

CANADA / JUDGMENT

R. v. Armitage & Busch

2022 BCSC 1407

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Supreme Court of British Columbia

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2022 BCSC 1407 R. v. Armitage & Busch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Armitage & Busch,

2022 BCSC 1407

Date: 20220817

Docket: 182518

Registry: Victoria

Regina

v.

Zachary Armitage and James Lee Busch

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Before: The Honourable Mr. Justice Crossin

Reasons for Judgment

Re: DNA Warrant

Counsel for the Crown:

C. Fisher

S. Bakken

Agent for the defendant Zachary Armitage:

J. Heller

Counsel for the defendant James Lee Busch:

R. Drury

S. Roy

Place and Dates of Hearing:

Vancouver, B.C.

June 6 - 7, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2022

- [1] The accused, Mr. Busch, brings an application to exclude from evidence at his trial the sample of blood seized from Mr. Busch on July 15, 2020. This seizure was pursuant to a warrant to take bodily samples from Mr. Busch for deoxyribonucleic acid ("DNA") analysis (the "DNA warrant"). The DNA warrant was signed by a provincial court judge pursuant to s. 487.05 of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code], on July 9, 2020.
- [2] Mr. Busch's position is that while the DNA warrant was validly issued pursuant to s. 487.05 of the Criminal Code, it nevertheless did not comply with s. 29 of the Criminal Code.
- [3] Section 29 of the Criminal Code reads as follows:

Duty of person arresting

- (1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

Notice

- (2) It is the duty of every one who arrests a person, whether with or without a warrant, to give notice to that person, where it is feasible to do so, of
 - (a) the process or warrant under which he makes the arrest; or
 - (b) the reason for the arrest.

Failure to comply

- (3) Failure to comply with subsection (1) or (2) does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from criminal responsibility.
- [4] In the case at bar, on the day of signing the DNA warrant, the provincial court judge did not fill in the blank space available for the signing day in July 2020. Mr. Busch submits that while the DNA warrant remains validly issued, given the events that transpired after the judge issued the DNA warrant, the circumstances as a whole amounted to a breach of s. 29 of the Criminal Code and, consequently, a breach of ss. 7 and 8 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter].
- [5] Consequently, Mr. Busch submits that the evidence of his bodily sample ought to be excluded pursuant to s. 24(2) of the Charter.

The Offence

- [6] Mr. Busch and Mr. Armitage are before the Court, jointly charged with the first-degree murder of Martin Payne on or about July 8, 2019 in Metchosin, British Columbia ("BC"). Metchosin is a small town in the area of Victoria, BC ("Victoria") on Vancouver Island.
- [7] Mr. Busch and Mr. Armitage, at the time of the alleged offence, were federal inmates serving prison sentences at William Head Institution ("WHI"); a federal institution located in Metchosin, BC.
- [8] On July 7, 2019, the two accused walked away from the prison.
- [9] The case for the Crown consists of evidence that the two accused, in the aftermath of their escape, set about attempting to arrange, facilitate, and advance their escape from Metchosin and off Vancouver Island. The position of the Crown is that one such step involved the two accused entering Mr. Payne's house when Mr. Payne was at work. The Crown seeks to lead evidence of activity in the house that places the two accused in Mr. Payne's house for a period of time. It is the Crown's theory that at some point, Mr. Payne returned to the house in his truck, and upon entering in the house, was accosted by the two accused and ultimately killed.
- [10] Some days later, the police attended Mr. Payne's home and discovered Mr. Payne's body on the floor of his bathroom.
- [11] The Crown submits that there is a good deal of circumstantial evidence linking the two accused to each other and to the crime in question. The Crown also says that there is a body of circumstantial evidence linking Mr. Armitage to the inside of Mr. Payne's home at the relevant time. However, according to the Crown, the circumstantial evidence linking Mr. Busch to being inside Mr. Payne's home is, unlike Mr. Armitage, sparse. The Crown's

evidence against Mr. Busch on this issue is limited to a DNA link between Mr. Busch and certain items found in Mr. Payne's home and vehicle. It is this evidence that Mr. Busch seeks to exclude.

