

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. D.S.N., 2010 NSPC 17

**Date:** February 23, 2010

**Docket:** 2081177, 2081178, 2081179

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

D.S.N.

**Restriction on Publication:** Restriction on publication pursuant to s. 110(1) of the Youth Criminal Justice Act

**Judge:** The Honorable Judge Jamie S. Campbell

**Decision:** February 23, 2010

**Charge:** CC 129(a); 129(a); 270(1)(a)

**Counsel:** Tanya Carter, counsel for the Crown  
Chandra Gosine, counsel for the Defendant

1) Parents want their children to grow up to be independent, confident people. Those are good things. It isn't always easy though, especially as a teenager, to tell the sometimes subtle difference between being standing up for oneself and giving back the kind of "attitude" that can lead to trouble.

2) D.S.N. was confronted with that choice on August 6, 2009. When asked for her name by a police officer who was investigating an assault, she refused and began to walk away. Things slid out of control from there. It has resulted in her being charged with obstruction of a police officer, resisting arrest and assaulting a police officer.

3) Her counsel, Mr. Gosine has argued that she had no obligation to give the police any information. Ms. Carter, for the Crown has argued that she had an obligation in the circumstances, to provide her name. While those differing views may have the benefit of distilling the legal issue to a single basic point, with respect, I think the issue may be a bit more complicated than that.

4) It involves the question of how the right to remain silent, to refuse to cooperate with the police and to walk away from police questioning relates to the limited police authority to detain for the purpose of investigation.

**Evidence:**

5) D.S.N., her friend J.S. and an acquaintance A.M., went to the Buskers Festival that evening. A.M. was assaulted by another female person, whom she did not know and for reasons that she did not know. They were standing near the Tim Horton's on the Halifax Waterfront, not far from Perks coffee shop. A.M. sought refuge there. She was afraid that the person who had assaulted her would come after her again.

6) She was let into the shop by one of the staff members just as the shop was closing after 11:00pm. Lindsay Robertson was the manager on duty that night. She spoke with A.M.. She said that A.M. asked her to tell the people gathering outside the shop to leave. That group of people, including D.S.N., remained outside the shop, screaming. She asked them to leave and they refused.

7) Lindsay Robertson specifically identified D.S.N. as a member of that group. She described her as making threatening motions, punching her fist into the palm of her other hand. While it may be that Ms. Robertson mistook the friends for a group trying to get at A.M., her interpretation was not entirely unreasonable. The group was noisy, refused to leave, and D.S.N. herself was making gestures that

appeared to her to be threatening.

8) Ms. Robertson called the police.

9) Constable Meshal was patrolling nearby in his vehicle. He received a dispatch call at 11:20 pm about an assault that had taken place in the area around Perks. A description was given of a group of five people alleged to have been involved. The group was made up of two white females, a heavy set white male, a black male with a red shirt bearing the Olympic logo and a black female with her hair pulled back, wearing a sweat pants and an orange shirt. He saved the printout of the description provided from dispatch, as it appeared on the screen in his police vehicle.

10) Constable Meshal went into Perks and spoke with the victim of the assault. He saw three people standing outside the shop who matched the description he had been given. He asked A.M. if they were the people who were involved and she nodded to indicate that they were. No individual person was singled out.

11) Rather than remaining with the victim to take a full statement, he decided to go out to investigate. The group to which the victim had pointed were at a bus stop. He was concerned that they might leave at any time, thus frustrating the investigation.

12) The constable went to that group of three people. By this time, Constable Withrow arrived. Constable Meshal says that he told them that he was investigating an assault. That was hardly news, at least to D.S.N.. She knew that A.M. had been assaulted and had gone into Perks. She agreed that she was not at all surprised to see the police show up.

13) Constable Meshal said that all three people in the group were evasive and said that they didn't know what he was talking about. He said that his main concern at that point was identifying the people. If the victim were to identify one of them as the assailant, he could then take the matter farther. They were, after all, at a bus stop. If they left, he might not have any chance to speak to anyone.

14) He asked D.S.N. if she had any form of identification with her. She did not. She would not even provide her name. She said that her mother had told her that she didn't have to give any information to the police. He told her that she was the

subject of an investigation. She then started to walk away. He grabbed her by the arm and brought her back. She started to walk away again. He told her that she was not free to leave.

15) D.S.N.'s evidence did not differ substantially from that. In court she sat with her mother. Her mother also sat next to her while she gave her evidence, holding her hand and comforting her. She was very upset. She appeared in every respect to be a shy, soft spoken and respectful young woman. She answered questions without becoming sarcastic or rude. She did not raise her voice and at times she spoke so softly that her words were barely audible.

