

CANADA / JUDGMENT

## R. v. Bonson

2024 BCSC 1092

### COURT

Supreme Court of British Columbia

### DECIDED

21 June 2024

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2024 BCSC 1092 R. v. Bonson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bonson,

2024 BCSC 1092

Date: 20240621

Docket: 89202-2

Registry: Nanaimo

Rex

v.

Michael Wayne Bonson

Before: The Honourable Justice Watchuk

Voir Dire Ruling - Charter Sections 8, 9, 10(a), and (b)

Counsel for the Crown:

V. Sissons

Counsel for the Accused:

K. Bradshaw

J. Turner

Place and Dates of Trial:

Nanaimo, B.C.

October 30-31, Nov 1, 2023

March 11-12, 2024

Place and Date of Judgment:

Nanaimo, B.C.

June 21, 2024

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## Introduction

- [1] The accused, Michael Wayne Bonson, is charged with five offences on Indictment 89202-- four counts of possession for the purpose of trafficking in fentanyl/carfentanil, cocaine, methamphetamine, and lysergic acid diethylamide ("LSD"), and one count of possession of fentanyl. The events leading to the charges occurred in Nanaimo, BC on June 11, 2020.
- [2] Mr. Bonson alleges violations of his ss. 8, 9, 10(a), and 10(b) Charter rights in relation to being detained and ultimately arrested by the RCMP on June 11, 2020. After he was arrested on a warrant for outstanding charges of fraud over \$5000 and using a forged document, the investigation carried out by Constable Viger of the Nanaimo RCMP involved consideration of the offence of possession of stolen property as well as drug-related offences. Mr. Bonson alleges breaches of his Charter rights at each stage of the interaction and investigation.

## Charter Application

- [3] In his amended notice of application dated October 27, 2023, Mr. Bonson seeks the following orders:

- 1) In relation to the arrest on the warrant, a declaration that Cst. Viger violated Mr. Bonson's rights under s. 10(b) of the Charter by failing to inform him of his right to counsel at the outset of the arrest on the outstanding warrant.
- 2) In relation to the possession of stolen property investigation, a declaration that Cst. Viger violated Mr. Bonson's rights under s. 9 of the Charter by failing to release him from the detachment after completing the process of obtaining fingerprints and a photograph, contrary to s. 498(1) [s. 499(a)] of the Criminal Code, R.S.C., 1985, c. C-46.
- 3) A declaration that Cst. Viger violated Mr. Bonson's rights under s. 9 of the Charter by detaining him for possession of stolen property without having the requisite grounds for an investigative detention.
- 4) A declaration that Cst. Viger violated Mr. Bonson's rights under s. 9 of the Charter, by detaining him for a period of time that fell outside the ambit of what is permissible for an investigative detention.
- 5) A declaration that Cst. Viger violated Mr. Bonson's rights under s. 8 of the Charter by conducting a search of the pick-up truck (from the outside), while he was unlawfully detained.
- 6) In relation to the drug-related investigation, a declaration that Cst. Viger violated Mr. Bonson's rights under s. 10(a) of the Charter by failing to inform him that he was being detained for a drug investigation.
- 7) A declaration that Cst. Viger violated Mr. Bonson's rights under s. 10(b) of the Charter by failing to inform him of his right to counsel when the detention shifted to a drug investigation.
- 8) A declaration that Cst. Viger violated Mr. Bonson's rights under s. 9 of the Charter by arresting him for possession of a controlled substance for the purpose of trafficking, without having the requisite subjective and objective grounds.
- 9) A declaration that Cst. Viger violated Mr. Bonson's rights under s. 8 of the Charter by searching the pick-up truck incident to an unlawful arrest.
- [4] Mr. Bonson also seeks an Order that the evidence be excluded pursuant to s. 24(2) of the Charter. This issue will be addressed in a subsequent hearing.

#### Charter Sections

- [5] The Charter sections applicable in this case are ss. 8, 9, 10(a) and (b), which provide:
  8. Everyone has the right to be secure against unreasonable search or seizure.
  9. Everyone has the right not to be arbitrarily detained or imprisoned.
  10. Everyone has the right on arrest or detention:

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; [ ]