The Evidence Relating to the Circumstances of the DNA Warrant

- [12] The circumstances relating to the issuance of the DNA warrant rests on an Agreed Statement of Facts, the viva voce evidence of Constable Don Davidson of the Royal Canadian Mounted Police ("RCMP"), and the affidavit evidence of Nour Rashead, who was a criminal registry staff member of the BC Provincial Court in Victoria during the relevant time.
- [13] Constable Margo Downey of the Victoria RCMP prepared DNA warrant applications for both Mr. Busch and Mr. Armitage, as well as a sealing order for both warrants. On July 9, 2020, Constable Downey presented the application materials for the DNA warrants and a sealing order to a staff person of the provincial court.
- [14] Later in the day of July 9, 2020, Constable Downey was advised the DNA warrants were ready to be picked up. Constable Downey attended the registry on July 10, 2020 and obtained a folder containing copies of the DNA warrants.
- [15] Constable Davidson and Constable Jennifer Schmidt were tasked with executing the DNA warrants at Kent Institution where Mr. Busch and Mr. Armitage were in custody. Constable Downey provided the DNA warrants to Constable Schmidt, who in turn provided the warrants to Constable Davidson on July 13, 2020. Constable Davidson was advised that a sealing order had been executed and that the original DNA warrants were sealed.
- [16] The DNA warrants in this case clearly state that the warrants may be executed between July 9, 2020 and August 7, 2020, from 7:00 a.m. to 9:00 p.m. The warrants then concluded with a signature line for a provincial court judge and a line to fill in a date in the following format: "Dated this ____ day of July 2020".
- [17] It is common ground that Mr. Armitage's DNA warrant and the accompanying sealing order was dated July 9, 2020. However, the blank space for the day of July 2020 was not filled in for Mr. Busch's DNA warrant.
- [18] Constable Davidson noted this discrepancy on receipt of the DNA warrants. He noted that while Mr. Armitage's DNA warrant was signed and dated as July 9, 2020 by the issuing provincial court judge, Mr. Busch's DNA warrant--which was signed by the same judge--was missing the day of the month.

- [19] Constable Davidson testified that upon discovering the missing day date in Mr. Busch's DNA warrant on July 13, 2020, he phoned the criminal registry in Victoria and left a voice message for a call back. As he had often dealt with the registry, he had the registry's number in his cell phone. While the details of the voice message Constable Davidson left was not elicited, his evidence is that he left a message explaining the date was missing on one of the DNA warrants.
- [20] Shortly thereafter, Constable Davidson testified a person named "Nour"--that is, Ms. Rashead--returned Constable Davidson's call. Constable Davidson said he recognized Ms. Rashead's first name and voice over the phone. He testified that after he explained the issue to Ms. Rashead, he indicated that he would drive over to the registry--which was only a few minutes away--to have the provincial court judge date the warrant.
- [21] I pause here to recognize that Mr. Busch's counsel, in his very able submissions, invited the Court to either reject this aspect of Constable Davidson's evidence or at least approach it with skepticism on the basis that the notes that Constable Davidson had prepared relating to this call did not reference him volunteering to attend the registry in this regard.
- [22] I am satisfied that Constable Davidson volunteered to drive over to the registry for the DNA warrant, and said words to this effect. Constable Davidson explained that his notes did not always record all aspects of a matter. Further, he testified he was "100%" sure he had volunteered to do this as he knew the provincial court judge who had signed the warrants and had considered it would be an opportunity to say hello.
- [23] Constable Davidson said that Ms. Rashead indicated to him that she would check--or words to that effect--and call him back. He said she called back within a few minutes and advised him to fill in the date--the ninth--himself. Constable Davidson then did so. He testified he assumed and believed Ms. Rashead had checked with the provincial court judge and this was the direction or advice of the issuing judge.
- [24] Constable Schmidt and Constable Davidson attended Kent Institution on July 15, 2020 to execute the DNA warrants. The officers first executed Mr. Armitage's DNA warrant and obtained a sample of Mr. Armitage's blood from his finger in accordance with the warrant.
- [25] The officers next met with Mr. Busch. The interaction between Mr. Busch and the officers during the execution of the DNA warrant was recorded and the transcript is before me.
- [26] The DNA warrant authorized three methods of obtaining bodily fluids:
- a) the plucking of individual hairs from Mr. Busch, including the root sheath;
 - b) the taking of buccal swabs by swabbing Mr. Busch's lips, tongue, and inside cheeks of his mouth to collect epithelial cells; or
 - c) the taking of blood by pricking Mr. Busch's skin surface with a sterile lancet.