16) Yet, even on her own testimony, her actions that night were very much unlike how she appeared in court. She was not about to cooperate with the police in even the most minimal way, by identifying herself. When they tried to bring her back to the scene she was not willing to comply. When they tried to arrest her, she struggled and tried to get away. She screamed at them. She did not, on that evening at least, look to the ground and cry.

17) That evening she was clearly much more assertive, self confident and confrontational than she was in court. When it came to pushing back on the police, she appears to have needed no support at all.

18) After she had refused to say who she was and had begun to walk away, Constable Meshal warned her that if she did not provide any information, she would be arrested for obstruction.

19) After the third time when D.S.N. got up to leave, she was arrested for obstructing police. Things just got worse from there.

20) She refused to comply with the demands and struggled as the officers tried to put handcuffs on her. She was writhing and swinging her arms. They knocked her off balance and brought her to the ground. They eventually gained control enough to be able to place the handcuffs on her.

21) The officers took her by the arms and walked her toward the police car. Constable Meshal says that she kicked backwards, in what he described as a “donkey kick” and struck him in the thigh with her foot. Constable Withrow did not see that but did say that he heard Constable Meshal make a sound like a grunt

or sigh consistent with his being struck. D.S.N. denies kicking the constable.

22) Oddly, the victim, A.M. was in Perks and saw the police talking with D.S.N.. On A.M.'s evidence D.S.N. had nothing whatsoever to do with the assault. She said that the person who had assaulted her was standing at the very same bus stop. Yet, she said nothing to the police about that because she was waiting for a drive and just wanted to go home.

23) B.M. was also at the Buskers Festival and knew the others from school. He had been walking ahead of D.S.N. and J.S. and stopped to watch when they was stopped by the police. He said that D.S.N. had not stopped at Perks and had not been screaming or yelling. On his evidence, the police stopped her and asked for her name. She tried to leave a few times and they pulled her back. When she refused to provide her name they just threw her to the ground. She was in pain and crying. When they took her to the car, she was not struggling and was not screaming or yelling. That description of the trip to the police car is inconsistent with all of the other evidence, even that of D.S.N. herself.

24) There are different versions of what took place but the circumstances leading up to the arrest are not substantially in dispute.

**The Right to Remain Silent and the Right to Walk Way:**

25) It doesn't matter whether the people in the group had anything at all to do with the assault. The police had to respond based on the information they had received, from Ms. Robertson, through their dispatch and from the victim. Ms. Robertson may well have incorrectly assumed that the people in the group were involved because of her discussion with the victim and the screaming outside the coffee shop windows. There may have been some confusion about which group exactly A.M. identified. But, that was the information the police had at the time.

26) The police needed to investigate. Part of that investigation involved finding out who those people at the bus stop were. Their first task, properly, was to find out who was there. That is hardly an intrusive line of questioning.

27) That however is when things took a really bad turn. D.S.N., for whatever reason, decided not to cooperate. She refused to give any information and began to walk away. Constable Meshal told her that he was investigating an assault and physically restrained her. She continued to attempt to walk away. He then placed her under arrest for obstruction. If that arrest was not legally justified, she had the right to resist. The issue then, is whether Constable Meshal had the right to place her under arrest for obstruction in those circumstances.

28) People do not have the right to resist arrest because they are innocent. If they have reasonable and probable grounds the police may arrest someone. If that person turns out to be innocent, the arrest was not illegal. In other words, the police sometimes have the right to arrest the “wrong person”. The police have the limited right to detain a person without arresting him or her. The issue of whether that detention is reasonable and not arbitrary will depend on the circumstances. *R. v. Mann*, [2004] 3 S.C.R. 59

29) People of course have the right to remain silent. That usually extends to refusing to provide identification. There are two exceptions. The first is when there is some statutory duty to provide identification, such as in the case of people driving cars. The second is when the police have witnessed the commission of an

offence and are then attempting to identify the person so that he or she can be made the subject of court proceedings. Otherwise, the right to remain silent is undiminished. *R. v. Moore*, [1978] S.C.J. No. 82, *R. v. Guthrie*, [1982] A.J. No. 29 (C.A.)

“It seems to me quite clear that though every citizen has a moral duty, or if you like a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law right of the individual to refuse to answer questions put to him by persons in authority, and a refusal to accompany those in authority to any particular place, short, of course, of arrest.” *Rice v. Connolly*, [1966] 2 All E.R. 649 at p. 652 (Q.B.D.)

