

CANADA / JUDGMENT

R. v. Alec

2020 BCSC 1040

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1040 R. v. Alec

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alec,

2020 BCSC 1040

Date: 20200618

Docket: 72354-2

Registry: Prince George

Regina

v.

Myles Hunter Alec

Before: The Honourable Madam Justice Devlin

Oral Ruling on Voir Dire

Counsel for the Crown:

R.D. Withall

Counsel for the Accused Myles Hunter Alec:

A.J. Lagemaat

Place and Dates of Hearing:

Prince George, B.C.

June 15-17, 2020

Place and Date of Judgment:

Prince George, B.C.

June 18, 2020

- [1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

Introduction

- [2] Myles Hunter Alec is charged with a total of 11 counts relating to the possession of a firearm and/or ammunition located inside a car in which he was the front seat passenger. On April 25, 2019, Sergeant Davidson of the Prince George RCMP stopped the car due to a report of expired insurance. During the brief exchange with the driver and Mr. Alec, the police officer noticed what he believed to be a gun case on the floor in the back seat of the car. Based on the information the police officer had at the time, he seized the case out of concern for officer safety. As a result of the seizure of the firearm, Mr. Alec and the driver were arrested and subsequently charged.
- [3] After his arrest at the scene, Mr. Alec was placed inside a police vehicle for 20 minutes and was not provided access to counsel until he was brought to the detachment. Mr. Alec asserts breaches of his ss. 8, 9, and 10 Charter rights in connection with the police questioning him, seizing the bag from the car without a warrant, and delaying his access to counsel. As a result of these breaches, Mr. Alec seeks to have the evidence excluded pursuant to s. 24(2) of the Charter.
- [4] I granted Mr. Alec's application for a voir dire with respect to the allegations that the police breached his ss. 8, 9, and 10 Charter rights. I also agreed that the Charter voir dire could be held in conjunction with a voluntariness voir dire regarding statements Mr. Alec made to the police during this encounter. However, during the evidentiary portion of the voir dire, counsel for Mr. Alec advised his position had changed regarding the voluntariness of the statements, thus eliminating the need for an inquiry into their voluntariness.

Background Facts

- [5] On April 25, 2019, at approximately 11:30 a.m., Sergeant Davidson, dressed in the full RCMP uniform and driving a marked police vehicle, commenced a patrol in the area known as the VLA lands in Prince George. Sergeant Davidson described this area as a high-crime area with numerous incidents of property and drug crime. He said about 90 percent of his patrol is conducted in this area.
- [6] At about 11:50 a.m., he ran the plate for a grey Nissan sedan ("the vehicle") using the police laptop inside his vehicle. He had no particular reason to run the plate, it was simply something he routinely did while out on patrol. He could see that there was a female driver and a male front seat passenger wearing a ball cap, slouched down in the seat. After a few

seconds, various pop-up screens on his laptop provided him with the following information related to the vehicle: the vehicle was owned by Ms. Christensen and she was the registered owner; there were prior police dealings with the vehicle; there were two files in March of 2019 involving possession of a weapon; and the insurance expired on April 24, 2019. He was also provided with the registered owner's address and description and the driving history associated with the car. Finally, he was provided information about any outstanding warrants for the registered owner.

- [7] Based on all the information provided he learned that the car was associated with Eric West and Ms. Christensen. Sergeant Davidson knew of Eric West and that he was wanted for a shooting earlier in the month, a block away from the area. Sgt. Davidson had had no prior dealings with Mr. West, but he knew what he looked like from photographs on the police electronic briefing board.
- [8] At 11:56 a.m., he decided to conduct a traffic stop to check the report of expired insurance and to see if Eric West was the passenger. He activated his overhead lights and the vehicle pulled over to the side of the road.
- [9] Sergeant Davidson approached the driver side of the car and spoke to the female driver. He told the driver the reason for the stop was expired insurance, and the driver told him that she lived nearby. He asked for her driver's licence and insurance. She gave him her photo driver's licence, but he cannot recall if she produced her insurance papers.
- [10] The B.C. driver's licence photo matched the driver, whom he had never met prior to this incident. After obtaining a driver's licence, he began to walk back towards his police car to check the driver's licence on the system, but before he got to his car, he turned back to clarify with the driver what her actual address was because the one on the driver's licence was not nearby, as she had suggested. At this point, Sergeant Davidson did not have any concerns regarding his safety.
- [11] Ms. Christensen provided another address which was closer to the location of the traffic stop. Sergeant Davidson testified he had no particular concerns regarding the different addresses. He then asked the passenger for his name. The passenger identified himself as Myles Alec. Sergeant Davidson asked if he was on any conditions, to which he said 10-10. Sergeant Davidson understood that to be a reference to police jargon for "all clear". Sergeant Davidson explained that, depending on the situation, he will often ask someone if they are on conditions. He knew that the passenger could have refused to respond to his questions and could have left at any time during the traffic stop.

