
CANADA / JUDGMENT

R. v. Bentley

2019 BCSC 2407

COURT

Supreme Court of British Columbia

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2019 BCSC 2407 R. v. Bentley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bentley,

2019 BCSC 2407

Date: 20191129

Docket: 68113-5

Registry: Chilliwack

Regina

v.

Michael Shane Bentley

Before: The Honourable Madam Justice Francis

Oral Reasons for Judgment

Re: Voir Dire #1

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused:

K.R. Beatch

Place and Date of Trial/Hearing:

Chilliwack, B.C.

November 25-28, 2019

Place and Date of Judgment:

Chilliwack, B.C.

November 29, 2019

Overview

- [1] THE COURT: Mr. Bentley stands charged with possession of heroin, fentanyl, and cocaine for the purposes of trafficking. He has pleaded not guilty to all counts on the indictment. These are my reasons for judgment on a blended voir dire in these proceedings. Because the matter is time-sensitive due to the trial being scheduled to commence December 9, 2019, I have prepared these reasons so as to deliver them orally the day after completion of the voir dire. As a result, I may edit these reasons for grammar, but the substance will not change. I will also omit some of the case citations in the oral version of these reasons.
- [2] The two issues raised in the voir dire are:
- a) Mr. Bentley argues that the warrant for the search of his home and two vehicles was improperly obtained, contrary to s. 8 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]; and
 - b) Mr. Bentley argues that his right to counsel under s. 10(b) of the Charter was violated when he was not immediately provided with access to his counsel upon arrest.
- [3] It was agreed at the outset that, in the event I find a violation of the accused's s. 8 or s. 10(b) rights, the matter of whether evidence should be excluded pursuant to s. 24(2) of the Charter will be the subject of a second application at a later date.
- [4] By way of very brief overview, the investigation in question originated with information from two confidential informants. One of those informants had observed through a window someone on the third floor of the apartment building where Mr. Bentley lives at 3090 Gladwin Road, Abbotsford (the "Building") engaging in activity that appeared to be the packaging of drugs for street-level sale. The other informant gave information that Mr. Bentley had been working with a person named Josh (later determined to be Josh Seffelaar) in drug trafficking. Surveillance was set up in November 2016. There were seven days of surveillance. On December 6, 2016, a search warrant of Mr. Bentley's apartment at #308 3090 Gladwin Road ("Apartment 308") and three vehicles was sought and denied. On December 7, Mr. Seffelaar and Mr. Bentley were arrested and, on searches incidental to arrest, large quantities of drugs were found on both of their persons. A warrant was then applied for and granted.

Challenge Re: Search Warrant

- [5] When an accused seeks the exclusion of evidence obtained through the execution of a search warrant, the burden of proof rests with the applicant who must demonstrate on a balance of probabilities that the Information to Obtain ("ITO"), is invalid and constitutes a breach of the accused's rights under s. 8.
- [6] A warrant is presumptively valid: *R. v. Sadikov*, 2014 ONCA 72 at para. 83. The test on review of a search warrant is whether, on the record before the issuing justice as amplified on review, the reviewing court concludes that the authorizing judge could have issued the search warrant. The review is specifically not a de novo assessment of whether the reviewing court would have issued the warrant: *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452; *R. v. Bisson*, [1994] 3 S.C.R. 1097 at 1098; *R. v. Araujo*, [2000] 2 S.C.R. 992 at paras. 19, 39, 40 and 50-61 [Araujo].
- [7] Another way of putting it, as stated by the Supreme Court of Canada in *Araujo*, is that the question for the reviewing judge is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether, in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge.
- [8] Challenges to search warrants may be launched on the basis of the facial validity of the ITO, in which case the applicant argues that the contents of the ITO on their face are such that the judge could not have concluded that there were reasonable grounds justifying the issuance of a search warrant. An applicant may also challenge a search warrant on a sub-facial basis by attacking the accuracy or the reliability of the contents of the ITO: *Araujo*, para. 50. Both a sub-facial and facial attack are being mounted in this case.
- [9] With respect to both the facial and the sub-facial attack, the role of this Court is to stay focussed on the ultimate test, whether on the basis of the record before the issuing judge as amplified on review but without reference to excised information, there remains a sufficient basis upon which the issuing judge could have issued a search warrant.
- [10] The record to be considered by the court in this voir dire includes the amplification evidence elicited from Constable Doucette.
- [11] In considering a challenge to a search warrant, the court must have reference to the statutory authority governing the issuance of search warrants which formed the framework of the issuing judge's analysis. Under s. 487 of the Criminal Code, R.S.C. 1985, c. C-46, there are two statutory preconditions for obtaining a search warrant: a requirement to show reasonable grounds to believe that an offence has been committed and a requirement to show reasonable grounds to believe that the evidence of that offence will be located at the place to be searched: *R. v. Morelli*, 2010 SCC 8 at para. 39.

- [12] The reasonable grounds standard does not require proof of a prima facie case, much less proof beyond a reasonable doubt. Rather, the reasonable grounds standard contemplates a reasonable probability. It has been described as the point at which suspicion gives way to credibly-based probability, *R. v. Vu*, 2011 BCCA 536 at para. 39.
- [13] An ITO must contain sufficient information to assess the credibility and the reliability of the facts contained therein. An affiant must state the source of any hearsay information in order to enable the reader to properly evaluate the credibility and the reliability of the source: *R. v. Belanic*, 2019 BCSC 1411 at para. 8 [Belanic].
- [14] In *R. v. Wong*, 2017 BCSC 306, Mr. Justice Kent put it this way:

As a practical matter, assessing the reliability of any facts, opinions, or information from third parties set out in an ITO requires an assessment of their source or origin. Hence, in order for such material to be attributed meaningful reliability, the affiant should link the information to a competent investigative resource.

