

## POLICE POWERS.

"(Police officers) have no power whatever to arrest or detain a citizen for the purpose of questioning him or of facilitating their investigations. It matters not at all whether the questioning or the investigation is for the purpose of enabling them to ascertain whether he is the person guilty of a crime known to have been committed or is for the purpose of enabling them to discover whether a crime has or has not been committed. If the police do so act in purported exercise of such a power, their conduct is not only destructive of civil liberties but it is unlawful." Regina v. Banner (1970) VR 240, at p 249, the Full Bench of the Northern Territory Supreme Court

Some time ago, I was made aware of a very interesting Victorian Supreme Court ruling. This was an appeal against the judgement handed down in the Victorian Magistrates Court in the matter of Hemingway vs. Hamilton (2011) VMC 10. The magistrate dismissed a charge against Andrew Hamilton of failing to stop for police because Hamilton was not obliged to do so if he was not actually under arrest.

The Director of Public Prosecutions appealed this judgement in the Supreme Court before Justice Stephen Kaye - DPP vs. Hamilton (2011 VSC 598, but the appeal failed and the original judgement by the Magistrates Court was upheld. Justice Kaye stated:

"It is an ancient principle of the Common Law that a person not under arrest has no obligation to stop for police, or answer their questions. And there is no statute that removes that right. The conferring of such a power on a police officer would be a substantial detraction from the fundamental freedoms which have been guaranteed to the citizen by the Common Law for centuries."

Judge Stephen Kaye – Melbourne Supreme Court ruling - 25 November 2011

A very important thing to remember is that a person can only be placed under arrest if he has committed a crime or is reasonably suspected of doing so. For there to be a crime, there has to be a victim or injured party or a violation of contract. So if a person has not committed a crime, injured anybody or violated a contract, he should be free to go about his business without any form of harassment by police.

It must be noted that Justice Kaye said that his ruling was very narrow and in this particular matter, there was no evidence that the defendant was fleeing from police after being informed that police were intending or attempting to arrest him. The defendant had not refused to provide his name and address to police although he was under no obligation to identify himself, as the ruling from Magistrate Duncan Reynolds indicates. The ruling hinged on whether the police had the power to require Hamilton to stop and speak to them when they were not in the course of actually arresting him and whether the police were actually acting in the execution of their duty under the Summary Offences Act.

A very important ruling was made by Chief Justice Latham of the High Court of Australia, as follows:

Common expressions such as: 'The Courts have declared a statute invalid' sometimes lead to misunderstanding. A pretend law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally, he will feel safer if he has a decision of a court in his favour, but such a decision is not an element that produces invalidity in any law. The law is not valid until a court pronounces against it - and thereafter invalid. If it is beyond power, it is void ab initio HCA 1942 (65 CLR 373 at 408). Chief Justice Latham - High Court of Australia - Uniform Tax Case

It is important to note that the Infringements Act 2006 has been validly challenged by Gerrit Schorel-Hlavka on 23 February 2011. It was challenged on Constitutional grounds and therefore it is Ultra Vires and no court can hear or determine any case involving the Infringements Act 2006 until or unless a court declares it otherwise." So if you are charged with any offence under this Act, your first line of defence is to challenge its validity and quote the precedent.

Firstly, I say that I support police to the hilt in their legitimate duties, such as stopping criminal acts, enforcing the law properly and acting in accordance to what the citizenry expect of them. Police have a very hard job and we can only imagine the anarchy and lawlessness that would be inflicted on us if there were no police. Having said this, I do not support police in their role as government revenue-raisers and tax collectors, such as cops booking motorists by entrapment and operating to both official and unofficial booking quotas.

So having absorbed these rulings from the Supreme Court of the Northern Territory, Victorian Supreme and Local Courts, I decided to check them out and see what sort of rights people have when dealing with police. I sent an email to the then NSW Police Minister Michael Gallacher and asked him a number of questions, which he answered. However, some of his answers were rather ambiguous and still left some issues unanswered or unclarified.

#### MUST A MOTORIST STOP WHEN FLAGGED DOWN BY POLICE?

Gallacher quoted a number of NSW statutes that required motorist to stop when flagged down for a breath or drug test. I really have no issue with this, because I am very much against people driving cars under the influence of anything that may impair them. However, Gallacher also quoted Section 39 of the NSW Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA) that states that it makes it an offence for a person to fail or refuse to stop a vehicle when directed to do so by a police officer.