- [12] Sergeant Davidson had never dealt with Mr. Alec before and he knew immediately that Mr. Alec was not Mr. West. Sergeant Davidson testified that during routine traffic stops, he is always looking around the scene for the presence of weapons. After this interaction with Mr. Alec, Sergeant Davidson noticed for the first time what appeared to be a soft, padded long-barrel gun case on the floor behind the front seats. He recognized this type of case because it was similar to his own.
- [13] Sergeant Davidson asked the occupants of the vehicle what was in the case. Ms. Christensen turned her head away from him and Mr. Alec stated, "you can't search the bag" and that the bag did not belong to him. At this point, Sergeant Davidson said he had a "spidey sense" that something was not right. He said he did not feel comfortable because the situation had suddenly changed. At first the occupants were polite, but when he asked about the bag, they became uncooperative and somewhat aggressive.
- [14] Sergeant Davidson testified that he was scared that there was a loaded firearm within reach of two uncooperative people in a vehicle. In addition to the information he had obtained from the police database regarding the vehicle being associated with two weapons-related files and an association with someone connected to a shooting, he was also concerned by the reaction of the occupants to his questions about the bag. In his experience, people legitimately in possession of a firearm are cooperative, even when he would seize the gun for investigative purposes. The behaviour of the two occupants caused him concern because he was alone with two occupants of a vehicle in which he suspected there might be a firearm. Believing there was a firearm in the bag, he did not feel he could go safely back to his car with the gun in the vehicle. He felt he needed to remove it.
- [15] I pause here to note that during his cross-examination, much was made of Sergeant Davidson's description of the bag when he first saw it in the car. Sergeant Davidson explained the bag was squished down at the front portion. In the courtroom, he was asked to demonstrate the position of the bag when he first saw it. There was nothing resulting from this courtroom demonstration that detracted from the veracity of Sergeant Davidson's testimony.
- [16] In order to address his concern, Sergeant Davidson reached in the driver side window to unlock the back door. As soon as he did that, someone inside the vehicle locked it and Sergeant Davidson had to reach in again to unlock the door. This contributed to Sergeant Davidson's concern for his safety. During cross-examination, it was suggested to Sergeant Davidson that the bag looked like a guitar case. Sergeant Davidson said he had no experience with guitar cases and only knows hard-shell guitar cases. This bag was soft-sided and it appeared similar to a soft-sided gun bag he owns.

- [17] When he opened the back door, he pulled the case towards him and unzipped it partway. He saw a rifle and two magazines taped together with one side inserted into the gun. He said this took about three to four seconds. These items, together with the bag, were tendered as exhibits on the voir dire. The firearm was an SK-type rifle with digital camouflage. There were two magazines, one containing 10 rounds and the other containing 16 rounds of ammunition.
- [18] Sergeant Davidson immediately transported the case back to his police car where he secured it in the trunk. He called for backup and remained at the back of the vehicle until another officer arrived. Sergeant Davidson said he took cover at the back of the car because of concern for his safety. As he explained, the police have a one-plus-one rule, meaning where you locate one gun in a car, there might be others.
- [19] Shortly after noon, Corporal Rauliuk arrived at the scene. Sergeant Davidson testified that he determined that both occupants of the vehicle should be arrested for unauthorized possession of a firearm. He said he advised the back-up officers what had happened and decided he would arrest the driver, while another officer would arrest the passenger. There was some discrepancy in the evidence between Sergeant Davidson's testimony and that of Constable Mahaffey. Constable Mahaffey testified when he arrived, Sergeant Davidson and another police officer were already near the suspect vehicle. Nothing turns on this discrepancy.
- [20] Sergeant Davidson arrested Ms. Christensen without incident and placed her inside his police car. Sergeant Davidson and Constable Peel examined the firearm. Constable Peel's evidence was admitted during the voir dire. He explained that while he was examining the firearm, a silver bullet ejected from it. Sergeant Davidson also conducted a further search of the vehicle. No other weapons were located, but two backpacks containing belongings, including mail addressed to Mr. Alec, were located together with some small plastic baggies and a scale. The backpacks were removed and stored in the detachment as personal effects of Mr. Alec. Eventually the car was towed back to the RCMP detachment and processed.
- [21] Sergeant Davidson subsequently submitted the firearm, magazines, and some ammunition for testing.

Arrest of Mr. Alec

- [22] At about noon, Constable Mahaffey heard over the police radio that Sergeant Davidson required backup and he immediately proceeded to the scene. Arriving at about 12:05 p.m., Constable Mahaffey saw Sergeant Davidson in the area behind the vehicle and Corporal Rauliuk near the passenger side. Sergeant Davidson told Constable Mahaffey there was a firearm in the vehicle and directed him to arrest the passenger.
- [23] Constable Mahaffey went to the passenger side and told the male to step out of the car. The male appeared to be on the phone, so using a firmer tone, Constable Mahaffey told him again to get out of the car. He complied and advised that his name was Myles Alec. Constable

Mahaffey arrested Mr. Alec at 12:08 p.m., placed him in handcuffs, and walked him back to his police vehicle. While doing so, Constable Mahaffey explained to Mr. Alec the reason for his arrest and that he was entitled to counsel. Constable Mahaffey testified he routinely provides an arrestee with this information, even before he provides them with the formal Charter warning.

