

Case Name:
R. v. Green

Between
Her Majesty the Queen, and
Richard Green

[2004] O.J. No. 5757

Ontario Court of Justice
Toronto, Ontario

P.M. Taylor J.

Oral judgment: September 29, 2004.

(42 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against arbitrary detention or imprisonment -- Specific remedies -- Exclusion of evidence -- Criminal law -- Offences -- Against the administration of justice -- Resistance or obstruction of a public officer or peace officer -- Regulatory offences -- Absolute liability.

Trial of the accused, Green, for riding a bicycle without a reflector, light or horn, contrary to the Highway Traffic Act, and for obstruction. Green was stopped by police for the bicycle offences while he drove on a sidewalk. He gave a false identity when he identified himself. Green claimed he was a victim of racial profiling. He was stopped because he was a black man who rode a bicycle. His detention violated his right under section 9 of the Canadian Charter of Rights and Freedom to be free of arbitrary detention.

HELD: Green was acquitted. The offences under the Act were absolute liability regulatory offences. The Act was intended to regulate traffic on highways. It did not apply to sidewalks. The officers' actions were not justified because they did not conform to the Act. They were not permitted to stop and detain Green using the Act. The evidence that was obtained by the police from Green in their efforts to identify him was conscriptive evidence and affected the fairness of the trial. The evidence was excluded because the Crown did not show, on a balance of probabilities, that the administration of justice would not be adversely affected by the evidence. Green was arrested for failing to properly identify himself for a charge under the Act. There was a complete procedure to deal with Green's alleged misconduct under the Act. That mechanism should have been used and Green should not have been charged with obstruction of justice. Green therefore satisfied the court that he

was arbitrarily detained. There was no common law or statutory power to stop him. Since the evidence was excluded there was no admissible evidence that could be used to convict Green.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 9.

Highway Traffic Act, ss. 62(17), 75, 179, 218.

Counsel:

M. Gillezeau Counsel for the Crown

R. Tomovski Counsel for the Accused

P.M. TAYLOR J. (orally):--

Introduction:

1 On the 6th of May, 2003, at 11:19 p.m., Richard Norris Green was riding a bicycle on the west sidewalk of Driftwood Avenue, in the City of Toronto.

2 His bicycle was not equipped with reflectors or a light, and Constables Steven Hewitt and Ryan Holmes of the Toronto Police Service stopped him for allegedly violating s. 62(17) of the Highway Traffic Act.

3 Mr. Green verbally identified himself as Ricardo Smith; date of birth, 27th of December, 1976, address, 26 Driftwood Avenue, number 43. Constable Hewitt further questioned Mr. Green in an effort to confirm his identity. Ultimately, Mr. Green told the police of his true identity, and he was charged with the offence of obstructing a police officer.

4 Mr. Green, through his counsel, has alleged that he was the victim of racial profiling; that he was stopped simply because he was a black man riding a bicycle. If this is true, his detention by the officers would be arbitrary and a violation of Mr. Green's right to be free from arbitrary detention as guaranteed by s. 9 of the Charter of Rights and Freedoms. The remedy his counsel, Mr. Tomovski, seeks, should I find such a violation, is the exclusion of the remarks made by Mr. Green to the police. The onus is on Mr. Green to show that his detention was arbitrary. If I were to find that the detention was not arbitrary, Mr. Tomovski urges me to acquit his client on the basis that no obstruction of the police occurred.

Background:

5 On the night of May the 6th, 2003, police Constables Hewitt and Holmes of The Toronto Police Service were on routine patrol in the Jane and Finch area, in the City of Toronto. They saw Richard Green riding a bicycle on the west sidewalk of Driftwood Avenue. The bicycle was not equipped with reflectors or a light. Section 62(17) of the Highway Traffic Act mandates that bicycles, under certain circumstances, must have a light or reflectors. The penalty for violating this section of the Highway Traffic Act is a fine not to exceed \$20.

6 Constable Hewitt stopped the accused and requested that he identify himself. The officer indicated that he told Mr. Green that it was in the interest of safety that his bicycle be equipped with a light and reflector. He then asked Mr. Green his name. The accused replied, Ricardo Smith; date of birth, 27th of December, '76; address, 28 Driftwood Avenue, Unit 43. That address is approximately one block south of where the stop occurred. Constable Hewitt asked the accused for further identification. The accused said he did not have anymore, and he indicated to the officer that he did not feel that he should require the equipment because he was an adult. Constable Holmes again repeated that this was needed safety equipment, and at this time, noticed that there was no horn on the bicycle. Section 75 of the Highway Traffic Act mandates that bicycles be equipped with a horn. It is a more serious offence than the no lights, carrying a minimum punishment of a \$60 fine.

