

CANADA / JUDGMENT

R. v. Anwyll

2025 BCSC 156

COURT

Supreme Court of British Columbia

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2025 BCSC 156 R. v. Anwyll

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Anwyll,

2025 BCSC 156

Date: 20250131

Docket: 185202

Registry: Victoria

Rex

v.

Alicia Sandra Anwyll and Michael Friesen

Before: The Honourable Justice Layton

Reasons for Judgment on Charter Voir Dire

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Place and Date of Trial:

Victoria, B.C.

January 13-17, 2025

Place and Date of Judgment:

Victoria, B.C.

January 31, 2025

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- [1] Ms. Anwyll and Mr. Friesen are both charged with multiple offences under the Criminal Code, R.S.C. 1985, c. C-46 and the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA], arising from the discovery by police of a firearm, ammunition and illegal drugs following the traffic stop of a rental vehicle a little over two years ago in Saanich, British Columbia. The charges are four firearms offences under the Criminal Code, including possession of a loaded prohibited or restricted firearm contrary to s. 95(1), and four counts of possession for the purpose of trafficking under s. 5(2) of the CDSA.

- [2] Ms. Anwyl and Mr. Friesen have applied under s. 24(2) of the Charter to exclude all evidence obtained as a result of the traffic stop, on the basis that the police conduct in making that stop and in taking subsequent investigative steps infringed their ss. 8 and 9 Charter rights.
- [3] While initially taking the position that no Charter breaches occurred, in closing submissions Crown counsel essentially conceded that Ms. Anwyl's s. 9 Charter right not to be arbitrarily detained was independently infringed by both the traffic stop and her arrest for driving while prohibited a few minutes later. The Crown nonetheless argued that these breaches were minor or technical, and that any subsequent Charter breaches were purely consequential in nature, and therefore the impugned evidence should not be excluded under s. 24(2).
- [4] I will begin my discussion of the issues by reviewing the relevant background as revealed by the evidence called on the Charter voir dire.

Evidentiary Background

- [5] On November 5, 2022, Constable Verot of the Saanich Police Department was in uniform on the evening shift, patrolling alone in a marked cruiser. At this point in his career, Constable Verot had been with the Saanich Police Department for about seven months. Before that, he was an RCMP officer in Alberta for around two years.
- [6] At about 9:30 p.m., Constable Verot drove by a 7-Eleven gas station and carwash at the corner of Tolmie Avenue and Douglas Street. This is an area of higher property crime in the municipality. It was common for him to query the license plates of vehicles in this area, whether stationary or in motion, which would provide information about the vehicle and registered owner.
- [7] As he drove by the 7-Eleven, Constable Verot noticed a stationary grey Hyundai Elantra ("Elantra"). It was parked just outside the car wash, next to a vacuum cleaner. Constable Verot saw that a man, later identified as Mr. Friesen, appeared to be wiping in the area of the vehicle's headlights, and that the driver's door was open. Constable Verot could not, however, see whether anyone was in the driver's seat. Constable Verot was also unable to make out the license plate. During this drive-by, nothing about the Elantra caught Constable Verot's attention. He did not see anything that might constitute a traffic infraction or was in any way suspicious.
- [8] CCTV footage later obtained from the 7-Eleven shows that about nine minutes before Constable Verot first saw the Elantra, the vehicle had exited the car wash and parked next to one of two vacuums available for cleaning inside of vehicles. The CCTV also shows that the Elantra's front and rear lights turned off soon after it had parked, and that the vehicle did not move at all during the events that followed. I thus conclude that the Elantra's engine was turned off during this entire period.

- [9] Constable Verot entered the 7-Eleven parking lot to look around, including at the Elantra and any other vehicles, and to see the store as well, because many thefts had occurred at that location. Entering this parking lot to observe people and vehicles is something he did on almost every patrol shift.
- [10] I will review the ensuing events in more detail, but by way of preliminary overview, once in the parking lot Constable Verot noticed a female in the driver's seat of the Elantra, and that the driver's door was now closed. He then queried the vehicle's plate through his onboard computer, which yielded the following two categories of information.
- [11] First, Constable Verot received information showing that the Elantra was a rental vehicle with valid insurance, and that the registered owner was National Rental. Constable Verot testified that, because the registered owner was a company, his query did not provide the sort of information he would typically receive if it were owned by a person, including whether that individual had a valid driver's license.
- [12] Second, Constable Verot received information indicating that the Elantra was mentioned in police files. These files indicated that the vehicle had been in contact with police at a prior point, and that a person named James Lamont was associated to it at that time. The police files further indicated that Mr. Lamont, with whom Constable Verot testified he had not previously been familiar, was a potential high-level drug trafficker. Constable Verot did not recall whether the police files indicated that Mr. Lamont had been renting the Elantra. Although Constable Verot did not remember the dates on which Mr. Lamont was associated to the vehicle, at one point in cross-examination he said the association was not too dated.
- [13] In chief, Constable Verot testified that, having obtained this information about the Elantra, he decided to conduct a vehicle stop. He explained that, because the registered owner was a company, and the person associated with the vehicle was a man (James Lamont), he wanted to determine whether the woman in the driver's seat had a valid driver's license and was on the rental agreement. Constable Verot testified that he also wanted to ensure that the insurance documents were in the vehicle.
- [14] In cross-examination, Constable Verot was shown the CCTV footage relating to his movements in the parking lot and his interactions with the Elantra and its occupants, and he provided more detail regarding the events that led him to decide to conduct the vehicle stop. I will now review the events depicted by the CCTV, along with Constable Verot's testimony about those events.
- [15] About 30 seconds after exiting the CCTV's field of vision while driving by the 7-Eleven on Tolmie Avenue, Constable Verot's cruiser is seen in the 7-Eleven parking lot, driving slowly towards the parked Elantra. The driver's door of the Elantra is now shut, and Mr. Friesen is walking in the direction of the 7-Eleven store, then disappears off camera. Constable Verot's cruiser executes a U-turn away from the Elantra to circle the gas pump area. Partway through this U-turn, his cruiser stops for about 10 seconds near the Elantra, before completing the turn and driving off camera.

- [16] Constable Verot testified that, on entering the parking lot, he saw the man who had previously been next to the Elantra walking towards the 7-Eleven store. He also noticed that the driver's door was shut, and that a woman, unknown to him at that point, but later identified as Ms. Anwyll, was sitting in the driver's seat of the Elantra.
- [17] While there was still nothing suspicious about the Elantra, Constable Verot decided to run its plate. He testified that he queries lots of vehicles during his shifts, and frequently runs the plates of stationary vehicles at the 7-Eleven. Constable Verot entered the query on his computer while making the U-turn, likely while he was stopped partway through that turn. Constable Verot testified that query results usually come back within five seconds, so he probably began to receive them while conducting the U-turn.
- [18] Constable Verot testified that the query results arrived in the form of about eight pages of text, somewhat like emails, in that he had to click on each of the eight or so items to read the information. He would have started reviewing the information pretty quickly, and agreed that within about 30 seconds of finishing the U-turn he knew the Elantra was a rental. At this point, he thus knew that the vehicle's owner was not an individual, and so he lacked the additional information he would otherwise have as to whether an individual owner had a valid driver's license.
- [19] The CCTV shows Constable Verot's cruiser re-approach the Elantra about 90 seconds later, before again driving off camera. Constable Verot testified that he approached the Elantra for this second time to make sure that he had entered the correct plate number in making his query, because rental car companies often buy many cars of the same make and model. Constable Verot added that, at this point, he was aware he did not have information about the driving status of the woman in Elantra, but he was not pressed for time, as the vehicle was not in motion. He therefore decided to "not yet conduct" a traffic stop.
- [20] About 10 minutes later, the CCTV shows Constable Verot's cruiser approach the Elantra for a third time, this time pulling up behind it and parking. Constable Verot testified that, during this ten-minute period, he had been in his cruiser "offscreen" but in the parking lot, reading the police files about the Elantra. He testified that it would have been foolish to conduct a traffic stop before completing this review, for officer safety reasons. Having done so, he knew that a male had been associated with the rental Elantra, but that a woman was driving it. This raised his suspicion because rental agreements usually require the renter to pay more for additional drivers, and so only one driver is usually listed on the agreement. He thus wanted to conduct the stop to ensure the woman had a driver's license, and to see the rental agreement and the insurance documents.
- [21] The CCTV footage shows that, after pulling up behind the Elantra, Constable Verot stayed in his cruiser for about a minute. He testified that, during this time, he radioed dispatch to indicate his location and say that he was going to conduct the traffic stop.

