

CANADA / JUDGMENT

R. v. Aeichele

2020 BCSC 298

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 298 R. v. Aeichele

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Aeichele,

2020 BCSC 298

Date: 20200303

Docket: 45595-2

Registry: Penticton

Regina

v.

Cheryl Lynn Aeichele and Elkena Michael Knauff

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment on Voir Dire

Counsel for Crown:

J.M. Le Dressay

Counsel for the Accused,

Cheryl Lynn Aeichele:

J.H. Pennington

Counsel for the Accused,

Elkena Michael Knauff:

M.A. Patterson

Place and Date of Trial/Hearing:

Penticton, B.C.

September 17 - 19, 2019

Place and Date of Result Given:

Penticton, B.C.

October 11, 2019

Place and Date of Judgment:

Penticton, B.C.

March 3, 2020

A. Introduction

- [1] These reasons follow a blended voir dire on the issue of what the two accused say were a number of Charter breaches by members of the Penticton RCMP prior to, during, and after their arrests on September 20, 2017. They apply to have all items seized by the police on that date excluded as evidence at the trial pursuant to s. 24(2) of the Charter.
- [2] Firstly, the accused say that they were detained by the RCMP without reasonable grounds, in violation of their s. 9 Charter rights.
- [3] Secondly, they say that the vehicle that they were occupying at the time of their arrest was unlawfully searched, in violation of their s. 8 Charter rights.
- [4] Thirdly, they say that they were not promptly informed of the reasons for their detention or provided with the opportunity to retain and instruct counsel following their detention and arrest, in violation of their s. 10 Charter rights.
- [5] The accused are jointly charged on a three-count indictment for possession of methamphetamine, cocaine and fentanyl for the purpose of trafficking. Both accused entered pleas of not guilty to the charges.
- [6] The trial commenced with a voir dire to determine whether the accused's Charter rights had been violated.

B. The Evidence on the Voir Dire

- [7] The evidence is straightforward. At approximately 2:00 pm on September 20, 2017, Constables Chad Jackson and Adam Burton, two members of the Penticton RCMP's Targeted Enforcement Unit ("TEU") were in an unmarked police vehicle conducting routine surveillance at the Penticton Wal-Mart store parking lot. The TEU's mandate is to keep an eye on and disrupt known prolific offenders including those involved in repeated street-level drug use and property crimes.
- [8] Constable Jackson has been a member of the RCMP since 2006 and has been involved in 10-20 prior drug trafficking investigations. In 2015, he was assigned to the TEU. Constable Burton has been an RCMP officer since 2010. He was transferred to Penticton in 2012 and was assigned to the TEU in May 2015. He has been involved in 6-12 prior dial-a-dope drug investigations.
- [9] The officers were not involved in any particular investigation that day, however it was "Welfare Wednesday", a day of the week known in the area to typically have an increased volume of street-level drug purchases.
- [10] At approximately 2:15 pm, they observed a Mr. Rai, a person known to them as being a low-level property offender and drug user, walking through the parking lot. They decided to monitor him to determine what he was up to. They observed him walk around the Wal-Mart parking lot, look up and down rows of parked cars, pace at times, enter a Subway to purchase a beverage and use his cell phone. It appeared to the officers that Mr. Rai might be awaiting a vehicle or a person to arrive.
- [11] They observed Mr. Rai meet up with another known illicit drug user, a Mr. Laforme. Mr. Rai and Mr. Laforme continued walking around and looking up and down the rows of parked cars.
- [12] The officers' experience in drug investigations and their prior knowledge of Messrs. Rai and Laforme suggested they might be waiting for a person or vehicle to arrive at Wal-Mart to sell them illicit drugs. They suspected a dial-a-dope operation, and decided to continue the surveillance. The surveillance lasted nearly two hours.
- [13] They next observed Messrs. Rai and Laforme walk briskly from the sidewalk in front of Wal-Mart's main entrances and disappear around the north side of the building.
- [14] The officers followed the men to the north side of the Wal-Mart building where they saw a white Explorer parked near the north-west end of the building. Mr. Rai was talking to the driver and Mr. Laforme was talking to the passenger. Neither officer recognized the vehicle or its occupants.