7 Further conversation ensued about the accused's address and driver's licence. Not satisfied with the answers he was receiving, at 11:30 p.m., Hewitt placed the accused under arrest for failing to identify himself. He handcuffed the accused and placed him in the back of the car. Hewitt's escort, Constable Holmes, continued to check police databases. He, Holmes, said that there was a Richard Green associated with the Driftwood Avenue address. It is alleged that the accused said, "How do you know I'm Richard Green? There are lots of Richard Greens". Hewitt then asked, "Are you Richard Green?" The accused said, "I told you my name". The officer replied, "I think you're lying". The officer said the accused then said, "I am Richard Norris Green". Constable Hewitt then told him he was going to be charged with obstructing a police officer and advised him of his right to counsel. At 2:05 a.m., on the morning of the 7th of May, 2003, he was released.

8 After he was released, Constable Holmes advised his escort, Constable Hewitt, that a small amount of marijuana had been found in the police car, and the accused was charged with that offence. Constable Hewitt confirmed Holmes' evidence that the accused was stopped for alleged violations of the Highway Traffic Act.

9 In cross-examination, Hewitt said he would always confirm identity of a suspect through the use of the police databases. Constable Holmes testified the accused was arrested for failing to identify himself under the Highway Traffic Act, after which he identified himself as Ricardo Smith; date of birth, 27 December, '76. When Holmes began checking the name in the police databases, he says he asked the accused his address and was told that it was 28 Driftwood, Unit Number 43. He says then a number of associations came back for a Richard Green at the Driftwood Avenue address. He then advised Hewitt of this fact, at which point he says the accused said, "How do you know I'm that Richard Green?" And then the accused identified himself as Richard Green.

10 Constable Holmes was unsure of when the original observations were made beyond the fact that they were after 10:30 p.m. Holmes reiterated in cross-examination that the accused was arrested by Hewitt and then gave the name Ricardo Smith.

Analysis:

The Applicable Legal Principles

The Power to Detain

The General Concern:

11 In any discussion of detention, the Court must balance individual liberty rights and privacy interests with societal interests in effective policing. Absent a law to the contrary, individuals are free to do as they please. By contrast, the police, and more broadly, the state, may only act to the

extent that they are empowered to do so by law. The vibrancy of a democracy is apparent by how wisely it navigates through those critical junctures where the state action intersects with and threatens to impinge upon individual liberties. (See *Mann and the Queen*, 185 C.C.C. (3d) 308, at p. 318, S.C.C.)

The Power to Detain at Common Law:

12 The test for whether a police officer has acted within his or her common law powers was first expressed by the English Court of Criminal Appeals in *Waterfield*. (Citation omitted). From this decision emerged a two-prong analysis; where the officer's conduct is *prima facie* an unlawful interference with an individual's liberty or property. In those situations, Courts must first consider whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or at common law. If this threshold test is met, the analysis continues to consider secondarily whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

13 Clearly, peace officers are required to perform their duty and preserve the public peace. In considering the limits with respect to the second stage, it is necessary to balance the competing interests of the police duty and the liberty interests at stake. This involves a consideration of whether an invasion of individual rights is necessary in order for the peace officers to perform their duty and whether such invasion is reasonable in light of the public purposes served by effective control of criminal acts on the one hand, and on the other, the respect for liberty and fundamental dignity of individuals.

14 There must clearly be an articulable cause for detention. Articulable cause has been defined as a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.

15 Ultimately, the governing principles with respect to the use of police power to detain for investigative purposes involve a consideration of the *Waterfield* test, along with the *Simpson* articulable cause requirement. A detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, to inform the officer's suspicion that there is a clear connection between the individual to be detained and a recent or ongoing criminal offence.

16 Reasonable grounds figures at the front end of such assessment underlying the officer's reasonable suspicion that a particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must be further assessed against all of the circumstances. Most notably, the extent to which the interference with individual liberty is necessary to perform the officer's duty; the liberty interfered with; and the nature and extent of that interference in order to meet the second prong of the *Waterfield* test. (See *Mann*, *supra.*, paragraphs 24, 26, 27 and 34.)

The Statutory Power Under the Highway Traffic Act:

17 Section 218 of the Highway Traffic Act provides that a police officer who finds any person contravening the Highway Traffic Act or a Municipal by-law regulating traffic while in charge of a bicycle may require that person to stop and provide identification of himself or herself. Every person who is required to stop by a police officer shall stop and identify themselves to the police officer. Giving one's correct name and address is sufficient identification. Failure to provide identification is arrestable without warrant.