- [22] Constable Verot can be seen on the CCTV exiting his vehicle, approaching the passenger side of the Elantra with his flashlight, and looking inside the vehicle, before coming back to the other side of the vehicle and stopping by the driver's door. Constable Verot explained that he checked the passenger side first because he wanted to see whether anyone else was in the vehicle before engaging with the driver. When looking into the vehicle from the passenger side, he saw two large dogs in the backseat.
- [23] Constable Verot testified that Ms. Anwyll lowered the window. He did not recognize her. He asked for her driver's license and the rental agreement. Ms. Anwyll said she did not have a driver's license "on her," so Constable Verot asked for her name and date of birth, which she provided. The Crown concedes that Ms. Anwyll was detained during this encounter.
- [24] Both in chief and initially in cross-examination, Constable Verot testified that he then returned to his cruiser to query Ms. Anwyll's name and date of birth on his onboard computer, and that the results indicated that Ms. Anwyll was prohibited from driving. He therefore returned to the Elantra and placed her under arrest for that offence. On his request, she stepped out of the vehicle. He put her in cuffs and walked her to the back of his cruiser. Constable Verot searched Ms. Anwyll incident to arrest to see whether she had any identification documents, but located none. He then put her in the backseat of his cruiser.
- [25] Also in chief, Constable Verot testified that, shortly before he arrested Ms. Anwyll, two fellow Saanich officers, Constables Fryers and Penner, arrived at the scene. The attendance of Constables Fryers and Penner, about a minute apart, is confirmed by the CCTV footage. Constable Verot testified that he assumed these officers attended after hearing him announce over the radio his intention to make the arrest. He testified that if one officer was going to make an arrest, other officers would often attend if available to assist.
- [26] Constable Fryers was the only other witness on the voir dire, and testified that at 9:35 p.m. he heard over the police radio that Constable Verot was conducting a traffic stop. Since Constable Fryers was relatively nearby, he attended on his own accord to assist, not because dispatch or any other officer asked him to do so. Constable Fryers testified that he arrived on site at 9:39 p.m.
- [27] I will now backtrack to further examine Constable Verot's initial testimony that he used his onboard computer to query Ms. Anwyll's name and date of birth. On being shown the CCTV footage later in his cross-examination, Constable Verot agreed that, after speaking to Ms. Anwyll, he remained near the Elantra for several minutes, during which time Constables Fryers and Penner arrived. The CCTV indicates that Ms. Anwyll exited the Elantra, and was arrested by Constable Verot and taken back to his vehicle, within a minute of Constable Penner arriving.

- [28] Constable Verot initially had difficulty explaining what he was doing prior to the arrival of his fellow officers, and conceded that he had no real memory in this regard. He eventually conceded that, while his memory is that he typed Ms. Anwyll's information into his cruiser's computer, he likely gave it to dispatch, and then heard back that she was a prohibited driver.
- [29] For two reasons, I conclude that Constable Verot's supposition on this point is correct. First, the CCTV footage shows that he did not enter his cruiser in the period between speaking to Ms. Anwyll and arresting her. Second, Constable Fryers testified that enroute to the 7-Eleven parking lot he heard Constable Verot ask dispatch for information about Ms. Anwyll, and then heard dispatch inform Constable Verot that she was a prohibited driver.
- [30] Moving ahead slightly in the narrative, but still prior to Ms. Anwyll's arrest, Constable Fryers testified that on arriving at the scene he briefly spoke to Constable Verot to get more information and determine how he could help. Constable Verot told him that the Elantra was associated with James Lamont in the police database, and that the woman in the vehicle was a prohibited driver. Constable Verot also said that he had seen a male associated with the Elantra in the parking lot, and that he was going to arrest the woman.
- [31] Constable Fryers testified that, around this same time, a man arrived and began speaking to Constable Penner near the Elantra. The CCTV confirms that Mr. Friesen returned to the area of the Elantra around the time that Constable Verot started the process of arresting Ms. Anwyll for driving while prohibited, and that he stood near Constable Penner.
- [32] Constable Verot testified that, at a certain point, Constable Fryers went inside the 7-Eleven to look at the CCTV footage. Constable Fryers testified that he volunteered to do so for the purpose of confirming whether Ms. Anwyll had been driving the Elantra. The CCTV footage shows Constable Fryers walking towards the area of the 7-Eleven about two minutes after Constable Verot began the process of arresting Ms. Anwyll. Constable Fryers testified that, on reviewing the CCTV footage, he determined that, after the Elantra emerged from the carwash and parked, the male who subsequently spoke to Constable Penner (i.e., Mr. Friesen) exited from the passenger side of the vehicle.
- [33] Constable Verot testified that, after placing Ms. Anwyll in his cruiser, he returned to the Elantra to see whether he could find her identification documents, a rental agreement or insurance papers. In cross-examination, he testified that by this point he had reasonable grounds to believe that the person he had arrested was Ms. Anwyll.
- [34] Constable Verot opened the driver's door. He testified that he did not see any of the sought-after documents in plain view. He therefore opened the centre console in the front seat area to see if any of the documents were located there. Inside the centre console was a clear Ziploc bag containing what he believed to be methamphetamine. Constable Verot estimated that, if bunched into a sphere, the contents would be about the size of an orange.

- [35] Constable Verot testified that once he found the Ziploc bag, he discontinued his search of the vehicle until later, when it was towed to the Saanich Police Department. He explained that the Ziploc bag went "beyond" the documents he had been searching for, and he needed to deal with the bag at that time. The rental agreement and insurance documents were located inside the Elantra when it was searched at the detachment.
- [36] Constable Verot testified that, around the time he emerged from the Elantra after finding the Ziploc baggy, Constable Fryer returned from the 7-Eleven and told him that the CCTV showed Mr. Friesen as having also been in the vehicle. Constable Verot was initially unable to recall whether Constable Fryers told him where Mr. Friesen had been seated in the Elantra, but after watching the CCTV video in cross-examination Constable Verot testified that he believed that Constable Fryers told him that Mr. Friesen had exited from the passenger side.
- [37] Constable Verot testified that, also around this time, the man who owned the two dogs in the Elantra's backseat arrived at the scene. This man can be seen on the CCTV footage approaching the vehicle on foot. The same footage shows that, shortly afterwards, A/Sergeant Miller of the Saanich Police Department arrived in a cruiser. In cross-examination, Constable Verot rejected the suggestion that an acting sergeant will usually stay at the station. Rather, he testified that where three civilians are present and one of them is under arrest, it is not uncommon for multiple officers to be involved. He said that Acting Sergeant Miller probably attended for this reason.
- [38] After obtaining the information about the CCTV footage from Constable Fryers, Constable Verot arrested Mr. Friesen for possession of a controlled substance. He testified that he believed he had reasonable grounds for making the arrest because: (a) Mr. Friesen was associated with the Elantra when he first saw the vehicle; and (b) Constable Fryers told him the CCTV footage showed that Mr. Friesen was in the car prior to entering the 7-Eleven. Based on the circumstances, Constable Verot testified that he had believed that Mr. Friesen had been sitting in the Elantra's front passenger seat.
- [39] Mr. Friesen was put in cuffs and Constable Verot searched him incident to arrest, locating about \$1,500 cash and a single round of live 9 mm ammunition in Mr. Friesen's jean pockets. Constable Verot then placed him in Constable Fryers' cruiser.
- [40] Constable Verot returned to his own vehicle, where Ms. Anwyll remained detained in the back seat. He arrested her for possession of a controlled substance and provided her with her Charter rights. He then returned to Constable Fryers' cruiser and provided Mr. Friesen with his Charter rights.

- [41] The CCTV shows that, at a certain point, another officer arrived at the scene in a cruiser, although he left shortly afterwards. A/Sergeant Miller left the scene once Mr. Friesen was arrested and placed in a cruiser, but returned about 15 minutes later. Constable Verot did not recall why A/Sergeant Miller returned, but testified that it was not unusual for him to assist in this way, in particular because two people were in custody and an active investigation was ongoing.
- [42] Around this point, Mr. Friesen appeared to overdose. Constable Fryers was initially unable to rouse Mr. Friesen, but managed to do so after administering Naloxone. Emergency health services were called, and about 10 minutes later transported Mr. Friesen to the hospital in the company of a Constable Penner. Mr. Friesen was eventually released from custody at the hospital.
- [43] Ms. Anwyll was transported from the scene to the Saanich Police Department, where she was searched by a female police officer. She was also released from custody, it appears either later that night or early the next morning.
- [44] The Elantra was towed to the Saanich Police Station, where it was searched by Constables Verot and Fryers. They located a Herschel brand bag in the trunk, which contained several items including: (a) a 9 mm Ruger handgun with a magazine containing ammunition; (b) about 400 or 500 grams of methamphetamine; (c) approximately 100 grams of cocaine; and (d) about 50 or 60 grams of fentanyl.

