

IN THE PROVINCIAL COURT OF SASKATCHEWAN

SASKATOON, SASKATCHEWAN

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

JAMES STEWART AND JARVIS STEWART

TRANSCRIPT OF TRIAL PROCEEDINGS

HELD: May 3, 2013

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SASKATCHEWAN, ON MAY 3, 2013, BEFORE THE HONOURABLE B.M.
SINGER, A JUDGE OF THE PROVINCIAL COURT OF SASKATCHEWAN.

APPEARANCES:

B. Pashovitz

Ministry of Justice
Saskatoon, Saskatchewan
COUNSEL FOR THE CROWN

James and
Jarvis Stewart

THE ACCUSED
APPEARING ON THEIR OWN BEHALF

- 1 THE COURT: Good morning.
- 2 COURT CLERK: You may be seated.
- 3 THE ACCUSED: Good morning, Your Honour.
- 4 MR. PASHOVITZ: Good morning, Your Honour.
- 5 THE COURT: Mr. Pashovitz, I may have
6 been vague in what I was -- left you with last time.
7 I -- I did say it was for decision today, but I
8 think we also had a discussion about whether you
9 wish to call any further evidence with regard to the
10 overholding issue?
- 11 MR. PASHOVITZ: You did say it was for
12 decision, so I did take some steps to send a request
13 to the Saskatoon Police Service for some reports
14 from the detention side of things, because, you
15 know, I didn't call any of that --
- 16 THE COURT: Yeah.
- 17 MR. PASHOVITZ: -- as far as the actual
18 substantive trial.
- 19 THE COURT: Right.
- 20 MR. PASHOVITZ: So we do have some disclosure
21 for James and Jarvis Stewart as far as --
- 22 THE COURT: Is it --
- 23 MR. PASHOVITZ: -- the reports from them, but
24 I haven't subpoenaed any of those police officers
25 here today because I'm just handing over their
26 reports now. Their reports do give me some comfort

1 as far as if I was to call that evidence I would be
2 able to even make a stronger argument about the fact
3 that arbitrary detention has not been shown to have
4 occurred here, Your Honour, but that's my position
5 this morning, Your Honour.

6 THE COURT: Okay. Well, I may have left
7 you without much of a -- a chance to make that
8 argument.

9 MR. PASHOVITZ: Well, I guess, I'll cross
10 that bridge when I come to it, Your Honour, so --

11 THE COURT: Well, I don't -- you see I
12 don't read the -- I think the *Salisbury* case the
13 same way you do. To me *Salisbury* does not say that
14 I have to make a finding first before it becomes an
15 issue.

16 MR. PASHOVITZ: Right.

17 THE COURT: I think what it says is that
18 each case is, you know, we have to decide the
19 process we're going to follow.

20 MR. PASHOVITZ: I appreciate that --

21 THE COURT: Yeah.

22 MR. PASHOVITZ: -- Your Honour, so --

23 THE COURT: And I'm not -- I don't think
24 it was appropriate, in this case, to wait until
25 there was a decision.

26 MR. PASHOVITZ: And -- and I appreciate

1 your --

2 THE COURT: So --

3 MR. PASHOVITZ: -- ruling --

4 THE COURT: -- so --

5 MR. PASHOVITZ: -- then, Your Honour.

6 THE COURT: -- well, maybe, do you want

7 to make your argument with regard, then, to the

8 overholding?

9 MR. PASHOVITZ: Well, I -- I believe I

10 already did, Your Honour, but just --

11 THE COURT: Yeah, just remind me, because

12 I --

13 MR. PASHOVITZ: I'll just refer to my notes,

14 Your Honour. With respect to that, of course, we're

15 familiar with Sections 497 and 498 of the *Criminal*

16 Code, the case of the Crown and *Salisbury*, and those

17 enumerated factors, among other things. And it was

18 my review of even the evidence-in-chief, and on the

19 night of the incident, the Saskatoon Police Service

20 had reasonable grounds to believe that out of the

21 same incident James Stewart and Jarvis Stewart were

22 charged with obstruction of a police officer by

23 failing to comply with lawful demands, as well,

24 obstruction of police officer by interfering with a

25 lawful arrest, and, also, a charge of assault and

26 intent to resist arrest.

1 And it's my reading of the
2 cases that it's not for the Crown to second guess or
3 to say what we would have done in the place of the
4 police officers, whether they had grounds to hold
5 them as they did. So when you look at the charges
6 that they were facing, that's one reason to have
7 held them overnight. And we're not talking about --

8 THE COURT: Why --

9 MR. PASHOVITZ: -- holding --

10 THE COURT: -- why? That, I'm -- that, I
11 don't understand. Why, when they're -- when they're
12 facing those charges?

13 MR. PASHOVITZ: When they're facing those
14 charges, as far as the totality of the
15 circumstances, facing those charges, again, looking
16 what the police officers had in their mind with
17 respect to this investigation, it all started off
18 with, according to Constable Keating -- and, again,
19 it's not for me to second guess their decision, or
20 to say what I would have done had I been the police
21 officer, but it's to look and see what the police
22 officers had in their mind on the night of the
23 incident, what Constable Keating stated in his
24 report. And this is what would -- the police would
25 have had in their mind on that Friday night, as far
26 as deciding to hold them, to have a J.P. release

1 them the next morning, is that Constable Keating was
2 faced with two individuals who were saying, "We're
3 not going to follow your laws, your laws don't apply
4 to us." He was sworn at. He had to call for back
5 up to have one of these individuals detained by back
6 up police officers.