### Facts: Overview

- [6] The facts are largely not in issue. The times noted are in evidence both from Cst. Viger as well as from CCTV video of the gas pumps and parking lot at the scene. There is no issue with regard to the accuracy of the times and events recorded on the CCTV video. When the videos were formatted, the technician did not transcribe the time of day. The time references during the evidence were to running times of the videos. The correlation of the running time and time of day was provided by a chart, also in evidence, and is the basis of the times in the Reasons.
- [7] Where there is disagreement between the parties on the facts it will be noted and discussed further below.
- [8] In the early morning of June 11, 2020, Cst. Viger was patrolling the area of 1702 Bowen Road, Nanaimo, BC, which is the location of a gas station and a convenience store. While driving in the parking lot, Cst. Viger observed a pick-up truck that was spray painted black which Cst. Viger found suspicious.
- [9] Constable Viger stopped and queried the licence plate on the pick-up truck and learned that the vehicle had active insurance and was registered as grey in colour. The query also identified a "Pointer Vehicle" associated to Michael Bonson, who had an outstanding warrant for offences of fraud over \$5000 and using a forged document.
- [10] Constable Viger parked behind the pick-up truck. He exited his vehicle and walked up to the male who was standing near the pick-up truck. He asked the male if he was Michael Bonson, and the male said, "Yes".
- [11] Constable Viger recorded in his notes that he then arrested Mr. Bonson for the outstanding warrant for fraud at 5:20 a.m. He commanded Mr. Bonson to place his hands behind his back and, when he complied, Constable Viger secured him in handcuffs. As the video shows actions consistent with an arrest and handcuffing at 5:18 a.m., I will return to the question of time of arrest.
- [12] Constable Viger conducted a search for officer safety and then escorted Mr. Bonson to his police vehicle. He placed Mr. Bonson in the back of the police vehicle, but Mr. Bonson got very nervous and passively would not put his feet in the vehicle. Mr. Bonson asked why he was arrested. Constable Viger called for back up. Other members arrived, and Mr. Bonson then complied with the commands of the officers to put his feet in the vehicle.
- [13] At 5:26 a.m. or 5:29 a.m., Cst. Viger informed Mr. Bonson of his right to counsel. At trial, Cst. Viger testified that Mr. Bonson told him that he did not want to call a lawyer "at this time".

- [14] Constable Viger secured the pick-up truck by closing the windows and locking the doors. He testified that as he was closing the driver's side window, he observed a scale on the front seat, but it was too dark to see if anything was on the scale. He did not recall if he had earlier gone into the front seat of the pick-up truck to retrieve Mr. Bonson's wallet or what he saw then.
- [15] At 5:38 a.m., Cst. Viger transported Mr. Bonson to the Nanaimo RCMP detachment to obtain fingerprints and a photograph as was required by the terms of the warrant.
- [16] At 6:20 a.m., after he completed the taking of fingerprints and photographs, Cst. Viger was in the process of writing a ticket for having the wrong colour on the pick-up truck. At that time, he noticed that the licence plate that was on the pick-up truck related to a Ford Explorer SUV registered to Mr. Bonson. Constable Viger remembered that the older pick-up truck was not similar to an Explorer. He testified that he told Mr. Bonson he was being detained for possession of property obtained by crime, and drove back to the gas station with Mr. Bonson still in his police vehicle.
- [17] At 6:29 a.m., Cst. Viger arrived back at the gas station with Mr. Bonson in the back of the police vehicle. Constable Viger exited the police vehicle and went to the pick-up truck to locate the vehicle identification number ("VIN") on the driver's side windshield. Constable Viger testified that the VIN was missing, and he took a photograph.
- [18] Constable Viger then looked into the pick-up truck and saw the digital scale he had seen earlier and noticed a white substance on it. He suspected that it was cocaine residue. He searched the vehicle from the outside by looking onto the dash and saw a plastic baggie with a white substance inside, which he suspected was cocaine. During a further search of the inside of the pick-up truck from the outside, Cst. Viger observed a glass pipe. He testified that he formed the grounds to believe Mr. Bonson was in possession of a controlled substance for the purpose of trafficking.
- [19] At 6:35 a.m., Cst. Viger returned to the police vehicle and informed Mr. Bonson he was under arrest for possession of a controlled substance for the purpose of trafficking. He informed Mr. Bonson of his s. 10(b) rights, and Mr. Bonson said he wanted to speak to a lawyer.
- [20] Constable Viger contacted legal aid, and Mr. Bonson spoke to a lawyer while in the back of the police vehicle.
- [21] At 7:00 a.m., Cst. Viger began to search the interior of the pick-up truck. As a result of the search, Cst. Viger located and seized numerous baggies of controlled substances.
- [22] The following drugs were seized:
- 1394 doses of LSD;
  - 28 grams of cocaine;

- 90.31 grams of methamphetamine;
- 0.5 grams of fentanyl; and
- 11.72 grams of carfentanil and fentanyl.

[23] At 8:21 a.m., Cst. Viger completed the search of the pick-up truck.

[24] At 8:58 a.m., Cst. Viger released Mr. Bonson at the scene.

#### Arrest on the Warrant: Section 10(b) of the Charter

[25] The defence submits that Mr. Bonson's s. 10(b) rights were breached at the following times:

- a) failing to inform him of his right to counsel immediately upon the arrest on the warrant; and,
- b) failing to inform him of his right to counsel once he was secured in the vehicle at 5:23 a.m., and delaying advising him for another six minutes after he was secured in the vehicle.

[26] The law with regard to s.10(b) is set out succinctly in *R. v. Taylor*, 2014 SCC 50 at paras. 21-26. In doing so, the Supreme Court of Canada refers to their prior seminal decisions on s. 10(b), including *R. v. Manninen*, [1987] 1 S.C.R. 1233, 1987 CanLII 67; *R. v. Bartle*, [1994] 3 S.C.R. 173, 1994 CanLII 64; and *R. v. Suberu*, 2009 SCC 33, and summarizes the law as follows:

[21] The purpose of the s. 10(b) right is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *Manninen*, at pp. 1242-43. The right to retain and instruct counsel is also "meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination": *R. v. Suberu*, [2009] 2 S.C.R. 460, at para. 40. Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy "is able to make a choice to speak to the police investigators that is both free and informed": *R. v. Sinclair*, [2010] 2 S.C.R. 310, at para. 25.