Alleged Charter Breaches

- [45] Ms. Anwyll and Mr. Friesen contend that Constable Verot breached their rights under ss. 8 and 9 of the Charter in various respects.
- [46] The Crown initially took the position that no Charter breaches had occurred, but during closing submissions basically conceded that the initial detention and first arrest of Ms. Anwyll breached her s. 9 Charter rights, which meant that all of the subsequent searches and detentions breached Ms. Anwyll's and/or Mr. Friesen's ss. 8 and 9 Charter rights pursuant to the doctrines of excision and consequential breach as articulated in *R. v. Zacharias*, 2023 SCC 30. The Crown nonetheless maintained that the evidence should not be excluded under s. 24(2) of the Charter.
- [47] I will now examine each alleged breach of the Charter and determine whether and, if so how, that breach occurred.
- (a) Initial Detention of Ms. Anwyll
- [48] Ms. Anwyll contends that Constable Verot breached her s. 9 Charter right not to be arbitrarily detained when he conducted the traffic stop that led to her arrest. She says that the traffic stop was unlawful, which if true would render her detention arbitrary and thus an infringement of s. 9. See *R. v. Tim*, 2022 SCC 12 at para. 22.

- [49] As already noted, there is no dispute that Constable Verot detained Ms. Anwyll when he conducted the traffic stop. The contested issue is whether that detention was arbitrary and particularly if so, why.
- [50] The police may detain an individual in relation to a criminal matter provided they have the lawful authority to do so. For example, an officer may have reasonable grounds to justify the individual's warrantless arrest, as set out in s. 495(1)(a) of the Criminal Code and discussed in *R. v. Beaver*, 2022 SCC 54 at paras. 71-72. Or the officer may detain the individual for investigative purposes provided the officer has reasonable grounds to suspect the individual is connected to a particular crime and that the detention is necessary, as noted in *Tim* at para. 53.
- [51] However, the Crown does not rely on any criminal law power to justify Ms. Anwyll's detention. In fact, the Crown concedes that Constable Verot had no authority to detain her under criminal law principles, nor did he purport to do so. Rather, the Crown, at least initially, argued that Ms. Anwyll's detention was justified pursuant to laws regarding the enforcement of traffic or vehicle safety.
- [52] A detention of a vehicle and its occupants for the purpose of enforcing traffic or vehicle safety laws may be authorized or justified by the Motor Vehicle Act, R.S.B.C. 1996 c. 318 ("MVA"). As noted in *R. v. Woody*, 2018 BCSC 2275 at para. 34, there are two different bases upon which a vehicle stop conducted to enforce traffic or vehicle safety laws will be authorized under the MVA.
- [53] Often, an officer will stop the vehicle based on an observed infraction of the MVA or its regulations. In such a case, the resulting detention is authorized by the MVA and does not infringe s. 9 of the Charter because a roadside stop of the vehicle for this purpose is not arbitrary. See *R. v. Kaddoura*, 2009 BCCA 113 at paras. 12-13.
- [54] However, this lawful basis for stopping a vehicle and its occupants does not apply here, because Constable Verot observed nothing about the Elantra that would lead him to reasonably believe that an MVA infraction had occurred. The Crown thus relies on the other basis for detaining a vehicle under the MVA, namely, a random stop to enforce traffic or vehicle safety laws as provided for under s. 73 of the MVA.
- [55] Section 73 of the MVA provides that:
- 73 (1) A peace officer may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as a peace officer, must immediately come to a safe stop.
- (2) When requested by a peace officer, the driver of a motor vehicle or the person in charge of a motor vehicle on a highway must state correctly the driver's or person's name and address and the name and address of the owner of the motor vehicle.

- (3) A person who contravenes subsection (1) or (2) commits an offence and is liable to a fine of not less than \$100 and not more than \$2 000 or to imprisonment for not less than 7 days and not more than 6 months, or to both.
- [56] Although no grounds are required to conduct a random stop under s. 73(1), the stop must be related to traffic safety and regulation. See *R. v. Strilec*, 2010 BCCA 198 at para. 29.
- [57] Unlike a vehicle stop based on an observed violation of the MVA, a random traffic stop is arbitrary under s. 9 of the Charter. Courts have nonetheless held that, provided they are limited to a proper highway-related purpose, such stops are justified as a reasonable limit under s. 1 of the Charter, because random traffic stops fit within the pressing and substantial objective of promoting traffic safety. For example, a police officer does not require cause or articulable grounds to stop a vehicle under s. 73 of the MVA to check for sobriety, or for licenses, insurance and the mechanical fitness of that vehicle. See *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 at 1277-1288; *R. v. Nolet*, 2010 SCC 24 at para. 22; *Woody* at para. 34.
- [58] The problem that arises in this case is that s. 73(1) of the MVA allows a police officer to require "the driver of a motor vehicle to stop", but Constable Verot never saw Ms. Anwyll driving the Elantra, because he only saw it parked.
- [59] The application of s. 73(1) to a parked vehicle was considered by Justice Crabtree in *R. v. Johnstone*, 2020 BCSC 316. I have concluded, and the Crown does not disagree, that the analysis in *Johnstone* is binding on me and results in the conclusion that Constable Verot had no lawful authority under the MVA to detain Ms. Anwyll for the purpose of asking for her driver's license.
- [60] In *Johnstone*, a police officer came upon a vehicle parked in a pullout on a remote highway, and saw Mr. Johnstone in the process of entering the driver's seat. The officer stopped to see whether roadside assistance was required. Mr. Johnstone "popped" back out of the vehicle and walked towards the officer's cruiser. Prior to speaking to Mr. Johnstone, the officer obtained information from dispatch indicating that the vehicle was registered to a car rental company. Mr. Johnstone told the officer he was travelling to Prince George, and it became apparent that no roadside assistance was required. The officer nonetheless asked Mr. Johnstone to produce his driver's license, insurance papers and car rental documents.
- [61] The officer used these documents to obtain further information from dispatch, including that Mr. Johnstone was on a recognizance that required him to produce that recognizance if stopped by a police officer. Mr. Johnstone was unable to produce the recognizance when asked, and was arrested for breach of recognizance. The officer searched the vehicle incidental to arrest to determine whether a copy of the recognizance could be found there. During the search, he located methamphetamine and a mix of fentanyl and heroin in two packages in a Tim Horton's cup, and a package of methamphetamine in a Subway cup in the centre console. Mr. Johnstone was charged with possession for the purpose of trafficking.