But Justice Kaye ruled in the Victorian Supreme Court that "a person not under arrest has no obligation to stop for police, or answer their questions. And there is no statute that removes that right." One can assume that Victoria has similar laws to NSW. So there cannot be two laws - one that states that people have to stop for police and another that states that people don't have to stop for police. There is really no difference between pedestrians or drivers - the common law and LEPRA - because they both refer to "a person", whether that person is a cyclist, motorists, pedestrian or any other person doing anything.

In the Justice Kaye matter, the defendant was acquitted on the charge of failing to stop for police. He has not been charged again and the Supreme Court appeal by the Director of Public Prosecutions against the ruling from the Magistrates Court failed. This obviously means that Justice Kaye's ruling is still valid and within certain parameters, it seems that people are not required to stop for police until they are placed under arrest, despite all the laws that state that people do have to stop for police if directed to do so.

In his ruling in July 2013, Magistrate Duncan Reynolds stated, "Nor is s.59 of the (Road Safety) Act a statutory source of such power." Supreme Court Judge Stephen Kaye stated literally the same thing when he said, "And there is no statute that removes that right." So there are two respected judges who have asserted that statutory laws do not trump or negate common law, therefore citizens can exercise their common law rights and if they violate statutory laws in the process, then those statutory laws cannot be enforced.

I consider that unless Justice Kaye's and Magistrate Reynolds's rulings are overturned in the High

Court or another precedent that overturns those rulings is set, then people are not required to stop for police unless they are arrested and there is no statute, such as Section 39 of LEPR that removes that right. That's only logical.

#### DRIVING OFF AFTER BEING FLAGGED DOWN

In the case of a motorist driving off after police flag him down, both rulings by Justice Kaye and Magistrate Reynolds also seems to apply here. If a person does not have to stop for police until he is placed under arrest, then at the time he is being flagged down, he is not under arrest and thus under no obligation to stop for police if he is not fleeing from them. Again, I consider that until both rulings by Justice Kaye and Magistrate Reynolds are overturned by the High Court or an overruling precedent is set, then people are not required to stop for police unless they are placed under arrest. There cannot be two conflicting laws in force.

#### CAN A MOTORIST SUE THE POLICE FOR BASELESS ARREST?

Gallacher dodged this question and stated that motorists in this situation should seek legal advice. I understand that motorists do commit offences and deserve to be arrested and I would not dream of questioning police in dealing with such people. However, there are mountains of examples of police wrongfully arresting people for no good reason and such victims of police errors should have recourse to compensation. Every person is entitled by law to have his day in court.

But it costs a lot of money and time to fight court cases and people who are wrongly arrested and charged with crimes and who are acquitted should be able to successfully sue for every cent of their costs, plus sue for exemplary damages - punitive amounts as compensation for their trauma and inconvenience that the police caused by their wrongful arrest and prosecution of them. If people did this on a regular basis, police would think twice about exceeding their powers and they would have to give serious consideration to the consequences of their wrongful actions.

#### DO YOU HAVE TO ACTUALLY HAND YOUR DRIVER'S LICENCE TO A COP?

Section 175 of the NSW Road Transport Act 2013 (NSW) states:

(1) An authorised officer may, in the execution of the officer's functions under the road transport legislation, require the driver or rider of a vehicle or horse to do any or all of the following:

(a) produce the driver's relevant Australian driver licence (in the case of the driver of a motor vehicle)...

So what is the definition of "produce"? There is case-law that clarifies this issue. The leading authority on the meaning of "produce" in the context of a traffic stop is *Tremelling vs Martin* (1971) Crim LR 596 (QBD).

In this case, Martin was pulled over by police and asked to produce his licence and insurance documents to a police station within five days. When he went to the police station to do so, he was met with a clerk who saw the documents briefly, but then had to go and answer a phone call. While the clerk was still on the phone, Martin decided to pick up his documents and leave, believing that they had been sighted. He was later charged with failing to produce his driver licence and certificate of insurance after being required to do so.

The matter ended up in court, where it was held that in situations where police ask you to produce your licence or insurance documents, you must give them a reasonable time to examine the

documents. This rule applies regardless of whether you are asked to hand over your licence by the side of the road or at a police station. The court found that in Martin's case, he had failed to give the police sufficient time to examine the documents in question.