[22] In *R. v. Bartle*, [1994] 3 S.C.R. 173, Lamer C.J. explained why the right to counsel must be facilitated "without delay":

This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. . . . [T]he right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process. [Emphasis added [by Abella J.]; p. 191.]

[23] He also confirmed the three corresponding duties set out in Manninen which are imposed on police who arrest or detain an individual:

- (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
- (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

(Bartle, at p. 192, citing Manninen, at pp. 1241-42; R. v. Evans, [1991] 1 S.C.R. 869, at p. 890; and R. v. Brydges, [1990] 1 S.C.R. 190, at pp. 203-4.)

[24] The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention (Suberu, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances (R. v. Luong (2000), 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

[25] This means that to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights and facilitate access to those rights where requested, both without delay. This includes "allowing [the detainee] upon his request to use the telephone for that purpose if one is available" (Manninen, at p. 1242). And all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so (see Brownridge v. The Queen, [1972] S.C.R. 926, at pp. 952-53).

[26] Until the requested access to counsel is provided, it is uncontroversial that there is an obligation on the police to refrain from taking further investigative steps to elicit evidence (R. v. Ross, [1989] 1 S.C.R. 3, at p. 12; R. v. Prosper, [1994] 3 S.C.R. 236, at p. 269).

[27] In this case, the issue is whether the police complied with the duty to inform Mr. Bonson of his right to counsel immediately upon arrest. The burden is on the Crown to show that a given delay was reasonable in the circumstances.

[28] Whether a delay in facilitating access to counsel is reasonable is a factual inquiry. As such, I will review the circumstances between the arrest at 5:18 a.m. and the giving of the right to counsel at 5:29 a.m., 11 minutes later.

[29] First, with regard to my findings of the times being 5:18 a.m. and 5:29 a.m., I rely on the video time stamp to determine that the arrest was at 5:18 a.m. rather than at 5:20 a.m., as recorded by Cst. Viger in his notes. At 5:18 a.m., Cst. Viger is shown putting handcuffs on

Mr. Bonson, and by 5:20 a.m., Mr. Bonson is in the vehicle with Cst. Viger outside the open passenger door. Constable Viger testified that he may have mentioned the right to counsel at the time of arrest as he usually does by saying words to the effect of "you are able to call a lawyer if you want to", but he does not recall. I do not find that the right to counsel was given at the time of arrest.

- [30] Although Cst. Viger testified that the right to counsel was "for sure" given at 5:26 a.m., his later evidence was that it was done at approximately 5:28 a.m., and his notes show that the time was 5:29 a.m. The time of 5:29 a.m. is consistent with the video evidence which establishes that by then Constables Barnett and Nelidov had left the scene, and Cst. Viger was alone in his vehicle with Mr. Bonson. It is also consistent with Cst. Viger having gotten out of his vehicle at 5:32 a.m., or three minutes later, to lock Mr. Bonson's pick-up truck before they left the scene for the detachment.
- [31] It was after the arrest, when Mr. Bonson did not co-operate with Cst. Viger as he was attempting to place Mr. Bonson in the back seat of the police vehicle, that Cst. Viger called for back-up. In the 11 minutes after arrest and before the right to counsel, three other Nanaimo RCMP officers attended the scene.
- [32] Only Cst. Barnett was available to testify when called as a witness by the defence. She testified about her actions as shown on the video and her lack of recollection of the events. Although she confirmed her presence at the scene after refreshing her memory by viewing the video, she had no independent recollection of the events of the morning involving Mr. Bonson. It appears that none of the officers made any notes of their attendance at the scene.
- [33] Constable Barnett, who arrived at the scene at 5:23 a.m., was the first officer to respond. Constable Viger was then able to close the rear passenger door, which was possible after Mr. Bonson put his feet into the vehicle. Constable Nelidov arrived next, and they both spoke with Cst. Viger outside his vehicle.
- [34] After speaking with Cst. Viger, Cst. Barnett at 5:24 a.m. opened the rear passenger door where Mr. Bonson was sitting and appeared to be talking to him. Constable Teel arrived at 5:25 a.m. At 5:27 a.m., Cst. Barnett closed Mr. Bonson's door and walked to her police vehicle. Constable Nelidov leaned into the front passenger window, and then went to the rear passenger door where Mr. Bonson was seated but did not open the door.
- [35] At 5:28 a.m., Cst. Barnett drove away, Cst. Teel also left, and Cst. Nelidov appeared to speak to Mr. Bonson briefly through the passenger door window. He then left at 5:29 a.m. I find that Cst. Viger provided the right to counsel at that time when he was seated in his vehicle with Mr. Bonson. Mr. Bonson replied that he did not wish to call a lawyer at this time.
- [36] There were no submissions that the actions of the other three officers who attended the scene at this time had any relevance to the issues before the Court. In my view, the relevance is with regard to the timing of the right to counsel and the delay in providing the rights.

