the beginning.

20  
25  
Police Constable Grant says that she too smelled burnt marijuana after she was alerted to it by Constable Cheechoo when they were in the police van. She says she was standing next to Cheechoo when he spoke to the accused, saying to Mr. Buckley, "How are you?" and, "We smell weed." She had no notes of this conversation and Cheechoo makes no mention of that conversation. When asked in cross-examination, she doesn't repeat the conversation.

30  
I find her evidence on this point to be very suspect. She says the accused was refusing to take his hands out of his pockets or to answer questions posed to him. She says that Cheechoo

5  
then said to her, "He is arrestable," at which point she moved forward to arrest the accused. He slapped her hand away and then pushed at her, at which point Cheechoo attempted to subdue Mr. Buckley.

10  
15  
The evidence that Cheechoo says, "He's arrestable," is, at best, bizarre. Cheechoo is a ten year police veteran. According to him, he had grounds to arrest the accused. He says he pronounced the words of arrest. Why would he say to Grant, "He's arrestable"? If he wanted to arrest the accused, he would do it. If there was a need for physical intervention, he was the logical choice to be the intervener. He stands well over six feet tall and weighs in excess of 300 pounds, while Constable Grant is relatively diminutive.

20  
In any event, Grant does not say that she was acting on the instructions of Cheechoo and then placed Mr. Buckley under arrest; rather, she simply says that she attempted to grab him.

25  
This was not an exigent circumstance, or a situation where the police needed to take physical control of an individual and then pronounce the words of arrest after control had been taken.

30  
Police Constable Douglas-Cook says that she was standing about a metre from Cheechoo, Grant and



5  
Buckley. She says she is not sure of the conversation that was going on among the parties, but she says that she heard Cheechoo arrest the accused. She is not sure for what offence.

10  
She says the accused then pushed Constable Grant and then, in her words, there was a bit of an altercation because the accused was not compliant. She says that she never saw Cheechoo or Grant strike the accused.

15  
Cheechoo, by his own admission, punched Mr. Buckley several times and later administered multiple knee strikes to Mr. Buckley's ribs. Douglas-Cook was right there. How could she miss the activity, she was right there?

20  
I have grave concerns that she was not actually present when Mr. Buckley was taken to the ground by the officers. I base this conclusion on the evidence in part of Keshia Weise. Miss Weise is a friend of Mr. Buckley's. She says, in her evidence, that she was waiting for him outside his apartment building so that they could go out to a nearby restaurant.

25  
30  
She observed some of the interaction between the parties, the police and Mr. Buckley. She gave her evidence in a straightforward fashion. Some of her evidence assisted Mr. Buckley, in the sense that it supported his position. Some, however,

was diametrically opposed to his version of events.

5  
10  
She impressed me as a candid witness. Of particular significance is that she says that she heard a commotion and saw Mr. Buckley taken to the ground and a male police officer, whom I find to be Cheechoo, motioning for other officers to come forward to help. She describes clearly a male and a female police officer involved in the initial interaction.

15  
20  
If I accept her evidence, and I do, given its consistency with the version of events proffered by Cheechoo and Grant, the accused was on the ground when the other officers were motioned to come forward. Cheechoo confirms that the other officers, particularly Douglas-Cook and Kennedy, came forward after the accused had been taken to the ground. Cheechoo's evidence is that he grabbed the accused and took him to the ground, but at that time only he and Grant were present.

25  
30  
The fourth officer, Constable Kennedy, says that she looked out of the window of the police vehicle and heard Constable Grant tell the accused he was under arrest. She says she saw Grant get pushed and that a struggle ensued.

Her evidence is at total variance with the other

three police officers. She also said that all four police officers were involved in taking Mr. Buckley to the ground. Again, her evidence is at variance with the other officers.

There are other aspects of the officers' evidence which are troubling. An example is Constable Cheechoo says that he was driving a marked police van. The other officers say it was unmarked and Miss Weise doesn't remember seeing anything other than marked police cars.

The point is a seemingly minor inconsistency, but Cheechoo's evidence is that the accused saw the van and began to move away because the van was marked and, presumably, seeing the marked van caused Mr. Buckley to move away because he had something to hide.

It is another example of what might be seen as an after the fact rationalization about what was occurring that night.

Police Constable Douglas-Cook was the exhibits' officer. She said she found a marijuana cigarette butt, commonly referred to as a roach, and a baggie containing an unsmoked marijuana cigarette, which was referred to during the course of argument as a "virgin spliff." She dumped both into a single drug envelope, making it impossible to determine what had been analyzed, whether it

had been the roach or the virgin spliff. Ultimately, that led to the Crown conceding that the marijuana charge should be dismissed.

Mr. Buckley's position is that he was accosted by all four officers, who surrounded him, and Constable Cheechoo threw him to the ground. He says he was never told that he was under arrest.

