

CANADA / JUDGMENT

R. v. Carstairs

2022 BCCA 69

COURT

British Columbia Court of Appeal

DECIDED

23 February 2022

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2022 BCCA 69 R. v. Carstairs

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Carstairs,

2022 BCCA 69

Date: 20220223

Docket: CA47255

Between:

Regina

Respondent

And

Matthew Michael James Carstairs

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia, dated
May 22, 2020 (conviction) (R. v. Carstairs, Kamloops Docket 107246-1).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

December 16, 2021

Place and Date of Judgment:

Vancouver, British Columbia

February 23, 2022

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Voith

Summary:

The appellant challenges his convictions for three drug offences and possession of stolen property. He submits the warrant to search his place of residence at night had been improperly authorized under s. 488 of the Criminal Code, and the evidence obtained from the search should be excluded pursuant to s. 24(2) of the Charter, and an acquittal entered. Held: Appeal dismissed. The trial judge erred in concluding there were sufficient grounds to authorize a nighttime search of the appellant's residence. The factors this Court identified in *R. v. L.V.R.*, 2014 BCCA 349 in considering whether a nighttime search is reasonable weigh against authorizing a nighttime search in this case. There was no urgency associated with a threat to the public, the nature of the offence under investigation did not weigh in favour of a nighttime search, the evidence sought was unlikely to pose a danger to the public or to be disposed of, and it was known the residence was likely to be occupied at the time of the search. However, the evidence should not be excluded under s. 24(2) of the Charter. The seriousness of the Charter-infringing state conduct is low, as the officers believed they were executing the search pursuant to a valid warrant. The impact of the Charter breach was not aggravated in any way by police conduct. Society's interest in adjudication of the case on its merits is significant, considering the offences include the trafficking of fentanyl.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

- [1] The appellant was convicted of two counts of possession of controlled substances for the purposes of trafficking, one count possession of a controlled substance and one count of possession of stolen property. He appeals his convictions on the grounds the trial judge erred in law in finding that a warrant to search his place of residence at night had been properly authorized pursuant to s. 488 of the Criminal Code and dismissing his application for an order that the evidence obtained from the search be excluded pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms.

Facts

- [2] The appellant's trial commenced with a voir dire into the validity of the warrant. An agreed statement of facts was entered into evidence on the voir dire. It included the following admissions:
4. On December 10, 2018, Cst. Lapierre faxed a Criminal Code search warrant application for Room 120, 1773 East Trans Canada Highway ("the motel room") to the Justice Centre at 1:48 am. A signed search warrant was received at 2:28 am, authorizing entry between 2:30 am and 6 am that day.
 5. At 3:15 a.m., officers attended to the motel room to execute the search warrant. The accused answered the door and was wearing a gold necklace/chain that had been reported stolen from Fifth Avenue Jewellers in Kamloops on September 17, 2018. The list price for the necklace was \$4,069.65.
 6. The accused was one of the renters of the motel room. At the time, he was on a recognizance for unrelated charges. A condition of that recognizance was that he reside at the motel room and obey a curfew from 9 p.m. to 6 a.m. each day.
 7. The accused was arrested for possession of stolen property and the motel room was searched.
 8. The motel room is a standard motel room. There is a main living area which includes a bed. There is a separate bathroom at the back of the room.
 9. In the motel room was a wallet that contained identification in the name of the accused (a bank card), a laptop with the login screen on and in the name of "Matt", income tax and employment insurance forms in the name of the accused, an air gun that resembled a semi-automatic firearm and \$950 Canadian currency.
 10. Also in the room was a small silver safe. The safe was searched and found inside was a baggy containing 5.7 grams of fentanyl, a baggy containing .70 grams of fentanyl, a baggy containing .60 grams of fentanyl, a baggy containing 14 grams of methamphetamine and a baggy containing 5.3 grams of cocaine.

11. On a small table was a digital scale, a small white bucket that contained colouring dye and a baggie with .30 grams of fentanyl, four bottles of food colouring, a clear bowl containing 14.70 grams of caffeine, a propane torch and a small measuring cup.
12. On the floor outside the bathroom was a drone that had been reported stolen by Keith Ginter on October 16, 2018.
13. In total, officers seized 7.3 grams of fentanyl, 14 grams of methamphetamine and 5.3 grams of cocaine from the motel room.
14. The fentanyl and methamphetamine were possessed for the purpose of trafficking as alleged in the Information, and expert evidence is not required.