- [37] With regard to the time between the arrest and providing Mr. Bonson with his right to counsel, Cst. Viger testified that he did not recall who the other officers were who attended or their conversations, but it was normal for them to be curious when he called for help.
- [38] I have found that there was an 11-minute delay in providing the right to counsel after arrest. In determining if the delay was reasonable, and having regard to the totality of the circumstances, I find that it was a reasonable delay.
- [39] In arriving at this conclusion, I rely on *R. v. Patrick*, 2017 BCCA 57, where Mr. Justice Fitch explains at paras. 11 and 12 that the obligation to facilitate the right to counsel immediately upon detention is subject to concerns for officer or public safety. Further, he states that "[t]he practicalities of the situation must be taken into account; they inform the reasonableness of the delay in facilitating the exercise of the right": *Patrick* at para. 113.
- [40] As to the cause of the delay, during this time, Cst. Viger also contacted the watch clerk to confirm the warrant before transporting Mr. Bonson to the detachment for fingerprints and photographs. He testified that he was waiting for the confirmation since it was outside of normal work hours, but he always gives the Charter rights before the confirmation. Although the evidence is not clear as to the sequence, I conclude that Cst. Viger sought confirmation, gave the Charter rights to Mr. Bonson, then received confirmation of the warrant before leaving for the detachment. Thus, any waiting time was after, not during, the 11-minute delay. In other words, the delay was not attributable to waiting for the warrant to be confirmed.
- [41] The time lapse resulted primarily from Mr. Bonson's refusal to comply with being placed in the police vehicle and the necessity to call for back up. It was reasonable for Cst. Viger to initially place Mr. Bonson in the police vehicle to provide him with his Charter rights. When the three other officers arrived five minutes later, they conferred with Cst. Viger and then there was some interaction between them and Mr. Bonson, who complied. When they left the scene after six minutes, Mr. Bonson was given his right to counsel.
- [42] I therefore find that there was no breach of Mr. Bonson's s. 10(b) Charter rights at the time of his arrest on the warrant.

### **Investigative Detention for Possession of Stolen Property: Section 9**

- [43] As set out above in the overview of the facts, at 6:20 a.m., after the fingerprints and photographs were completed at the detachment, Cst. Viger was in the process of writing up a ticket for having the wrong colour on the pick-up truck. At that time, while seated in his police vehicle with Mr. Bonson, he noticed that the licence plate on the pick-up truck related to a Ford Explorer SUV registered to Mr. Bonson. Constable Viger remembered that the older pick-up truck was not similar to a Ford Explorer SUV. Constable Viger testified that he told Mr. Bonson he was being detained for possession of property obtained by crime, and drove from the RCMP detachment back to the gas station with Mr. Bonson still in his police vehicle.

- [44] The defence submits that three Charter violations arise from these events:
- a) Constable Viger violated Mr. Bonson's rights under s. 9 of the Charter by failing to release him from the detachment after completing the process of obtaining the fingerprints and photograph, contrary to s. 498(1) [s. 499(a)] of the Criminal Code;
  - b) Constable Viger violated Mr. Bonson's rights under s. 9 of the Charter by detaining him for possession of stolen property without having the requisite grounds for an investigative detention; and
  - c) Constable Viger violated Mr. Bonson's rights under s. 9 of the Charter by detaining him for a period of time that fell outside the ambit of what is permissible for an investigative detention.
- [45] The law with regard to investigative detention is set out in *R. v. Mann*, 2004 SCC 52, which decided "(i) whether there exists, at common law, a police power to detain individuals for investigative purposes; and (ii) if so, whether there exists a concomitant common law power of search incident to such investigative detentions": para. 2. The Supreme Court of Canada explains the relationship between ss. 9 and 10(a) of the Charter:
- [20] A detention for investigative purposes is, like any other detention, subject to Charter scrutiny. Section 9 of the Charter, for example, provides that everyone has the right "not to be arbitrarily detained". It is well recognized that a lawful detention is not "arbitrary" within the meaning of that provision. Consequently, an investigative detention that is carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the Charter.
- [21] Section 10(a) of the Charter provides that "[e]veryone has the right on arrest or detention to be informed promptly of the reasons therefor." At a minimum, individuals who are detained for investigative purposes must therefore be advised, in clear and simple language, of the reasons for the detention.
- [46] The Supreme Court of Canada discusses several guiding principles governing the use of a police power to detain for investigative purposes:
- [34] The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the [*R. v. Waterfield*, [1964] 3 All E.R. 659, [1964] 2 C.C.C. 286 (B.C.C.A.)] test, along with the [*R. v. Simpson*, 12 O.R. (3d) 182, 1993 CanLII 3379 (C.A.)], articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the

interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.