[27] Constable Davidson testified Mr. Busch was largely cooperative in that although he was agitated, he wanted the process over and done with as soon as possible.

[28] It is clear on the transcript of the execution that Constable Davidson read the entirety of the DNA warrant to Mr. Busch, including the applicable executing dates--that is, between July 9, 2020 and August 7, 2020. Immediately after reading the dates, Constable Davidson noted the date of execution--July 15--and that it falls within the executing period. The following is an excerpt from the transcript:

The bodily substance will be seized from James Lee BUSCH at Kent Institution between the following times and date. The times and date is July 9th, 2020, to August the 7th, 2020, from 7:00 a.m. to 9:00 p.m., and today's date is July the 15th, so it falls within that time.

[29] Constable Davidson additionally verbally noted that the warrant was dated July 9, 2020:

Dated this 9th day of July, 2020.

[30] Mr. Busch was given the DNA warrant and the opportunity to consult with counsel and indeed did consult with counsel. Thereafter, a sample of his blood was taken by a prick in the finger. The officers then left Kent Institution.

[31] While returning from Kent Institution, Constable Davidson and Constable Schmidt placed a telephone call from their vehicle to report the events of the day to their commanding officer, Sergeant Kerr. The call was made while the vehicle was in motion. It was on speakerphone and, to Constable Davidson's recollection, Constable Schmidt took notes of the call.

[32] In the course of reporting on events, Constable Davidson related the issue concerning the missing date on Mr. Busch's DNA warrant to Sergeant Kerr. Sergeant Kerr asked if Ms. Rashead had spoken to the issuing provincial court judge. Constable Davidson said that it was his assumption that she had. Sergeant Kerr advised that Constable Davidson confirm this with Ms. Rashead. Constable Davidson testified that he contacted Ms. Rashead that day, and that she confirmed she had obtained the direction for Constable Davidson to fill in the date from the issuing judge.

[33] Ms. Rashead filed an affidavit that is before the Court. Her affidavit evidence was brief and, in my view, entirely unhelpful. It proved more confusing than illuminating.

[34] Firstly, Ms. Rashead deposes that she believes she was contacted by an officer concerning the missing day date on July 9, 2020. This is clearly inaccurate as the DNA warrants were not picked up by Constable Downey until July 10, 2020.

[35] Secondly, Ms. Rashead deposes that the issuing judge gave her permission to write in the missing day date "9" on the warrant, which she deposes she did. She then deposes that she communicated this to the officer, who she believes was Constable Davidson.

- [36] Crown counsel submits that Ms. Rashead's evidence at least provides confirmatory evidence of Constable Davidson's evidence regarding his discussions with Ms. Rashead. In my view, it clearly does not. This evidence cannot help establish that Ms. Rashead advised Constable Davidson to fill in the date on his copy of the DNA warrant, nor that Ms. Rashead confirmed to Constable Davidson that it was the issuing judge who had directed her to tell him to fill in the date.
- [37] In any event, I find Constable Davidson to be entirely credible on this point. Conversely, I find that the vague and uncertain nature of Ms. Rashead's evidence renders it completely unreliable. Therefore, I give her evidence no weight.