[Bolding original.]

- [3] The search warrant and the information to obtain (ITO) were entered into evidence on the voir dire. The ITO contained the following summary of information in support of Constable Lapierre's assertion that he had grounds to believe the appellant was in possession of stolen property and that evidence of the commission of the offence would be found at his residence:
5. On September 17, 2018, at 13:16 hours, Kevin SMITH ("SMITH") reported that an unknown male stole a \$4000 gold chain from the Firth Avenue Jewelers, located at 101-1055 Hillside Dr, Kamloops, British Columbia. SMITH said that the male was shopping for a gold chain, tried it on, and ran out the door with it. Full, high quality video surveillance was available for RCMP members to view and was disseminated to Kamloops RCMP members. A picture, captured from the video surveillance was reviewed by Cst Jillain KINGS ("Cst KINGS") who identified the male as Danny SOLMONSON ("SOLMONSON"). Through police records checks and police interactions, it was known to police that SOLMONSON was an associate of Matthew CARSTAIRS ("CARSTAIRS"). On December 7th, 2018, CARSTAIRS was advertising a gold necklace on Facebook Market Place under his full name. The gold chain was recognized by Cst Gerald JACOBS ("Cst JACOBS") as the one stolen from the Fifth Avenue Jewellers. Cst JACOBS confirmed with employees of the store that the gold chain was unique and was positively identified as the one stolen on September 17th, 2018. The same necklace with the same pictures from Facebook was also found on Kijiji, and was also advertised by CARSTAIRS. [Redacted.] I completed a curfew check on CARSTAIRS, at unit 120 of the Motel 6, located at 1763 East Trans Canada Highway, Kamloops, BC, and while speaking to CARSTAIRS, I noticed that he was wearing a gold necklace. I confirmed that the necklace was identical to the one CARSTAIRS was advertising for sale. Based on the positive identification by Fifth Avenue Jewellers' employees, the advertisement on Facebook Market Place and Kijiji site and the identification of the necklace during the curfew check, I believed that the necklace is currently in possession of CARSTAIRS at his unit 120 of the Motel 6, 1763 East Trans Canada highway, Kamloops, BC.

[Redacted in original.]

- [4] The summary does not refer to an undercover operation described in the following excerpt from the detailed account of the investigation in the redacted text of the ITO:

UNDERCOVER OPERATION

20. On December 7th, 2018, I initiated an undercover operation to acquire the necklace and make a successful arrest of the Facebook seller, who was believed to be CARSTAIRS. The following steps were taken during the course of the undercover operation:
- a. I was told by Cst JACOBS that a Kijiji account was identified, selling the exact same necklace;
 - b. At 14:00 hours, I reviewed the Kijiji account profile: [HTTPS://www.kijiji.ca/o.profile/1007865899/1](https://www.kijiji.ca/o.profile/1007865899/1);
 - c. The Kijiji ad was posted on December 5th, 2018;
 - d. I compared the pictures on the kijiji account with the ones from CARSTAIRS' facebook ad and confirmed that the pictures were the exact same. The backdrop were the same and it appeared that the pictures originated from the same user;
 - e. I was advised that undercover, Sgt [redacted], had made an offer on the kijiji account with two separate user names;
 - f. Up to December 9th, 2018, no response was received from the kijiji seller of the necklace;
 - g. On December 9th, 2018 at 21:11 hours, I confirmed that the necklace was still advertised on CARSTAIRS' facebook account as well as on kijiji under the same user profile mentioned above;

[Redacted in original; underlining original.]