7 THE COURT: But -- but --

8 MR. PASHOVITZ: So --

9 THE COURT: -- but --

10 MR. PASHOVITZ: -- all of that would have
11 been in their mind as far as saying we ought to
12 tread carefully here.

13 THE COURT: But -- but didn't -- didn't
14 he say he arrested them to determine their identity?

15 MR. PASHOVITZ: That's correct.

16 THE ACCUSED: Yeah, whoops.

17 THE COURT: And -- and if I accept that,
18 they knew their identity?

19 MR. PASHOVITZ: And that's -- if you accept
20 that, and that's one of the factors.

21 THE COURT: Right.

22 MR. PASHOVITZ: Okay. Another one of the
23 factors was the police, as they indicated, even the
24 patrol constables were checking in to see whether
25 the vehicle in question had been stolen or not. So
26 they were checking into that as well too. And this

1 was all occurring during the wee morning hours of a
2 Friday night, Your Honour.

3 THE COURT: Seven o'clock? Seven
4 o'clock?

5 MR. PASHOVITZ: Well, that's when the arrest
6 was, yes. But we heard evidence that the police
7 officers were dealing with these individuals over
8 and over again throughout the night, coming and
9 asking one of them about the identity of the other
10 one of them. So those are other factors as well,
11 too. Then we have in their glove box, I don't want
12 to quote the names of the documents, but, basically,
13 right to travel documents, which also indicate that,
14 basically, we're sovereign individuals, we're
15 stating that we don't need to have driver's
16 licences, we don't need to register our vehicle.

17 That was in the police
18 officer's mind as far as determining whether these
19 individuals were going to follow any release
20 conditions placed upon them by an officer in charge.
21 And that's all under the umbrella of the initial
22 allegations as far as obstructing a peace officer
23 times two, assault with a resist to -- assault with
24 intent to resist arrest of a peace officer.

25 THE COURT: Well, they seized the
26 vehicle, right?

- 1 MR. PASHOVITZ: They did.
- 2 THE COURT: All right. So they're
3 entitled to hold them to -- or, they're supposed to
4 release them unless they have to establish the
5 identity -- and they knew who they were -- secure
6 and preserve evidence. And there's no evidence of
7 them, you know, here. I mean, they have the
8 vehicle, if that's what they need, and they have the
9 licence plate, if that's what they need.
- 10 MR. PASHOVITZ: Right.
- 11 THE COURT: They have to prevent the
12 continuation and repetition of an offence -- of the
13 offence, pardon me, or the commission of another
14 offence. And --
- 15 MR. PASHOVITZ: That's what I'm hanging my
16 hat on as well, Your Honour.
- 17 THE COURT: Well --
- 18 MR. PASHOVITZ: Again, when you're looking at
19 a --
- 20 THE COURT: Well -- well, I don't know,
21 as well, because I don't know I understand how the
22 other ones apply even.
- 23 MR. PASHOVITZ: Well, and then there's the
24 overriding consideration, as far as -- those are
25 enumerated factors, but --
- 26 THE COURT: But they've -- they had those

1 things in their glove compartment forever. Why, you
2 know, I mean, this is the first we've heard of them
3 being in trouble with the law.

4 MR. PASHOVITZ: With respect to that last
5 clause that you'd mentioned, as far as preventing
6 the continuation and repetition of the offence,
7 we've heard what happened to Constable Keating on
8 the night in question. As I argued before, this was
9 just supposed to be a traffic stop. You had this
10 happen the way that Constable Keating described, you
11 have all these documents seized, you have the police
12 reports full of references to, "We're not going to
13 follow your laws."

14 THE COURT: But what -- what offence
15 would they continue?

16 MR. PASHOVITZ: What offence would they
17 continue?

18 THE COURT: Yeah.

19 MR. PASHOVITZ: Well, the concern --

20 THE COURT: Drive -- driving without a
21 plate?

22 MR. PASHOVITZ: True. And, as well -- as
23 well, there would be concern as far as appearing
24 back before court. I would respectfully submit
25 there's enough grounds for this Court to rule just
26 on the evidence that was heard. If you have these

1 individuals on the street saying, "We're not going
2 to follow your laws, your laws don't apply to us."
3 And this is all that we have to look at with respect
4 to this matter, Your Honour, is what happened on
5 that night, plus a glove box full of these
6 documents. That would cause concern --

7 THE COURT: But --

8 MR. PASHOVITZ: -- as far as them abiding by
9 any release documents, as far as them coming back to
10 court when released by an officer in charge.

11 THE COURT: All right. I don't see -- I
12 just don't get it. Sorry, it just doesn't seem to
13 me how any of that changes, by holding them until
14 the morning to see a J.P. and then them not getting
15 released until later in the day.