- [24] At 12:11 p.m., after Mr. Alec was placed in the police vehicle, Constable Mahaffey proceeded to read from his police-issued Charter card. Constable Mahaffey was in the front seat with a Plexiglas panel separating him from Mr. Alec. There is no evidence from Constable Mahaffey to suggest that Mr. Alec could not hear what he was saying.
- [25] After reading the s. 10(a) reasons for arrest, Mr. Alec responded to the question, "Do you understand?" by saying, "No, man, I don't." As Constable Mahaffey proceeded to advise Mr. Alec of his right to contact counsel, Mr. Alec interrupted him. Constable Mahaffey said he heard Mr. Alec state "he made me take the gun and I should probably just shut up and not say anything."
- [26] Constable Mahaffey did not engage in conversation with Mr. Alec following these comments and continued to read from his Charter card, and Mr. Alec confirmed he understood what Constable Mahaffey had told him. There was no further conversation with Mr. Alec.
- [27] Between 12:20 p.m. and 12:40 p.m., Mr. Alec remained in Constable Mahaffey's police vehicle while he took photographs of the car and the seized firearm. There was no explanation as to who made the decision to delay transport of Mr. Alec to the police detachment.
- [28] At 12:45 p.m., Constable Mahaffey arrived at the detachment, processed Mr. Alec, and at 1:09 p.m. he placed Mr. Alec in the phone room so he could speak with counsel. Constable Mahaffey advised Mr. Alec that he had contacted counsel's office, but that counsel was not available and would be in court the next day. Mr. Alec stated he did not wish to speak to any other counsel and was then placed in his cell. Constable Mahaffey had no further dealings with Mr. Alec.
- [29] At 2:56 p.m., Sergeant Davidson spoke to Mr. Alec in his cell regarding access to counsel. Mr. Alec confirmed he wanted to speak to counsel, but knew he was not available till the next day. Sergeant Davidson had no further contact with Mr. Alec.

Issues

- [30] As stated earlier, there are several issues to be determined on this voir dire, all arising out of a valid traffic stop. I propose to deal with the issues as follows:
- 1) Were the accused's ss. 9 and 10 Charter rights infringed when Sergeant Davidson first spoke to him and asked if he was on conditions?
 - 2) Did Sergeant Davidson conduct a valid safety search of the bag?

- 3) Was the seizure of the bag a breach of the accused's reasonable expectation of privacy, contrary to s. 8 of the Charter?
 - 4) Was the accused's s. 10(b) Charter right infringed after he was arrested for possession of the firearm?
- [31] Before I commence my analysis of the issues, I will set out some general legal principles that will guide my discussion.

The Governing Legal Principles

- [32] As this case demonstrates, a roadside stop is not a static event. As stated in *R. v. Nolet*, 2010 SCC 24 at paragraph 4:

. . . It is necessary for a court to proceed step by step through the interactions of the police and the appellants from the initial stop onwards to determine whether, as the situation developed, the police stayed within their authority, having regard to the information lawfully obtained at each stage of their inquiry.

- [33] Courts must be mindful that police officers often find themselves in the midst of unpredictable and volatile situations which may pose an imminent threat to the safety of the public and the police. (see: *R. v. Mann*, 2004 SCC 52 [Mann]; and *R. v. MacDonald*, 2014 SCC 3 [MacDonald]).
- [34] In *R. v. Grant*, 2009 SCC 32 [Grant] the Supreme Court of Canada set out the analytical framework for determining whether a person has been detained for Charter purposes. In *R. v. Suberu*, 2009 SCC 33 [Suberu] the Supreme Court of Canada applied that framework in finding that Mr. Suberu had not been detained. I will briefly review the facts in *Grant* and *Suberu* and summarize the principles that must govern my analysis.
- [35] *Grant* involved three police officers patrolling a school area around the lunch hour when they saw a young man they deemed suspicious. One officer stood in front of the man, blocking his path, and asked the man his name and address. The man appeared nervous and adjusted his jacket, prompting the officer to tell him to keep his hands visible. The two other officers approached and stood behind the man. The Court held that Mr. Grant was not detained when the uniformed officer stepped into his path and asked him "what's going on" and for his name and address. However, the nature of the encounter changed when Mr. Grant was told to keep his hands in front of him and the two other officers took up a position behind him. At that point, the encounter took on the character of an interrogation and the detention of Mr. Grant crystallized.
- [36] In *Suberu*, the police were responding to a report of two men trying to use a stolen credit card. When one of the police officers who responded to the call entered the store, Mr. Suberu walked past him saying, "He did this not me, so I guess I can go." The officer followed Mr. Suberu out of the store, stating, "Wait a minute, I need to talk to you before you go anywhere." The police officer followed Mr. Suberu to his car and engaged Mr. Suberu in

conversation about any connection he might have to the events in the store. The officer then learned that the vehicle Mr. Suberu was in matched the description of the vehicle associated with the use of a stolen credit card earlier that day, and he noticed a number of shopping bags in the vehicle. At that point, the police officer decided he had reasonable grounds to arrest Mr. Suberu for fraud.