- [5] The ITO set out the following basis for seeking a warrant authorizing a search at night:
33. I know that the undercover operation was not successful at this point and the execution of a search warrant remains the only investigational avenue possible for Kamloops RCMP to retrieve the necklace and arrest CARSTAIRS for the crime committed;
34. Further I am requesting that a Search Warrant be granted for an evening search based on the following rational [sic]:
- a. This investigation is time sensitive in nature. The fact that the necklace is being sold on 2 separate sites presents a risk that the necklace could be sold at any time. The further this Search Warrant is delayed, the more chance that the necklace and any other evidence may be lost, preventing Kamloops RCMP from investigating this crime;
 - b. In addition, a night search will be timed with CARSTAIRS' curfew check, which will guarantee his presence inside the unit;

- c. When members conducted a curfew check in the morning at 04:00 hours, on December 9th, 2018, CARSTAIRS was fully dressed and appeared to be awake and fully functional.
- [6] Constable Lapierre was called for cross-examination on the ITO. He testified that no one was continuously watching the motel room overnight, and that Mr. Carstairs' recognizance required him to remain in the motel room overnight (until 6:00 am) and to wear an electronic monitoring device. Constable Lapierre was aware of the particulars of only one prior curfew check, which he performed on December 9, 2018.
- [7] The appellant testified in the voir dire. His evidence was that he was awake and had been speaking with a visiting friend when the police arrived. He was arrested at the door of the motel unit. His girlfriend was laying in bed. He was taken to a police car while the unit was searched.

Ruling on the Voir Dire and Trial

- [8] The trial judge held, on the conclusion of the voir dire:
- [28] I am satisfied that the Judicial Justice was entitled to find, as she did, that there were reasonable grounds for nighttime execution of the s. 487.1 Search Warrant. The necklace had in recent days been put up for sale on two websites and was apparently still listed for sale. It was an easily moveable piece and indeed had been worn by the accused during the early morning curfew check on December 9.
- [29] Given the circumstances as set out in the Information, the Judicial Justice was entitled to find reasonable grounds to authorise the warrant and to provide for execution of the warrant by night. The evidence heard on the voir dire disclosed no errors of significance in the Information put before the Judicial Justice or any evidence of bad faith.
- [30] Once reasonable grounds for authorising a night warrant are established and those reasonable grounds are included in the Information, the test is met. All that remains is to ensure that the warrant authorizes execution by night. Unlike s. 185 of the Code, s. 488 does not require the Informant to establish that other investigative procedures have been tried and failed, or otherwise to establish the investigative necessity element required of an affiant in a wiretap application.
- [9] The trial judge found that the search warrant was properly granted and that the accused's s. 8 Charter rights were not infringed by its execution. He, therefore, considered it unnecessary to engage in a s. 24(2) Charter analysis to determine whether the evidentiary results of the search should be excluded as inadmissible.
- [10] The agreed statement of facts became an exhibit in the trial, and no other evidence was adduced. The appellant was convicted.

Grounds of Appeal

[11] The appellant says the trial judge erred in law by finding the nighttime search was justified in this case. He submits the evidence obtained on the impugned search should be excluded under s. 24(2), and an acquittal entered.

Validity of the Warrant: s. 488 of the Criminal Code

Standard of review

[12] There is no substantial dispute between the parties with respect to the standard of review.

[13] The appellant says no deference is owed to the trial judge's decision to find that the warrant was properly authorized because he erred in law in his application of the relevant legal standard to the facts of this case: *R. v. Shepherd*, 2009 SCC 35 at para. 20.

[14] The Crown says this Court owes deference to the findings of the reviewing judge in the assessment of the record as amplified on the review, and the disposition of the s. 8 Charter application, and we should not interfere with the trial judge's decision in the absence of an error of law, a misapprehension of the evidence, or a failure to consider relevant evidence: *R. v. Perkins*, 2021 BCCA 9 at para. 12; *R. v. Reilly*, 2020 BCCA 369 at para. 36, affirmed 2021 SCC 38; *R. v. Slemko*, 2020 BCCA 207 at para. 53.

[15] It is common ground that insofar as the issuing justice was engaged in the application of a legal standard to the facts of this case, he was obliged to apply the correct standard. The appellant is required to establish a legal error and we are not to reweigh the evidence before the issuing justice. The role of the reviewing judge was described in *R. v. Campbell*, 2011 SCC 32 at para. 14:

The question for a reviewing court is "not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence" to permit an issuing justice to authorize the warrant (*Morelli* [2010 SCC 8], at para. 40). In conducting this analysis, the reviewing court must exclude erroneous information from the ITO and may have reference to material properly received as "amplification" evidence (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 58; *Morelli*, at para. 41). The accused bears the burden of demonstrating that the ITO is insufficient (*Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708, at para. 68; *Morelli*, at para. 131).