16 MR. PASHOVITZ: Mmhmm, on a Saturday morning.

17 THE COURT: Yeah.

18 MR. PASHOVITZ: All right. I would -- well,
19 Your Honour, it's -- I --

20 THE COURT: All right.

21 MR. PASHOVITZ: -- appreciate your
22 decision --

23 THE COURT: Yeah.

24 MR. PASHOVITZ: It's my position that when
25 I'm faced with proving the elements of an offence,
26 that's the witnesses that I called, I don't want to

1 get too far into other evidence. But, I believe, if
2 I was to call some detention individuals, which I
3 think I ought to be able to do. While I don't want
4 to speculate, but I would anticipate that they would
5 talk about the fact that there was no J.P. there by
6 the time these individuals got dealt with. Friday
7 night's busy, there may be a number of reasons, and
8 I just don't want to ask the Court --

9 THE COURT: Well --

10 MR. PASHOVITZ: -- to speculate on that.

11 THE COURT: -- all right. Okay.

12 MR. PASHOVITZ: I would prefer to call those
13 detention individuals.

14 THE COURT: I just don't see why they
15 couldn't have been released by the officer in
16 charge, or even given appearance notices once they
17 ascertained their identity. That's -- this is an
18 obstruction charge and an assault PO. And it's --

19 MR. PASHOVITZ: It -- they --

20 THE COURT: -- and the only reason, I
21 think, that they held them was to punish them.

22 MR. PASHOVITZ: Well, I -- I made my
23 arguments to point out --

24 THE COURT: All right.

25 MR. PASHOVITZ: -- other reasons, Your
26 Honour.

1 THE COURT: Okay, thanks. Okay. I'm
2 prepared to give my judgment today.

3 THE ACCUSED: You'll -- pardon me, sorry?

4 THE COURT: I'm prepared to give my
5 judgment today.

6 THE ACCUSED: Okay. Should I stand up,
7 or --

8 THE COURT: Both -- you just -- you can
9 sit.

10 THE ACCUSED: Thank you.

11 THE COURT: I have to read something,
12 it's 14 pages long.

13 THE ACCUSED: Okay.

14 THE COURT: Both Jarvis and James Stewart
15 are charged with willfully obstructing Constable
16 Keating, a police officer engaged in the lawful
17 execution of his duty, on August 24th, 2012. While
18 they were charged in separate Informations, by
19 agreement, both trials proceeded at the same time on
20 the same evidence.

21 The essence of Jarvis's
22 obstruction, according to the Information, was that
23 he disobeyed lawful commands at a traffic stop. The
24 essence of James's obstruction, according to the
25 Information laid against him, was that he interfered
26 in the lawful arrest of Jarvis.

1 Prior to the trial, notice
2 was filed by the defendants alleging breaches of
3 their *Charter* rights, alleging a breach of Section
4 10(a) of their right to be informed promptly of the
5 reason for their arrest, or detention; 10(b)
6 alleging that they were not given an opportunity to
7 contact a lawyer, and, further, that the warrantless
8 search of their vehicle was unreasonable, and that
9 their rights were breached, and that they were held
10 an overly long period of time before their release
11 on these charges.

12 And, again, by agreement, the
13 circumstances that may or may not amount to a breach
14 of the rights of the accused were part of a voir
15 dire that was held at the same time as the evidence
16 and the trial proper. This is a practice often
17 followed in this court as it has been found to be
18 not only efficient but fair to all the parties, as
19 long as sufficient notice of the allegations of
20 breach have been given to the Crown.

21 The evidence of Constable
22 Keating: Constable Keating is a member of the
23 Saskatoon Police Service in the traffic section. On
24 August 24th, 2012, he was driving an unmarked police
25 vehicle on 8th Street and was in the left turn lane
26 while going into the Grosvenor Park Shopping Centre.

1 At that time he noticed a
2 white Toyota Celica directly in front of him. The
3 rear licence plate looked suspicious. The white
4 "continuous" tag did not appear to be proper.
5 Constable Keating ascertained that the licence plate
6 was for a Honda Civic, which it had expired in 2010.
7 He decided to pull the vehicle over to do a traffic
8 stop, in order to issue a driver -- the driver a
9 ticket for misuse of a licence plate.

10 Constable Keating activated
11 his emergency lights. While his vehicle was
12 unmarked, it was equipped with various flashing
13 lights and a siren. He indicated he chirped his
14 siren and then followed the Celica into the parking
15 lot where it parked. The police officer moved his
16 vehicle in behind the -- the Celica.

17 The police vehicle was
18 equipped with a car camera system. This system
19 continuously records, but when a police officer
20 activates his lights the system also saves the
21 recording from a few minutes before the activation
22 of the emergency lights until they are turned off.
23 In this case we have a video showing 20 minute --
24 about 20 minutes of the camera's view. However,
25 only a few moments are relevant. In addition, for
26 some unexplained reason, the video is without sound.

1 The video confirms that the
2 police officer was behind the Celica and that he was
3 there for some time, and that he turned on his
4 emergency lights while the vehicle was still on 8th
5 Street. As the police officer pulled up behind the
6 Celica, the occupants, Jarvis, the driver, and
7 James, the passenger, left the vehicle.