- [62] Justice Crabtree held that s. 73(1) of the MVA did not provide a lawful basis to detain Mr. Johnstone because it only permits an officer to conduct a traffic safety stop of a "driver" of a motor vehicle. In the following passages, Justice Crabtree held that the term "driver" only applies to an individual who is "driving" a motor vehicle, which requires elements of both movement and control:
- [29] During the course of the interaction with Mr. Johnstone, the officer assumed he was the driver. As was noted above, s. 73(1) provides a peace officer with the authority to stop a vehicle and to make inquiries of the driver.
- [30] The terms "driving" or "driver" are not defined in the interpretation section of the MVA. Section 215 of the MVA defines driver to include a person who is in care and control of a motor vehicle. However, this provision is limited in its applicability to Part 4 of the MVA.
- [31] In *R. v. Steeden*, [1995] B.C.J. No. 1413 (C.A.), the Court considered the meaning of driving in relation to s. 149 of the MVA, the provision prohibiting careless driving. The Court held that the meaning of "driving" in relation to a motor vehicle, combines the elements of movement and the exertion of control. As an example of movement and the exertion of control, the Court in *Steeden* cited earlier jurisprudence to explain that somebody sitting in the driver's seat of a vehicle being towed would not be driving because that person had nothing to do with the propulsion. At para. 13, Wood J.A. stated:
- [13] It is my view, that when it is intended to describe conduct in relation to a motor vehicle, the ordinary meaning which attaches to the verb "drive" in the English language is one that combines the elements of movement and control; movement of the vehicle and control of that movement by the person said to be driving.
- [32] As there was no observable movement of the vehicle. Mr. Johnstone does not meet the definition of a driver in this circumstance and s. 73 (1) does not become engaged.
- [63] This analysis applies equally in the case at bar, and is thus binding on me: *R. v. Sullivan*, 2022 SCC 19 at paras. 65, 73-86. Although Ms. Anwyll occupied the driver's seat of the Elantra, Constable Verot observed no movement of the vehicle. Although perhaps unnecessary to the analysis, I would add that the Elantra's engine was not running, and Constable Verot did not suggest that he believed otherwise. I therefore conclude that Ms. Anwyll was not a driver of the Elantra within the meaning of s. 73(1) when the vehicle was observed by Constable Verot, and that this provision of the MVA provided no lawful basis upon which he could detain her.
- [64] In *Johnstone*, Justice Crabtree further concluded that s. 73(2) of the MVA provides a separate basis for the police to detain a "person in charge" of a vehicle for the purpose of stating their correct name and address, and the name and address of the vehicle's owner, only if the person was engaged in the operation of the motor vehicle. Otherwise, s. 73(2) would enable a police officer to detain any person in charge of a vehicle parked on the highway or in a public place. Justice Crabtree held that the justifiable infringement of s. 9 of the Charter

right articulated in *Ladouceur*, *Nolet* and *Strilec* does not extend the infringement of a person's s. 9 rights to this extent, and therefore cannot be justified under s. 1 of the Charter. See *Johnstone* at para. 34.

- [65] Justice Crabtree's analysis of s. 73(2) included consideration of s. 33(1) of the MVA. Section 33(1) provides that, apart from some exceptions not engaged here, every person must have their driver's license, as well as other specified documents related to the motor vehicle they are "driving or operating", in their possession at all times "while driving or operating that motor vehicle on a highway", and must produce their license and the other documents on demand of a peace officer.
- [66] Although Justice Crabtree recognized that the term "operating" as found in s. 33(1) included a broader form of activity than "driving", citing *Steeden*, he concluded that the case law justifying a random and thus arbitrary detention of a motor vehicle for traffic safety purposes under s. 1 of the Charter is premised on the pressing and substantial concern of preventing harm that might otherwise be caused by the operation of motor vehicles on highways. These case authorities did not justify the detention of individuals in relation to parked vehicles on highways. Accordingly, Mr. *Johnstone's* arbitrary detention was not only contrary to s. 9 of the Charter, but in addition was not saved by s. 1. See *Johnstone* at paras. 35-42.
- [67] Once again, the same analysis applies to Constable Verot's detention of Ms. Anwyll. I therefore find that the detention breached her s. 9 Charter rights.
- [68] Ms. Anwyll also argues that her s.9 Charter rights would have been breached regardless because Constable Verot was motivated to conduct the random stop, not for a valid highway-related purpose, as required by s. 73(1) of the MVA, but rather by a desire to determine whether there were drugs in the Elantra. See, e.g., *R. v. Huete*, 2018 BCSC 637 at paras. 62-79; *Woody* at paras. 39-43.
- [69] Ms. Anwyll's argument on this point is not rendered moot by virtue of my having already found her detention to constitute a breach of her s. 9 Charter rights, because as explained in *Zacharias* at paras. 48-49, additional or independent police misconduct associated with a Charter breach will tend to increase its seriousness at the first stage of the s. 24(2) analysis.
- [70] The Crown agrees that if Constable Verot's purpose was in whole or part to pursue a drug investigation, then Ms. Anwyll's detention would be unlawful on this basis as well, thus amounting to additional or independent police misconduct associated with the s. 9 Charter breach. The Crown does not seek to invoke the dual-purpose doctrine in relation to random stops conducted under s. 73 of the MVA, and thus is not asking me to adopt the approach taken in *R. v. Morris*, 2011 ONSC 5142 at paras. 4-5 and 17-51, affirmed 2013 ONCA 223 at paras. 2-7.

- [71] However, the Crown argues that Constable Verot's decision to detain Ms. Anwyll was not motivated by anything other than a valid highway-related purpose. For the following reasons, I agree.
- [72] Ms. Anwyll argues that Constable Verot's three drive-bys of the Elantra in the 7-Eleven parking lot, and his delay in conducting the stop until after he had reviewed the police files associating the vehicle to a known drug dealer James Lamont, supports the inference that he was motivated by a desire to locate drugs. However, I accept Constable Verot's evidence regarding his reasons for the second and third drive-bys. In particular, for officer safety purposes it was reasonable for him to review the police files before conducting the stop.
- [73] In this respect, and more generally, I do not find that Constable Verot was an insincere or evasive witness. His memory was at times fallible, as he readily admitted, but he was not confronted with any material inconsistencies between his testimony and the independent evidence that would lead me to conclude that he was intentionally untruthful on the stand. Constable Verot's demeanour was also suggestive of a desire to tell the truth in a reliable manner, although I recognize that demeanour is only one factor to consider in assessing credibility.
- [74] I also reject the argument that Constable Verot's subsequent search of the centre console indicates that he was really looking for drugs, and not for identification documents, the rental agreement or insurance papers. While it is true that insurance papers will usually be in a vehicle's glovebox, the same cannot be said for documents that might help identify the driver of a rental vehicle or the rental agreement itself.
- [75] Nor do I find anything untoward in Constable Verot checking the centre console before looking in the glovebox, despite Ms. Anwyll's argument to the contrary. He started his search from the driver's side of the Elantra, and not seeing any of the documents he was looking for in plain view, it was reasonable for him to next check inside the centre console.
- [76] Ms. Anwyll also contends that, in any event, there was no legitimate reason for Constable Verot to be looking for these documents as part of his search incident to arrest for driving while prohibited, further indicating that he was motivated by an improper purpose. I will address this contention below, in the section of my reasons dealing with whether, but for the preceding s. 9 Charter breaches, the search would have been lawfully conducted incidental to Ms. Anwyll's arrest. For now, suffice it to say that in my view the search would have been lawful on this basis had Ms. Anwyll's s. 9 rights not been breached.
- [77] Ms. Anwyll further argues that the presence of so many officers at the scene suggests that the initial detention was motivated by Constable Verot's desire to locate drugs in the Elantra. However, Constable Verot was not shaken in his testimony that it is common for other officers to attend to assist in a traffic stop or arrest if available and in the vicinity. Indeed, Constable Fryers testified that this was the reason he attended. No other officers were called to support a contrary conclusion, and there is no evidence before me to suggest that any of the radio broadcasts to or from dispatch revealed that the stop was motivated in whole or

part by a criminal law purpose.

[78] Ms. Anwyll submits that Constable Verot is not being forthright about his motivation for asking Ms. Anwyll for her driver's license because his claim of being previously unaware of James Lamont as a drug dealer is undermined by the evidence of Constable Fryers, who testified about having previously known that Mr. Lamont was a suspected high-level drug dealer. I reject this submission. The mere fact that Constable Fryers had come across what he referred to as anecdotal information about Mr. Lamont does not make Constable Verot's testimony about not having previously heard about Mr. Lamont less credible. The two constables worked in different teams or units, and there is no basis for me to conclude that the source of Constable Fryers' knowledge was seen or heard by Constable Verot as well.

[79] Nor do I accept that Constable Verot's veracity as a witness is undermined by his contention that the Elantra was not parked in a designated spot in the 7-Eleven parking lot. While the photographic evidence with which Constable Verot was confronted in cross-examination suggests that his view is incorrect, Constable Verot never suggested that the Elantra was parked illegally or in a manner that impeded the movement of other vehicles. Ultimately, the way the Elantra was parked was not in any way material to the issues in dispute on the voir dire, and so I am unwilling to draw any adverse inference against Constable Verot's credibility based on this aspect of his testimony.

(b) Arrest of Ms. Anwyll for Driving While Prohibited

[80] Ms. Anwyll's warrantless arrest for driving while prohibited necessarily constitutes a breach of her s. 9 Charter rights because the police are not permitted to rely on unconstitutionally obtained evidence to ground an arrest: *Zacharias* at paras. 26-44.