I find great portions of Mr. Buckley's evidence to be suspect. For example, he said his head was banged into the police cruiser by Constable Cheechoo, a fact that Cheechoo denies. But, more importantly, Miss Weise, who according to the evidence was only a few feet away and who was paying attention to what was happening, didn't see this occur.

At the end of the analysis, however, I don't have to believe Mr. Buckley. He doesn't have to prove his innocence. The burden is at all times on the Crown to prove the case beyond a reasonable doubt.

After reviewing the officers' evidence, I find that I cannot be satisfied that Mr. Buckley was at any time lawfully arrested. There are simply too many inconsistencies in their evidence. The result is that I find there was no lawful arrest proven, the officers were not acting in the

execution of their duty and Mr. Buckley was entitled to resist.

5 The charges of assault with intent to resist arrest are, therefore, dismissed.

10 I will now turn to the charge of attempting to disarm Constable Grant. Having found that the police were not engaged in the execution of their duty would seem to end the matter. However, I propose to deal with the case on a far more direct basis.

15 I find that the Crown has not proven, beyond a reasonable doubt, that the accused was attempting to disarm Constable Grant. The situation, to use the phrase that the police used and which was later adopted by Mr. Buckley, was "dynamic."

20 The police say, and Mr. Buckley seems to confirm, that he was moving around, he was flailing, he was thrashing about, while predominately being face down on the pavement. He says he remained face down and put his hands behind his back so that the police could handcuff him. There was some  
25 evidence that he was rolling from side to side at times.

30 Police Constable Kennedy says that she saw the accused's hand on Constable Grant's gun and she shouted, "Judy, he's got your gun." She said she

5  
did this to alert Constable Grant that the accused had a hold of or was going to the gun. She said she hit the accused's hand and he moved away to the front of Constable Cheechoo's duty belt.

10  
Constable Kennedy was asked to describe what she saw. She said the accused was face down and he put his hand on the grip of Constable Grant's gun. She hit his hand and he removed it.

15  
In her testimony, it was quite clear that she was unnerved, perhaps understandably, by the thought of an arrestee even touching a police officer's sidearm. She says emotionally she went through the ceiling.

20  
At the time Mr. Buckley is alleged to have touched Constable Grant's gun, the evidence is that he was face down on the pavement. It would be impossible for him to see behind him.

25  
30  
Constable Kennedy, who saw the action and who raised the alarm, and who says she hit the accused's hand causing him to move it away, never says that the accused did anything more than touch the firearm. She does not testify as to any pulling, tugging or grasping at the firearm. Given the nature of the charge, if she had seen any of that action, she would have mentioned it.

5  
Constable Grant says that when she heard Kennedy yell, she looked and she saw the accused tugging on her gun. If that action had occurred, it would have had to have been seen by Kennedy, who was focussed on the gun and the accused.

10  
Earlier in my judgment, I indicated that I found Constable Grant's evidence to be suspect. I have come to a similar conclusion with respect to this aspect of her evidence. I cannot accept her evidence that the accused was tugging on the gun.

15  
While it is entirely possible, and indeed conceded by Mr. Buckley, that he may have touched the grip of Constable Grant's gun, he was face down and flailing about, he was getting punched and kneed by at least one officer, who was attempting to subdue him. I cannot find, beyond a reasonable doubt, that he was attempting to disarm Police Constable Grant.

20  
SUMMARY AND CONCLUSION:

25  
30  
There is no doubt that there was a violent struggle outside 2415 Jane Street on the evening of December 13, 2008, involving Mr. Buckley and four members of the Toronto Police Service. I find it impossible to completely unravel what occurred that night or to determine other significant issues, such as whether Mr. Buckley

was the victim of racial profiling.

While many would no doubt have preferred that I answer those questions, I cannot. My task is far more narrowly defined, has the Crown proven, beyond a reasonable doubt.

On the basis of the evidence that I have heard, I cannot find that the Crown has proven, beyond a reasonable doubt, that Mr. Buckley assaulted the police officers with intent to resist his lawful arrest or that he was attempting to disarm Constable Grant.

The result is that the charges are dismissed.

-----



5

10

15

20

25

30

THIS IS TO CERTIFY THAT  
the foregoing is a true  
and accurate transcript  
of my recordings to the  
best of my ability and  
skill.

*M. Spencer*

---

Marlene Spencer  
OFFICIAL COURT REPORTER

Dated at Toronto, this 19<sup>th</sup> day of May, 2011.

FORM 2

Certificate of Transcript

*Evidence Act*, subsection 5(2)

5

I, Marlene Spencer, certify that this document is a true and accurate transcript of the recording of Regina v. **DAMIAN BUCKLEY** in the Ontario Court of Justice, held at 1000 Finch Avenue West, Toronto, taken from Recording No. 0244/11, which has/have been certified in Form 1.

10

15

20

25



Marlene Spencer  
Official Court Reporter

30

May 19, 2011.