8 The officer testified that he
9 used his loud hailer to instruct them to get back
10 into the vehicle, but they ignored his command. The
11 video shows James walking from the passenger side of
12 the vehicle, past the rear of the car, in the
13 direction of the Shoppers Drug Mart to the east of
14 where the car was parked.

15 The officer testified that he
16 exited his vehicle and watched the driver, Jarvis
17 Stewart, walk towards him. The police officer when
18 -- was in his usual police uniform, including a
19 badge and all of the equipment police have on their
20 person. He advised the driver to get back into the
21 vehicle, but the driver failed to do so and
22 continued to walk towards him, brushing his shoulder
23 against the officer as he passed by.

24 The police officer then asked
25 the driver to stop and show him his driver's
26 licence. He says Jarvis refused and started yelling

1 at him, saying he had no right to detain him. At
2 this point in time James was approximately two car
3 lengths away and began yelling at the police
4 officer, telling him to go fuck himself.

5 Constable Keating ignored
6 James and continued to ask Jarvis for his driver's
7 licence, and "explained that he had stopped for
8 misuse of plates." Constable Keating advised the
9 Court that Jarvis responded with a question, "Are
10 you a peace officer or a police officer?" and would
11 not provide him with a driver's licence, name, or
12 photo identification.

13 Constable Keating testified
14 that he then told Jarvis that, "If he didn't have a
15 driver's licence with him -- or, his name or date of
16 birth was sufficient." Jarvis's response was again
17 to ask Constable Keating if he was a peace officer
18 or a police. Constable Keating testified that
19 Jarvis went on to say that, "He didn't believe in
20 our laws, or that I had the right to detain him, and
21 he attempted to walk away," or similar words to that
22 effect.

23 Meanwhile, Jarvis's brother,
24 James, according to Constable Keating, continued to
25 yell obscenities. Constable Keating then advised
26 Jarvis that he would be arrested for obstruction if

1 he continued not to provide his name or
2 identification, or follow his commands. Jarvis
3 Stewart then made a 180 degree turn and began to
4 walk away.

5 Constable Keating said he
6 again asked for his identification, saying this was
7 a traffic stop, and that if he kept walking away he
8 would be arrested for obstruction. Jarvis's
9 response was to tell Constable Keating to, "fuck
10 off." And at this time he was arrested. He was
11 placed in handcuffs, with his hands behind his back,
12 and placed under arrest for obstruction.

13 After Jarvis Stewart was
14 arrested, James Stewart, who was several car lengths
15 away, began, "aggressively," walking towards
16 Constable Keating and Jarvis, who are beside the
17 officer's vehicle. James Stewart was continuing to
18 yell, and to tell Constable Keating to let his
19 brother go and to go fuck himself.

20 The officers [sic] pushed
21 Jarvis towards his vehicle, and while holding him --
22 the officer pushed Jarvis toward his vehicle, and,
23 while holding him with one hand, turned to squarely
24 face James Stewart, who was walking in his
25 direction. He testified that he felt threatened by
26 James, who, besides yelling and swearing, had his

1 teeth and fists clenched and his forehead wrinkled,
2 and, according to Constable Keating, was sweating
3 profusely.

4 At this point in time
5 Constable Keating called for backup. The officer
6 then testified that he told James to get back;
7 however, he kept walking towards him. As he told
8 him to get back he said he raised his foot -- his
9 right foot off the ground in case he had to kick at
10 James. James -- eventually James stopped.

11 James had been about two-and-
12 a-half to three car lengths away when Jarvis had
13 been arrested. And, according to Constable Keating,
14 he had advanced to about eight to 16 feet away, or
15 about the length of one car, when he stopped.
16 Constable Keating recalls that James then turned
17 back towards Shoppers Drug Mart, but shortly there
18 -- again, turned around again and came towards the
19 officer.

20 Constable Keating said he,
21 again, looked aggressive. His fists were clenched,
22 he was swearing, and sweating profusely, and
23 demanding that he let his brother go, and shouting
24 obscenities at the officer. And, again, the officer
25 raised his foot slightly. At this time another
26 police car, with sirens blaring, was fast

1 approaching. James stopped and turned away, and
2 walked west away from the Shoppers Drug Mart.

3 By the time the other police
4 officers arrived, and the officers had exited their
5 vehicle, James is about one-and-a-half car lengths
6 away from Constable Keating. Constable Keating told
7 the other officers to arrest James for obstruction.
8 Constable Keating testified that he requested
9 identity from Jarvis Stewart on at least five
10 occasions, and when he was not provided, and went to
11 walk away, he was arrested for obstruction.

12 While Constable Keating was
13 detaining Jarvis Stewart, James Stewart was
14 approaching in an aggressive manner, yelling and
15 swearing, demanding that he let his brother go, and
16 refused to stay away. Constable Keating felt that
17 James was interfering in his arrest of Jarvis and
18 was obstructing him. So he asked the other officer
19 [sic] -- officers to arrest him.

20 The evidence of Jarvis
21 Stewart: The other relevant evidence that I heard
22 concerning the obstruction charges came from the
23 accused, Jarvis Stewart. Jarvis testified that he
24 exited his vehicle and only then saw the vehicle
25 behind him. He testified that he was unaware of the
26 emergency -- that the emergency lights were

1 flashing.