Argument

[16] The relevant provision of the Criminal Code reads as follows:

488 A warrant issued under section 487 or 487.1 shall be executed by day, unless

- (a) the justice is satisfied that there are reasonable grounds for it to be executed by night;
- (b) the reasonable grounds are included in the information; and

(c) the warrant authorizes that it be executed by night.

[17] The appellant relies on *R. v. Sutherland* (2000), 150 C.C.C. (3d) 231 (Ont. C.A.) at para. 20, as authority for the proposition that a warrant must be executed by day unless there is, in addition to the grounds for the issuance of a warrant generally, an "additional justification" for the search to be conducted at night. He says there must be "exceptional circumstances" [emphasis added].

[18] Not only is *Sutherland* relied upon as a statement of applicable principles, the appellant says the facts of the case strongly resemble those before us and the judgment strongly speaks to exclusion of the impugned evidence in the case at bar. The Court of Appeal there held that there was "no question" that the night search could not be authorized: at para. 27. The offence being investigated was possession of a stolen ring, which had been in the accused's possession for two months. The Court held, at para. 18: "[t]he obvious and only reasonable approach was for the officer to obtain the warrant and greet the appellant at his apartment door in the morning".

[19] The appellant says *Sutherland* was followed by this Court in *R. v. L.V.R.*, 2014 BCCA 349, leave to appeal to the Supreme Court of Canada refused [2014] S.C.C.A. No. 485, where Saunders J.A., writing for the Court, identified factors that may be considered in weighing whether it is reasonable to authorize a nighttime search: at para. 25. These include:

- a. the gravity of the substance of the investigation;
- b. the likely occupancy of the residence and degree of disruption to privacy the search may cause;
- c. the nature of the items that may be found in a search; and
- d. the needs of the investigation.

[20] The appellant contends the trial judge did not consider whether there were exceptional circumstances justifying the search and did not turn his mind to the factors outlined in *Sutherland* and *L.V.R.* He says a nighttime search should not have been authorized in this case. The nature of the offence being investigated, possession of stolen property (the same offence being investigated in *Sutherland*), did not demand a nighttime search. Delay in the investigation or arrest in this case did not pose an imminent threat to the public, such as that posed in *L.V.R.* and *R. v. MacDonald*, 2012 ONCA 244. There was no urgency overnight. The necklace had been stolen months before; the appellant advertised the necklace for sale online five days earlier; and multiple offers to purchase the necklace went unanswered. A fact considered by the trial judge to be critical--that the evidence sought was "easily moveable"--is true of almost any evidence typically seized and does not justify a nighttime search.

- [21] Further, the appellant argues, his presence at home at the time of the execution of the warrant is not a factor that favours its execution at night. Rather, a resident's absence from the scene tends to lessen the invasion of privacy and security occasioned by a search, as in L.V.R.
- [22] In response, the Crown says there need not be exceptional grounds to authorise a search warrant for execution at night. There need only be reasonable grounds, and imposition of any other burden is inappropriate. It contends Sutherland is distinguishable for multiple reasons. First, it is not a considered judgment on the requirements of s. 488 because the search warrant in that case had been issued before subclauses 488 (a)-(c) were added to the Criminal Code by amendments enacted in 1997. When the warrant in that case was issued, the Code simply provided that warrants would be executed by day, unless the justice authorized execution by night, without expressly describing the criteria that ought to be considered.
- [23] The Crown argues the facts in the case at bar distinguish it from Sutherland. The ITO relied upon in that case did not explain why authorization to execute the warrant at night was sought. The material evidence had been in possession of the appellant for months and there was no evidence its disposition was imminent. The ITO was found to have significant inaccuracies. The Ontario Court of Appeal found the affiant to have been "flagrantly careless". The Crown says that the use of "exceptional" in Sutherland to describe the circumstances in which a warrant for a search at night should be issued should be seen in context, and was used to distinguish the "casual" approach taken by the police in that case.
- [24] The Crown says Parliament chose the well-known reasonable grounds standard as the threshold for authorizing night searches, as opposed to "exceptional circumstances" or "necessity". For that reason, the Crown argues, this Court in L.V.R. noted that whether there are reasonable grounds for issuing a warrant to search at night pursuant to s. 488 is a practical, common sense-question to which the answer depends on all the circumstances: at para. 24. Section 488 does not set out "necessity" as the basis for a night search warrant. The Crown suggests that in L.V.R. this Court did not interpret s. 488 as requiring "exceptional circumstances".
- [25] The Crown contends the statutory test was met in this case. The affiant had legitimate concerns about the preservation of the evidence. The trial judge accepted that the investigation was time sensitive.
- [26] The Crown argues the appellant's approach invites this Court to substitute its view for that of the judicial justice and the trial judge. It says the issue for us is whether the trial judge erred in concluding that the judicial justice could have issued the warrant.