- [35] Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have carte blanche to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a de facto arrest.
- [47] With regard to search powers incident to investigative detention, the Supreme Court of Canada states:
- [39] To continue in the Waterfield analysis, the conduct giving rise to the interference must involve a justified use of a police power associated with a general duty to search in relation to the protection of life and property. Put differently, the search must be reasonably necessary. The relevant considerations here include the duty being performed, the extent to which some interference with individual liberty is necessary in the performance of that duty, the importance of the performance of the duty to the public good, the nature of the liberty being interfered with, and the nature and extent of the interference: [Dedman v. The Queen, [1985] 2 S.C.R. 2 at pp. 35-36, 1985 CanLII 41].
- [40] The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances: see S. Coughlan, "Search Based on Articulable Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.
- [48] The three Charter breaches articulated by the defence allege that Mr. Bonson was arbitrarily detained when he was over-held on the arrest and not released on an appearance notice, and was detained, and for too long, for possession of stolen property and transported back to the gas station where his truck remained parked.
- [49] Constable Viger testified that he had not completed the appearance notice for the release on the warrant when, while writing the violation ticket, he remembered that the vehicle was a pick-up truck, and not the Ford Explorer SUV as indicated on the registration. When he informed Mr. Bonson that he was being detained for possession of stolen property, he testified that he recalled that he told Mr. Bonson that he could speak to a lawyer to which Mr. Bonson replied, with words to the effect of "whatever". Constable Viger assumed that Mr.

Bonson was indifferent. There is nothing in his notes regarding advising Mr. Bonson that he could call a lawyer, and he fairly agreed that he did not fully inform Mr. Bonson of his Charter rights at that time. The defence is not alleging a breach of s. 10(a) in this regard, but they make a submission regarding the inaccuracies and omissions in Cst. Viger's notes to which I will return.

- [50] Constable Viger agreed that he did not arrest Mr. Bonson because he did not have reasonable and probable grounds for arrest. He testified that his ground for detention was that it was not the right plate for the right car. In addition to the licence plate, which was in the name of Mr. Bonson but on the wrong vehicle, and together with the fact that the pick-up truck had been spray painted, he had a suspicion that the vehicle was stolen. He believed that he could drive Mr. Bonson back to the scene after detention, and said that he probably would have offered him a ride back to his pick-up truck in any event.
- [51] It is the submission of the Crown that Cst. Viger had the requisite grounds for an investigative detention, and that the detention was both reasonably necessary and of a permissible duration. With regard to the initial detention, Crown submits that Mr. Bonson was still under arrest as he had not been released on the warrant.
- [52] The appearance notice was not issued to Mr. Bonson because before Cst. Viger completed it, he had formed the grounds for detention for possession of stolen property.
- [53] The defence submits that this failure to release Mr. Bonson was a breach of his s. 9 Charter rights. I agree. I understand that the reference to s. 498 in the application should be read as s. 499. Section 499 of the Criminal Code states that a person arrested on a warrant may be released by a peace officer on an appearance notice. Here, all the requirements, including fingerprinting and photographing, were completed; only completion of the paperwork remained. There was no reason not to issue the appearance notice. The intended subsequent detention would not be affected by a release. Extending the arrest was arbitrary in the circumstances.
- [54] I would add that the wording of s. 498 regarding release from custody after arrest without a warrant, which provides for release "as soon as practicable", does not form a comparison which results in a conclusion that s. 499 permits a delayed release in these circumstances.
- [55] With regard to the grounds for the detention, I am satisfied that Cst. Viger's grounds in these somewhat unusual circumstances meet the requirements set out in Mann. His suspicion that the pick-up truck was stolen was objectively reasonable given that the licence plate in Mr. Bonson's name was on the wrong vehicle, which had been spray-painted. I am satisfied that the detention was reasonably necessary on the totality of the circumstances, including that Mr. Bonson would need to return to his vehicle in any event which also reduced the interference with his liberty.

- [56] As to the length of the detention, it was approximately 15 minutes from the detention at the detachment to the arrest for possession for the purpose of trafficking. I find that this was a reasonable length of time for this investigative detention.
- [57] Had the investigation proceeded without the subsequent drug investigation, after the detention at approximately 6:20 a.m., Cst. Viger could have within 11 minutes (by 6:31 a.m.) completed his investigation of the VIN and taken the next steps.
- [58] In the result, I find one breach of Mr. Bonson's s. 9 Charter rights arising from the investigative detention being the failure to release on the appearance notice and the consequent extension of the arrest on the warrant.