2 He testified that he noticed
3 a man get out of the car. Prior to that, he
4 testified that when he got out of the vehicle he
5 heard demands over a loudspeaker. When the man got
6 out of the vehicle Jarvis said to him, "Who are you
7 and what's going on?"

8 He says there are a lot of
9 people there -- there were a lot of people there.
10 And the next thing he knew was that the man was
11 running towards him, screaming at him and arresting
12 him. He says he told the man to get his hands off
13 him, but the man knocked his hat off and ripped his
14 sunglasses off his face.

15 He says the man threatened to
16 use pepper spray if he did not allow himself to be
17 handcuffed, so he cooperated. He says at no time
18 did he refuse to give his identification. He
19 testified that he did not believe that a police
20 officer could do a traffic stop, as they were in a
21 parking lot, and that he had never refused to give
22 his name and that he knew his rights.

23 He testified that Constable
24 Keating's response was that he should, "fuck -- shut
25 the fuck up, douche bag." He said about ten police
26 officers -- police cars arrived after he was

1 arrested. In cross-examination he insisted the
2 Toyota was registered to him, as he had a bill of
3 sale from SGI, and they must have known he was the
4 owner. He stated he got out of his car and stood by
5 it, as did James. Jarvis said he put his hands up
6 when he got out of the car. It is unclear to me why
7 he would do this if he did not know it was a police
8 car behind him, and a policeman in it.

9 Jarvis testified that he was
10 never asked for his driver's licence and
11 registration by Constable Keating. He -- he says,
12 later on after the arrest, after the police -- after
13 the other police officers arrived, that he was
14 placed in a patrol car, that he did give his name
15 and date of birth as that was the only time he was
16 ever asked. He denied walking away from Constable
17 Keating. It should be noted that Jarvis admitted
18 putting the licence plate on the Celica, as it did
19 not have one, although he did not know how the
20 continuous sticker got on the plate. It was just a
21 plate that he had around.

22 Jarvis had filed an Affidavit
23 with the Crown Prosecutor's office. This
24 "Affidavit" was dated September 4th, 2012. It was
25 signed and allegedly sworn by him. And, while on
26 the stand, he acknowledged the truth of its

1 contents. He also acknowledged, as a statement,
2 that it was voluntary.

3 That Affidavit was filed by
4 the Crown as Exhibit P-10. In it, James adopted
5 many -- I'm sorry, on the stand James adopted many
6 portions of the Affidavit as true, even where they
7 contradicted his sworn evidence on the stand and the
8 evidence from the police video, which he filed. For
9 instance, the sworn Affidavit stated he noted the
10 flashing lights as he made his left turn onto the
11 parking lot.

12 He also stated he knew that
13 he was under arrest for obstruction at the time of
14 his arrest, yet in his oral evidence he denied ever
15 being told what he was under arrest for. The
16 Affidavit stated, and he'd adopted as truth, that
17 Constable Keating was not wearing a badge, yet the
18 video taken from the police officer's own vehicle
19 clearly shows he was wearing one.

20 The evidence in relation of
21 breach of Section 8 of the *Charter*: The police
22 carried out a warrantless search on the accused's
23 motor vehicle. There is a presumption that warrant
24 -- warrantless searches are unreasonable and that
25 they may be -- and that may be rebutted by the
26 parties seeking to justify the search.

1 Constable Keating testified
2 that after the other police officers arrived, he had
3 Jarvis Stewart placed in a patrol car with a silent
4 patrolman and then proceeded to search the Celica in
5 order to find evidence of the driver's identity.
6 Other officers took part in this search.

7 In the vehicle were found
8 Exhibits P-2, P-3, P-4, which are traffic tickets
9 issued to Jarvis. Exhibit P-5, a letter addressed
10 to Jarvis, and Exhibits P-6 and 7, documents
11 entitled, Notice of Affidavit, signed by Jarvis
12 Stewart and James Stewart. These documents had been
13 found in the vehicle by Constable McAvoy and given
14 to Constable Keating for safekeeping.

15 Constable McAvoy had arrived
16 on the scene with Constable Schaefer. The first
17 duty -- their first duty was to arrest James
18 Stewart, upon the direction of Constable Keating.
19 Constable McAvoy testified that he searched the
20 glove box of the vehicle to, "identify the
21 individual who was the driver."

22 While there's no authority to
23 search for identification incidental to an
24 investigative detention, as suggested by the Crown,
25 *R. v. Mann* does allow for a search of a person's
26 vehicle sufficient to determine the safety of the

1 officers and others. However, the police in this
2 case indicated that the search of the vehicle was
3 for identification purposes, not for a police
4 officer's safety.

5 Constable Keating said he
6 specifically arrested the driver of the vehicle for
7 obstruction because he failed to identify himself.
8 According to the case law, the police are entitled
9 to conduct a search of the vehicle to ascertain the
10 name of the owner and possibly acquire information
11 to identify the driver. If I find this arrest for
12 obstruction occurred because Jarvis Stewart refused
13 to identify himself when he was found to be
14 committing a traffic offence, then the continuing
15 efforts to determine that the identity -- that
16 identity by searching the vehicle was a justifiable
17 and reasonable search of the vehicle.