The Parties' Position

- [38] As mentioned, it is common ground that Mr. Busch's DNA warrant was validly issued.
- [39] However, Mr. Busch submits that his DNA warrant should be considered undated and invalid as a result of the circumstances that occurred after the issuance of his DNA warrant--that is, Constable Davidson's addition of the day onto the warrant despite having no statutory or common law authority to do so. He says that Canadian courts and Parliament have recognized that the intrusive nature of seizing bodily substances for DNA testing requires a warrant procedure of high standards--such as specifically requiring the authorization of a provincial court judge--and argues that Constable Davidson's conduct was contrary to that standard.
- [40] Mr. Busch's position is that since the officers in this case failed to present Mr. Busch with a properly dated and valid DNA warrant at the time of executing the warrant, they failed to comply with s. 29 of the Criminal Code and acted contrary to s. 8 under the Charter. Mr. Busch specifically relies on *R. v. Chen*, 2016 BCCA 506 [Chen] in which the BC Court of Appeal (the "BCCA") agreed with the trial judge that an unsigned search warrant which could have understandably confused the person who is subject to such a warrant is a breach of ss. 7 and 8 of the Charter.
- [41] Mr. Busch submits that Charter breaches should be remedied by excluding his DNA evidence under s. 24(2) of the Charter.
- [42] Mr. Busch also contends that Constable Davidson's conduct was egregious police misconduct which resulted in a subversion of the warrant process. He says the Court should use its residual discretion to set aside the DNA warrant in these circumstances.
- [43] The Crown's position is that there was no breach of s. 29 of the Criminal Code nor of Mr. Busch's Charter rights because the DNA warrant was valid and the DNA seizure was properly authorized and executed despite the missing day on the warrant.

- [44] The Crown submits that Constable Davidson, who both produced a copy of the DNA warrant to Mr. Bush and reviewed it with him, fully complied with his s. 29 duties. The Crown also says that, unlike Chen, there is no basis to find that Mr. Busch would have been confused as to whether the warrant was valid in the circumstances of this case.
- [45] The Crown also submitted that the principles engaged by what the Crown referred to as a "slip rule", could be applied in the circumstances of this case. I confess I didn't fully appreciate this point, but I do not find it necessary to address it.
- [46] Finally, the Crown contends that even if the Court finds there was a breach of Mr. Busch's Charter rights, his DNA evidence should nonetheless be admitted, as an exclusion of this evidence would bring the administration of justice into disrepute.

The Issues

- [47] When an accused argues their s. 7 and s. 8 Charter rights were violated in the execution of a DNA warrant, there is no need for the Court to engage in a separate s. 7 analysis. The principles of fundamental justice that are alleged to be implicated by a DNA warrant are more appropriately considered under a s. 8 analysis: *R. v. S.A.B.*, 2003 SCC 60 at para. 35.
- [48] The issues that need to be addressed are as follows:
1. Did the circumstances of Mr. Busch's DNA warrant fail to comply with s. 29 of the Criminal Code contrary to s. 8 of the Charter?
 2. If Mr. Busch's rights under s. 8 of the Charter were breached, should the DNA evidence be excluded, pursuant to s. 24(2) of the Charter?
 3. Did Constable Davidson's conduct amount to egregious police misconduct that requires the Court to use its residual discretion to set aside the DNA warrant?
- [49] For the following reasons, I dismiss Mr. Busch's application.

The Analysis

1. Did the circumstances of Mr. Busch's DNA warrant fail to comply with s. 29 of the Criminal Code contrary to s. 8 of the Charter?

Legal Framework

- [50] Under s. 29 of the Criminal Code, persons who execute a DNA warrant have a duty, where it is feasible, to show that the search was legally authorized by having the warrant with them and to produce it when required.
- [51] The purpose of s. 29 is to allow persons who are subject to a search warrant to know why the search is being carried out so as to enable them to properly assess their legal position. It also intends to ensure that such persons understand there is a colour of authority for the search, making forcible resistance improper: *R. v. Cornell*, 2010 SCC 31 at para. 43.