- [15] It was shortly before 4:00 pm. Both officers strongly suspected a dial-a-dope drug transaction was unfolding and they decided to investigate further. Neither officer had seen any hand-to-hand transaction, or exchanges of drugs or money. The officers moved in. Constable Jackson parked the unmarked police vehicle at the rear of the Explorer.
- [16] Acting on their experience, instincts and suspicions, the officers exited their vehicle with Cst. Jackson going to the driver's side of the Explorer where Ms. Aeichele was seated, and Cst. Burton going to the passenger side where Mr. Knauff was seated. They asked the four individuals to explain what they were up to.
- [17] Although neither officer thought about the fact that they had detained four people nor about those individuals' Charter rights, the Crown concedes the four individuals were detained within the meaning of the Charter ("Initial Detention").
- [18] Mr. Rai started to walk away from the Explorer. Constable Jackson told him to stop and he complied. Constable Jackson did not recognize Ms. Aeichele but recognized Mr. Knauff. He knew him to be involved in past criminal activity and with illicit drug dealers.
- [19] Constable Jackson asked Ms. Aeichele for identification. She complied. He noted a loose \$10 bill on the dash of the Explorer consistent, he thought, with the sale of a "dime bag" of drugs which typically sells for \$10. Ms. Aeichele told Cst. Jackson that she knew Mr. Rai from attending school together and they were just saying hi.
- [20] Meanwhile, at the passenger side, Cst. Burton had asked Mr. Knauff and Mr. Laforme to explain what they were up to as he conducted a visual search of the interior of the Explorer. He did not see anything suspicious.
- [21] The Initial Detention lasted about four minutes during which neither officer informed the detainees of the reason for their detention. Although the officers suspected they had interrupted a drug transaction in progress, they did not feel they had grounds to arrest anyone and told the four that they were free to go.
- [22] Messrs. Rai and Laforme immediately departed on foot to the west. Ms. Aeichele reversed the Explorer and began negotiating her way around Cst. Jackson's vehicle. As she did so, Cst. Burton saw a small baggie that he immediately identified as a dime bag on the pavement underneath the passenger side of the Explorer where Mr. Laforme had been standing. He could see that the baggie contained a hard white substance that he suspected was crack cocaine.
- [23] In his mind, this confirmed his earlier suspicions that they had interrupted a dial-a-dope drug transaction and that either Mr. Laforme or Mr. Knauff dropped the baggie underneath the Explorer to conceal it.

- [24] Constable Burton informed Cst. Jackson of his discovery and the officers ordered Ms. Aeichele to stop the Explorer. She complied. The officers immediately informed Ms. Aeichele and Mr. Knauff that they were under arrest for possession of a controlled substance.
- [25] Both occupants were asked to exit the vehicle. Both denied having any drugs. As Ms. Aeichele opened the driver's door, Cst. Jackson noted more dime bags, a loose \$20 bill and a loose \$5 bill on the door sill between the driver's seat and the driver's door.
- [26] At 4:04 pm, Ms. Aeichele was formally arrested for possession of a controlled substance and provided a Charter and police warning. She stated that she understood the warnings and requested to speak to counsel.
- [27] Mr. Knauff was agitated, prompting Cst. Burton to search his pockets. Constable Burton found a large baggie containing four smaller baggies of white powder that was later determined to be cocaine. Mr. Knauff was formally arrested by Cst. Burton at 4:06 pm, also for possession of a controlled substance, and was provided a Charter and police warning. He stated that he understood and requested to speak to counsel. Both were handcuffed behind their backs and seated on a curb.
- [28] Neither officer considered giving the accused access to counsel through the use of either the accused's or the officers' cell phones. In Cst. Burton's experience, it was rare to do so, especially since it was going to be a short drive to the nearby detachment. The officers felt that their investigation into a possible dial-a-dope operation would include the accused's cell phones and that allowing the accused to use their phones at the curb might result in evidence being compromised. Further, any discussions with their lawyers at that point would not have been private.
- [29] The officers radioed for a cruiser to transport the accused to the Penticton detachment, and for another cruiser to assist in locating Messrs. Rai and Laforme. The cruisers arrived at 4:10 pm and the accused were transported to the detachment, a seven to twelve minute drive.
- [30] At 4:15 pm, Csts. Jackson and Burton began a search of the Explorer completing it at 4:25 pm. They discovered and seized drugs, money, a digital scale, a number of empty "dime bags", drug paraphernalia, two cell phones, credit cards and identification belonging to third parties located in a purse and in a small safe in the console ("Seized Items"). Constable Burton took photographs of the Seized Items in the locations they were found in the Explorer. The Seized Items were taken by Cst. Burton to the Penticton detachment for processing. It was determined that the drugs were methamphetamine, powdered cocaine, crack cocaine, and fentanyl mixed with caffeine.