Alleged Deficiencies in the ITO

- [15] The accused makes a number of arguments about alleged deficiencies in the ITO, I have divided the accused's various challenges to the ITO into four broad categories:
- a) Certain paragraphs of the ITO, specifically, 36, 45(v), 46(d) and (e), and 47(h) and (j), are said to omit material information. For example, para. 47(h) and (j) state that drugs were found on Mr. Seffelaar and Mr. Bentley's persons on searches incidental to arrest. At the time the ITO was sworn, the drugs could not have been analyzed, so the accused's position is the affiant failed to provide sufficient information on which the issuing judge could conclude that what was found in the searches was indeed illegal drugs. Broadly stated, his argument is that in an ITO, the affiant need not only state the conclusion, but the foundation upon which the conclusion is based. He makes a similar argument with respect to a conclusion about the identity of Mr. Seffelaar at para. 46(d) and (e), and Mr. Bentley's whereabouts as they are described in para. 45(v). A different argument is made about para. 36 wherein the affiant failed to take steps to determine the status of Mr. Bentley's criminal charges from a January 2016 arrest and include in the ITO the fact that Mr. Bentley had pled not guilty to those charges.
 - b) The accused argues that it was incumbent on the affiant to disclose in the ITO that stash houses are commonly used in dial-a-dope operations of the kind for which the accused was being investigated. There was no information in the ITO specifically indicating where the drugs were stored. The accused argues that it is crucial in a search warrant if the police do not know where the drugs are stored that the police disclose that they thought the premises for which they were seeking a search warrant was a stash house.
 - c) The accused argues that the information from the confidential informants should be given no weight because of shortcomings in that evidence.

- d) The accused argues that even if no paragraphs of the ITO are excised, the ITO does not contain sufficient facts from which the issuing judge could have concluded that there were reasonable and probable grounds that an offence had been committed and that evidence of that offence was to be found in the places sought to be searched. He argues that the sum of the evidence in the ITO simply was not sufficient to establish a reasonable connection between Mr. Bentley, drug-trafficking activities, and Apartment 308.

Alleged Deficiencies in Certain Paragraphs

- [16] There are three legal principles that are relevant to the arguments raised by the defence about the alleged omissions from paras. 36, 45(v), 46(d) and (e), and 47(h) and (j).
- [17] First, a reviewing judge must take into account that an authorizing justice may draw reasonable inferences from the evidence in the ITO: *R. v. Vu*, 2013 SCC 60 at para. 60. The question is whether the issuing justice could reasonably have drawn a suggested inference based on the contents of the ITO: *Belanic* at para. 10.
- [18] Second, the specificity and legal precision expected of pleadings are not required in an ITO: *Belanic* at para. 11. The drafter of an ITO must be given reasonable latitude in drafting in light of the fact that most drafters of ITOs are not legally trained and the ITO is often drafted in extremely time-sensitive circumstances.
- [19] Finally, the principle that was the focus of a large part of the submissions was the requirement to properly source information in an ITO. In short, any factual assertion in the ITO must be sourced to some investigative resource: *Belanic*, para. 12.
- [20] Crown and defence rely on different authorities for the approach that ought to be taken on the extent to which hearsay statements must be sourced in the ITO.
- [21] The defence relies on the decision of Mr. Justice Thompson in *R. v. Vaz*, 2015 BCSC 728 [*Vaz*] for the proposition that in addition to identifying the source of a hearsay statement, the affiant in an ITO must also provide information that would assist the judge in determining the credibility of the hearsay source. In *Vaz*, the court rejected the notion that an affiant could provide no sources for hearsay statements and that the judge could simply infer that he gained his information from reliable standard police sources.
- [22] In *Vaz*, the ITO contained a considerable number of entirely unsourced statements. Many of those were capable of more than one interpretation. For example, the affiant recited a description of the suspect without stating whether this information came from video images that were available or a review of the police file. Further, because the affiant simply referred to a source as the police file, it was not clear whether the description of the suspect, if it did come from the police file, came from witness statements, occurrence reports, or something else.
- [23] In *Vaz*, after noting these shortcomings, Thompson J. stated at para. 32:

Of course, an ITO need not alleviate all doubts or answer all questions. Neither the justice nor the reviewing judge is conducting a trial. If despite uncertainty, there remains a basis upon which the justice could have concluded that there was a credibly-based probability that the warrant prerequisites were met, this is sufficient to authorize the investigatory step of conducting a search. However, in this case, because the justice could not know which, if any, of the observations set out by the affiant came from the video review, it comes to this: is it sufficient in preparing an ITO for an affiant to aver that he has reviewed a police file, that it discloses certain details, and to set out those details without further sourcing the information?

[24] The circumstances in Vaz are very different from the case before me, where the statements impugned by the defence are all identified as coming from the surveillance notes of a particular officer. However, I do take guidance from Thompson J.'s reasoning and particularly his conclusion that the failure to properly source essential information can impact the court's assessment of portions of the ITO.