30) While that concept of the duty to assist the police might be questioned by some, the issue might be rephrased now not as a moral or a social duty but as a common sense duty to oneself. You do have the right to refuse to give any information, if you wish. Things may flow from that. A more prudent course of action might sometimes be to just provide an explanation. But, if you wish to stand on principle or make a point, you may. The police may then reasonably interpret the surrounding circumstances in the absence of an explanation in a way that you may wish they hadn't.

31) Telling a false story is, of course, obstruction. The refusal to provide any information and the refusal to answer questions is not. A person can be uncooperative, but cannot give false information. D.S.N. did not give false information, except perhaps a denial of any knowledge of what had happened. Refusing to speak to the police is not the same thing as saying you don't know anything about what happened. While Constable Meshal testified that the group was evasive, there is no evidence that D.S.N. specifically denied any knowledge of what had happened.

32) This "side issue" serves as an example of what sometimes happens when people decide to stand on principle or act in ways that they later justify to themselves as acting on principle. You can do it. But you have to be willing to take the risk that your actions might cross the line into being an offence.

33) Refusal to talk is within the principle. Actually saying you don't know anything and that is why you won't talk, may just be outside it. That rather fine distinction is one that most people might not appreciate on a warm summer night in the crowded downtown. It might transform an opportunity to make a point about one's willingness to confront authority into an obstruction charge, just because of the choice of words.

34) The right to silence however, has not been eroded by any concept of a limited obligation to respond with certain information. A person is not legally obligated to tell the police anything, unless there is some specific statutory requirement or an offence has been witnessed by the police. (*R. v. Moore supra.*) D.S.N. had the right to say nothing.

35) Constable Meshal had the duty and authority to investigate. He had the authority to ask D.S.N. for her name and she had the right to refuse to answer.

36) The matter doesn't end there. Once the decision has been made to stand on principle in the face of police authority, the police are not obligated to just give up. It would be a strange result indeed if, having been pointed out as one of the people involved, D.S.N. could simply refuse to talk, get on the bus and have the police standing helplessly with police notebooks in hand.

37) Constable Meshal did not come upon three random people on the street and ask their names out of idle curiosity or as part of a power trip. He had an assault victim a few feet away, who had pointed them out to him and a dispatch call that he reasonably believed described them. He did not know who had assaulted A.M.,

but he did believe that these people had something to do with it.

38) D.S.N. was not arrested for assaulting A.M.. The police at that point had no idea which of the three people might be implicated or even how they were implicated.

39) When asked for her name, she refused to provide it. As someone in the group of people who had been identified, that raised the level of concern that the police had. The police are entitled to factor D.S.N.'s silence into their assessment of the situation and how to continue their investigation. Her right to silence remained undiminished. The police have to take into account the surrounding circumstances. At this point, they had a young person in the group identified as being involved, who would not even provide her name. She was not bystander. She was still not arrested but did know that the police were investigating an assault. She knew that this was not a random police shake down of three young people. The situation might have been entirely different if the police had simply decided to stop D.S.N. to ask her name for no apparent reason.

40) She was not arrested when she refused to answer questions. But when she tried to leave the police detained her. They had not at that point arrested her but she

was, clearly detained. When she insisted on leaving, despite the police demand that she remain, she was arrested for obstruction.

41) There is a limited power of detention for investigative purposes. The police do not, at this point, need to have reasonable grounds to make an arrest. They couldn't. They had no idea who had assaulted A.M..

42) In order to detain D.S.N. to ask any questions to take the matter further, there had to be a clear connection to an offence. That is based on the information available to the police officer at that moment. The detention begins when the police officer stops the person in a manner that involves significant physical or psychological restraint. This is an investigative and not a charging power. *R. v. Cooper*, [2005] N.S.J. No. 102 (CA)

43) Constable Meshal spoke to D.S.N. not on a hunch or an informed guess. He did not see three young people and leap to the conclusion that they must have been involved. He had the description which D.S.N. fit, despite some discrepancy about the actual color of her shirt, and the victim pointing in the direction of the group. While there were not grounds for arrest at that point, there was a connection sufficient to justify detention for investigation.

44) D.S.N. knew that the investigation was with respect to the assault. The detention here was not in any sense a “pretext for prying” or the use of the general power of detention “ to satisfy their curiosity”.

45) Investigative detention does not “impose an obligation on the detained individual to answer questions posed by the police”. *R. v. Mann* para. 45.

D.S.N. continued to have the right to remain silent and refuse to answer questions. She did not however, have the right to end the investigative detention on her own, simply by leaving. The police had the authority to stop her and question her. She had the right to refuse to speak to them. They had the limited right to then physically detain her.

46) That results in a stand off of sorts, with the detained person, refusing to speak and the police asking questions in vain. That raises the issue of just how long this standoff can be allowed to continue and just how aggressive the police can be in their questioning, particularly of a young person.