- [37] In *Suberu*, the Court found the initial encounter between Mr. Suberu and the officer was preliminary investigative questioning falling short of detention. The Court found that the trial judge had not erred in finding Mr. Suberu was not detained prior to his arrest. The encounter arose in the context of an officer orientating himself to the situation. The officer made no move to obstruct or impede Mr. Suberu, the conversation was brief and not strained, and Mr. Suberu never told the officer he did not want to speak to him. Considering all of these factors, a reasonable person would not have concluded that they had no choice but to cooperate.
- [38] In *Grant*, the Court held at paragraphs 28 through 30 that the fundamental general principle that determines detention for Charter purposes is that a person is detained when he or she submits to a deprivation of liberty and reasonably believes that there is no choice but to comply with the investigation. The Court summarized the test for determining whether there has been a detention for the purposes of s. 9 and 10 of the Charter at paragraph 44:
1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:
 - (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
 - (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
 - (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

- [39] According to *Suberu* at para. 28:

The onus is on the applicant to show that in the circumstances he or she was effectively deprived of his or her liberty of choice. The test is an objective one and the failure of the applicant to testify as to his or her perceptions of the encounter is not fatal to the application. However, the applicant's contention that the police by their conduct effected a significant deprivation of his or her liberty must find support in the evidence.

- [40] The liberty of choice on which the analysis centres is broad, although it generally refers to the freedom to choose whether to comply with a request or demand to physically do something, such as remain in a certain place, and/or answer questions or engage in a conversation with the police. Although the test is objective - that is, whether a reasonable person in the individual's circumstances would conclude that he or she had no choice but to comply with the alleged deprivation of his or her liberty of choice - the court may consider the particular circumstances of the individual bringing the application: Grant at para. 32.
- [41] The police may effectively interfere with an individual's freedom of movement without detaining that individual where they take control of a situation in order to help people or gather information, such as when responding to a medical emergency, because it is commonly understood that such interference carries no legal consequences: Grant at para. 36. Further, general inquiries precipitated by community-oriented concerns usually do not threaten an individual's liberty of choice: Grant at para. 41. However, when the basis for an inquiry shifts towards focused suspicion of a particular individual, the courts must scrutinize whether the police words or actions would cause a reasonable person in the suspected individual's position to conclude that he or she was not free to choose to walk away or decline to answer questions: Grant at para. 41. In this regard, it is important to recall that the subjective intentions of the police officer are not determinative. Rather, the question is whether the police have done anything to provide an objective basis on which the individual could conclude that he or she was deprived of the ability to choose whether to cooperate: Grant at para. 32. Ultimately, the test involves a "realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements": Grant at para. 32.

- [42] With these principles in mind, I turn to my analysis.

ANALYSIS

Was the accused detained when he was asked about conditions?

- [43] Counsel for Mr. Alec argues that Sergeant Davidson commenced a criminal investigation into Mr. Alec when he asked him if he was on conditions. At that point, Mr. Alec was detained and his s. 10 Charter rights engaged. Sergeant Davidson's question to Mr. Alec was unrelated to the reasons for the traffic stop and exceeded the scope of a lawful detention associated with that traffic stop. Therefore, upon embarking upon a criminal investigation, Mr. Alec was arbitrarily detained and his s. 10 Charter rights were engaged. Further, counsel argues Sergeant Davidson's explanation as to how he routinely deals with people during

traffic stops is not worthy of belief.