- [27] Further, the Crown submits, the fact that the appellant was expected to be home at the time the warrant was to be executed was relevant. It was important that the search warrant be executed while the appellant was present since he had been seen wearing the stolen necklace the day before. The fact the appellant was up and appeared to be awake the previous day at 4:00 a.m. was also relevant to the intrusiveness of the night search.
- [28] In summary, the affiant believed a nighttime search was called for because the investigation was time sensitive. There was a risk that the necklace could be sold at any time, and the search should be conducted while Mr. Carstairs was home. It was unlikely to be intrusive because on the prior evening Mr. Carstairs had been "fully dressed and appeared to be awake and fully functional" at 4:00 am. The reviewing judge concluded there were reasonable grounds for nighttime execution of the warrant because the necklace had "in recent days" been put up for sale and was still listed for sale and it was an easily moveable piece. The appellant says these grounds are insufficient at law and speak to a failure on the part of the judicial justice to apply an appropriate legal test in weighing the ITO.

Discussion

Statutory Requirements

- [29] In support of his argument, the appellant relies heavily upon *Sutherland*. In my view, the judgment in that case may not be distinguished as easily as the Crown suggests. The Court of Appeal was clearly aware of the amendments to the Criminal Code (in fact it was the Court, rather than counsel, that canvassed the evolution of the wording of s. 488 and pointed out that the warrant had been issued before the enactment of s. 488 (a)-(c): at paras. 19-20). The enactment of these sections was not considered to have effected a change in the law. Justice Carthy wrote:
- [20] Even before it was amended, this section called for "execution by day" and therefore clearly implied that there be a reason for authorizing entry of a home at night. Thus, both before and after the amendment, additional justification for a night search was required and is wanting in the instant case.

[Emphasis added.]

- [30] The requirement that exceptional circumstances be established has continued to be imposed by the Ontario Court of Appeal in cases subsequent to the enactment of the current provisions (see *R. v. Lowe*, 2018 ONCA 110).
- [31] The view expressed in *Sutherland* that reasonable grounds to execute a warrant at night will exist in "exceptional" circumstances was not a phrase used lightly by the Ontario Court of Appeal. The term was not merely used in contrast to the "casual" approach taken by the police. The expression was repeated in the following passage, which appears in the s. 24(2) balancing exercise but is nevertheless helpful in describing the circumstances in which a warrant may authorize a search at night:

[33] To some extent, whenever a guilty person evades conviction because of a Charter breach, the administration of justice suffers. However, a balance must be found when Charter breaches are exposed in court to assure that innocent persons do not suffer by repetition of the breach. When the conduct of the police, who form an integral part of the administration of justice, falls below the expected standard, the protection of the public by the justice system suffers. The mere presence of police officers at one's home in the middle of the night, for whatever reason, is a frightening event. Parliament has recognized that only in exceptional circumstances can the police exercise this unusually intrusive procedure.

[Emphasis added.]

[32] In L.V.R., as noted above, this Court described a common-sense approach to s. 488 but did not take issue with the Ontario Court of Appeal's characterization of the circumstances justifying a nighttime search as "exceptional":

[24] The question is whether the judge erred in concluding that this affiant, in the circumstances known to her and disclosed to the justice of the peace, had reasonable grounds for execution of the search warrant at night. What is reasonable depends on all the circumstances. It is a practical, common-sense question. Good faith on the part of the affiant is important in answering this question, but subjective belief does not provide the whole answer. The criteria in s. 488 contains an objective aspect: in the circumstances known at the time the search warrant was issued, was it reasonable that the search warrant be executed at night?

