



THE UPDATE

Issue #5 May 15, 2009

CHARTER - 9 - DETENTION - MANN - TEST TO APPLY

R. v. N.O. 2009 ABCA 75 per Hunt, Berger, Watson, JA - T. Judge: Franklin, PCJ:

Youth Court conviction appeal on charge of possession of cocaine. Shortly after midnight a police officer saw a brief hand-to-hand exchange between two young men at the entrance of an apartment building in an area of Edmonton known for drug trafficking. Accused was detained, handcuffed and searched. Trial judge found no breach of s. 9.

Held: Appeal allowed, acquitted.

Section 9 breach and evidence ought to have been excluded. As per *Mann* [2004] 3 SCR 59, the objective requirement for reasonable cause to detain did not exist. The officer's evidence re: the area of the city was vague, and neither the accused nor the apartment building were known to him. "Since not all law-abiding citizens are home before midnight, it is difficult to see how the time of night could form part of the necessary constellation of circumstances objectively justifying detention."

K. McGowan - Defence Counsel

IMPAIRED DRIVING - 254(2) DEMAND - "FORTHWITH"

R. v. Byers 2009 ABQB 129 per Acton, J:

Appeal from conviction on 253(b) charge. Issue being whether trial judge erred in finding compliance with the "forthwith" requirement in 254(2) CC. After stopping the accused the officer took 2-4 minutes to write notes before approaching the vehicle. 4-5 minutes were then spent talking to the accused, and the accused was then walked to the police vehicle. 2 more pages of notes were written, a few more questions were asked, and then the screening demand was made. Approximately 15 minutes transpired from the vehicle stop to the demand.

Held: Appeal dismissed.

Test set out in *Megahy* 2008 ABCA 207. "The Alberta Court of Appeal rejected the argument that the Supreme Court decision in *R. v. Woods* [2005] 2 SCR 205 modifies the earlier case law and imposes a stricter, less tolerant approach to any delay prior to a demand." Police are allowed the time reasonably necessary to ensure that it is appropriate to make a screening demand.

R. Prithipaul - Defence Counsel

IMPAIRED DRIVING - 254(3) - REASONABLE GROUNDS

R. v. Toma 2009 ABQB 146 per Moen, J:

Appeal from acquittal on refusal charge. Trial judge acquitted on the basis that the arresting officer did not have reasonable grounds to make a breath demand. Some of the information that the officer relied upon in making the demand came to the officer via a 911 dispatch call. Trial judge found that this information was hearsay and could not be relied upon to form grounds.

Held: Appeal allowed, new trial.

"The Trial Judge's conclusion that hearsay information cannot form the basis of officer's reasonable and probable grounds is clearly in conflict with the case law. Police officers are not required to confirm information received from dispatch directly with the witness so long as there are some indicators of reliability as was the case here. Tom's acquittal was based on an extricable error of law."

In Person

**SENTENCE - DRUGS -
COCAINE TRAFFICKING**

R. v. Bergen 2009 ABCA 69 per
McFadyen, Hunt, O'Brien, JA - T.
Judge: LeGrandeur, PCJ:

Crown appeal from 18 month conditional sentence. Accused pleaded guilty to trafficking in cocaine. 24 year old remorseful accused with no record. Accused was addicted to cocaine, but had subsequently moved home to live with her parents in a small community and had ended her drug involvement.

Held: Appeal dismissed.

“This Court continues to denounce cocaine trafficking in the strongest terms ... Nevertheless, in appropriate cases a conditional sentence ... can accomplish deterrence and denunciation.”

G. White - Defence Counsel

**SENTENCE - LURING AND
CHILD PORNOGRAPHY**

R. v. Johnson 2009 ABCA 74 per
McFadyen, Hunt, O'Brien, JA - T.
Judge: McIntyre, J:

Defence appeal from 15 month jail sentence. Accused pleaded guilty to luring and possession of child pornography. Over 4-5 months the accused made over 5,000 internet communications with teenage girls inviting them to meet him for sex in exchange for money and alcohol. Accused possessed 260 child pornography photos and 24 movies.

Held: Appeal dismissed.

No error in principle. Predatory offences involving the sexual exploitation of vulnerable young victims. A sentence of imprisonment was necessary.

B. Der - Defence Counsel

**SENTENCE - ROBBERY -
TOTALITY PRINCIPLE**

R. v. Manybears 2009 ABCA 82
per McFadyen, Hunt, O'Brien, JA -
T. Judge: Fraser, PCJ:

Defence appeal from 6 year jail sentence. 47 year old aboriginal accused convicted of bank robbery with a note. Accused was a “career criminal” who 7 months earlier had been convicted of a separate robbery and received a 5 year sentence.

Held: Appeal allowed, sentence reduced to 4 years.

“In both *R. v. Trudell* (11084), 56 AR 77 and *R. v. Fraser* (18 Oct 1993), this Court reduced sentences that had been imposed separately in circumstances when the accused was already serving time for another offence. In both cases, the Court considered that the global effect on the accused was excessive. We are of a similar view.”

A. Sanders - Defence Counsel

Dawson Stevens Duckett & Shaigec
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4
Tel: (780) 424-9058 Fax: (780) 425-0172

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