- [52] Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search or seizure. Our courts have found that a failure to comply with s. 29 of the Criminal Code is a "significant breach" of s. 8 of the Charter: *Chen* at para. 36.
- [53] However, not every variance with a police practice, a minor defect in the search warrant, or a flaw in process amounts to a s. 8 violation: *R. v. Boekdrukker*, 2018 ONSC 266 at para. 20.
- [54] The question of whether certain defects on the face of a search warrant could render the warrant invalid and unable to serve the purposes of s. 29 of the Criminal Code was addressed by the BCCA in *Chen*.
- [55] In *Chen*, the search warrant in question was in all respects regular except for the missing signature of the issuing justice of the peace.
- [56] The Court found that the absence of the justice's signature would have understandably confused the accused as to whether the search had been properly authorized: *Chen* at para. 37. Consequently, the Court found the warrant in question could not provide the accused with proper notice that the warrant was authorized, and could not serve the purposes of s. 29, contrary to s. 8 of the Charter.
- [57] In *R. v. Roy and Biesinger*, 2017 ONSC 6020, *aff'd R. v. Roy*, 2020 ONCA 18, leave to appeal *ref'd* [2020] S.C.C.A. No. 155, the applicant relied on s. 29 and *Chen* to argue that he was provided a defective copy of the warrant at the time of the search and that his s. 8 rights were violated. The applicant's copy of the warrant did not include the appendix that contained a description of the property to be searched.
- [58] The Court in *Roy* found that while the missing appendix might give rise to less confusion than the defect in *Chen*, it nonetheless could lead to some confusion about whether the search had been properly authorized. The Court concluded that the failure to provide the applicant with a complete copy of the warrant breached his s. 8 rights: *Roy* at paras. 108-111.

Discussion

- [59] I find that regardless of whether I accept Mr. Busch's invitation to consider the DNA warrant to have been undated, the defect in the case at bar differs substantially in nature from the defects in *Chen* and *Roy* and gives rise to significantly less confusion. In other words, this case does not raise the same concerns as in *Chen* and *Roy*.
- [60] Mr. Busch submits the circumstances of this case--that is, the missing date at the time of issuance--is analogous to that of the missing signature in *Chen*.
- [61] I do not agree. In my view, the signature requirement and the day date requirement in a search warrant serve different purposes. The signature requirement informs its readers that the warrant has been judicially approved by the appropriate authority. This in turn can impact the decisions that a person subject to the search makes in regards to protecting their privacy interest. The day date requirement simply informs its reader of the day that the

warrant has been signed and issued. It plays a much lesser, if any, role in impacting the decisions of the person subject to the search.

- [62] In addition, the date in this case was partially missing at issuance, whereas the signature in Chen was fully missing. While the blank space provided for the day date was left empty at the time of its issuance, the DNA warrant provided the month and the year of issuance--July 2020. In other words, even if Constable Davidson had not filled out the day date, Mr. Busch would still have been put on notice of the month and year of issuance.
- [63] As well, the approximate day date can be inferred from the body of the DNA warrant. The DNA warrant clearly stated that the warrant could be executed between July 9, 2020 and August 7, 2020, from 7:00 a.m. to 9:00 p.m. Based on this information, and the provided month and year of issuance, a reader can easily infer that the missing day was between the July 1 and July 9, 2020.
- [64] Finally, unlike Chen, there was in fact no circumstance that could have caused Mr. Busch to perceive the warrant as defective at the time the DNA warrant was provided and read to Mr. Busch. By the time the DNA warrant was provided to Mr. Busch, Constable Davidson had filled in the missing date. During the execution of the warrant, Constable Davidson verbally noted the date in which the warrant was dated. In these circumstances, there was nothing that could have caused Mr. Busch confusion as to whether the DNA warrant had been properly authorized.
- [65] I am alive to the observations of Justice Doherty in *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.) at 215:

Respect for the rule of law and the long-term viability of the justice system suffers where the police engage in "short cuts" or fail to respect the constitutional rights of those they encounter in the course of the exercise of their duties. The long-term harm to the justice system is not worth the short-term gain made by the admission of evidence which was obtained in a manner that ignores the rule of law.