### Search of the Pick-Up Truck from the Outside: Section 8

- [59] The defence submits that there was a violation of Mr. Bonson's s. 8 Charter rights when Cst. Viger conducted a search of the pick-up truck from the outside during an unlawful detention for possession of stolen property.
- [60] As I have found that the detention was lawful, I would dismiss this application for that stage of the search. However, I have also considered whether the actions of Cst. Viger in looking for the VIN from the outside of the pick-up truck was lawful. As stated in *R. v. Clayton*, 2007 SCC 32 at para. 30: "As explained in *Mann*, searches [on an investigative detention] will only be permitted where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk". Here, there were no safety issues, since the initial safety search of Mr. Bonson had occurred at the time of the arrest on the warrant. Although it was not raised by counsel, I am satisfied that there is no reasonable expectation of privacy in the VIN number of a vehicle visible from the outside of the vehicle and thus s. 8 is not engaged. I reach that conclusion applying the test in *R. v. Cole*, 2012 SCC 53 at para. 40.
- [61] In *R. c. Koulakis*, 2012 QCCQ 4276, Justice Mascia considers the federal Motor Vehicle Safety Regulations, C.R.C., c. 1038, s. 115(2) and opines that a VIN does not attract a reasonable expectation of privacy:
- [44] The factors that reduce the reasonable expectation of privacy in motor vehicles apply more so to the VIN number. To enhance the praise-worthy objectives of the VIN number, federal legislation mandates that the VIN number be placed in a manner that renders it visible from the outside. As already seen, the provincial Highway Safety Code at s. 221 requires that the VIN number must always be legible. Under such circumstances, it would be unreasonable for a motorist to have an expectation of privacy in a VIN number that--by law--is easily viewable from outside the vehicle. In a sense, the VIN number is akin to a license plate in the back of a vehicle.

- [62] I note that before Cst. Viger left for the detachment, two other RCMP officers attended the scene and looked into the pick-up truck. Constables Deveau and Roberts arrived at 5:38 a.m. and spent a few minutes looking into the windows of the pick-up truck, leaving after Cst. Viger had left the scene. Both officers testified that they did not recall, and had no notes of their observations of the interior of the pick-up truck, but if they had seen anything of significance they would have made notes.
- [63] After the detention at approximately 6:20 a.m., Cst. Viger arrived back at the scene at 6:29 a.m. by the video time stamp, or 6:31 a.m. by Cst. Viger's testimony. He then got out of his vehicle and is seen on the video at the driver's side windshield of the pick-up truck, looking in the driver's side window for one to two minutes. He saw that the VIN number was missing and took a photo of the place it should have been.
- [64] However, Cst. Viger continued his examination of the pick-up truck. When looking for the VIN, he again saw the scale on the front seat. Earlier, during the arrest process, he had seen the scale, but in the improved daylight he now saw white residue or a trace of cocaine on the scale. He testified that he got excited as he had found something significant, and that he switched to a drug investigation. He continued to search the pick-up truck through the windows. This is apparent on the video from 6:31 a.m. to 6:35 a.m., as he walks from the driver's side window, where he looked for the VIN, to the passenger window and continues to look inside the pick-up truck, possibly taking a photograph.
- [65] Mr. Bonson was not informed that the investigation was now a drug investigation and that the reason for the detention had changed. He was not provided with his ss. 10(a) and (b) Charter rights when the investigation changed to a drug investigation. He was not arrested for possession for the purpose of trafficking until Cst. Viger had searched the vehicle for four further minutes. At this point, the officer had also located the baggie and the pipe which together with the scale formed the initial grounds for the arrest.
- [66] While Mr. Bonson was detained for possession of stolen property, Cst. Viger conducted a search of the pick-up truck in a drug investigation and located items which formed the grounds for the arrest of Mr. Bonson for possession for the purpose of trafficking.
- [67] The Crown submits that the continuation of the search after checking for the VIN number was lawful under the plain view doctrine, and submits that an officer is lawfully able to seize items that will afford evidence of an offence if such an item is found in plain view. It relies on *R. v. Gibson*, 2003 BCSC 1572, which states:
- [18] I next consider the plain view doctrine. This rule of law permits the police to seize evidence that is in plain view if certain conditions are proved. As I read the authorities, the elements that are essential to the application of this doctrine are the following. (This is my paraphrasing.) First, that the police officer had lawful, prior justification for his or her intrusion into or presence at the place where the evidence was found. Second, that the police officer discovered the evidence inadvertently while in the course of exercising a lawful police power or performing a lawful police duty. Third, that the evidence was in plain

view in the sense that it was detected through the unaided use of the police officer's senses. Fourth, that it must have been immediately apparent to the police officer that the evidence was probably connected with criminal activity.

- [68] The submission of the defence is that this case goes beyond what can be characterized as a "plain view search". They say that Cst. Viger did not happen to see contraband while carrying out a separate, lawful investigation, because he was not acting lawfully as Mr. Bonson was unlawfully detained. Further, once he saw the residue on the scale, according to his testimony, Cst. Viger actively continued looking through the windshield and other windows of the pick-up truck to pursue a drug investigation. This, they say, is not simply noticing something in plain view.
- [69] The plain view doctrine was thoroughly considered in *R. v. Gill*, 2019 BCCA 260 at paras. 21 et seq. I note particularly: "The premise is that a person can have no reasonable expectation of privacy in an item in plain view to officers where the officers have a right to be present and are carrying out their lawful duties": *Gill* at para. 32 (emphasis added). As well, I note: "The reason for the elements is to minimize the dangers of the plain view doctrine being used as a pretext to get around the necessity of obtaining a warrant. It is not a way of allowing the admission of evidence obtained by police conducting an unauthorized search": *Gill* at para. 68.
- [70] In this case, after looking for the VIN, and further inspecting the scale which he had seen earlier and knew was on the seat, and observing the residue on the scale in broader daylight, Cst. Viger commenced a drug investigation. He neither advised Mr. Bonson of the change in reason for his detention, nor did he provide Mr. Bonson his Charter rights at that point.
- [71] As discussed above, Mann and Taylor set out the requirements of ss. 10(a) and 10(b), respectively, and the reasons for the requirements of police compliance with those requirements. Specifically: "Until the requested access to counsel is provided, it is uncontroversial that there is an obligation on the police to refrain from taking further investigative steps to elicit evidence": Taylor at para. 26. As is apparent, Cst. Viger did not refrain from taking further steps when he commenced a drug investigation without providing Mr. Bonson his Charter rights. This is not a case involving rapidly evolving external circumstances but, rather, an investigation without urgency.
- [72] Thus, the search further to the drug investigation was not lawful. The plain view doctrine therefore has no application in these circumstances.
- [73] The continued search of the pick-up truck after the scale was located and the drug investigation commenced was a breach of Mr. Bonson's s. 8 Charter rights.