[81] However, as already noted, any additional or independent police misconduct surrounding her arrest may make the Charter breach more serious at the first stage of the s. 24(2) analysis. It is therefore necessary to consider whether, even assuming the evidence grounding the arrest had been constitutionally obtained, the arrest would still have breached s. 9 of the Charter. In particular, the question arises as to whether the police would have had a lawful basis to arrest Ms. Anwyll without a warrant for the MVA offence of driving while prohibited.

[82] The authority to arrest a person without a warrant for driving while prohibited under s. 95 or 102 of the MVA, one or the other of which I understand applied in Ms. Anwyll's case, is found in s. 79 of the MVA, which reads:

79 An officer or constable of the Royal Canadian Mounted Police or of the police department of a municipality may arrest without warrant

(a) a person who the officer or constable finds driving a motor vehicle, and who the officer or constable has reasonable and probable grounds to believe was driving in contravention of section 95 or 102,

- (b) a person driving a motor vehicle who the officer or constable has reasonable and probable grounds to believe is not insured as required by this Act or does not hold a valid and subsisting motor vehicle liability insurance card or financial responsibility card, and
- (c) a person who the officer or the constable has reasonable and probable grounds to believe has contravened section 68,

and may detain the person arrested until the person can be brought before a justice to be dealt with according to law.

[83] As the Crown essentially conceded in closing submissions, Constable Verot's warrantless arrest of Ms. Anwyll would not have been lawful under s. 79 even had the information grounding it been constitutionally obtained. Her warrantless arrest was thus in breach of s. 9 of the Charter for another reason as well. I will explain why this is so.

[84] A warrantless arrest for driving while prohibited under s. 320.18(1) of the Criminal Code is governed by s. 495(1) and requires only that the arresting officer have reasonable grounds to believe the arrestee was operating a motor vehicle while prohibited from doing so. In contrast, s. 79(a) of the MVA only permits the warrantless arrest of, "a person who the officer or constable finds driving a motor vehicle, and who the officer or constable has reasonable and probable grounds to believe was driving in contravention of section 95 or 102" (emphasis added).

[85] As held in *R. v. Pelgrom*, 2020 BCSC 2311 at para. 6, s. 79(a) thus authorizes a warrantless arrest only where the person is, "in the very act of committing an offence", or in other words has been caught "red-handed."

[86] Constable Verot did not observe Ms. Anwyll in the very act of driving while prohibited, and thus did not "find" her "driving" the Elantra within the meaning of s. 79(a). Constable Verot did not contend otherwise in his testimony. Rather, he stated that he had "reasonable grounds" to believe Ms. Anwyll had been driving the vehicle, based on her occupying the driver's seat in a parking lot in which cars usually remained only for a short time. In cross-examination, Constable Verot readily conceded that on the evidence available to him at the time of arrest it was possible that Mr. Friesen was the one driving the car. Indeed, Constable Verot volunteered that the evidence available to him at the time of arrest would have been insufficient to launch a prosecution.

(c) Search of Elantra Incidental to Ms. Anwyll's Arrest for Driving While Prohibited

[87] Following Ms. Anwyll's warrantless arrest, Constable Verot conducted a warrantless search of the Elantra. As the Crown did not argue that Ms. Anwyll or Mr. Friesen had no reasonable expectation of privacy in the Elantra or its contents, the question becomes whether this search of the vehicle breached their s. 8 Charter right to be secure against unreasonable search or seizure.

- [88] A warrantless search is presumptively unreasonable unless the Crown establishes the contrary on a balance of probabilities. To be reasonable, the search must be authorized by law, that law must itself be reasonable, and the search must have been carried out in a reasonable manner. See *R. v. Collins*, 1987 CanLII 84 (SCC) at paras. 22-23.
- [89] The only possible basis upon which Constable Verot's search of the Elantra could have been authorized by law is the common law power to search incident to an arrest.
- [90] To be valid, a search incident to arrest must meet three preconditions: (1) the person searched is lawfully arrested; (2) the search is truly incidental to the arrest, i.e., for a valid law enforcement purpose related to the reasons for the arrest; and (3) the search is conducted reasonably. See *R. v. Stairs*, 2022 SCC 11 at para. 35.
- [91] As already explained, Ms. Anwyll was not lawfully arrested. The first precondition for a search incident to arrest is therefore not met, meaning that Constable Verot's search of the Elantra breached both Ms. Anwyll and Mr. Friesen's s. 8 Charter rights.
- [92] Ms. Anwyll and Mr. Friesen argue that additional or independent police misconduct occurred in relation to this search because it would not have fallen within the power to conduct a search incident to arrest even had Ms. Anwyll's preceding arrest been lawful.
- [93] The validity of this argument hinges on whether the search of the Elantra met the second precondition for a search incident to arrest, namely, the requirement that the search be truly incidental to the arrest.
- [94] To be truly incidental to the arrest, a lawful search must be for a valid objective in pursuit of the ends of criminal justice, such as seizing anything in the arrested person's possession or the surrounding area of the arrest for the purpose of: (1) ensuring the safety of the police and public, including preventing escape; (2) discovery of evidence related to the arrested offence; or (3) prevention of the destruction of evidence. See *R. v. Caslake*, 1998 CanLII 838 (SCC) at paras. 14 and 19; *Stairs* at paras. 34 and 36.
- [95] A police officer must have one of these purposes in mind when conducting the search, but in addition the officer's belief that this purpose will be served by the search must be objectively reasonable. For example, if the justification for the search is to find evidence, there must be some reasonable basis or prospect of securing evidence of the offence for which the accused is being arrested. See *Caslake* at paras. 19-22, 27.
- [96] Importantly, the Crown need not establish reasonable grounds to believe the search will meet one of these valid objectives, because the lawful arrest provides that foundation and the right to search derives from it. As stated, the only requirement is that there be some reasonable basis for doing what the officer did, which is a much lower standard than the standard of reasonable grounds to believe. It is also less stringent than the reasonable suspicion standard, because it permits searches based on generalized concerns arising from the arrest, while the reasonable suspicion standard does not. See *Caslake* at paras. 13, 19 and 25; *Stairs* at paras. 37-38 and 67.

- [97] These principles apply no differently for motor vehicles than for any other place. The right to search a vehicle incident to arrest, as well as the scope of that search, depends on several factors, including the basis for the arrest, the location of the vehicle in relation to the place of the arrest, and other relevant circumstances. A search of a vehicle incident to arrest cannot be undertaken for purposes having no connection to the reason for the arrest. For example, an arrest for outstanding traffic fines does not authorize the search of the vehicle's trunk. See Caslake at paras. 15, 22-23.
- [98] I will now examine whether Constable Verot's search of the Elantra was truly incidental to Ms. Anwyll's arrest.
- [99] The Crown's argument that such a search was truly incidental to arrest centered almost entirely on Constable Verot's search for Ms. Anwyll's identification documents, so I will do likewise in these reasons.
- [100] As noted, Constable Verot testified that he searched the Elantra incidental to arrest to see whether he could find Ms. Anwyll's identification documents. He stated that, when making the arrest and prior to searching the vehicle, he had reasonable grounds to believe that he was dealing with Ms. Anwyll, but he wanted to confirm the identification through documentation.
- [101] Based on this evidence, there is no question that Constable Verot subjectively believed that his search of the Elantra was truly incidental to Ms. Anwyll's arrest. As explained in my rejection of Ms. Anwyll's argument that Constable Verot's true motivation was to search the vehicle for drugs, I am not prepared to infer a nefarious purpose in his decision to look in the centre console before searching the glovebox. Nor do I accept that Constable Verot lacked the professed subjective belief because he ceased searching for any documents once the methamphetamine was located. As Constable Verot effectively stated in his evidence, locating the methamphetamine substantially changed the nature and direction of the investigation, making it reasonable to wait until later to continue searching the Elantra.
- [102] In my view, Constable Verot's subjective belief was also objectively reasonable, especially given that the "some reasonable basis" standard is much lower than the standard of reasonable grounds to believe. Identification is an essential element of the offence of driving while prohibited. Identification documents would thus be relevant to whether the Crown could prove the offence. Many if not most people carry identification documents on or with them, and it is not uncommon for a person to keep such documents in a vehicle.
- [103] There was thus some reasonable basis for Constable Verot to search the Elantra for identification documents relating to the person he had just arrested. He was not required at law to wait to see whether evidence obtained from other sources would help prove or disprove this element.