- [66] In my view however, Constable Davidson's conduct here could not be characterized as a "short-cut". Upon receiving the warrants, he took the time to review them and consequently noted the issuing judge's error. He compared it with Mr. Armitage's DNA warrant and found that it was signed and dated as July 9, 2020. He phoned the criminal registry and sought guidance on how the error could be remedied. He offered to drive to the registry, which again was only a few minutes away, to have the issuing judge date the warrant. Upon being informed by the court registry staff member to fill in the missing day he did so. During the execution of the warrant, Constable Davidson clearly noted the applicable executing dates, the date of execution, and the fact that the date of execution fell within the executing period. After the execution of the warrant, he reported the issue of the missing day date to his superior.

- [67] In these circumstances, I find that Constable Davidson not only acted in good faith but also that he met his duties under s. 29 of the Criminal Code.
- [68] I accept the Crown's proposition that the issuing judge's failure to set out the day date does not invalidate the DNA warrant in these circumstances and that it is a technical error upon which nothing of substance turns and was not calculated to mislead.
- [69] Thus, I find that the circumstances of Mr. Busch's DNA warrant complied with s. 29 of the Criminal Code and was not contrary to s. 8 of the Charter.
2. If Mr. Busch's rights under s. 8 of the Charter were breached, should the DNA evidence be excluded, pursuant to s. 24(2) of the Charter?
- [70] In light of my conclusions on the parties' s. 29 submissions, it is not necessary to resolve the question of whether Mr. Busch's DNA evidence should be excluded under s. 24 of the Charter. However, in the interest of providing a comprehensive analysis of the parties' pleadings and submissions, I will address this issue.

Legal Framework

- [71] The modern approach to analyzing the exclusion of evidence under s. 24(2) of the Charter was set out in *R. v. Grant*, 2009 SCC 32.
- [72] The purpose of s. 24(2) is not to punish the police for misconduct or provide compensation to an accused. Rather, the purpose is to maintain the good repute of the administration of justice in the long-term sense--that is, maintaining the overall integrity of, and public confidence in, the justice system--by admitting or excluding evidence. Section 24(2) is also prospective in that it seeks to ensure that evidence obtained through a Charter breach does not do further damage to the repute of the justice system: *Grant* at paras. 67--70.
- [73] A s. 24(2) inquiry is objective and asks whether "a reasonable person, informed of all relevant circumstances and the values underlying the Charter conclude that the admission of the evidence would bring the administration of justice into disrepute": *Grant* at para. 68.
- [74] As set out in para. 71 of *Grant*, the analysis under s. 24(2) engages three distinct avenues of inquiry:
- a) the seriousness of the Charter-infringing state conduct;
 - b) the impact of the breach on the Charter-protected interests of the accused; and
 - c) society's interest in the adjudication of the case on its merits.
- [75] Justice Cromwell's explanation of these factors in *R. v. Côté*, 2011 SCC 46 at para. 47 are as follows:

- a) The first line of inquiry involves an evaluation of the seriousness of the state conduct in breaching an accused's protected interests. The more serious the state misconduct, the greater will the need be for the court to dissociate itself from that conduct by excluding the evidence.
 - b) The second line of inquiry deals with the seriousness of the impact of the Charter breach on the accused. The impact may range from a minor technical breach to a profoundly intrusive violation. The more serious the impact of the breach, the more likely it will be that an exclusion of the evidence is warranted.
 - c) The third line of inquiry is concerned with society's interest in an adjudication on the merits--that is, whether the truth-seeking function of the criminal process would be better served by admitting or excluding the evidence. For this inquiry, the reliability of the evidence and its importance to the Crown's case are key factors as admitting unreliable evidence will not serve the accused's fair trial interests nor the public's desire to uncover the truth. On the other hand, excluding reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective.
- [76] In the third inquiry, the court must balance the public's interest in having a justice system that is "above reproach" with the public's interest in seeing criminal cases determined on its merits. Where reliable evidence is discovered as a result of good faith infringement that did not greatly undermine an accused's protected interests, the court may conclude that evidence should be admitted under s. 24(2). In contrast, the court may conclude to exclude evidence that is otherwise reliable where deliberate and egregious police conduct severely impacted an accused's protected interests: Grant at para. 127.