**Commencement of the Drug Investigation: Sections 10(a) and (b)**

- [74] As discussed above, when the investigation for possession of stolen property became a drug investigation, Cst. Viger did not immediately inform Mr. Bonson that the reason for his detention had changed. There was no impediment to his ability to do so; he simply did not do so. Rather, he continued his search of the pick-up truck from outside the vehicle.
- [75] It is not in issue that Mr. Bonson did not receive his ss. 10(a) (informational) and 10(b) (right to counsel) Charter rights immediately. I therefore find that the Charter breaches alleged in this regard are established.

**Grounds for Arrest for Possession for the Purpose of Trafficking: Section 9**

- [76] First, I note that there is no issue that on arrest for possession for the purpose of trafficking, Cst. Viger provided Mr. Bonson with his ss. 10(a) and (b) Charter rights. Mr. Bonson called a lawyer and spoke with them from the police vehicle on the officer's cell phone.
- [77] At 6:35 a.m., Mr. Bonson was arrested for possession for the purpose of trafficking. The issue on his arrest is whether there were grounds for the arrest for this offence. The evidence on this issue is far from straightforward as there are a number of inconsistencies in the evidence of Cst. Viger in the trial, in his notes, in his report to Crown counsel (the "RCC"), and on the preliminary inquiry.
- [78] In his notes made contemporaneously at the scene as he was searching the pick-up truck from the outside before arresting Mr. Bonson, Cst. Viger wrote that the grounds were: the scale with the residue, the baggie in the metal basket on the passenger side dash, and the used crack pipe on the seat.
- [79] In his cross-examination, Cst. Viger testified that he decided to arrest as a result of those three items, and then seeing the cash (a \$5 bill and a bag of coins) "closed the deal". He said that the cash was in his mind and he mentioned it later.
- [80] Further in his cross-examination, when asked if his grounds now were the scale, the baggie, the pipe, the coins, and the \$5 bill, Cst. Viger added that the colour of the pick-up truck and the plate not matching were also grounds. He did not recall that the backpack was part of his grounds. It was not in his mind at the moment.
- [81] When asked in cross-examination about the RCC which he authored approximately one week later, he agreed that he did not list money or the bag of coins as grounds for arrest. He described the scale with the residue, the baggie described as 1"-2" by 1"-2" with suspected cocaine, and the meth, or crack, pipe.
- [82] At the preliminary inquiry, his testimony was that the grounds were the powder residue on the scale, the \$5 bill, the dime bag completely full of cocaine which was significant, the backpack, and the meth pipe. The bag of coins was not mentioned.

- [83] In cross-examination, Cst. Viger explained the different grounds for arrest which he provided at different times. He testified that he was suspicious from the start, the grounds were all building, and he was organising his thoughts. He does not take note of everything, and when he takes his decision to arrest he does not make a list, and the note may not have all the grounds that are in his head. He also testified that later, after the arrest, he had done better research and better preparation.
- [84] Other inconsistencies in the testimony regarding grounds for arrest include the description of the baggie as being completely full, which at the preliminary inquiry was important in the decision to arrest for possession for the purpose of trafficking rather than possession, while at trial he agreed that the baggie as shown in the photograph taken at the time was not full. At trial, the baggie was described as 2" by 2" but he agreed that it could have been 1" by 1" but said it was the style that was important, whereas in the RCC it was 1"-2" by 1"-2".
- [85] Cst. Viger was also questioned about his evidence at the preliminary inquiry that it was very dark at the time of the arrest and too dark to see the residue on the scale at that time, but that it was visible later in the daylight. The defence submits that his testimony in this regard is another exaggeration similar to the exaggerated description of the amount of suspected cocaine in the baggie.
- [86] With regard to the credibility and reliability of Cst. Viger, I find that he was intent on being truthful and complete in his evidence for the Court. The issues arise primarily not because he was not being truthful, but, in my view, from a lack of knowledge and experience at the time of proper processes and practices. He willingly explained how his grounds had changed. He candidly discussed, for example, the changes in his description of the size of the baggie and the amount of the suspected cocaine in it. It was his first investigation and arrest for possession for the purpose of trafficking, and he also admitted that he now knows that the amount of cocaine located in the baggie does not support that charge.
- [87] The reliability of the testimony of Cst. Viger was hampered by his lack of memory of certain events, such as whether and when he went into the front seat of the pick-up truck to retrieve Mr. Bonson's wallet. His notes were sorely lacking in a number of areas, and reliance on his memory after the passage of time was problematic.
- [88] The one area of his testimony where I have reservations about his credibility is whether he saw the residue on the scale during the arrest process, rather than only after he looked for the VIN in the possession of stolen property investigation. The evidence regarding the increasing daylight is unclear, as is Cst. Viger's evidence as to whether or when he went onto the front seat of the pick-up truck to retrieve Mr. Bonson's wallet.
- [89] Accepting as I do that the residue was visible to Cst. Viger at the later time, it is also noted that the two officers who remained at the scene while Cst. Viger was at the detachment did not recall or make note of the presence of the electronic scale, or the scale with the residue.