18 Section 62(17) of the Highway Traffic Act mandates that bicycles, under certain circumstances, must be equipped with lights.

19 Highway is defined in the act as a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles, including the area between the lateral property lines thereof.

Was the Accused on a Highway?

20 The Highway Traffic Act is a provincial statute intended to regulate traffic on highways, as defined in the Act. There is an abundance of jurisprudence dealing with whether private roadways or parking lots are highways. See, for example, *Regina and Treshem*, [1998] O.J. No. 1744; *Gayle et. al. v. Ellwood* (1969), 9 D.L.R. (3d) 681, a decision of the Ontario Court of Appeal; *R. v. Douglas* (1997), 35 O.R. (3d) 197, Ontario Court of Justice; and *R. v. Mansoor*, [1979] 2 S.C.R. 916, 47 C.C.C. (2d) 129, a decision of the Supreme Court of Canada.

21 There appeared to be, however, virtually no cases concerning whether a sidewalk is a highway. In *R. v. Wall*, 11 Criminal Law Quarterly, 223, a case decided in 1968, Magistrate R.J. Marin, at page 224, said: "The definition of highway, when read in light of the above quoted law, is restricted and does not include a sidewalk."

22 In *R. v. Robinson*, [1996] O.J. No. 5350, a Provincial Offences Act Appeal to the Ontario Court of Justice, one of the grounds of appeal was that the Justice of the Peace who found the defendant guilty of careless driving erred in finding that the defendant's driving had occurred on the sidewalk, and it was, therefore, governed by the Highway Traffic Act. The appeal was dismissed, however, arguments were raised on a number of issues, and the case cannot be said to have decided affirmatively that a sidewalk was part of the highway.

23 Clearly the word "sidewalk" is not included in the definition of highway, and one would have expected it to be included if the legislature intended it to be a component of the highway.

24 The Act does refer to sidewalks in other sections. For example, dealing with pedestrians who walk on the highway where there is no sidewalk. (see s. 179 of the Highway Traffic Act.) The question becomes, is the sidewalk included as part of a highway based on the extended definition of highway within the Act?

25 In *R. v. Mansour*, supra., the Court discussed the meaning of the word "includes", which is found in the definition of highway. The Court said, at pages 10 and 11,

"I have not overlooked the fact that the definition employs the expansive word "includes" rather than the word "means". In applying this definition to the facts in question, I adopt the statement in Maxwell on interpretation of statutes which reads as follows:

"Sometimes it is provided that a word shall mean what the definition section says it shall mean. in this case, the word is restricted to the scope indicated in the definition section. Sometimes, however, the word 'include' is used in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used, these words or phrases must

be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares they shall include. In other words, the word in respect of which "includes" is used bears both its extended statutory meaning and its "ordinary popular and natural sense, whenever that would be properly applicable."

Application of the Principles to the Facts of This Case:

26 Constable Hewitt indicated the sole reason for stopping the accused was a violation of the Highway Traffic Act; specifically, that he had no light and reflector. This is not a situation in which the Crown seeks to rely on the common law power to detain for investigative purposes.

27 In order for the officer's actions to be justified, they must, therefore, be in conformance with a statutory power. I am of the view that a highway does not include the sidewalks. The officer's actions, therefore, were not sanctioned by law, and they were not permitted to stop and detain the accused using the provisions of the Highway Traffic Act.

28 For those that are concerned that this will result in a lack of regulation of the sidewalks and carnage and mayhem, I do point out that sidewalks can be subject to Municipal by-laws, and they are subject to the provisions of the Criminal Code; specifically, the dangerous operation of a motor vehicle section, which contemplates actions that occur in a public place.

29 Having found that the officers were not acting under a valid common law or statutory power, the question becomes should the evidence be excluded?

30 Mr. Green was allegedly operating his bicycle with no lights or reflector or horn. The first two violations were punishable by a maximum \$20 fine. The latter, punishable by a \$60 to \$500 fine. Constable Hewitt's predominant concern was for Mr. Green's safety. The offences are regulatory. They are absolute liability offences with little, if any, moral turpitude.

31 A person validly stopped by the police, pursuant to section 216, is required to identify themselves. Clearly, this may be done orally and does not require a person stop to identify themselves through the use of a document such as a driver's licence. (See R. v. G.(P.), 10 M.V.R. (4th) 139.) In this case, Constable Hewitt was not going to release the accused until he was satisfied as to his identity. The various databases had been consulted, and indeed, he arrested the accused for failing to identify himself.