Discussion

The seriousness of the Charter-infringing state conduct

- [77] As I have analyzed and concluded above, the executing officers in this case proceeded at all times with good faith and an honestly held belief that they were adhering to their lawful duties. There is no evidence of willful blindness or reckless disregard, nor of conduct calculated to circumvent Mr. Busch's Charter rights.
- [78] I find that the executing officers' conduct was on the lower end of the spectrum of Charter-infringing state conduct.

The impact of the breach on the Charter-protected interests of Mr. Busch

- [79] The seizing of bodily substances for DNA testing involves physical and informational intrusions on an individual's privacy and human dignity: S.A.B. at para. 40.

- [80] The extent of the physical intrusion will depend on the circumstances. For instance, the degree of offence to the physical integrity of the person is "relatively modest" when it is executed under a validly issued DNA warrant. Blood samples, which are obtained by pricking the surface of the skin as it was in this case, have been found to not be particularly invasive in the physical sense: S.A.B. at para. 44.
- [81] However, the informational intrusion of a DNA warrant can be high as the highest level of personal and private information is contained in an individual's DNA: S.A.B. at para. 48.
- [82] If I had found that the DNA warrant breached Mr. Busch's Charter rights, I would have found that its impact on Mr. Busch's protected interests was severe.

Society's interest in an adjudication on the merits

- [83] The evidence in issue is highly relevant and reliable. While there is no suggestion excluding Mr. Busch's DNA evidence would "gut" the Crown's case, it is critical evidence in the most serious of matters--an allegation of first-degree murder.
- [84] I find that in the circumstances of this case society has a strong interest in adjudicating this case on its merits.

Conclusion

- [85] In my view, even if I were to find that Mr. Busch's s. 8 Charter right was violated by non-adherence to s. 29 of the Criminal Code, I find that the admission of Mr. Busch's DNA evidence would not bring the administration of justice into disrepute.
- [86] In this regard, the focus of the court must be anchored in the long-term sense of maintaining the integrity of our justice system. Section 24(2) contemplates the exclusion of evidence in order to maintain and promote adherence to Charter values and the rule of law.
- [87] In my view, in the event of a breach of s. 8 in these circumstances, the serious impact on the accused's Charter protected rights would weigh heavily in favour of excluding the evidence. The public interest in the adjudication of a criminal trial on the merits in these particular circumstances is significant and would weigh in favour of admission of the evidence. The conduct of the executing officers would be, in my view, at the very low end of a culpability spectrum and it is this factor that would persuade me the admission of the evidence would not undermine the repute of the administration of justice.
3. Did Constable Davidson's conduct amount to egregious police misconduct that requires the Court to use its residual discretion to set aside the DNA warrant?

- [88] Whether a reviewing judge in BC has a residual discretion to set aside a warrant due to a subversion of the warrant process is not clearly decided: *R. v. Thiessen*, 2020 BCCA 85 at paras. 59-66. As noted in *Thiessen*, while "there may be residual discretion to strike down a warrant for abuse of process [there has not yet been] an occasion to firmly adopt and apply such a rule".
- [89] In any event, similar to *Thiessen*, this case does not present such an occasion because the conduct of the executing officers is "very far from the point where its application could be seriously considered": *Thiessen* at para. 66, quoting from *R. v. Beaumont*, 2018 BCCA 342, leave to appeal ref'd [2018] S.C.C.A. No. 448 at para. 45.
- [90] As I have found above, Constable Davidson acted in good faith, and his conduct was not so fundamentally subversive as to require a serious consideration of the Court's residual discretion to set aside the warrant.

The Conclusion

- [91] In my view, notwithstanding the invasive nature of the evidence obtained, these circumstances do not cause me to conclude there was non-compliance with s. 29 of the Criminal Code. Therefore, I dismiss Mr. Busch's application.

"Crossin J."

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