- [44] Crown counsel submits the exchange between Mr. Alec and Sergeant Davidson was nothing more than exploratory questions similar to those which arose in Suberu. Merely asking Mr. Alec questions in the midst of verifying information during a valid traffic stop did not constitute the commencement of a criminal investigation. In any event, once the question was asked and answered, there was no further inquiry. Nothing resulted from the exchange between Mr. Alec and Sergeant Davidson.
- [45] In Suberu, the court rejected the argument that the accused was detained as soon as he was told to "wait" and questioned by the police officer. While it was acknowledged that Mr. Suberu was momentarily "delayed" when the police asked to speak to him, he was not subjected to physical or psychological restraint "so as to ground a detention within the meaning of the Charter" (Suberu, at para. 7). As stated in Suberu, not every interaction between the police and members of the public, even for investigative purposes, constitutes a detention within the meaning of the Charter, with reference to the earlier decision of Mann. Similarly, in Grant, the court held that Mr. Grant was not detained when the uniformed police officer stepped in his path and asked him for his name and address. (Grant para. 47) In my view, Mr. Alec is urging me to conduct my analysis by engaging in a minute parsing of words and movements, rather than a realistic appraisal of the entire interaction as it developed, as contemplated in Grant.
- [46] As in Suberu, the accused was not subject to physical or psychological restraint. When first speaking to Mr. Alec, Sergeant Davidson was orientating himself to the situation. The conversation between Sergeant Davidson and Mr. Alec was very brief and polite. At no time did Sergeant Davidson engage in any type of aggressive behaviour geared towards intimidating Mr. Alec, nor did Sergeant Davidson instruct Mr. Alec that he could not leave the area. Sergeant Davidson did nothing more than make some general inquiries with the passenger in a vehicle he had stopped due to expired insurance. These inquiries included asking Mr. Alec for his name and whether he was on conditions.
- [47] Mr. Alec never told Sergeant Davidson that he did not want to speak with him. Indeed, he stated his name and that he was 10-10, which Sergeant Davidson understood to be a reference to police jargon for "clear". In other words, Mr. Alec advised he was not on conditions. That was the end of the discussion between Mr. Alec and Sergeant Davidson. There is no evidentiary basis to conclude, as counsel urges me to do, that Sergeant Davidson had commenced a criminal investigation into Mr. Alec's compliance with court orders, or that he had engaged in a fishing expedition with the goal to discover Mr. Alec's engagement in some type of criminal activity.
- [48] As set out in paragraph 30 of Suberu, the introductory and preliminary questions were merely to determine if there was any involvement by this person before him. There was no evidence to support Mr. Alec's contention that his freedom to choose whether to cooperate with the police was removed during the initial encounter.

- [49] Mere contact with a police officer does not constitute arbitrary detention. As established in Grant, "general inquiries precipitated by community-oriented concerns usually do not threaten an individual's liberty of choice" (Grant para. 41). Sergeant Davidson's actions would not cause a reasonable person in Mr. Alec's position to conclude that he was deprived of the ability to choose whether to cooperate.
- [50] I find that Mr. Alec was not detained within the meaning of the Charter when Sergeant Davidson initially spoke to him. In these circumstances, Mr. Alec bore the onus of establishing, on a balance of probabilities, that he was detained. I find that he has failed to do so.
- [51] In R. v. Woody, 2018 BCSC 2275, Mr. Justice Riley dealt with a scenario distinguishable from the one before me. At paragraph 63, Mr. Justice Riley set out those circumstances, stating:
- [63] In this particular case, Cst. Coyne testified that "the reason why I asked that question is because if I am dealing with a dial-a-dope, I want to get a story started to see what story they're going to tell me". Cst. Coyne gave no other rationale for asking Mr. Woody this particular question. In the circumstances of this case, Cst. Coyne's questioning of Mr. Woody about where he was coming from was not rationally connected to Motor Vehicle Act compliance. Rather, the question was posed expressly for the purposes of exploring Cst. Coyne's unfounded suspicions about drug trafficking activity.
- [52] I find the following observations at paragraph 57 in Woody of assistance in my analysis:
- [57] I accept that the stop was very brief, and that the Court must be careful not to subject every movement made or word spoken to a discrete constitutional analysis. I also accept that the Court must be wary of holding an officer's conduct to a standard of perfection with the benefit of perfect hindsight. Allowances must be made for the reality that a vehicle stop can be a dynamic situation. In this context, the police must have some degree of latitude in determining how to carry out their duties, taking into account concerns about officer safety and public safety more generally.
- [53] As mentioned earlier, I am mindful of the comments in Nolet regarding the need for a court to proceed step by step through the interactions of the police with an accused in order to conduct a proper analysis. Having determined that Mr. Alec was not detained during his initial encounter with Sergeant Davidson, I also find that his s. 10 Charter right to counsel was not engaged at this point.

Section 8 - Was the search of the bag justified as a safety search?

- [54] Crown counsel acknowledges that the search of the bag retrieved from the vehicle by Sergeant Davidson was a warrantless search; however, the search was authorized under the common law police power to conduct a safety search, and references the cases of Mann, MacDonald, R. v. Patrick, 2017 BCCA 57 and R. v. Webber, 2019 BCCA 208 [Webber].

- [55] Counsel for Mr. Alec argued that the search of the bag was based on nothing more than a hunch and points to Sergeant Davidson's explanation that he wanted to know what was inside the bag because he was curious, interested, and his "spidey senses" were alerted. None of these explanations established the necessary, objectively discernible facts to justify a safety search. Counsel also urges this court to treat Sergeant Davidson's testimony with caution as it was crafted to conceal his deliberate non-compliance with the Charter.
- [56] I will first consider what constitutes a safety search and then apply those factors to the evidence.

What constitutes a safety search?