[25] I will turn now to each of the impugned paragraphs of the ITO. Paragraph 36 states:

On December 5 [2016], Cst Doucette queried BENTLEY on PRIME and learnt the following: On January 5, 2016, APD patrol members S/Sgt Jordan and Cst Garrigus attended unit 308-3090 Gladwin Road to arrest BENTLEY for an unendorsed warrant for APD file 2015-49593. ADP members exited the elevator to the third floor of 3090 Gladwin Road and walked by BENTLEY.

Cst Garrigus recognized BENTLEY, advised him of his warrant, and arrested him for the unendorsed warrant. BENTLEY'S cell phone rang continuously as he was escorted to the police vehicle for transport. S/Sgt Jordan performed a quick pat down search of BENTLEY and asked if he had anything sharp or drugs on his person. BENTLEY admitted that he had drugs in his pants pocket.

S/Sgt Jordan located a small, see through plastic bag with individually wrapped plastic bags of white powder, white rock and some folded pieces of papers. S/Sgt Jordan also located BENTLEY'S wallet with \$345.00 cash in it. BENTLEY'S cell phone continues to ring and BENTLEY advised members to just answer it. S/Sgt Jordan placed BENTLEY in the rear seat of the police vehicle and answered BENTLEY'S cell phone. The caller display showed "Chad" and the male voice asked for fabric softener but then hung up after he became suspicious. "Chad" called back later and hung up again when he heard S/Sgt Jordan's voice.

S/Sgt Jordan answered the cell phone again and had the following conversation:

Jordan: Hello

Female: Hey, are you there?

Jordan: Yeah, what do you need?

Female: Six.

Jordan: Six what?

Female: Six down.

Jordan: OK.

I know from experience that the term "Down" is a street term which refers to heroin.

BENTLEY requested Cst Garrigus to call his friend Josh SEFFELAAR to take care of his cats. BENTLEY asked Cst Garrigus to give his apartment keys from 308-3090 Gladwin Road to SEFFELAAR and instruct him to pick up his cats. Cst Garrigus met SEFFELAAR at the Abbotsford Police Department, provided him with BENTLEY'S keys and relayed BENTLEY'S instructions regarding the cats.

[26] The defence argues that this paragraph should be excised or should be given no weight because the affiant, when describing the circumstances of Mr. Bentley's January 5, 2016 arrest, failed to mention that:

- a) Mr. Bentley pleaded not guilty to the charges that arose from this arrest; and,
- b) at the time the ITO was sworn, the matter had been set for trial.

[27] On cross-examination, Constable Doucette testified that he was unaware at the time he swore the ITO of what the status of the charges were. Since the charge relating to the January 2016 arrest had not yet been adjudicated when the ITO was sworn, I do not see how the fact that Mr. Bentley pled not guilty to the charges is a material fact that Constable Doucette would need to disclose in the ITO. The arrest of Mr. Bentley on the third floor of the Building and the fruits of the search incidental to that arrest are corroborative of Informant A's observations of someone engaging in activity that appeared to be the bagging of drugs for street distribution on the third floor of the Building. That is their significance for the purposes of the ITO. How Mr. Bentley pled to the charges that ensued is not material and Constable Doucette was under no obligation to obtain this information and include it in the ITO.

[28] The second challenge is to para. 45(v) of the ITO that states:

At 1640 hours, BENTLEY exited from an apartment unit across the hallway from the elevator on the third floor. BENTLEY entered the elevator.

The concern raised by the defence is that the observing officer indicated in the surveillance notes that he was not able to see what unit Mr. Bentley came out of. The defence says it was incumbent on the affiant to state that the observing officer could not see what unit Mr. Bentley came out of. This argument may have some validity if the ITO had stated that Mr. Bentley came out of Apartment 308, but it did not. The ITO simply states that he came out of an apartment unit across the hallway from the elevator on the third floor, which was correct. I fail to see anything misleading about this.

[29] The defence also challenges para. 46(d) and (e). These paras. say:

- (d) At 1050 hours, SEFFELAAR exited the elevator and entered into the unit via the unlocked door at unit 308;
- (e) At 1059 hours, SEFFELAAR exited unit 308 and spoke with someone while he stood near the doorway. SEFFELAAR went into the elevator.
- [30] The challenge arises from the fact that Constable Doucette admitted on cross-examination that the observing officer, Constable Bell, could not see Mr. Seffelaar's face when he entered Apartment 308. Constable Bell viewed a photograph taken by Constable Gump and noted that the clothing and build of the person who entered and exited Apartment 308 matched the person in the photo. This was his basis for concluding that Mr. Seffelaar was the person entering Apartment 308.
- [31] I agree that subparagraph (d) is problematic. The fact that Mr. Seffelaar's face was not visible to the observing officer and that he was only able to identify Mr. Seffelaar by his clothes and build was something that ought to have been disclosed. I find that this paragraph would have left the issuing judge with a misleading impression about the steps taken by the police to identify Mr. Seffelaar as he entered the apartment.
- [32] With respect to subparagraph (e), it is important that the defence did not cross-examine Constable Doucette about Constable Bell's observations of Mr. Seffelaar exiting Apartment 308 at 10:59 and whether Constable Bell saw Mr. Seffelaar's face at that point in time. The defence also strongly resisted the Crown's application to conduct an examination in redirect to amplify the evidence about this with reference to the surveillance notes. Therefore, I find it is not open to the defence to ask this Court to infer, in the absence of any evidence, that Constable Bell did not see Mr. Seffelaar's face upon him exiting Apartment 308 at 10:59 and, therefore, I reject the defence's challenge to subparagraph (e).
- [33] This leaves para. 47(h) and (j). These are the subparagraphs that disclose the results of the search incidental to arrest of Mr. Seffelaar and Mr. Bentley on December 7 and specifically list the drugs that were found on their persons. They are the subparagraphs which the defence most vociferously attacks.
- [34] Paragraph 47 (h) and (j) say:
- (h) At 1113 hours, the Abbotsford Police Mobile Arrest Team conducted a traffic stop at or near the 2400 block of Centre Street. SEFFELAAR was arrested for Possession for the Purpose of Trafficking and was found to be in possession of: nine bags of powder cocaine, 35 baggies of crack, 45 flaps of heroin and 11 Fentanyl pills (with CDN and 80 on the front and back sides). The items were located inside SEFFELAAR's left pants pocket;