- [104] Ms. Anwyll argues that the reasoning I have just set out is unconvincing because during cross-examination Constable Verot agreed that he had seen a mug shot of Ms. Anwyll prior to searching the Elantra. However, it is unnecessary to determine whether confirming her identity from a mug shot prior to conducting the search would render that search not truly incidental to the arrest, because I find that Constable Verot did not view Ms. Anwyll's mug shot prior to conducting the search.
- [105] My finding is based on the CCTV footage, as well as the evidence of Constable Fryers regarding the radio communications he overheard between Constable Verot and dispatch, which together establish that Constable Verot did not run Ms. Anwyll's name and date of birth on his onboard computer prior to arresting her for driving while prohibited. The CCTV footage further shows that Constable Verot did not enter his vehicle, or any other police vehicle, between first speaking to Ms. Anwyll and searching the Elantra. Accordingly, while it is quite possible that Constable Verot saw Ms. Anwyll's mug shot at some point after he left the 7-Eleven parking lot that evening, he did not do so prior to searching the Elantra.
- [106] I recognize that in *R. v. Harrison*, 2009 SCC 34, a police officer was held to lack a lawful basis to conduct a search incident to arrest for the appellant's driver's license, which the appellant had said he could not find and might have left at home, after the appellant was arrested for driving while suspended. But in *Harrison* the officer appears to have been in fact motivated by a desire to find drugs, the "ostensible" reason for having searched the vehicle incident to arrest being viewed as a ruse. Perhaps more importantly, the appellant is said to have initially identified himself accurately, which indicates that the search was not, and could not have been, for the purpose that motivated Constable Verot in the case at bar. See *Harrison* at paras. 6-8, 11, 20.
- [107] As a final point, which in a sense operates as a footnote to the first paragraph of my discussion of this particular s. 8 breach, Mr. Friesen was not the driver of the Elantra, and depending on the circumstances a passenger may have a lesser expectation of privacy in a vehicle than does the driver, or no expectation of privacy at all (*R. v. Belnavis*, 1997 CanLII 320 at paras. 22-23). However, the Crown is not arguing that Mr. Friesen had no expectation of privacy in the Elantra or its contents (*R. v. Jones*, 2017 SCC 60 at paras. 32-33; *Belnavis* at para. 24).
- (d) Arrest of Ms. Anwyll for Possession of a Controlled Substance
- [108] Constable Verot's reasonable grounds for arresting Ms. Anwyll for possession of a controlled substance relied entirely on the Ziploc bag of methamphetamine he unconstitutionally obtained from the centre console of the Elantra. Excising that evidence from consideration results in there being no reasonable grounds and thus no lawful basis for the arrest. Accordingly, the arrest breached Ms. Anwyll's s. 9 Charter right to be free from arbitrary detention.

- [109] Ms. Anwyll does not suggest that this arrest was characterized by any additional or independent police misconduct, whether in the form of an independent Charter breach or otherwise. I therefore need not undertake any analysis in this respect.
- (e) Arrest of Mr. Friesen for Possession of a Controlled Substance
- [110] Constable Verot arrested Mr. Friesen for possession of a controlled substance after finding the methamphetamine in the covered centre console of the Elantra.
- [111] The parties agree that this arrest breached Mr. Friesen's s. 9 Charter right to be free from arbitrary detention, because it was based entirely on evidence obtained through an unlawful search of the Elantra, which constituted a breach of Mr. Friesen's s. 8 Charter rights.
- [112] However, Mr. Friesen argues that the state misconduct in breaching his s. 9 right was rendered more serious because the police lacked reasonable grounds to arrest him for possession of a controlled substance.
- [113] Beaver at para. 72 sets out the principles applicable in determining whether the police have reasonable grounds to make a warrantless arrest (citations omitted):
1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint.
 2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence. Subjective grounds for arrest are often established through the police officer's testimony. This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal.
 3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer.
 4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism". Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting] officer", deference is not necessarily owed to their view of the circumstances because of their training or experience. The arresting officer's grounds for arrest must be more than a "hunc[h] or intuition".
 5. In evaluating the objective grounds to arrest, courts must recognize that, "[o]ften, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete". Courts must also remember that "[d]etermining whether sufficient grounds exist to justify an

exercise of police powers is not a 'scientific or metaphysical exercise', but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience'".

6. "Reasonable and probable grounds" is a higher standard than "reasonable suspicion". Reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime. At the same time, police do not require a prima facie case for conviction before making an arrest. Nor do the police need to establish that the offence was committed on a balance of probabilities. Instead, the reasonable and probable grounds standard requires "a reasonable belief that an individual is connected to the offence". A reasonable belief exists when "there is an objective basis for the belief which is based on compelling and credible information". The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest.
 7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest.
 8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds.
- [114] To recap, Constable Verot based his reasonable grounds for arresting Mr. Friesen on: (a) having seen Mr. Friesen associated with the Elantra when he first observed the vehicle while driving along Tolmie Avenue; and (b) Constable Fryers telling him that the CCTV footage showed that Mr. Friesen was in the car prior to it parking beside the car wash. Based on this information, Constable Verot testified that he believed that Mr. Friesen had been sitting in the Elantra's front passenger seat.
- [115] While I accept that Constable Verot subjectively believed he had reasonable grounds to arrest Mr. Friesen, those grounds were not objectively reasonable in the circumstances, which means that the arrest would have breached Mr. Friesen's s. 9 Charter rights even had the preceding search of the Elantra been constitutional. I come to this conclusion for several reasons.
- [116] Constable Verot did not know how long Mr. Friesen had been in the Elantra before it arrived at the car wash, or for what purpose. Nor did Constable Verot have any knowledge as to whether Mr. Friesen had some prior association with the vehicle, whether as a renter, driver or otherwise.
- [117] Furthermore, Constable Verot's observations of the Elantra did not suggest its involvement in drug activity, let alone drug activity involving Mr. Friesen. This is not a case, for example, where the vehicle was under surveillance for a period during which its movements, and/or interactions between its occupants and other individuals, reasonably suggested the involvement of all those occupants in drug trafficking.

- [118] Also relevant is that Constable Verot did not know whether Mr. Friesen had ever accessed the centre console, or other closed off parts of the Elantra, such as the trunk or glove compartment, which might have supported the inference that Mr. Friesen had some level of control over the vehicle and knowledge of its contents, including items located in those closed off areas. Nor did Constable Verot have any information regarding the relationship between Ms. Anwyll and Mr. Friesen.
- [119] Plus, during the vehicle stop Mr. Friesen did not make any statements or conduct himself in any way that might support an inference of involvement with drug possession or trafficking. For instance, there is no evidence he acted nervously, or made a comment suggesting a substantial connection to the vehicle or evincing an attempt to cover up his or Ms. Anwyll's activities by misdirecting the officers.
- [120] Constable Verot also had no information to suggest that Mr. Friesen had any history of involvement in possessing or trafficking controlled substances.
- [121] Finally, Constable Verot did not include among the factors he relied on to arrest Mr. Friesen that: (a) Elantra was a rental vehicle and such vehicles are sometimes used to traffic drugs; or (b) not-too-dated police reports that linked the Elantra to a known high-level drug trafficker. It is therefore unnecessary for me to decide whether these factors, in combination with Mr. Friesen's presence as a passenger, might have provided objective reasonable grounds to believe that Mr. Friesen was in possession of the methamphetamine.
- [122] The Crown submits that I should conclude that Constable Verot had objectively reasonable grounds for arresting Mr. Friesen because the methamphetamine was within his reach, and one or the other of the Elantra's occupants, or both jointly, must almost certainly have been in possession of it. However, while it is often reasonable to infer that a driver has knowledge and control of items located in a vehicle's closed off areas, such as a covered centre console, the same cannot be said of a passenger, at least absent some further information capable of supporting that inference, none of which exists in this case.
- [123] The Crown's book of authorities included the decision in *R. v. Juan*, 2007 BCCA 351, but this case does not materially support the Crown's position. If anything, it does the opposite.
- [124] In *Juan*, an undercover officer arranged to buy nine ounces of cocaine from someone she knew as "Joey". The sale was set for a shopping mall parking lot. Joey arrived driving a vehicle in which the appellant was a passenger. Joey left that vehicle, walked to the undercover officer's vehicle, and showed the officer the cocaine. Police officers then arrested Joey and the appellant. In setting out their grounds for arresting the appellant, the officers testified to the effect that, in their experience, people who arrive at a drug transaction of this size normally have some involvement in the transaction, either as a supplier or someone helping to ensure that money or drugs are not stolen.