- [31] Corporal Van Every, a seasoned officer of some 23 years and who had attended the scene in one of the cruisers to assist Csts. Jackson and Burton, located and arrested Messrs. Rai and Laforme for possession of a controlled substance, and brought them to the Penticton detachment around 4:30 pm. At that time, he noted that Mr. Knauff was in the beginning stages of being processed at the booking desk and assisted in the process. At this point, both accused were under arrest for possession of a controlled substance only.
- [32] At 4:35 pm, Cpl. Van Every placed a call to Mr. Knauff's lawyer, Mr. Patterson, and left a message. Mr. Patterson returned the call at 5:04 pm and Mr. Knauff was placed in a private room to talk to him. The call ended at 5:09 pm.
- [33] At 5:35 pm, Cpl. Van Every placed a call to Ms. Aeichele's requested lawyer, Mr. Pennington, and left a message. Ms. Aeichele stated that she did not wish to speak to an alternate lawyer and was content to await Mr. Pennington's return call. There is no explanation for the delay of some 90 minutes from Ms. Aeichele's arrest at 4:04 pm and her request to speak to counsel, until 5:35 pm when a call was placed to her lawyer Mr. Pennington.
- [34] It took Cst. Burton approximately two hours to process the Seized Items. The investigation had changed from possession of a controlled substance, to possession for the purpose of trafficking.
- [35] At 6:43 pm, Cst. Burton arrested Ms. Aeichele and charged her with three counts of possession for the purpose of trafficking and possession of stolen property respecting the birth certificate and credit cards found in the purse in the Explorer. Ms. Aeichele stated that she understood the charges. Constable Burton advised her of her right to counsel and she stated that a message had already been left for Mr. Pennington to call.
- [36] At 6:48 pm, Cst. Burton arrested Mr. Knauff and charged him with three counts of possession for the purpose of trafficking and two counts of breaching the conditions of bail on another matter. He informed Mr. Knauff of his right to counsel. Mr. Knauff requested to speak to Mr. Patterson again and he was escorted to the lawyer room. Constable Burton successfully called Mr. Patterson at 6:54 pm and left the room to allow Mr. Knauff to speak to Mr. Patterson. The call lasted some 5 minutes.

C. Crown's Position

- [37] Respecting whether the officers had grounds for the Initial Detention, the Crown points out that Csts. Jackson and Burton are seasoned officers, experienced in illicit drug transactions. Despite not seeing a hand-to-hand transaction, the indicia of a possible dial-a-dope transaction were present. These indicia included:
- a) Messrs. Rai and Laforme were known drug users;
 - b) It was a day of the week when drug transactions are known to increase;

- c) Messrs. Rai and Laforme's behavior at the Wal-Mart parking lot suggested that they were waiting for someone;
 - d) After waiting nearly two hours, Messrs. Rai and Laforme suddenly and quickly moved from the front of the Wal-Mart store to its north-west side which is typically a quiet area; and
 - e) The officers saw Messrs. Rai and Laforme speaking to the occupants of an unknown vehicle.
- [38] The totality of the circumstances gave rise to reasonable and probable grounds for the officers to believe, subjectively and objectively, that there was a dial-a-dope drug transaction taking place.
- [39] Respecting the s. 10(a) Charter breach issue, the Crown concedes that the accused should have been informed of the reason for the Initial Detention. However, the Crown asserts that this is not a case where the officers acted maliciously or deliberately avoided compliance with the Charter. Rather, it is a case where two officers in pursuit of their duties moved in to interrupt what they suspected was an illegal drug deal, and did not give sufficient thought to the accused's Charter rights. The detention lasted only about four minutes and had a minimal impact on the detainees. The four detainees were then free to go. Despite the breach, in the circumstances, the Seized Items should be admitted under s. 24(2) of the Charter.
- [40] Respecting the s. 10(b) Charter breach issue, the Crown argues that the delay in the implementation of the accused's right to consult counsel until they had been transported to the local detachment was reasonable and not a breach of their Charter rights. In the context, and given that the accused's cell phones were a possible repository of evidence, the officers were not prepared, nor were they obliged, to allow the accused to use their own or the officers' cell phones. The arrest took place within minutes of the RCMP detachment where a private booth was available. The Crown asserts that accommodating access to counsel at the scene in the Wal-Mart parking lot is neither practical nor reasonable.