- (j) At 1117 hours, BENTLEY was taken into custody in the underground parking lot as he approached the driver side door of the Prelude with keys in his hand and was arrested for Possession for the Purpose of Trafficking. BENTLEY was searched incident to arrest and found to be in possession of: a small sandwich baggy that contained the following: three individually wrapped baggies of powder cocaine, fifteen individually wrapped baggies of heroin and twenty-one individually wrapped baggies of crack cocaine.
- [35] The defence argues that at the time of the investigation the most the arresting officers could know was that it appeared that both Mr. Seffelaar and Mr. Bentley were in possession of large quantities of cocaine, crack, heroin, and fentanyl. The drugs had not yet been analyzed in a lab. The defence argues that it was incumbent on the affiant to state which officer concluded that the drugs were present and what his or her reasons were for drawing that conclusion. Given the centrality of this evidence to the granting of the warrant, the defence argues that I must apply the strictest scrutiny to the hearsay in this paragraph and that, consistent with Vaz, an unsourced statement about matters this critical does not pass muster.
- [36] As stated in different ways in both Vaz and Belanic, the purpose of sourcing hearsay evidence in an ITO is to provide a sufficient basis on which the issuing judge could conclude that the information is reliable. Given the practical, non-technical and common sense approach I am required to take on a review of an ITO, I must not apply a rote rule about what degree of sourcing is required in every case. Rather, I must look at the circumstances of this ITO in this case and determine whether there was sufficient information in para. 47(h) and (j) by which the issuing judge could in all the circumstances and drawing reasonable inferences conclude that the information was reliable.
- [37] The entirety of para. 47 is a summary of the scribe notes prepared by Constable Toews which were reviewed by the affiant. At para. 8 of the ITO, the affiant describes how the surveillance reports were prepared in this investigation. One member of the surveillance team was responsible for acting as "scribe" and accurately reporting the observations for all members on any particular shift. Constable Toews was the member of the team who was acting as scribe on December 7. His notes were relied on by the affiant just as the scribe notes for every day of the surveillance were relied on by the affiant.
- [38] Could the issuing judge drawing reasonable inferences on a review of the affiant's statement, sourced to the surveillance scribe notes of Constable Toews, conclude that the information at para. 47(h) and (j) was reliable? I find that the issuing judge could reach this conclusion.
- [39] The officers in question who took part in the surveillance and arrest were part of the Abbotsford Police Department Gang Drug Enforcement Unit. They were not general members of the public. They were, by virtue of their professional training, people with some level of experience in identifying drugs.

- [40] The scribe notes indicate that Mr. Seffelaar was found to be in possession of nine bags of powder cocaine, 35 baggies of crack, 45 flaps of heroin, and 11 fentanyl pills. Mr. Bentley was found in possession of a small sandwich baggie containing three individually wrapped baggies of powder cocaine, 15 individually wrapped baggies of heroin, and 21 individually wrapped baggies of crack cocaine.
- [41] Keeping in mind that the issuing judge was entitled to draw reasonable inferences, I find it was an available inference for the issuing judge to infer that the officers in question were capable of identifying cocaine, heroin, fentanyl, and crack packaged for street distribution. I therefore decline to accept the defendant's submission that para. 47(h) and (j) are inadmissible.
- [42] To the extent that any of the challenged paragraphs are impugned, I must take the next step of considering whether the warrant could have been granted on the basis of the information that has not been impugned. The only paragraph I am prepared to overlook in my review is para. 46(d). Before I engage in a review of the entire ITO, I will consider the two other concerns raised by the defence.

Stash House Issue

- [43] The defence argues that it is a key material fact that drug dealers commonly use stash houses. The issuing judge ought to have been informed of all of the possible storage places for drugs, particularly because the defence argues that the information to suggest that drugs were stored at Mr. Bentley's apartment is weak.
- [44] I cannot accede to this argument. The police were seeking to search Apartment 308 because they had a reasonable basis to believe drugs were being kept in Apartment 308. This was based on a whole host of information connecting Mr. Bentley, drug-trafficking activity, and Apartment 308. This included the information from Informant A about what was observed on the third floor of the Building, the fact that Mr. Bentley was arrested on the third floor of the Building in January 2016 with drugs on his person, the fact that Mr. Bentley resided in Apartment 308, the surveillance evidence of the activities of both Mr. Bentley and Mr. Seffelaar, and the December 7 search incidental to arrest of both Mr. Bentley and Mr. Seffelaar. There was no reason why the affiant would need to discuss stash houses in an ITO where he does not reasonably believe that a stash house is being used. I find there is nothing problematic about the failure of the affiant to discuss stash houses in the ITO.