- [57] In MacDonald, the police attended at the accused's apartment in response to a noise complaint. The police knocked on the door, which the accused partially opened so that the police could see half of his body. An officer noticed that the accused was holding a black shiny object behind his leg. The officer twice asked the accused what he had behind his leg and the accused did not respond. The officer pushed the door open further, at which point he noticed that the accused was holding a handgun. The police forcibly entered the suite and arrested the accused at this point. Mr. Justice LeBel, writing for the 4-3 majority, held that the officer's actions in opening the door to see what the accused had behind his leg constituted a search for the purposes of s. 8 and it was an intrusion upon the accused's reasonable expectation of privacy that went beyond the officer's implied licence to approach the door of a residence and knock (para. 27). The Court went on to find that the search, although warrantless, was authorized under the common law police power to conduct what LeBel J. called a "safety search" - that is, a search that is reasonably necessary to eliminate threats to the safety of the public or the police - and that this common law power was reasonable. At para. 32 LeBel J. defined a "safety search" as follows:
- [32] A search that is reasonably necessary to eliminate threats to the safety of the public or the police -- which I will term a "safety search" -- will generally be conducted by the police as a reactionary measure. In other words, although such searches may arise in a wide variety of contexts, they will generally be unplanned, as they will be carried out in response to dangerous situations created by individuals, to which the police must react "on the sudden". . . .
- [58] At paragraph 40, the Court stated:
- [40] On balancing these factors, I am convinced that the duty of police officers to protect life and safety may justify the power to conduct a safety search in certain circumstances. At the very least, where a search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police, the police should have the power to conduct the search.
- [59] While finding that the police have the power to conduct safety searches, LeBel J. emphasized at paragraph 41 that such power is not unlimited:

[41] But although I acknowledge the importance of safety searches, I must repeat that the power to carry one out is not unbridled. In my view, the principles laid down in [R. v. Mann, 2004 SCC 52, [2004] 3 S.C.R. 59] and reaffirmed in [R. v. Clayton, 2007 SCC 32, [2007] 2 S.C.R. 725] require the existence of circumstances establishing the necessity of safety searches, reasonably and objectively considered, to address an imminent threat to the safety of the public or the police. Given the high privacy interests at stake in such searches, the search will be authorized by law only if the police officer believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search (Mann, at para. 40; see also para. 45). The legality of the search therefore turns on its reasonable, objectively verifiable necessity in the circumstances of the matter (see R. v. Tse, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 33). As the Court stated in Mann, a search cannot be justified on the basis of a vague concern for safety. Rather, for a safety search to be lawful, the officer must act on "reasonable and specific inferences drawn from the known facts of the situation" (Mann, at para. 41).

[Emphasis added.]

[60] As clarified in Webber, the legal threshold to justify safety searches is reasonable suspicion, which was the standard applied in Mann in the context of a pat-down search, and in MacDonald in the context of police entry into a private residence.

Was Sergeant Davidson engaged in a valid safety search?

[61] The Crown relies on a number of factors identified by Sergeant Davidson to establish a valid basis for a safety search. Those factors generally fall into three categories: information obtained through the police database, Sergeant Davidson's experience dealing with members of the public and firearms, and the sequence of events that unfolded during the motor vehicle stop.

[62] Sergeant Davidson testified that while out on patrol in the area of Prince George, he queried the licence plate of a vehicle and learned that the registered owner was Melissa Christensen. Ms. Christensen and the vehicle were associated with another male who had a warrant outstanding for a shooting incident which occurred in the recent past in the same area. This other male was well known among the local police, and the vehicle was also associated with two other weapons files. The insurance for the vehicle expired the day prior.

[63] Sergeant Davidson had experience dealing with members of the public who were in possession of firearms, particularly in northern areas of the province. In his experience, people were always cooperative with his inquiries, even when he took possession of the firearm while conducting his routine checks. Sergeant Davidson recognized the bag on the floor in the back seat of the vehicle as one similar to a gun bag he has. It was made of the same material, a similar two-tone colour with a zipper closing.

- [64] When dealing with Ms. Christensen and Mr. Alec, there was a significant change in their behaviour when he asked them what was in the bag. During the initial encounter, Ms. Christensen and Mr. Alec were polite and cooperative. When he asked them about the bag, Ms. Christensen turned away from the officer and Mr. Alec became somewhat aggressive, stating that Sergeant Davidson could not search the bag and he had nothing to do with the bag. Their reaction, combined with the information Sergeant Davidson had regarding the recent association of this vehicle with weapons and a person involved in the shooting, caused Sergeant Davidson to become increasingly concerned about the contents of the bag and his safety in the situation.
- [65] Further, when Sergeant Davidson attempted to unlock the door, someone within the car immediately locked it again, causing Sergeant Davidson to unlock the door a second time. This action further contributed to Sergeant Davidson's belief that he needed to search the bag to eliminate immediate threats to his safety.
- [66] Considering these factors collectively, I am satisfied that Sergeant Davidson's decision to search the bag was a valid exercise of the safety search power. I am satisfied that the officer's safety concerns were objectively reasonable. I have no hesitation in accepting Sergeant Davidson's evidence and reject the suggestion by defence that Sergeant Davidson crafted his evidence to sanitize his Charter-infringing conduct. This is not, as counsel for Mr. Alec would have me accept, a fishing expedition based on nothing more than a hunch. Rather, this is precisely the scenario described in MacDonald where the police are required to take quick action, guided by "on-the-spot observations" in situations that are "generally unplanned, as they will be carried out in response to dangerous situations created by individuals to which the police must react on the sudden" (MacDonald, at para. 32).
- [67] Having found that Sergeant Davidson was engaged in a valid safety search when he examined the bag, I conclude that the accused's section 8 Charter right was not engaged.