18 The accused was -- also
19 argued the Section 9 *Charter* rights against
20 arbitrary arrest arose because Constable Keating had
21 no right to arrest them. Again, if I determine in
22 the circumstances above that Constable Keating was
23 acting in the execution of his duty and was lawfully
24 arresting James and Jarvis Stewart then there was no
25 *Charter* breach.

26 Section 10(b), right to

1 instruct counsel. Jarvis says that after his
2 detention and arrest he was given his right to
3 counsel, that is he was told of his right to contact
4 a lawyer and he -- and he indicated that he wished
5 to do so. He alleges, however, that he was never
6 given a real opportunity to exercise that right.

7 Constables Boyce and Hounsell
8 arrived at the scene at the Grosvenor Park Shopping
9 Centre in a regular marked police vehicle. Such a
10 vehicle has a silent patrolman and it is used to
11 transport people under arrest from the scene to the
12 police station. Constable Hounsell testified he
13 took Jarvis Stewart to the Saskatoon Police Station
14 as Jarvis was under arrest.

15 He attended to his booking at
16 the detention area, and then testified that he
17 placed Jarvis in the north phone room and gave him a
18 phone book to look up the names of the lawyers. He
19 then closed the door on the phone room. The
20 telephone in the phone room does not work in the
21 sense that no one can dial out with that phone. The
22 dialing of any outside number is done outside the
23 phone room by the police on the instruction of the
24 person in the phone room. And, then, the door can
25 be closed to afford privacy to an accused who can
26 then speak to a lawyer of their choice. However, a

1 person just placed in the phone room does not have
2 the ability to phone anyone without the assistance
3 of a police officer.

4 Constable Hounsell testified
5 that he placed Jarvis in the phone room, closed the
6 door to the room, and then left the area to go down
7 to the basement of the police station to assist in
8 the transportation of James Stewart. Constable
9 Hounsell testified that approximately 20 minutes
10 later he attended with Jarvis Stewart. He says he
11 recalls that Jarvis indicated to him that he had a
12 lawyer in British Columbia, but that he did not wish
13 to call him at that time.

14 Constable Hounsell then
15 testified that he determined that Jarvis, who had
16 previously asked to speak to a lawyer, waived that
17 right. He agreed that he did not give him any
18 further information as to the right he was giving
19 up, something that is known as a Prosper warning.

20 Jarvis, however, testified
21 that it was not Constable Hounsell who placed him in
22 the phone room, or even directed him in that way.
23 It was Constable Boyce who casually pointed in the
24 direction of the phone room, and, rather, Constable
25 Mitzel who actually placed him in the room.
26 However, Constable Mitzel did not point out the

1 phone book and instead just closed the door.

2 Jarvis was in the phone room
3 for a lengthy period of time and had no idea that
4 the phone did not work, though he tried to use it
5 several times. He says he never waived his rights,
6 but was told, essentially, after his lengthy wait in
7 the phone room, that he could not call a lawyer in
8 British Columbia.

9 He denies that Constable
10 Hounsell ever came back and asked if he had a
11 telephone call or not. He denies that he ever told
12 anyone that he was waiving his rights to a lawyer.
13 After his lengthy stay in the phone room he was
14 placed in the cells by another police officer.

15 Jarvis indicated that from
16 the beginning the police told him and James that
17 they believed that they were in possession of drugs
18 and that is why they searched his vehicle, his
19 person, and continued to hold him incommunicado. It
20 should be noted in the video of his attendance at
21 the booking desk that there appears to be no problem
22 with Jarvis giving information to the booking
23 officer. And, in fact, he gave the booking officers
24 all the information they sought. The video confirms
25 what Jarvis said.

26 The video shows, among other

1 things, a police officer smelling Jarvis's phone
2 repeatedly, allegedly for the smell of drugs. It
3 shows Constable Boyce, not Constable Hounsell,
4 indicating the direction of the north telephone
5 room. It shows no one directing Mr. Stewart in the
6 phone room as to where the phone book was, or
7 showing him any other information.

8 The video shows the accused
9 repeatedly attempting to use the phone, but locked
10 in the room without any assistance. It shows him
11 being taken from that room not by Constable
12 Hounsell, but by another officer and placed in the
13 cells. The video evidence confirms what the accused
14 says. And I have no difficulty accepting that he
15 was never given an opportunity to call his lawyer,
16 or any lawyer, for that matter.

17 Section 8, arbitrary
18 detention, what's known as overholding. After
19 Jarvis' booking and detention, and experience in the
20 telephone room, the accused was taken to police
21 cells. At that time his identity was known to the
22 police. He indicated that he has -- he has no
23 criminal record. There has been no evidence led
24 that he was intoxicated.

25 The accused says that his
26 rights were breached because he -- he was not

1 released at that point in time, but was held
2 overnight until he saw a Justice of the Peace in the
3 morning, and was held even longer until he was
4 released in the early afternoon, along with his
5 brother James.

6 For the reasons above, the
7 accused is asking me to grant a remedy under 24(1)
8 of the *Charter of Rights and Freedoms*. Based on his
9 reading of *Salisbury*, the accused took the position
10 that I must make a finding of guilt before engaging
11 in a determination of breach of *Charter* rights that
12 may involve a Section 24 remedy.