Confidential Informants

- [45] The totality principle was described by Mr. Justice Riley in *Belanic* in the following way:

- [9] The requirement to consider the totality of the circumstances means that I cannot simply examine each aspect of the grounds in isolation. I must consider whether, in light of all the grounds taken together or viewed cumulatively, the issuing justice could have granted the warrant. As explained in *R. v. Lam* "[i]t is important that the Information be examined as a whole and not one piece of evidence at a time, because each piece of evidence colours other pieces of evidence and a fuller picture emerges by considering all the evidence together."
- [46] The accused specifically attacks the strength of the confidential informant information and argues that it should be accorded no weight. The defence relies heavily in this regard on the decision of the Ontario Court of Appeal in *R. v. Herta*, 2018 ONCA 927 [Herta]. I note at the outset that Herta was a case where the viability of the search warrant turned entirely on the strength of the confidential informant information. Herta was a facial attack on a search warrant on the basis that the ITO contained insufficient grounds to support its issuance. This is obviously distinguishable from the case before me where the confidential informant information is just one element of the information contained in the ITO. The defendant is seeking to rely on Herta in asking this Court to disregard or give no weight to the confidential informant information. However, because in Herta the warrant stood or fell on the strength of the confidential informant information, I find it is of limited application in the matter before me. In this case, I must consider the confidential informant information in accordance with the totality principle and the other information contained in the ITO.
- [47] In assessing information from informants, the court must be guided by the approach described in *R. v. Debot*, [1989] 2 S.C.R. 1140. Under that approach, one must consider:
- i. the extent to which the informer's information is compelling in its detail,
 - ii. the credibility of the informer; and
 - iii. the extent to which the informer's information is corroborated.
- None of these are standalone considerations and weaknesses in one area may be overcome by strengths in the other two.
- [48] In *Belanic*, Riley J. points out that there are particular concerns about information from confidential informants. In order to protect the identity of the informant, the reality is that sometimes nothing can be disclosed about the informant's source of knowledge or other details. This does not mean that the information must be disregarded. The totality of circumstances must be considered.
- [49] The defence argues that the evidence of Confidential Informant A should be given no weight for a variety of reasons including the inability to assess Informant A's credibility and, most seriously, Informant A's failure to state that the apartment where the drug packaging activity was observed was indeed Apartment 308 where Mr. Bentley lives.

- [50] I do not accept that the redaction of Informant A's motivation for disclosing information is a reason to reject Informant A's evidence, for reasons described by Riley J. in *Belanic*. I do agree that the evidence about the place where the drug packaging activities were observed on its own cannot be directly tied to Apartment 308. However, what was observed by Informant A in a third-floor apartment in the Building appeared to be the packaging of drugs for street-level sales, or at least that would be a reasonable inference to draw from what Informant A observed. When this is considered along with the January 5, 2016, seizure of plastic bags of white powder, white rock, and some folded pieces of paper from Mr. Bentley on the third floor of the Building and the arrest of Mr. Bentley after leaving Apartment 308 on December 7, 2016, with, among other things, individually wrapped baggies of powdered cocaine, and the fact that there is no question that Mr. Bentley lives at Apartment 308, it was an available inference for the issuing judge employing the totality principle to infer that the apartment observed by Informant A was indeed Apartment 308.
- [51] Therefore, I cannot agree that, as the defence puts it in his written argument, "at the end of the day, Informant A's information does not advance the case that drugs would be found in Mr. Bentley's apartment or the two vehicles". On the contrary, I find that information from Informant A is compelling and corroborated.
- [52] In terms of Informant B, the primary concern of the defence is that the information is dated. The Crown points out that the datedness of Informant B's information (it goes back to a March 2014 allegation that Mr. Bentley was selling drugs and working with a man named Josh) supports the inference that Mr. Bentley has been running a business selling drugs with Mr. Seffelaar for a long period of time. While this might not be the most important piece of information in the ITO, it is not irrelevant nor is it improperly included. Again, employing the totality principle, the issuing judge was required to look at all the circumstances and draw inferences. The fact that the information is dated and at some points vague (which was pointed out by the issuing judge when the first application was rejected) simply suggests that Confidential Informant B's information by itself would not be enough for a warrant to be issued. It does not mean that the informant's information should be excised or given no weight and I decline to do so.

Review of Warrant

- [53] I am in agreement with only one of the defence arguments about disregarding paragraphs from the ITO and that is the argument with respect to para. 46(d). I must now consider whether, if that paragraph is disregarded, the remaining paragraphs of the ITO contain reliable evidence that might reasonably be believed on the basis of which the authorization could have issued.