- [90] The importance of police notes is aptly stated in *R. v. Tweedly*, 2013 BCSC 910 at para. 160, which states:
- [160] In reaching that conclusion, based on the evidence I have heard on the voir dire, it is important to recall it has been held innumerable times in our courts that police testimony, without the advantage of contemporaneous notes, is unreliable and often not admitted into evidence for that purpose.
- [91] The issue on the s. 9 application is whether Cst. Viger violated Mr. Bonson's rights by arresting him for possession for the purpose of trafficking without having the requisite subjective and objective grounds for that offence.
- [92] The defence submits that Cst. Viger did not have subjective grounds because he testified that he did not consider whether Mr. Bonson knew that the baggie with the suspected cocaine was in the metal basket on the passenger side dash of the pick-up truck. The baggie was on the window side of the basket and there were papers sticking up at the other side of the basket, potentially impeding the view of the driver. The failure to consider the element of knowledge is, they say, an absence of subjective grounds, citing *R. v. Du Temple*, 2020 BCSC 2202.
- [93] With regard to objective grounds, it is clear that Cst. Viger did not understand the requirement to have grounds to arrest at the time of the arrest. I find that his grounds for arrest at the time of the arrest were the scale with the residue, the baggie, and the crack pipe.
- [94] The baggie, about which there was much evidence, was in evidence through photographs. There are no measurements of the bag in evidence. From its proximity to other items in the photographs, it appears to be small, and could be between 1" and 2" square. It has a red dog pattern on one side and is clear on the other side. It appears less than half full of the substance suspected by Cst. Viger to be cocaine. In the basket the red dog pattern is visible.
- [95] The baggie, the scale with the residue, and the used pipe do not provide reasonable grounds for an arrest for possession for the purpose of trafficking. It was the view of Cst. Viger that people who use drugs do not have scales. He testified that he is now aware that the quantity of suspected cocaine was not sufficient to support a charge of possession for the purpose of trafficking.
- [96] The Crown submits that because Cst. Viger had grounds to arrest for simple possession, the arrest was lawful. They cite *R. v. Nesbeth*, 2008 ONCA 579 at paras. 18-19, leave to appeal to SCC ref'd, 32971 (28 May 2009), which discusses grounds for an investigative detention. With respect, I cannot accede to this submission. As stated by Mr. Justice Frankel in *R. v. Whitaker*, 2008 BCCA 174 at para. 65, leave to appeal to SCC ref'd, 32657 (30 October 2008), the police "are to be judged on what they did, not what they could have done".

[97] I therefore find that Cst. Viger did not have grounds to arrest Mr. Bonson for the offence of possession for the purpose of trafficking. The warrantless arrest was therefore unlawful, and in breach of his s. 9 Charter rights.

### Search of the Pick-Up Truck Incident to an Unlawful Arrest: Section 8

[98] As the arrest of Mr. Bonson was unlawful, the search was not lawful. The Supreme Court explains in *R. v. Fearon*, 2014 SCC 77 at para. 27 that "[t]he common law framework requires that a search incident to arrest must be founded on a lawful arrest, be truly incidental to that arrest and be conducted reasonably."

[99] Mr. Bonson's s. 8 Charter rights were breached by the unlawful search of the pick-up truck after his arrest.

### Conclusion and Summary

[100] The application is granted in part.

[101] I find that Mr. Bonson's Charter rights were breached as follows:

- a) Section 9 - by failing to release him at the RCMP detachment on the appearance notice;
- b) Section 8 - by continuing to search the pick-up truck from the outside after the investigation became a drug investigation;
- c) Sections 10(a) and 10(b) - by failing to provide Charter rights when the investigation switched to a drug investigation;
- d) Section 9 - by the arrest for possession for the purpose of trafficking without reasonable grounds; and
- e) Section 8 - by searching the pick-up truck after an unlawful arrest.

[102] The application pursuant to s. 24(2) of the Charter will proceed at the scheduled continuation of this matter.

"The Honourable Madam Justice J. Watchuk"

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Prepared on 25 October 2026 · Esheria