Was the accused's s. 10(b) Charter right infringed after he was arrested for possession of the firearm?

- [68] Section 10(b) of the Charter provides that an arrested or detained person has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. In Suberu, the Court considered the effects of the words "without delay" in the section and interpreted it as immediately, noting at para. 41:

If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

- [69] In Grant, the Court applied the standard in Suberu, finding that Mr. Grant was entitled to be informed of his s. 10(b) rights immediately upon detention, and that by failing to provide this information, the officer had breached his rights, notwithstanding the failure was due to the fact that the officer did not believe he had detained Mr. Grant: Grant para. 58.

- [70] More recently, in *R. v. Fan*, 2017 BCCA 99 [Fan] Madam Justice Dickson, stated at para. 50 that the right to counsel "is designed to ensure that detainees are treated fairly in the criminal justice process: *R. v. Bartle*, [1994] 3 S.C.R. 173 at 191. It operates in tandem with the right to silence protected by s. 7 of the Charter: *R. v. Hebert*, [1990] 2 S.C.R. 151 at 176-177". As noted earlier, the defence argues that the police breached Mr. Alec's s. 10(b) rights by failing to provide access to counsel in a timely fashion after his arrest.
- [71] Dickson J.A., writing for the court, discussed the legal framework surrounding the right to retain and instruct counsel without delay and to be informed of that right upon arrest or detention, including the applicable temporal requirements, at paragraphs 51 to 55 of *Fan*:
- [51] The primary function of legal advice upon detention or arrest is to enable a suspect to make a meaningful choice about whether to speak with police or to remain silent. That choice will only be meaningful if it is freely made and appropriately informed. Once engaged, s. 10(b) imposes informational and implementational duties upon police officers. The informational component requires police to inform the detainee of the right to retain and instruct counsel without delay. The implementational component requires police to provide the detainee with a reasonable opportunity to exercise the right, and to refrain from eliciting incriminatory evidence until he or she has had that opportunity or unequivocally waived the right: *R. v. Suberu*, 2009 SCC 33 at para. 38.
- [52] The police must advise a detainee of the right to counsel and facilitate the exercise of this right immediately upon detention or arrest. This is because a situation of vulnerability relative to the state is created at the outset and the detainee is exposed to legal jeopardy. The immediacy requirement is intended to provide the detainee with the means to shield himself or herself from the risk of accidental or involuntary self-incrimination. It is also intended to assist him or her in the process of regaining liberty: *Suberu* at paras. 40-42.
- [53] However, "immediate" is not necessarily synonymous with "instantaneous". Sometimes practical considerations play a role in what is immediate for purposes of s. 10(b), particularly with respect to the implementational duty. For example, in some cases a police officer's implementational duty may be limited by urgency or legitimate concerns for safety: *R. v. Ashby*, 2013 BCCA 334 at paras. 70-72. As Fitch J.A. emphasized in *R. v. Patrick*, 2017 BCCA 57, it is incumbent on a judge to give meaningful consideration to the exigencies of a situation in a s. 10(b) ruling: paras. 111-114.
- [54] A police officer's duty is to facilitate access to counsel upon a detainee's request at the first reasonably available opportunity. The question of whether a given delay was reasonable is a factual inquiry: *R. v. Taylor*, 2014 SCC 50 at para. 24. If a telephone is available and the detainee asks to speak with counsel, the duty to facilitate access may be engaged. Abella J. explained the reason in *Taylor*:
- [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" (Manninen, at p. 1242 [R. v. Manninen, [1987] 1 S.C.R. 1233]). 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 (see *Brownridge v. The Queen*, [1972] S.C.R. 926, at pp. 952-53).