- [125] The trial judge in Juan concluded that objectively reasonable grounds did not exist for the appellant's arrest, because the information available to the police went no further than indicating that the appellant was a passenger in the vehicle. In overturning the ensuing acquittal, the Court of Appeal held that this conclusion was in error, in particular because the grounds relied on by the officers went further than mere reliance on the appellant's status as a passenger. In this respect, the Court stated:
- [28] In the case at bar the judge concluded that the officers' testimony supported the subjective grounds, but not the objective grounds. He based this on a finding that the arrest was "simply because [Mr. Juan] was a passenger in the vehicle." That conclusion overlooked both the experience of the officers and, most significantly, their knowledge as to the customs of the illegal drug trade and their testimony with respect to the transaction in question. Matters of security involving protection of the principal were known by the officers to be important and often resulted in other people accompanying the principal. The officers knew this was a high level illegal commercial drug transaction and that principals do not take "innocents" along to testify against them in the case of an arrest, but rather only people who are trusted. The officers were aware that Mr. Juan was involved in such a "purposeful trip."
- [126] The circumstances in Juan are materially different from those in Mr. Friesen's case. Constable Verot saw no drug transaction, nor did he testify about customs in the drug trade that suggested reasonable grounds to believe that Mr. Friesen was in possession of a controlled substance. Rather, the circumstances indicate no more than Mr. Friesen was a passenger in the Elantra, which the quotation set out above from Juan arguably accepts is insufficient to constitute reasonable grounds to make an arrest.
- [127] The Crown also relied on *R. v. Graham*, 2018 ONSC 6718, where the trial judge held that the police had objectively reasonable grounds to arrest a front-seat passenger for possession of a controlled substance, in circumstances where a small baggie of marihuana appeared to have been tossed from the vehicle during a traffic stop, perhaps by the back-seat passenger. However, *Graham* is not binding upon me, and the circumstances in that case are in any event distinguishable, including because the police observed interactions between the vehicle's occupants that suggested joint possession, and knew that the front-seat passenger had a recent conviction for possession of cocaine for the purposes of trafficking. See *Graham* at paras. 62-68.
- [128] I therefore find that Constable Verot lacked reasonable grounds to arrest Mr. Friesen for possession of a controlled substance, which would have breached Mr. Friesen's s. 9 Charter right even had the presence of the methamphetamine not been discovered through a previous breach of Mr. Friesen's s. 8 Charter right.
- (f) Searches of Mr. Friesen and Ms. Anwyll Incident to Their Arrests

- [129] Constable Verot searched both Mr. Friesen and Ms. Anwyll incident to their arrests in the 7-Eleven parking lot, and Ms. Anwyll was searched again at the Saanich Police Station. As the arrests were unlawful, so too were these searches, which thus infringed the s. 8 Charter rights of both Mr. Friesen and Ms. Anwyll.
- [130] Neither Mr. Friesen nor Ms. Anwyll allege that these searches involved any additional or independent police misconduct.
- (g) Search of Elantra Incidental to Arrests of Ms. Anwyll and Mr. Friesen for Possession of a Controlled Substance
- [131] Neither Ms. Anwyll nor Mr. Friesen were lawfully arrested for possession of a controlled substance. Constables Verot and Fryers thus had no lawful basis to search the Elantra's trunk and the bag inside it at the Saanich Police Station incidental to those arrests. This search of the Elantra and the bag therefore breached their s. 8 Charter rights to be free from unreasonable search and seizure.
- [132] There is no basis to conclude that this subsequent search of the Elantra and bag involved any additional or independent police misconduct. Rather, these breaches of s. 8 of the Charter are purely consequential upon the earlier breaches of Mr. Friesen and Ms. Anwyll's Charter rights.

Section 24(2) of the Charter

- [133] Section 24(2) provides that evidence obtained in a manner that infringes any Charter rights shall be excluded if it is established that, having regard to all the circumstances, its admission in the proceedings would bring the administration of justice into disrepute.
- [134] The s. 24(2) inquiry examines the impact of admitting evidence obtained in breach of the Charter on public confidence in the justice system over the long-term, based on a consideration and balancing of three factors: (1) the seriousness of the state's Charter-infringing conduct; (2) the impact of the breach on the accused's Charter-protected interests; and (3) society's interest in an adjudication of the case on its merits. See *Tim* at para. 74; *Beaver* at paras. 116-117.
- [135] Some of the Charter breaches in this case arise only as a consequence of preceding Charter breaches, including the two searches of the Elantra (one at the 7-Eleven, the other at the Saanich Police Station), Ms. Anwyll's arrest for possession of a controlled substance, and the searches of Ms. Anwyll and Mr. Friesen following their arrests.
- [136] Purely consequential breaches - i.e., ones that arise only as a result of an initial breach and involve no additional or independent police misconduct - must be factored into the first stage of the s. 24(2) analysis, but will usually not meaningfully increase the seriousness of the Charter-infringing conduct, at least where the police honestly believed they did not commit the initial breach. The focal point for evaluating seriousness will thus likely remain the initial breach. By contrast, at the second stage of the s. 24(2) analysis the impact of a

breach on Charter-protected interests must be considered irrespective of whether that breach is purely consequential in nature. See Zacharias at paras. 47-49, 52-57.

(a) Seriousness of the Breaches

- [137] The first-stage inquiry asks whether the police engaged in misconduct from which the court should disassociate itself. The focus is not on punishing the police, but rather on preserving public confidence in the rule of law and its processes. The court must situate the Charter-infringing conduct on a scale of culpability. At the more serious end of this scale is wilful or reckless disregard of Charter rights, a systemic pattern of Charter-infringing conduct, or a major departure from Charter standards. Courts should disassociate themselves from such conduct because it risks bringing the administration of justice into disrepute. At the less serious end of the scale are Charter breaches that are inadvertent, technical or minor, or which reflect an understandable mistake. Such circumstances minimally undermine public confidence in the rule of law, and thus disassociation is much less of a concern. See Tim at para. 82; Beaver at para. 120.
- [138] The s. 8 Charter breaches occasioned by the searches of the Elantra and of Ms. Anwyll and Mr. Friesen, and the s. 9 Charter breach occasioned by Ms. Anwyll's arrest for possession of a controlled substance, are consequential breaches that constitute state misconduct only because of the preceding unlawful detentions and/or searches. They were not characterized by additional or independent misconduct, and Constable Verot did not know from the outset that he was acting beyond his lawful authority. Accordingly, these consequential breaches do not meaningfully raise the seriousness of the state conduct in this case, and the focal points in assessing seriousness are the initial detention and first arrest of Ms. Anwyll, and the arrest of Mr. Friesen.
- [139] Constable Verot did not conduct the traffic stop or the arrest of Ms. Anwyll for driving while prohibited pursuant to a ruse under which he sought to use his authority under the MVA as illegitimate cover for pursuing a drug investigation. He therefore did not act in bad faith, and instead was acting honestly when he took these actions. This case is therefore distinguishable from *R. v. Young*, 2020 BCSC 1201, relied on by Ms. Anwyll, in which the seriousness of the breach was egregious because the police officer improperly targeted a driver simply because he believed that driver was up to no good, and then denied doing so in his testimony.
- [140] Nor is this case like *Harrison*, the other s. 24(2) authority relied on by Ms. Anwyll and Mr. Friesen in arguing that the Charter breaches were at the most serious end of the spectrum. In *Harrison*, the police officer arbitrarily stopped the appellant's rental vehicle even though he knew he had no legal basis to do so, and his in-court explanations for his actions were contrived and defied credibility. Moreover, once the vehicle was stopped the officer's actions were motivated by a desire to pursue a mere suspicion that it contained drugs. In these circumstances, the officer's conduct was held to be brazen, flagrant and extremely serious. See *Harrison* at paras. 6, 11-12, 22-27.