D. Ms. Aeichele's Position

- [41] Although proactive police work includes being able to "meet and greet" members of the public and stop to talk to them, there are limits to what is allowed. Constables Jackson and Burton were not involved in an investigation. They were parked and watching Mr. Rai and later Mr. Laforme, who were minding their own business and who were not engaged in any criminal activity. The officers made assumptions and based their decision to watch them on a hunch.
- [42] Ms. Aeichele points to the officers' lack of contemporaneous notes, their differing evidence respecting where they were parked, how many times their vehicle was moved, and on whether they were in plain clothes, as Cst. Jackson states, or whether Cst. Burton was wearing a police vest, as Cst. Burton suggests, to argue that these discrepancies make the officers' evidence largely unreliable.

- [43] Respecting the Initial Detention, the test for reasonable and probable grounds, while less than beyond a reasonable doubt, is still a serious threshold. Ms. Aeichele argues that her detention was marked by a total absence of reasonable and probable grounds. She asserts that on any objective measure, the officers had no basis to believe that a drug transaction was taking place. Whatever suspicious activity Messrs. Rai and Laforme may have been engaged in, Ms. Aeichele argues that there was nothing to connect that activity to the Explorer and Ms. Aeichele. Their interaction with Messrs. Rai and Laforme may have been mildly suspicious to the officers, but the totality of the evidence falls short of objective reasonable grounds. The detention was therefore a violation of her s. 9 Charter rights.
- [44] Further, she argues, the Initial Detention and the arrest moments later were one continuous event, not separate events as the Crown suggests. Because the Initial Detention was made without reasonable and probable grounds and in violation of Ms. Aeichele's s. 10(a) rights, it was illegal, and so were the events that followed.
- [45] Ms. Aeichele refers to *R. v. Ulm*, 2015 BCSC 1979, as an example of where the police have been found to overstep their authority without reasonable and probable grounds and effect a detention.
- [46] To add to the illegality of the officers' conduct, Ms. Aeichele points to their failure to immediately advise her of the reason for her detention. Such a failure cannot be condoned even if the officers were acting in good faith. Once there has been a Charter violation, the officers' innocent error or ignorance of the scope of their duty is no defence. It is the officers' responsibility when dealing with members of the public to be mindful of the scope of their authority and to act within it: *R. v. Mann*, 2004 SCC 52, at para 55.
- [47] Respecting s. 10, Ms. Aeichele argues that the officers' failure to facilitate her immediate right to access to counsel was also a violation of her rights. She waited at the scene while handcuffed, then was transported to the detachment, placed in a cell and not allowed to contact counsel for nearly 90 minutes. She argues this a clear violation of the Charter.
- [48] Ms. Aeichele argues that the breaches of her Charter rights are serious and had a significant impact on her liberty interests. Society's interest in adjudication of this case on its merits does not weigh in favour of inclusion of the Seized Items following her illegal detention and arrest.

E. Mr. Knauff's Position

- [49] Mr. Knauff adopts a similar position to Ms. Aeichele. Constables Jackson and Burton observed what looked to them to be suspicious activity by Mr. Rai and Mr. Laforme, followed by a benign activity that they merely suspected to be a drug deal.