- [54] An important overriding principle that was emphasized by the Crown is that a Garofoli hearing such as this is not a trial. I am not in this application undertaking an exercise of fact-finding. I am merely reviewing the issuing judge's conclusions for the purpose of determining whether they could have been reasonably made.
- [55] I am not able to re-weigh the evidence in the ITO or reject inferences if I think they are not the most plausible inferences to draw from the information. My role in this application is far more limited than that.
- [56] The Crown's summary of the information from the ITO is helpful in laying out the facts in a conceptual rather than chronological order and I will excerpt it nearly in its entirety as I think it provides a useful summary of the facts upon which the issuing judge relied.
- [57] With respect to the information relating to Apartment 308 and the accused, these are the facts in the ITO relevant to that issue:
- 2) Background searches indicate that the accused maintains an address at [Apartment 308]. Abbotsford probation has him residing at the Apartment. A motor vehicle search shows that he owns a Cadillac which is registered to the Apartment.
 - 3) On November 28, the Cadillac is seen in the secured parking area of the complex containing the Apartment.
 - 4) On November 29 the accused is seen to meet someone in the Cadillac in the secured parking area of the Complex.
 - 5) On the same day he is seen to arrive at the Complex and then leave the Complex in a Honda Prelude.
 - 6) In January 2016, the accused was arrested on the third floor of the Complex. He is in possession of drugs packaged for street-level sale. He is in possession of a cell phone on which the officers arresting him take a call asking for heroin.
 - 7) On December 5 the accused is seen to let himself into the Apartment and then leaves from "an apartment across from the elevator".
 - 8) On the same day he is seen to return and let himself into the Apartment.
 - 9) On December 7 the accused is seen to leave the Apartment immediately prior to his arrest.
 - 10) Confidential Informant "A" with a view of an apartment on the third floor of the Complex reports that they can see a caucasian male packaging drugs [in a third floor apartment].
- [58] The facts connecting Mr. Seffelaar and the accused were:
- 11) Confidential Informant "B" advises in March 2014 that the accused sells drugs and works with Josh Seffelaar.

- 12) The informant advises in February 2016 that the accused is still selling drugs and that he is a partner with Seffelaar.
- 13) Background checks indicate that Seffelaar, according to Motor Vehicle records, resides at 408 - 2233 McKenzie Road in Abbotsford.
- 14) The Elantra is not registered to Seffelaar, but is registered to the same address on McKenzie Road.
- 15) On five occasions between November 30 and December 7, the Elantra attends at the Complex in the morning for a brief period of time.
- 16) On November 30 the Elantra arrives at the Complex at 10:46 and parks in visitor parking. It leaves at 10:57.
- 17) On December 1 the Elantra arrives at the complex at 11:00 and then leaves at 11:02.
- 18) On December 5 the Elantra arrives at the Complex at 10:44 and leaves at 10:53. On that day Seffelaar is identified as the driver of the Elantra in a dual purpose traffic stop.
- 19) On December 6 the Elantra arrives at the Complex at 10:45. The Elantra leaves the Complex at 10:59.
- 20) On December 7 the Elantra arrives at the Complex at 10:51. Seffelaar enters the Apartment at 10:52. At 11:00 Seffelaar leaves the Apartment. The door to the Apartment was then locked from the inside. At 11:01 the Elantra leaves the complex.
- [59] In terms of information relating to street-level drug sales by Mr. Seffelaar, the ITO contained the following information:
 - 21) On three days Seffelaar is seen to engage in short meets consistent with street-level drug sales immediately after leaving the Apartment.
 - 22) On November 30 Seffelaar is seen to make two quick stops lasting one minute and two minutes.
 - 23) On December 5 Seffelaar is seen to make five quick stops in the span of an hour between 11:02 and 12:06. The stops last anywhere from one minute to five minutes. He is then identified in a dual purpose traffic stop.
 - 24) On December 7 Seffelaar is observed to conduct a short 15 second meet. He is subsequently arrested and found to be in possession of a cache of drugs packaged for street-level sales.
- [60] Finally, in terms of the information about street-level sales by the accused:
 - 25) On November 29 the accused walked from the complex to a Jeep Cherokee parked in the complex parking lot. He interacted with the driver through the passenger window for 45 seconds and then leaned in through the passenger window.

- 26) On December 5 the accused left the Complex in the Honda Prelude. At 16:51 the Prelude was encountered in the parking lot of Abby Pizza. A male entered the front passenger seat of the Prelude and the Prelude drove to another exit of the parking lot where the male left the vehicle at 16:52.
- 27) On December [7], after Seffelaar had left the Apartment, the accused was seen to leave the Apartment. He was arrested while approaching the Prelude. In the course of his arrest a cache of drugs packaged for street-level sale was seized from the accused.
- [61] Even with para. 46(d) excised, I find there was sufficient information from which the issuing judge could find reasonable grounds to believe that an offence had been committed and reasonable grounds to believe that evidence of the offence would be located at the places to be searched. I am therefore satisfied that there is reliable evidence that might reasonably be believed on the basis of which the warrant could have been issued.
- [62] As such, I find no breach of the accused's s. 8 Charter rights.

Access to Counsel

- [63] The defence argues that Mr. Bentley's rights under s. 10(b) of the Charter were violated by the delay in his access to counsel. The timeline here is important:
- Mr. Bentley was arrested at 11:17 am on December 7, 2016;
 - he requested counsel at 11:18 am;
 - he was turned over to Constable Springman for transport to the detachment at 11:37 am;
 - he arrived at Abbotsford Police Detachment at 11:46 am;
 - he was fingerprinted and photographed at some point before he had access to counsel; and
 - he was provided access to counsel at 12:09 pm.
- [64] Under s. 10(b) of the Charter, everyone on arrest has the right to retain and instruct counsel without delay. This has been interpreted by the Supreme Court of Canada in *R. v. Suberu*, 2009 SCC 33 at paras. 41-42 to mean that the duty to facilitate access to counsel arises immediately upon the detainee's request to speak to counsel.
- [65] The police have a constitutional duty to facilitate access to counsel at the first reasonably available opportunity once it is requested. The burden is on the Crown to show that a given delay was reasonable in the circumstances: *R. v. Taylor*, 2014 SCC 50 at para. 24.
- [66] The question of whether the duty to facilitate access to counsel at the first reasonably available opportunity requires the police to facilitate telephone access to counsel at the scene of arrest has been the subject of much discussion in cases from this Court and the B.C. Court of Appeal. Most recently, in *R. v. Patrick*, 2017 BCCA 57, the Court of Appeal disagreed with the proposition that the right to be afforded counsel without delay meant that police were always obliged to facilitate contact with counsel at the roadside. Mr. Justice Fitch held

in that case that the trial judge committed an error when she treated the duty to facilitate access to counsel as near immediate and near absolute. His discussion on this matter is apposite to this case:

- [112] In *R. v. Suberu*, 2009 SCC 33 at paras. 2, 42, the court held that the police have a duty to inform a detainee of his right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention. The immediacy of this obligation is, however, subject to concerns for officer or public safety. A police officer's implementation duties are "necessarily limited in urgent or dangerous circumstances": *Taylor* at para. 31, citing *R. v. Bartle*, [1994] 3 S.C.R. 173. In *Ashby*, this Court noted that, "the exigencies of the arrest situation can excuse immediate compliance with s. 10(b)". The burden rests with the Crown to show that delay in facilitating a request to obtain legal advice on detention was reasonable in the circumstances. Whether the delay was reasonable is a factual inquiry: *Taylor* at para. 24.
- [113] The practicalities of the situation must be taken into account; they inform the reasonableness of the delay in facilitating the exercise of the right. With respect, the trial judge was wrong to reject as misguided Cpl. Butler's testimony that she was obliged to facilitate the respondent's right to counsel "as soon as practicable". In *Taylor*, the court confirmed that the police have a duty to provide phone access to counsel "as soon as practicable" or "at the first reasonably available opportunity" (at paras. 24, 28).
- [114] The trial judge did not meaningfully consider the exigencies of the situation in her s. 10(b) ruling. Given her conclusion that Cpl. Butler was unaware of her constitutional obligation to facilitate the respondent's contact with counsel "without delay", it was unnecessary for her to do so.
- [115] Further, the trial judge made no reference to the governing jurisprudence in this area nor did she consider recent and binding authority on the obligation of the police to provide their own cell phone to a detained individual (*Taylor* at para. 27) or to provide a cell phone to a detainee at the scene of a high risk arrest (*R. v. Montgomery*, 2009 BCCA 41 at paras. 34-37).
- [116] With respect, the trial judge was obliged in this case to consider whether the Crown discharged its burden of demonstrating that the delay was reasonable. She was obliged to meaningfully assess Cpl. Butler's stated reasons for delaying facilitation of the right: [in this case] the respondent had just been arrested for carrying a loaded concealed weapon and, for safety reasons, needed to remain handcuffed until he was thoroughly searched at the detachment; the respondent might use the opportunity of a telephone call to contact other people in the context of what was clearly an ongoing investigation; and the practicalities of the situation were such that the respondent could not be afforded privacy during the call. Although the trial judge referenced these considerations, she was required to make a factual finding as to whether, in the totality of the circumstances, the delay in facilitating contact with counsel was reasonable. She did not do so. I am satisfied that her failure to do

so was premised on a misunderstanding and misapplication of the law.

- [67] The defendant's submission that the current state of the law requires access to a phone at the scene of the arrest may be an overstatement of the state of the current law in this province. In any event, each case must be considered and the reasonableness of the delay assessed on its own facts.
- [68] The question before me, then, is whether the Crown has discharged the burden of showing that in the totality of the circumstances, on the particular facts of this particular arrest, was the 52-minute delay in providing access to counsel reasonable?
- [69] I have considered the following factors in coming to my conclusion:
- a) This was a planned arrest. The police had time to consider in advance how they could best facilitate timely access to counsel.
 - b) This arrest took place in 2016, prior to the Abbotsford Police Department's implementation of a system for facilitating access to counsel at the scene of arrest by providing burner phones and Bluetooth headsets to individuals being arrested. This policy was not fully implemented until early 2019.
 - c) Constable Young testified that he did not think it was advisable to allow Mr. Bentley to use his own phone to contact counsel at the scene of arrest because the phone was evidence and if Mr. Bentley was given privacy with his own phone, he could alter or remove evidence from the phone.
 - d) Constable Young also testified that he did not think it was advisable to give his own phone to Mr. Bentley because his phone contained confidential information related to his police work.
 - e) The detachment was a six to nine-minute drive away from the scene of arrest.
 - f) After arriving at the detachment, there was a further delay of 23 minutes, during which Mr. Bentley was photographed and fingerprinted before Mr. Bentley was given access to counsel.
- [70] Arguably, given that no appropriate phone was available, it may have been reasonable for the arresting officers in this case to wait to provide access to counsel until they had returned to the detachment, particularly considering that the detachment was only a six to nine-minute drive away. Had access to counsel been immediately provided upon arrival at the detachment, my analysis may have been different. However, I cannot see any reasonable justification for delaying implementation of Mr. Bentley's right to counsel for a further 23 minutes once he arrived at the detachment. It is clear that there was no plan made ahead of time for facilitating access to counsel. Constable Gump testified that he was tasked with calling counsel only because he happened to be at the station doing other things. Constable Springman testified that her only job was to transport Mr. Bentley and she had no part in facilitating access to counsel. There is simply no reason why, as part of this planned arrest, an officer could not have been assigned with the task of facilitating access to counsel

immediately upon Mr. Bentley's arrival at the station. I find that the Crown cannot meet the burden in this case of showing that the delay was reasonable in the circumstances.