- [141] That said, Constable Verot's ignorance as to the scope of his legal authority under the MVA when he initially detained Ms. Anwyll to ask for her license, and then arrested her without a warrant for driving while prohibited, cannot amount to good faith (Tim at para. 85). Plus, officers are expected to know the law they are enforcing (Tim at paras. 30 and 85). The decisions in Johnstone and Pelgrom are both from 2020, and in my view leave no uncertainty as to the governing legal principles. They should have been known to and followed by all Saanich officers, even relatively new ones such as Constable Verot. I therefore reject the Crown's argument that these breaches were only trivial in nature.
- [142] I also reject the Crown's argument that the breaches are less serious than would otherwise be the case because they both arose from Constable Verot's failure to recognize that his powers under the MVA did not extend to a scenario involving a parked vehicle. Each breach was the result of a failure to adhere to a discrete restriction set out in a specific provision of the MVA. One provision dealt with random stops, the other with arresting a person for driving while prohibited. Moreover, the breaches occurred sequentially, rather than at the same time. I am therefore not prepared to view the two breaches as more akin to a single incidence of misconduct.
- [143] Nor do I accept the Crown's argument that Constable Verot had no choice but to initially detain Ms. Anwyll to check for her license, and then arrest her for driving while prohibited, because to do otherwise would have created an unacceptable risk to the public. As I pointed out to the Crown during closing submissions, Constable Verot had several alternative steps available to him. For example, he could have waited until the Elantra began to exit the parking lot to conduct a traffic stop, and there is no good basis to believe that doing so would have exposed the public to undue risk, because at that point Constable Verot did not have reasonable grounds to believe that Ms. Anwyll was a suspended driver.
- [144] Constable Verot's arrest of Mr. Friesen without the requisite reasonable grounds is also concerning, because the reasonable grounds standard is well-established in the case law. In my view, this is not a case where the officer was off the mark only to a miniscule degree.
- [145] Also relevant in assessing the seriousness of the breaches is the fact that Constable Verot infringed the Charter in three different ways regarding two individuals in a matter of only a few minutes. Given Constable Verot's honest belief that he was acting lawfully, I would not describe this as a pattern of abuse. But it is nonetheless a concerning pattern of Charter noncompliance, which I find pushes the state misconduct further towards the more seriousness end of the spectrum of culpability. See *R. v. Fan*, 2017 BCCA 99 at paras. 72-73, 78-79.

(b) Impact on Protected Rights

- [146] This stage of the analysis involves identifying the interests protected by the relevant Charter rights and evaluating how seriously the breaches affected those interests. A court should situate the adverse impact on those Charter rights on a spectrum, ranging from impacts that are fleeting, technical, transient, or trivial, to those that are profoundly

intrusive or that seriously compromise the interests underlying the rights infringed. The greater the impact on Charter-protected interests, the greater the risk that admission of the evidence would suggest that Charter rights are of little actual avail to citizens, thus breeding public cynicism and bringing the administration of justice into disrepute. See *Tim* at para. 90; *Beaver* at para. 123.

- [147] In my view, taken cumulatively, the impact of the non-consequential and consequential breaches on Ms. Anwyll's Charter-protected interests cannot be described as fleeting, technical, transient, or trivial. Rather, those interests were adversely impacted in a fairly significant way. The same can be said regarding Mr. Friesen's Charter-protected interests.
- [148] Not only did Ms. Anwyll's initial detention negatively affect her individual liberty, but her further unlawful detention following her arrests for driving while prohibited and possession of a controlled substance had an even more significant impact in this regard. She was also handcuffed, then searched both at the scene of her arrest and at the Saanich Police Station.
- [149] I acknowledge that the adverse impact of the two searches of the Elantra on Ms. Anwyll's s. 8 Charter interests was less significant because of the reduced expectation of privacy in a vehicle (*Tim* at para. 93). Indeed, the fact that she was a prohibited driver arguably further reduces this expectation of privacy, although the Crown did not provide me with any case law to this effect, and more importantly did not argue that Ms. Anwyll had zero expectation of privacy in the vehicle.
- [150] As for Mr. Friesen, while he was detained at least a few minutes later than was Ms. Anwyll, the negative effect of the breaches on his Charter-protected rights was also substantial. He was handcuffed, searched and placed in the back of a police cruiser, thereby depriving him of his liberty and detracting from his right to privacy.
- [151] I do not accept that the impact of the breaches on Mr. Friesen's right to be free from arbitrary detention ended at the point where he had a medical emergency and was taken to the hospital by ambulance. While the quick action of Constable Fryers in administering Naloxone to Mr. Friesen is commendable, Mr. Friesen continued to be detained thereafter. Specifically, Constable Penner stayed with Mr. Friesen during the ambulance ride and up until he was released from the hospital. Constable Penner's presence for this purpose was unlawful because of the preceding Charter breaches, and undermined the dignity of Mr. Friesen while he was receiving medical treatment for a serious health event.
- [152] As was the case with Ms. Anwyll, the adverse impact on Mr. Friesen's s. 8 Charter rights from the searches of the Elantra was less serious because of the reduced expectation of privacy in a vehicle.

[153] Finally, with respect to the various breaches of Ms. Anwyll and Mr. Friesen's Charter rights, on the record before me it would be speculative to suggest that any of the impugned evidence would have been discovered by police even absent those breaches. I am thus unable to find that the adverse impact on these Charter-protected rights is attenuated because the police would have located the incriminating evidence regardless. See *Beaver* at para. 125; *Tim* at para. 94.

(c) Interest in Fair Trial on Merits

[154] The third stage of the s. 24(2) analysis considers factors such as the reliability of the impugned evidence and its importance to the Crown's case. The question is whether the truth-seeking function of the criminal justice system would be better served by admitting the evidence or by its exclusion. Relevant factors under this inquiry include the reliability of the evidence, the importance of the evidence to the prosecution's case, and the seriousness of the offence at issue. See *Tim* at para. 90; *Beaver* at para. 129.

[155] The impugned evidence in this case is reliable: a 9 mm bullet and a large amount of cash discovered during the search of Mr. Friesen; and a handgun with a magazine containing ammunition and relatively significant amounts of several types of controlled substances, including fentanyl, during the searches of the *Elantra*. This evidence is also critical to the Crown's case - without it the prosecution will necessarily founder. And the offences are indisputably serious in nature: *Tim* at para. 99.

(d) Balancing

[156] The balancing step in the s. 24(2) analysis involves weighing each of the three lines of inquiry to determine whether admitting the evidence would bring the administration of justice into disrepute. This balancing is prospective in nature: it aims to ensure that evidence obtained through a Charter breach does not cause further damage to the justice system. It is also societal in scope, the goal being not to punish the police but to address systemic concerns involving the broad impact of admitting the evidence on the long-term reputation of the justice system. The balancing is contextual and qualitative, is not capable of mathematical precision, and there is no overarching rule governing how the balance is to be struck. See *Tim* at para. 98; *Beaver* at para. 133; *R. v. McColman*, 2023 SCC 8 at para. 59.

[157] For the reasons set out above, I find that the state misconduct, while not flagrant or egregious, is at the more serious end of the culpability scale for both Ms. Anwyll and Mr. Friesen. This line of inquiry therefore pulls decidedly towards exclusion. So too does the second line of inquiry, because Ms. Anwyll and Mr. Friesen experienced substantial adverse impact to their protected Charter rights. On the other hand, the third line of inquiry tugs strongly in favour of inclusion.

[158] In my view, the cumulative weight of the first two lines of inquiry makes a strong case for exclusion, and the third line of inquiry cannot therefore tip the scale in favour of admissibility. See *Beaver* at para. 134.

- [159] The long-term reputé of the criminal justice system cannot countenance admitting the impugned evidence in these circumstances. Exclusion is necessary to avoid the further damage to the justice system that would arise if the unlawfully-obtained evidence derived from these breaches were relied on by the Crown to prosecute Ms. Anwyll and Mr. Friesen. Exclusion is also necessary to demonstrate to the public that Charter rights are important and will be protected by the courts.
- [160] While the offences with which Ms. Anwyll and Mr. Friesen are charged are very serious, and exclusion of the evidence will gut the Crown case, the seriousness of an alleged offence has the potential to cut both ways. The public has a heightened interest in seeing a determination on the merits where the offence charged is serious, but it also has a vital interest in having a justice system that is beyond reproach, particularly where the penal stakes for the accused are high. See Grant at para. 84; R. v. Paterson, 2017 SCC 15 at paras. 55-56.
- [161] In this case, I have concluded that for both Ms. Anwyll and Mr. Friesen the state misconduct was serious and had a substantial negative impact on their Charter-protected rights. The importance of ensuring that such conduct is not condoned by the courts therefore requires exclusion of the impugned evidence.

Conclusion

- [162] Based on my findings above, all the items seized by police from Mr. Friesen and the Elantra are excluded from evidence under s. 24(2) of the Charter.

"D. Layton J."

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