There is no definition of "reasonable time for examination" or any specific case-law stating whether or not a licence must be physically handed-over to police, but the time period must be sufficient for police to verify the authenticity of the licence. So there is a very strong argument that showing it for a sufficient period of time without physically handing it over would suffice. That assertion is supported by the definition of the word "produce" in the Oxford dictionary, which is "bring forward for inspection, consideration or use".

So if you are pulled over by police, you are within your rights to say something like "I am producing my licence for a reasonable time to enable you to examine it, but I do not wish to surrender it to you".

However, there are certain offences where police are able to suspend you from driving and require you to surrender your licence immediately, including speeding by over 45km/h and driving with a mid or high range prescribed concentration of alcohol. For those offences, police are required to serve you with a notice of suspension. So there is case law to show that you do not have to physically hand your licence to a copper, but you have to give him adequate time to see it. Of course you should be recording the encounter, so if the cop does something untoward, you have hard evidence to nail him.

#### CAN POLICE STOP, ENTER AND SEARCH A VEHICLE?

The power of police to stop, search and enter a vehicle and to erect roadblocks is provided in Division 5 of the Law Enforcement (Powers and Responsibilities) Act 2002 NSW (LEPRA). Obviously, the Act allegedly gives police the power to stop, search and enter a vehicle, however the ruling from Supreme Court Judge Kaye would tend to negate these powers. Logic dictates that if common law and that Supreme Court ruling means that a person does not have to stop for police if he is not actually under arrest, then police have to firstly arrest that person before he is able to be detained.

The important thing to note is that police do not have the right to enter and search a vehicle without a search warrant, unless they have reason to believe that a crime has been committed. Therefore, a motorist who is pounced upon by police should never ever allow them to enter and search their vehicles without a warrant. If police claim that they have the right to search a motorist's vehicle because they suspect the motorist of having committed a crime, then police have an obligation to state the details and specify the specific crime that they allege has been committed. This is where every motorist should video and audio record every encounter with police and also have a car black box recorder operating to gather hard evidence to ensure that the law is being enforced properly and police are not exceeding their powers.

#### USE THIS DOCUMENT IF YOU ARE PULLED OVER BY POLICE

If you are pulled over by police and you refuse to answer their questions and you start to video record them, many cops will demand that you cease doing so and some may even be silly enough to threaten you with prosecution under the Listening Devices Act and other laws. The fact is that a person is legally entitled to record whatever he likes in a public place and police have no right to try and stop anybody from doing so.

I fully support police who are performing their law enforcement role. However, I am very much opposed to police acting as revenue-raisers and tax collectors, as they do when they pretend to be enforcing speeding offences by hiding in bushes and snapping photos and then sending fines a month after the offence. Enforcement means preventing the offence at the time it is happening, not taking happy snaps and allowing perpetrators to keep going. This is akin to police dealing with a bank robbery by taking photos of the robbers as they run out of the bank with their loot and then trying to find them one month later. This is not enforcement - it is nonsense.

In my opinion, police who allow motorists to continue speeding after pinging them with speed guns should be charged with dereliction of duty. The principle of enforcement is that police stop the continuation of an offence at the time they are made aware of that offence. But if police set up speed traps and hide behind bushes and ping motorists speeding and allow them to continue to speed and then send them infringement notices, that is not enforcement at all. The police know damn well that they could stop people speeding merely by driving their marked police cars on the road, but they choose to entrap them instead.

Motorists who are booked in such a way should fight the booking in court and question the police as to why they allowed them to continue speeding after ascertaining that they were doing so. This would be extremely embarrassing and would further prove that police were there to raise revenue, not to enforce the speeding laws and prevent motorists from speeding at the time.

Despite the Attorney-General's and Police Minister's explanations, it seems that police must have reasonable grounds to even ask for a driver's identification. If speeding is not an indictable offence, then identification does not have to be disclosed. Even the statutory laws requiring the removal of face coverings for identification purposes do not override the common law rights of people to refuse to identify themselves unless they are placed under arrest.

However, I consider that no person should be allowed to maraud the streets wearing full-face disguise and understands exactly why this law was enacted, because of the infamous Carnita Matthews burqa incident in NSW. I support the police in every way in regard to compelling motorists to remove burqas to identify them. This is not for reasons of motoring offences, but for security reasons and the threat of terrorism.

But I want motorists to understand that they have legal rights and to realise that police do not have unfettered powers to stop and detain people without very good cause. Again, I remind all citizens that they should never talk to police, because anything they say can and may be used AGAINST them - never FOR them.