- [50] Mr. Knauff submits that the officers had a cavalier disregard for his Charter rights throughout. They had no knowledge of either the Explorer or its occupants. There were no observations made of any hand to hand exchange, nor was there any evidence that the four detainees were doing anything but talking. The officers' own assumptions led to an unsupported belief that the dime bag on the ground belonged to one of the four individuals they had just detained. These facts do not give rise to a credibly-based probability.
- [51] Accordingly, Mr. Knauff asserts the Initial Detention was without objectively reasonable and probable grounds and was illegal, as was the subsequent arrest and search of the Explorer and Mr. Knauff's person.
- [52] The arrest was initiated by seeing the dime bag on the ground and was objectively coloured by the Initial Detention which was coloured by the officers' "hunches". It was not difficult for them to make the leap to assuming the dime bag came from the Explorer, despite the lack of objective evidence that makes that connection.
- [53] Mr. Patterson points to the lack of police notes that were maintained that makes the officers' evidence unreliable. He asserts that police officers are expected to come to court with contemporaneous notes, not notes that are prepared hours later. They did not. Their evidence differed in respect of the places their car was parked, whether it moved and what they were wearing.
- [54] Respecting the failure of the officers to facilitate Mr. Knauff's access to counsel in violation of his s. 10(b) rights, Mr. Patterson relies on the comments of the Supreme Court of Canada in *R. v. Suberu*, 2009 SCC 33, at para 42:
- [42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.
- [55] And also, their comments in *R. v. Taylor*, 2014 SCC 50, at para 32:

- [32] The duty of the police is to provide access to counsel at the earliest practical opportunity. To suggest, as the trial judge did, that it is presumptively reasonable to delay the implementation of the right to counsel for the entire duration of an accused's time waiting for and receiving medical treatment in a hospital emergency ward, without any evidence of the particular circumstances, undermines the constitutional requirement of access to counsel "without delay".
- [56] Mr. Patterson asserts that the s. 10(b) right is not just the right to counsel, it is the right to counsel without delay, regardless of the circumstances and regardless of whether evidence may have been elicited before access to counsel has been facilitated: *R. v. Moyles*, 2019 SKCA 72, at para 81.
- [57] Therefore, he argues, "without delay" means immediately and the failure on the part of Csts. Jackson and Burton to provide Mr. Knauff with a telephone so that he could call his counsel immediately at the scene of his arrest in the Wal-Mart parking lot is a flagrant breach of his Charter rights and cannot be condoned. He points out that at one point during their detention, there were six police officers at the scene and Mr. Knauff was not provided with access to counsel until 35 minutes later. That, he says, is simply not good enough.
- [58] He argues that although there is a societal interest in prosecuting drug offences, Csts. Jackson and Burton's cavalier attitude of detaining people without reason, without explaining why and arresting them without granting them their right to access to counsel immediately, requires this Court to distance itself from officers who ignore Charter rights. Accordingly, the Seized Items should not be admitted into evidence.

F. Discussion

- [59] The sole issue in this voir dire is whether the Seized Items should be excluded under s. 24(2) of the Charter on the basis that Csts. Jackson and Burton violated the accused's rights under sections 8, 9 and 10 of the Charter because the admission of the Seized Items would bring the administration of justice into disrepute. Section 24(2) reads:

24(2). Where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

- [60] It is therefore necessary to determine whether the accused's rights were infringed or denied during the Initial Detention, the Arrest, the search of Mr. Knauff and the Explorer or afterward.