13 I do not read the *Salisbury*
14 decision as saying that. The appropriate procedure
15 and process depends on the particular circumstances.
16 In this case we had held a blended voir dire and
17 trial to get the facts of the case before the court.
18 That is the evidence upon which the Crown relies to
19 prove the charge, and the evidence of the accused on
20 his trial, and the evidence upon which the accused
21 and the Crown may want called to determine if a
22 *Charter* breach has -- has occurred. This is
23 convenient, efficient, and very common in this
24 jurisdiction. All parties proceeded on this basis.

25 At the end of calling of
26 evidence, however, I did, in fairness, indicate that

1 I would allow further evidence to be called by the
2 Crown as to the reading [sic] -- reasons for the
3 lengthy time both accused were held in custody. In
4 this case the accused, Jarvis Stewart, testified. I
5 am mindful of the Supreme Court of Canada in *R. v.*
6 *W.D.* and our Court of Appeal in *MacKenzie v. R.*

7 In this case it is very
8 difficult to believe the evidence of Jarvis Stewart,
9 or to give it enough credit to raise a reasonable
10 doubt. His sworn evidence and his Affidavit
11 evidence, which he adopted as true, contradict each
12 other and were full of inconsistencies.

13 He admits to placing a false
14 licence plate on his own Celica vehicle, knowing it
15 was not a valid plate for that car. He testified he
16 did not think the police could stop him for a
17 traffic offence when he was in a parking lot. This
18 is a curious reading of case law. It is also what
19 Constable Keating says he told him at the scene.

20 As Constable -- as the
21 Constable put it, "Jarvis did not think that the
22 police had the right to detain him, and that he did
23 not believe in the laws." I can only ask myself how
24 Constable Keating knew this if he hadn't been told
25 this by Jarvis at the scene.

26 In his evidence Jarvis

1 Stewart stated that he did not see the flashing
2 lights of Constable Keating's unmarked police
3 vehicle, and that he did not know that it was a
4 policeman who was making commands over the
5 loudspeaker and getting out of the car. Yet, he
6 also said in his evidence, "I got out of my car and
7 noticed an unmarked car behind me."

8 In his Affidavit he stated,
9 "As I made my left into the parking lot I noticed
10 the flashing lights behind my vehicle." In cross-
11 examination he says he got out of his car and put
12 his hands up, something one would not do for a
13 "man," but might do for a police officer. He
14 testified he did not hear or understand the command
15 to get back in his car. Yet, on cross-examination,
16 when asked by Constable -- then asked if Constable
17 Keating asked for registration and licence, he
18 volunteered the following, "The only thing he ever
19 asked me to do was get back in the car."

20 He testified that when he got
21 out of his vehicle he put his hands up. Why would
22 he do this if he didn't know if the man was a police
23 officer? He testified that Constable Keating, until
24 he was read his rights and warnings several minutes
25 after the arrest, did not tell him what he was under
26 arrest for. Yet in his Affidavit he stated, "I

1 asked what he was doing," while he was being
2 arrested, "and the man simply stated I was under
3 arrest for obstruction."

4 He testified that his brother
5 stood by the side of the car when Constable Keating
6 was doing all this to him. Yet, the video clearly
7 shows James getting out of the car and walking
8 towards the Shoppers Drug Mart. Had Constable
9 Keating at any time been rushing towards Jarvis,
10 James clearly would have, if not stopped to watch,
11 at least followed Constable Keating with his head.
12 We do not observe this on the video.

13 Lastly, the Affidavit,
14 Exhibit P-10, says that the officer was not wearing
15 his badge, and that was one of the reasons James
16 didn't know he was a police officer. He did have a
17 badge, a police officer's uniform, and all the
18 accoutrements of a police officer and all this was
19 clearly visible in the video.

20 All in all I do not accept
21 Jarvis Stewart's evidence. The evidence of the
22 police officer at the scene makes sense to me. This
23 was an ordinary traffic stop that got out of hand
24 when the driver refused to identify himself and
25 claimed the law did not apply to him. There were,
26 by all accounts, many people about. This was cruise

1 weekend. It is unlikely that a police officer would
2 act in the manner described by Jarvis in full view
3 of all these citizens.

4 I believe that the accused
5 coloured his evidence to conform with what he
6 believed was the case law. For instance, when he
7 wrote in his Affidavit of September 2012 that he saw
8 the flashing lights while turning into the parking
9 lot on 8th Street, he was probably telling the truth.
10 Yet, later, on the stand, Jarvis testified he didn't
11 know there was a policeman behind him when he
12 stopped in the parking lot, and he didn't know that
13 the person who got out of the vehicle with all the
14 flashing lights was a police officer.

15 Yet when Jarvis testified the
16 policeman had no right to stop him and that the
17 officer never asked him for identification or his
18 driver's licence, I do not believe that he was being
19 truthful. Jarvis was disingenuous when he claimed
20 that he did not know he was dealing with a police
21 officer, when he continuously asked if he was a
22 peace officer or a police officer. And, then, on
23 the stand, in cross-examination, he finally agreed
24 that Constable Keating maybe dressed like a police
25 officer, but he certainly didn't act like one.