- [55] Where a telephone is available and a detainee asks to speak with counsel, police must grant the request if it would be reasonable to do so. A lack of privacy for the call will not necessarily justify refusal of such a request: *R. v. Luu*, 2006 BCCA 73 at para. 30. On the contrary, failure to give a detainee the option of contacting counsel without privacy may amount to an infringement of s. 10(b), as occurred in *R. v. Bui*, 2005 BCCA 482. The touchstone is reasonableness, given all of the circumstances of the case.
- [72] There is no dispute that there was delay between Mr. Alec's initial arrest by Constable Mahaffey at 12:08 p.m. and his access to counsel at 1:09 p.m. After Constable Mahaffey provided Mr. Alec with his 10(a) and 10(b) Charter and police warnings from his police-issued Charter card by 12:20 p.m. -- Constable Mahaffey left Mr. Alec in the police car for 20 minutes while he returned to the seized vehicle to take photographs, rather than immediately transporting Mr. Alec to the RCMP detachment which was a five-minute drive from the scene. At 12:40 p.m., Constable Mahaffey returned to his vehicle, transported Mr. Alec to the detachment, processed him, and placed him in the private phone room to contact counsel at 1:09 p.m.
- [73] There was no explanation as to why Mr. Alec was not afforded an opportunity to contact counsel immediately, as contemplated in s. 10(b). I agree with counsel for Mr. Alec that the delay constitutes a breach of Mr. Alec's 10(b) Charter rights.
- [74] Counsel also argues that the utterances Mr. Alec made while sitting inside the police vehicle with Constable Mahaffey were obtained in breach of his s. 10 rights. He takes the position that had Constable Mahaffey provided the Charter warning sooner, Mr. Alec would have been made aware of his right to silence. I do not agree. I accept Constable Mahaffey's evidence that he provided Mr. Alec with an initial warning from memory as they walked towards the police car. Once inside the car, as Constable Mahaffey was endeavouring to read Mr. Alec his rights from the police-issued Charter card, Mr. Alec chose to interrupt him. Constable Mahaffey testified Mr. Alec stated "He made me take the case" and "I should probably just shut up and not say anything." Neither of these statements were elicited as the result of any action by Constable Mahaffey. Rather, these were voluntary statements made by Mr. Alec while Constable Mahaffey was providing him with his Charter warning. These statements did not engage Mr. Alec's s. 10 Charter.
- [75] In summary, I find that the failure of the police to facilitate Mr. Alec's access to counsel without delay was unreasonable and a breach of the s. 10(b) Charter right. I do not find the statements made by Mr. Alec in the presence of Constable Mahaffey engaged his Charter rights.

Section 24(2) Analysis

[76] Having found a breach of Mr. Alec's s. 10(b) Charter right to access to counsel without delay, I must conduct a s. 24(2) analysis. Both Crown and defence counsel agree with the general legal principles governing the exclusion of evidence. There are two stages in a s. 24(2) analysis: the threshold analysis which determines whether there is a nexus between the breach of a Charter right and the evidence sought to be excluded, and the second analysis utilizing the framework in *Grant*.

The Grant Analysis

[77] In *Grant* the Court articulated three lines of inquiry for determining whether evidence obtained in a Charter-infringing manner should be excluded under s. 24(2) of the Charter. The factors to consider and weigh are:

- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct),
- (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and
- (3) society's interest in the adjudication of the case on its merits.

[78] These three factors do not operate as a three-part test. There are no particular findings under these three lines of inquiry that mandate particular results, and "it is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case": *R. v. Harrison*, 2009 SCC 34 at para. 36. The balancing mandated by s. 24(2) is "qualitative in nature and therefore not capable of mathematical precision": *Grant* at para. 140. Rather, the court must weigh its consideration under all three factors to determine whether, on a balance, and having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute in the long term, from the perspective of a reasonable person: *Grant* at paras. 68 and 85-86.

[79] Having set out the analytical framework established in *Grant*, I will proceed to consider those factors.

[80] I agree with counsel for Mr. Alec that the delay in implementing Mr. Alec's access to counsel amounts to a blatant disregard for Mr. Alec's Charter rights. This was not a minor breach as suggested by the Crown. There was no justification for this delay. However, the breach did not result in any further evidence being obtained, nor did it have any impact on the evidence which had already been lawfully obtained.

[81] The second line of inquiry focuses on the seriousness of the state's Charter-infringing conduct from the accused's perspective. Under this head of analysis, the court must examine the interest engaged by the infringed right and the degree to which the Charter infringement impacts or intrudes upon those interests.

- [82] Despite the breach of Mr. Alec's right to access counsel, the infringement had no impact on the evidence which was obtained.
- [83] Next, the court must consider "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion": Grant, at para. 79. A court analyzing this factor must be careful not to allow the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis, because this would afford lesser Charter protection to those charged with more serious crimes.
- [84] Balancing all the factors, and bearing in mind that no evidence was obtained as a result of the breach, I find that there is no need to invoke s. 24(2) of the Charter in this case. For the reasons provided, I have concluded that Mr. Alec's s. 10(b) Charter rights were infringed when the police delayed providing him access to counsel, but that infringement does not result in the exclusion of evidence obtained. Therefore, the firearm and the statements Mr. Alec made to the police are admissible at trial.

Conclusion

- [85] I find that there was no breach of s. 8 or s. 9 of Mr. Alec's Charter rights. I do find a breach of s. 10(b), but that breach does not result in an exclusion of evidence.

"Devlin J."

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