i. The Initial Detention

- [61] Section 8 of the Charter does not protect against all encroachments of a person's right to privacy. Its goal is to protect the public from arbitrary state action by balancing the public's interest in being left alone against the state's interest in investigating crime. It is an objective standard. In most cases, the state's interest in detecting and preventing crime begins to prevail over an individual's privacy interests when credibly-based probability replaces suspicion: *R. v. Chehil*, 2013 SCC 49, at para. 22.
- [62] The objective justification based on reasonable suspicion must be assessed cumulatively against the totality of the circumstances, must be fact-based, flexible and grounded in common sense and practical everyday experience. Generalized suspicion is not enough. The reasonable suspicion standard addresses the possibility of uncovering criminality, and not a probability of doing so: *Chehil*, paras. 29-30 and 32.
- [63] In *R. v. Bracchi*, 2005 BCCA 461, the Court of Appeal held at paras. 20-21, that the proper test was whether the totality of the circumstances upon which the Crown relied as objective justification for arrest when considered cumulatively, amounted to reasonable and probable grounds. The question is whether a reasonable person standing in the officer's shoes and considering the officer's training, knowledge and experience constituted objectively reasonable grounds that an offence was taking place: *R. v. Juan*, 2007 BCCA 351 at para. 27; *R. v. Jir*, 2010 BCCA 497 at para. 24; *R. v. Luong*, 2010 BCCA 158 at para. 18.
- [64] The Crown concedes that the accused were detained when Cst. Jackson parked his vehicle behind the Explorer partially blocking its ability to leave. Further, the Crown concedes that the officers did not comply with the detainees' s. 10(a) Charter rights by not advising them the reason for the Initial Detention.
- [65] The accused argue that on this basis alone, their application to exclude the Seized Items should succeed. They say that what followed the Initial Detention is a continuum of the same event.
- [66] Respecting the Initial Detention, I have no difficulty concluding that the officers properly detained both accused for the purpose of determining if there was an illegal dial-a-dope transaction in progress. They were engaged in usual, routine duties as members of the TEU in conducting surveillance at the Wal-Mart parking lot. In the circumstances of this case, this was not an arbitrary detention.
- [67] Police duties at common law include the preservation of the peace, the prevention of crime, and the protection of life and property: *Mann*, at paras. 25-26, citing *R. v. Dedman*, [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97. In my view, their "proactive policing" falls well within these duties.
- [68] Respecting the s. 10(a) breach issue, I accept that the officers had a duty to inform the accused as to the reason for their detention as soon as Cst. Jackson stopped his vehicle behind the Explorer and they stepped out. The officers failed in their duty and violated the accused's s. 10(a) Charter rights during what was an otherwise lawful detention.

[69] It is clear that following the brief Initial Detention, both officers lacked a subjective belief that there were grounds to arrest the four individuals and although their suspicions remained, they decided that all four were free to go. At that point, the Initial Detention was over. Messrs. Rai and Laforme departed. Ms. Aeichele had the option of staying put. Had she not reversed the Explorer, Cst. Burton would not have seen the dime bag on the ground underneath where the Explorer had been parked. Although the officers were not asked, I infer that had Ms. Aeichele simply stayed put, the officers would have left and there would have been no arrest.

ii. The Arrest

- [70] For the arrest to be valid, arresting officers must have believed that the accused were engaged in committing an indictable offence. The standard of proof is that of reasonable probability, that is, the arresting officers must subjectively have reasonable and probable grounds to arrest and those grounds must be justifiable from an objective point of view: *R. v. Storrey*, (1990), 53 C.C.C. (3d) 316 at p. 324 (S.C.C.); *R. v. Tran*, 2007 BCCA 491 at para. 6.
- [71] Tran involved an individual by the name of Mr. McConville who was known to the police as a habitual drug-user and who supported his habit by committing property crimes. A police officer had been told that Mr. McConville had been recently released from jail and had him under surveillance. The officer observed Mr. McConville and an accomplice unsuccessfully attempt to break into a series of homes. A few minutes later, the officer saw a vehicle pull into a lane and Mr. McConville get in and kneel in the passenger seat in close proximity to the driver, Mr. Tran. The officer could not see what was taking place. Mr. McConville exited the vehicle about 15 seconds later. Mr. Tran was arrested for trafficking. Mr. Tran argued that his rights under ss. 8 and 9 of the Charter were violated because the officer did not have reasonable and probable grounds for his arrest. In convicting Mr. Tran, the trial judge stated at para. 15 (as reproduced at para. 8 of the Court of Appeal's reasons):

In my view, the arresting officer had sufficient evidence to objectively support her view that an offence had been committed. While the observations of what occurred in the lane, standing alone, would have been highly suspicious, I doubt that that would suffice as reasonable and probable grounds. However, when combined with the officer's knowledge of Mr. McCandless' [sic] drug addiction, his casing of the neighbourhood with a crowbar, and his ordinary conduct of doing breaking and enterings and car thefts to support his drug habit, the purpose of what occurred in the lane became highly probable, that is, the acquisition of drugs from the driver. The inference that the driver had drugs in his possession was, accordingly, also highly probable.