26 My conclusion, with regard to

1 the charge of obstruction: Constable Keating was
2 there to issue the driver of the Celica a ticket for
3 misuse of a licence plate. He could not issue the
4 ticket with that -- without ascertaining the
5 identity of the driver.

6 He was acting within his duty
7 when he conducted the traffic stop. He was clearly
8 identifiable as a police officer throughout. He was
9 acting within his duty when he asked the driver to
10 provide his name, date of birth, or driver's
11 licence.

12 Jarvis was obliged by the
13 *Traffic Safety Act* to provide identification to the
14 police officer. In addition, the law has been the
15 same since 1978 that a person who is stopped for
16 committing an offence, even a bylaw offence, where
17 he has to be issued a ticket, must give his name,
18 otherwise, he is obstructing the police officer in
19 his duties.

20 When Jarvis Stewart failed to
21 give his identification and moved to walk away from
22 the police officer he was committing the crime of
23 obstruction. Once it was determined that he was
24 committing a criminal offence the police officer was
25 in the execution of his duty by detaining him and
26 charging him with obstruction.

1 The *Criminal Code* provides
2 that a person may be kept under arrest in order to
3 ascertain his identity, and this is exactly what
4 happened here. As such, Jarvis Stewart committed
5 the crime of obstruction. The police officer was
6 well within his duty to detain him for that charge,
7 in order to ascertain his identity. Therefore,
8 there is no breach of Section 8 *Charter* rights at
9 that time.

10 Similarly, the police officer
11 was empowered to search a motor vehicle, as I
12 indicated above, to ascertain the identity of the
13 driver and registered owner. And that is exactly
14 what they did in this case. There is no breach of
15 Jarvis Stewart's right for unreasonable search or
16 seizure.

17 However, I have determined
18 that his right to counsel -- that his ability to
19 contact counsel was obstructed by the police. Since
20 there is no connection between the arrest of the
21 accused and his inability to contact counsel the
22 accused seeks a remedy under 24(1) of the *Charter of*
23 *Rights and Freedoms*.

24 I -- I will address that
25 matter once I have determined whether his right
26 under Section 9 for unlawful detention -- that is

1 overholding him for longer than necessary in custody
2 -- have been breached, as well as the remedy if
3 there is such a breach under 24(1) of the *Charter* is
4 that -- is also under 24(1) of the *Charter*.

5 James Stewart did not testify
6 in this case. I have to analyze whether he
7 committed the crime of obstruction by interfering
8 with the lawful arrest of Jarvis Stewart based on
9 the evidence that I heard. On the evidence of
10 Constable Keating, James Stewart approached him in
11 an aggressive manner, coming as close as a car
12 length away on two occasions, when he was detaining
13 his brother Jarvis.

14 On both occasions he looked
15 to be aggressive, and the officer felt that he was
16 being threatened. No words of threat were spoken,
17 however, the accused, James Stewart was swearing and
18 demanding the police officer let his brother go.
19 Does this conduct amount to obstruction?

20 Certainly, the actions of
21 James Stewart made Constable Keating's job more
22 difficult. They were dramatic enough that Constable
23 Keating felt threatened. He was told on several
24 occasions to get back, but kept walking towards the
25 officer. He only finally walked away when he saw
26 and heard the other police vehicle approaching.

1 On the other hand, I find it
2 significant that even though James may have been
3 walking towards him in an aggressive manner and
4 swearing at him and demanding that Constable Keating
5 let us go, my review of the evidence indicates that
6 when Constable Keating told him to stop and get back
7 he did.

8 He was never told that if he
9 continued to come in the direction of the police
10 officer that he would be charged with obstruction.
11 Indeed, the first time we heard that in evidence is
12 when Constable Keating advised the other two
13 officers to arrest James Stewart for obstruction.

14 That being said, however,
15 having reviewed the case law it appears that
16 whenever a policeman is doing anything in the
17 execution of his duty, and an individual makes it
18 difficult for the officers to carry out his duty,
19 that individual obstructs the police officer. The
20 essence of the offence is interfering with a police
21 officer who is trying to carry out a lawful action.

22 In this case James Stewart
23 made the continued detention of Jarvis more
24 difficult for Constable Keating. He was, therefore,
25 guilty of obstruction. However, he too was held in
26 custody much longer than necessary.

1 I -- I believe that the
2 appropriate remedy under Section 24(1) is that the
3 breaches that I've found in this case apply to the
4 sentence that's imposed. I'm going to proceed
5 directly to that, because I think I -- I've heard
6 enough to give a sentence, unless the Crown or the
7 defence wishes to say anything with regard to
8 sentence?

9 MR. PASHOVITZ: No, Your Honour.

10 THE COURT: Do you wish to say anything
11 with regard to the sentence?

12 THE ACCUSED: No.

13 THE COURT: Okay. You're both being
14 sentenced to absolute discharges.

15 THE ACCUSED: Okay.

16 THE COURT: That means that you have no
17 criminal record as arising out of these offences.

18 THE ACCUSED: Thank you, Your Honour.

19 MR. PASHOVITZ: Thank you, Your Honour.

20 THE ACCUSED: Thank you, Your Honour.

21 Thank you very much, Your Honour.

22 (END OF PROCEEDINGS)