- [71] I therefore find that Mr. Bentley's right under s. 10(b) of the Charter to retain and instruct counsel without delay was violated in this case.

Argument Re: Automatic Excision

- [72] The defence argues that as a remedy for the breach of s. 10(b) I should excise para. 47(h) and (j) from the warrant. The reasoning for this is based on what defence counsel acknowledges is an extension of existing law relating to excision from warrants.
- [73] It is clear that there is authority derived from the Supreme Court of Canada cases of *R. v. Grant*, [1993] 3 S.C.R. 223, *R. v. Wiley*, [1993] 3 S.C.R. 263 and *R. v. Plant*, [1993] 3 S.C.R. 281 for the proposition that if a search is found to be in breach of the Charter, evidence from that search cannot be used to support an application for a warrant. This flows from the premise that it would be improper to base the issuance of a warrant on evidence that was obtained in violation of the Charter.
- [74] Counsel for the defence asks me to take a broad reading of Charter-tainted evidence that would encompass excising from a warrant not only evidence that is causally connected to a Charter breach such as evidence obtained in a search that violated s. 8, but also excising evidence that is more broadly connected to a breach of the Charter. That connection, he argues, can be found in the authorities under s. 24(2) of the Charter such as *R. v. Pino*, 2016 ONCA 389, a case where the Ontario Court of Appeal took an expansive approach to the meaning of "obtained in a manner" as that phrase is used in s. 24(2) of the Charter. The Ontario Court of Appeal held that the "obtained in a manner" requirement under s. 24(2) could be met where the evidence and Charter breach are not necessarily causally connected, but are part of the same transaction or course of conduct. The defence argues that I should take the same approach to the excision analysis and find that since the s. 10(b) violation was in some way connected to the search incidental to arrest described in para. 47(j), albeit not causally, I should excise para. 47(j).
- [75] Neither counsel was able to provide any case law directly on point. However, there are some cases from the Ontario Superior Court that discuss the distinction between the excision analysis and the s. 24(2) analysis and those cases are helpful in framing the issue.
- [76] In *R. v. Lam*, 2015 ONSC 2131 [Lam], the court described the excision rule as it pertains to constitutional violations as follows at para. 55:

As Justice Code observed recently in *R. v. Jaser and Esseghaier*, 2014 ONSC 6052, *Grant*, *Wiley* and *Plant* have been consistently interpreted as laying down a 'rule' requiring courts reviewing the sufficiency of informations to obtain search warrants to excise facts obtained by means of a Charter breach regardless of the gravity of the breach and without the kind of assessment of contextual factors that takes place in a s. 24(2) analysis. The rule has not been without its critics,

however. It is anomalous, some have argued, that facts derived from a breach of the Charter must be 'automatically' excluded on a mere evidentiary hearing while at the trial itself, where guilt or innocence is at stake, unconstitutionally obtained evidence can only be excluded after the careful balancing required by s. 24(2).

[77] Where evidence is obtained by means of a Charter breach, there is no question that it must be excised. The controversy around excision, at least according to the discussion referenced in *Lam*, is not that the rule of excision does not apply broadly enough, but rather that the automatic excision of evidence obtained from Charter breaches omits the important balancing stage of s. 24(2) wherein the gravity of the breach and contextual factors may be weighed before evidence is excluded. What the defence is arguing is the inverse of the controversy referenced in *Lam*. He argues that I should take the rule of excision farther and apply automatic excision, with no balancing or consideration of the gravity of the breach or assessment of contextual factors, to any evidence that is connected causally, temporally, or contextually to a Charter breach.

[78] The court in *Lam* makes the following statement about the law of excision at para. 56:

it is a mechanism for determining the significance of prior unconstitutional conduct in the chain of events that led to the evidence that is sought to be excluded.

[79] *Lam* provides a clear statement of the present state of the excision rule and its limitation to causally connected Charter breaches.

[80] In *R. v. Ferguson*, 2018 BCSC 378, Madam Justice DeWitt-Van Oosten was asked to consider the scope of excision. A similar argument was made before her to the one that the defence made before me. The facts were different in that case and, ultimately, the court held that it was unnecessary to analyze the breadth of the excision rule and determine whether it appropriately captures not only information or facts that were obtained in the immediate face of a breach, but all facts that are temporally, contextually, and/or causally connected to the established infringement.

[81] It therefore appears that the defence is asking this Court to greatly expand the automatic excision rule in the absence of any case authority in support. Were I to accept the defence's argument on expanding the scope of the excision rule, I would be making new law. The defence has not persuaded me that the automatic excision rule should be changed so as to broaden the category of cases in which evidence is automatically excluded without the court undergoing the important balancing exercise under s. 24(2).

[82] I therefore decline to find that para. 47(j) can be excised from the warrant on the basis of a later violation of Mr. Bentley's s. 10(b) Charter rights.

[83] Before I conclude, I add this: I have not in these reasons expressly considered the question of whether the evidence obtained from Mr. Bentley on the search incidental to arrest was evidence obtained in a manner that violated the Charter. The proper test under s. 24(2) was not squarely before me given my findings on the automatic excision argument so I make no

comment on it except to say that the defence's submission on Pino and the state of the law in B.C. will require further submissions should an application to exclude evidence under s. 24(2) be brought in this matter.

[84] That concludes my ruling.

"Francis J."

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