[72] On appeal, the Court stated at paras. 13-14:

[13] In this case, Corporal Tupper had 10 years of experience as a police officer, five of which had been as part of a surveillance team focusing on property crime, which frequently brought her into contact with drug addicts engaged in property crime to support their drug use. In the course of her duties, Corporal Tupper had seen in excess of 100 drug transactions. As

she testified, the encounter between Mr. McConville and the appellant in the appellant's vehicle fit the pattern of a "dial-a-dope" transaction, in which the buyer orders drugs from a drug dealer, the dealer arrives in a vehicle to conduct the sale, and the transaction concludes with a very brief meeting in the dealer's car.

- [14] Thus, Corporal Tupper's evidence as to her assessment of the nature of the encounter between Mr. McConville and the appellant was one of the factors the trial judge properly considered.
- [73] The Court upheld the trial judge's conclusion that the officer had objective reasonable grounds to arrest Mr. Tran based the totality of the circumstances.
- [74] When Cst. Burton saw the dime bag on the ground underneath the passenger side of where the Explorer had been, the officers formed reasonable and probable grounds to believe they had indeed interrupted a dial-a-dope drug transaction. The dime bag confirmed what had previously been the officers' mere suspicions.
- [75] Despite the officers having no knowledge of where the dime bag came from, how long it had been there or who put it there, and despite seeing no hand-to-hand transaction, the accused's arrests were prompted by the totality of the circumstances amounting to what, in the officers' minds, was a dial-a-dope transaction. The officers were not required to discount competing inferences before making the arrest.
- [76] In *R. v. Chehil*, 2013 SCC 49 at para. 29, the Court offered the following guidance concerning the reasonable suspicion standard:
- [29] Reasonable suspicion must be assessed against the totality of the circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience. A police officer's grounds for reasonable suspicion cannot be assessed in isolation.

[Citations omitted]

- [77] Assessing whether the reasonable suspicion standard has been met should be guided by common sense, flexibility and practical, everyday experience applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.
- [78] Police have the power to detain for investigative purposes on objectively reasonable and probable grounds: *Mann*, at para. 70. What is objectively reasonable depends on the totality of the circumstances.

[79] In my view, the facts of this case are similar to Tran. There were a number of suspicious circumstances outlined above that, in their totality, and given the officers' knowledge and expertise, persuade me that Csts. Jackson and Burton had reasonably objective grounds for the accused's arrest.

[80] Considering the totality of the circumstances, I conclude that the accused's arrests were legal and were not a violation of their s. 9 Charter rights.

iii. The Search

[81] A search incidental to arrest will be valid if the arrest out of which it arose was valid. Having already concluded that the accused's arrests were valid, the officer's search of the Explorer and Mr. Knauff's person made incidental to their arrest and the subsequent seizure of the Seized Items, was also valid and lawful.

iv. Afterward - Section 10(b)

[82] Section 10(b) imposes a duty upon the police, on arresting or detaining a person: (1) to inform the detainee of their right to retain and instruct counsel; (2) if a detainee has indicated a desire to exercise this right, provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and (3) to refrain from eliciting evidence from the detainee until they have had that reasonable opportunity (again, except in cases of urgency or danger): R. v. Taylor, 2014 SCC 50.

[83] The accused assert that immediately on their detention and arrest, Csts. Jackson and Burton had a duty to facilitate access to counsel immediately. They refer to the Court's comments in Taylor at paras. 24-25:

[24] The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention, and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances. Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

[25] This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights and facilitate access to those rights where requested, both without delay. This includes "allowing [the detainee] upon his request to use the telephone for that purpose if one is available". And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so.

[Citations omitted.]

- [84] I do not read the law to require "instant" telephone access to counsel regardless of the circumstances, but that access to counsel must be facilitated as soon as reasonably practicable: Taylor, paras. 28 and 32.
- [85] Immediately does not mean instantly. Surely, policer officers are entitled to effect an arrest, take a reasonable time to secure the scene, arrange for transport of the suspects to the cells and then arrange for telephone access to counsel there: Taylor, para. 24. I am supported in this conclusion by the fact that police officers are not obliged to let detained or arrested persons use the police officer's cell phones at the scene: Taylor, para. 27.
- [86] Respecting Mr. Knauff, Cpl. Van Every facilitated his access to counsel shortly following the booking-in process at the detachment and in a reasonable period of time in the circumstances. In my view, his s. 10(b) Charter right to access to counsel was not breached.
- [87] Respecting Ms. Aeichele, however, she was taken to the detachment and placed into a cell where she sat for approximately one hour before a call to the counsel of her choice was made. All told it was approximately 90 minutes from the time of her arrest at 4:04 pm until a phone call was placed to Mr. Pennington at 5:35 pm. No explanation for that delay has been proffered by the Crown. In my view, the failure to allow her access to counsel shortly after arriving and being processed at the detachment was a clear breach of her s. 10(b) Charter rights.