47) The issue then is whether the circumstances of the detention were proportionate to the requirements. *R. v. Mann*, supra. The police asked D.S.N. for her name at least twice and perhaps three or more times. She walked away and

each time was brought back.

48) An assault had taken place. D.S.N. had been identified as part of the group involved in it. There was a real chance that the group would leave at any moment. It was reasonable for the police to detain those three people, for a brief time to allow questions to be asked.

49) D.S.N.'s refusal to answer would not end her involvement. The others in the group could reasonably be expected to have something to say that might implicate or exonerate her. Constable Meshal was not engaging in an intrusive search or a pat down search or an intensive questioning at this point. He had not identified her as a suspect. He was just asking her for her name. Even though she was a young person, that is not heavy handed police work. In the context of the investigation in which he was involved, the extent of the detention was not unreasonable.

50) D.S.N. was not simply refusing to cooperate. She could indeed have continued to say nothing. She went beyond that. She arbitrarily decided to leave. Her refusal was not simply the refusal to answer questions but the refusal to remain on the scene for a brief time while the most cursory investigation took place. Had she continued to remain silent, Constable Meshal at some point, would have to

decide whether he could detain her further or arrest her for assault. Further detention might have depended on what further information he was able to get from the others at the scene. That further detention might have become unreasonable as time passed. Her decision to leave preempted that.

51) Once she decided to end the detention, on her own, the police were left with a choice. They could let her walk away and simply hope that someone else might identify her. They would be left with the prospect then of watching all of the witnesses or potential perpetrators walking calmly away. They could assess whether they then had reasonable and probable grounds for an arrest with respect to the assault of A.M.. No one had identified D.S.N. specifically as the person who had assaulted A.M.. They simply did not have reasonable grounds to make that arrest. They could arrest her for obstruction because she was failing to comply with their demands.

52) Once she had been detained, properly, she did not have the right to leave. A person has the right to walk away from police questioning. Once the police decide to detain for investigation, that changes. At that point, her refusal to remain became obstruction.

53) If the detention were arbitrary, she would have had the right to walk away.

The person who decides to walk away from police detention, like the person who resists arrest, plays the odds that the detention or arrest will be found to have been illegal.

54) The detention here was reasonable and proportionate. Once she was detained, by being physically pulled back to the scene by the police, she had the obligation to remain until such time as the investigative detention became unreasonable. By attempting to leave she was obstructing the police in the performance of their duties.

55) The evidence is very clear that she also struggled and resisted arrest. The evidence of both Constable Meshal and Constable Withrow as well as D.S.N.'s own evidence makes it abundantly clear that she did not comply with the demands to put her hands behind her back. They were required to physically force her to submit and she resisted that.

56) The final issue is with regard to the allegation that D.S.N. kicked Constable Meshal. D.S.N. says she did not. Constable Meshal says she did. No one else had a clear view of the situation for the entire time during which the officers were

taking D.S.N. to the police vehicle.

57) Constable Withrow did say that he heard Constable Meshal made a sound that one might make upon being kicked. Constable Withrow could indeed have embellished his evidence and claimed to have seen the kick but he did not. His evidence and that of Constable Meshal is very reliable.

58) That of course, is not the issue. The issue is whether D.S.N.'s evidence or any of the evidence raises a reasonable doubt. D.S.N. was angry, upset and screaming at the officers when she was being removed. She did not simply decide that the jig was up and calmly walk away to the police car. She fought and struggled. Given her agitated state it is reasonable to infer that she would have a less than clear recollection of what happened after she was brought to the ground and placed in handcuffs

59) While giving her evidence she presented as being remarkably different from the person who was involved with this incident. The very shy, polite and respectful young woman in the courtroom would hardly seem to be the same person who refused to identify herself, defied the demands of the police to remain at the scene, and then fought with them as they tried to restrain her. Those are things that she

actually admitted to having done. There is a disturbing disconnect. It is disturbing because it is the very opposite of what is described by the phrase “what you see is what you get”.

60) Of course people don't behave in court the way they do at the Busker's Festival, when their friends are watching. But it is very difficult to accept the denial from a person who is so fundamentally different in court than in what might be called “real life”. It leaves the impression that at one of those times, a part was being played, either for those at the Busker's Festival or for those in the courtroom. Whether the part was being played there or here, that raises a serious question as to the extent to which D.S.N.'s testimony can be relied upon. Given her high state of agitation at the time of the incident, and the strong testimony of the two officers, I find that her evidence does not raise a reasonable doubt as to her guilt. The crown has proven beyond a reasonable doubt that she did assault Constable Meshal by kicking him.

61) I find D.S.N. guilty of all three charges.

J