32 In assessing whether the evidence should be excluded, I am mindful that what followed was conscriptive evidence, and it affects the fairness of the trial. I am of the view that on the facts of this case, that the Crown has not shown on a balance of probabilities that the administration of justice would not be adversely effected by the admission of the evidence, and that it should be excluded.

33 Much of my reasoning depended on my determination that the sidewalk was not a highway. It is a novel point. I am prepared to consider the matter further on the assumption that my analysis may not withstand appellate review.

The Obstruct Police Charge:

34 The Crown asserts by giving the false last name, and arguably a false first name, that Mr. Green obstructed the police. It is common ground that the date of birth is his date of birth, and the address is his correct address.

Analysis:

35 It is well settled that the mens rea with respect to the offence of obstruct police officer consists of an obstruction, that the officer was in the execution of his duty, and that the action was willful. In this particular matter, the accused was arrested for failing to identify himself under the Highway Traffic Act. The offence was complete. The Act provides a mechanism for enforcement.

36 The situation that arose was not unlike that which was considered by the Court of Appeal in *Her Majesty the Queen and Hayes*, 65 O.R., (3d), 787. In that case, Mr. Hayes was riding his motorcycle when he was stopped at a police road check and asked to remove his helmet and submit it for inspection. He refused to take off his helmet, and the officer warned him that he would be charged with obstructing a peace officer if he did not comply. He persisted in his refusal to remove his helmet and was arrested and charged with obstruct police officer. His helmet was removed thereafter without incident, and upon inspection, was found to comply with all of the safety standards. One of the questions posed for the Court's determination was can the appellant's refusal to turn over his helmet for inspection form the grounds for the Criminal Code offence of obstruct police officer? The judgment of the Court, which was rendered by the Chief Justice, was as follows:

"The intersection between police powers and enforcing provincial offences in the Criminal Code offence of obstruct police was addressed by the Supreme Court of Canada in *R. v. Sharma*, [1993] 1 S.C.R. 650, (citation omitted). In *Sharma*, a street vendor was exposing goods on the sidewalk without a licence in contravention of a Municipal by-law. A police officer issued the vendor a Provincial Offences ticket, as was authorized under the by-law and the Provincial Offences Act, and instructed the vendor to move on. The vendor refused to do so and was ultimately charged with obstruct police officer. The Court overturned the conviction on the grounds that the by-law was ultra vires. However, the Court also found that even if the by-law were valid, the accused could not be convicted of obstruct police. At page 157 and 158, the Court said:

"In my view, Arbour J.A. was correct in holding that even if s. 11 of the by-law were valid, police cannot circumvent the lack of an arrest power for a violation of the by-law by ordering someone to desist from the violation and then charging them with obstruction. The power to arrest in order to enforce the by-law cannot be inferred in the face of clear language in the Municipal Act and the Provincial Offences Act, setting out more moderate means of dealing with repeated infractions. The police constable in this case indeed had an obligation to enforce the by-law. The legislature defined the enforcement power as ticketing the offender, and the appellant did not obstruct the constable in the performance of his duty. The power of arrest cannot be derived as a matter of common law from the officer's duty to enforce the by-law, given the legislature's definition of what enforcement details."

37 Ultimately, the Court held in *Hayes* that the officer ought to have used the provisions of the Highway Traffic Act enforcement, and that the appellant did not obstruct the police officer in the performance of his duty.

38 In this particular case, the officer arrested the accused for failing to identify himself. There is a complete procedure to deal with the accused's alleged misconduct under the Highway Traffic Act, and on the basis of the reasoning in Hayes, that ought not to be allowed to be translated into the more serious criminal offence of obstruct police officer.

Conclusion:

39 The appellant has satisfied me that he was arbitrarily detained. There was no common law power to stop him. There was no statutory power to stop him.

40 The evidence of what he said to the police, which flowed from the stop, is to be excluded, and on the basis of that, there is no admissible evidence as to any alleged obstruction, and the charge would be dismissed on that basis.

41 Assuming that my analysis was incorrect, however, the accused was arrested under the Highway Traffic Act for failing to identify himself. That is what he did. That was what he should have been charged with, and the matter on the basis of the reasoning in Hayes ought not to be extended and translated into a charge of obstruct police officer. So, he would be entitled to an acquittal on that basis also.

42 I make no comment, given my findings, on the issue of racial profiling as it is unnecessary, given that I have acquitted the accused.

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