G. Section 24(2) of the Charter

- [88] I have concluded that the Initial Detention and the arrests were separate consecutive events and were not continuous or concurrent. The Initial Detention had concluded and the four detainees had either already departed or were in the process of departing. The officers' failure to advise the accused of the reason for the Initial Detention is not connected to their subsequent arrests. I have already concluded that the officers violated the detainee's s. 10(a) Charter rights during the Initial Detention; they did not violate Mr. Knauff's s. 10(b) Charter rights following his arrest, but they did violate Ms. Aeichele's s. 10(b) Charter rights.
- [89] Section 24(2) of the Charter allows the Seized Items to be admitted into evidence unless to do so would bring the administration of justice into disrepute. Before allowing the Seized Items into evidence, I must assess three factors:
- a) The seriousness of the Charter breach;
 - b) The impact on the Charter-protected interests of the accused; and
 - c) Society's interest in the adjudication of the case on its merits,
- (R. v. Grant, 2009 SCC 32; and R. v. Harrison, 2009 SCC 34).

- [90] The Grant inquiry requires an objective analysis. At the heart of the matter is whether, in light of the Charter-infringing conduct of the police in seizing the impugned evidence, its admission will send a message to the public that the court condones police deviation from the rule of law.
- [91] Regarding the seriousness of the breach, I agree with the accused's submissions that the Initial Detention, although otherwise lawful, became unlawful when they were not told the reason for their detention. The officers should have stated that they suspected there was a dial-a-dope operation and that the accused were being detained while they investigated. The detention itself involved the officers questioning what the four detainees were up to. It is not necessary that the detention be in relation to a known, as opposed to a suspected, offence: *R. v. Yeh*, 2009 SKCA 112 at para. 94.
- [92] Respecting the first Grant factor, in my view, the s. 10(a) breach was on the lower end of the seriousness scale because the Initial Detention involved a relatively brief encounter and the officers were acting in good faith in the execution of their duties. This favours inclusion of the Seized Items into evidence.
- [93] Respecting the second Grant factor, the impact of the breach on the accused, after the Initial Detention, the detainees were allowed to depart. They were free to go. The intrusion was limited to a visual search of the Explorer. The impact was minimal. When weighed against what the officers were attempting to prevent - an illegal dial-a-dope transaction - the officers' failure to tell the accused the reason for the detention favors allowing the evidence in.
- [94] Regarding the breach of Ms. Aeichele's s. 10(b) Charter rights by not being given access to counsel for 90 minutes following her arrest, I consider that more serious and favors exclusion of the Seized Items.
- [95] I note, however, that the evidence sought to be excluded is not evidence that directly flowed from the violation of Ms. Aeichele's s. 10(b) Charter rights. The Seized Items were obtained incidental to her lawful arrest which occurred well before. Following her arrest there were no statements or other evidence elicited that Crown seeks to introduce.
- [96] Regarding the third Grant factor, society's interest in the adjudication of the case on its merits heavily favours admission of the evidence. That the offence of trafficking in illicit drugs is a serious criminal offence cannot be understated. Drug trafficking involves profiting from addictions, and increases violence and other related criminal offences. These offences are aimed at prosecuting serious drug offenders and keeping our communities safe.
- [97] Ultimately, the issue boils down to the admissibility of real evidence, the Seized Items, which are essential to the Crown's case. If, despite the s. 10(a) and 10(b) breaches, the Seized Items are excluded, the Crown's case collapses and, in my view, this would have the effect of bringing the administration of justice into disrepute.

H. Decision

[98] It follows that the defence application must be dismissed. I rule that the Seized Items obtained by Constables Jackson and Burton incidental to the accused's arrests, are admissible at trial pursuant to s. 24(2) of the Charter.

"G.P. Weatherill J."

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