[25] Section 488 does not set "necessity" as the basis for a night search warrant, but rather engages the situational term "reasonable grounds". A night search may be reasonable in one situation but not in another, depending upon a host of factors. The gravity of the substance of the investigation, the likely occupancy of the residence and degree of disruption to privacy the search may cause, the nature of the items that may be found in a search, and the needs of the investigation are but a few. The effect of some of these factors is seen in Sutherland, in which Justice Carthy said:

[25] The provision for a night search of a home is meant to be invoked in exceptional circumstances and not, as here, to be used casually to justify invasion of a home whose occupants can be expected to be in bed asleep--all to find watches worth \$3,000 and some commemorative rings which would in all likelihood have remained there until morning.

[26] The judge here referred to three aspects of the case in upholding the search warrant: the seriousness of the matters under investigation, the disposable nature of the items sought, and the fact that no-one was home during the hours proposed for the search. In my view, the judge made no reversible error in resting his conclusion on these factors.

[Emphasis added.]

[33] Assessing the reasonableness of a request for authorization of a search at night requires the issuing justice to engage in a balancing process, including consideration of factors such as those identified in L.V.R. Section 488 of the Criminal Code establishes that search warrants

will ordinarily be executed by day and only exceptionally by night. While this Court in L.V.R. accepted the description of the circumstances in which a night time search may be authorized as "exceptional", it clarified that common sense must be used in assessing what objective foundation must exist for authorizing such a search, consistent with Parliament's adoption of the "reasonable grounds" test.

- [34] The factors expressly considered in this case included (a) the evidence sought was for sale online, (b) the appellant would be home at the time the warrant was to be executed, and (c) the evidence sought was very portable. There was no express consideration of whether the nature of the offence being investigated was such as to justify an urgent search.

Nature of the Offence

- [35] The Ontario Court of Appeal in Sutherland acknowledged that there was little jurisprudence addressing what might exceptionally justify a search at night. It noted that in *R. v. Peddle* (1997), 486 A.P.R. 54 (N.L.S.C.) the court upheld a warrant to search for cocaine where there was evidence it was being sold at night and its sale posed a serious threat to the public. In contrast, in *R. v. Charlie*, [1992] B.C.W.L.D. 1696, 16 W.C.B. (2d) 162 (Y.T. Terr. Ct.), the Territorial Court quashed a warrant to search for stolen goods at night when the ITO set out no basis for an urgent search. The nature of the offence being investigated is clearly significant.
- [36] A nighttime search is more likely to be considered reasonable where there is a heightened concern for public safety, even where there is a relatively small risk the evidence sought will be lost or disposed of. In *Lowe*, Rouleau J.A. for the Ontario Court of Appeal upheld the validity of a warrant in circumstances where there was such concern:
- [65] The appellants argue that the ITO provided no basis upon which a night search of the premises could be authorized. Under the heading "request for night grounds" in the ITO, there is only one basis listed in support of the request. That basis is the belief that evidence is currently located in the premises and that delay could result in the potential loss of that evidence. Nothing in the rest of the redacted ITO or judicial summary, however, gave any reason to believe that the evidence would in fact be lost. As a result, the trial judge ought to have found the search to have been unreasonable.
- [66] I disagree. The trial judge acknowledged that the record did not support the concern that the evidence may be lost if it was not seized in a timely manner. She went on, however, to find that the ITO clearly showed that there was a basis for the police being concerned about public safety. Although those concerns were not specifically articulated as the basis for the request for night entry, the circumstances described in the ITO as a whole were sufficient to support and justify a night time entry into the targeted address on the basis of public safety. As found by the trial judge:

The imminence related not to any evidence that the firearms were going to be disposed of or moved, but to the imminence of a threat to public safety arising from the firearms as described in the ITO. The ITO set out the grounds for believing that there was a firearm in the residence. The ITO specifically requested night time authorization and it was granted. The requirements of s. 488 were met.

[67] Therefore, in my view, when the circumstances are viewed in their totality, there existed reasonable grounds justifying the warrant being executed by night, and the trial judge's conclusion that the requirements of s. 488 were met is supported by the record: *Sutherland*, at para. 27. That conclusion is also owed deference by this court, which should decline to interfere with the reviewing judge's decision absent an error of law, misapprehension of evidence, or failure to consider relevant evidence: *Sadikov*, at para. 89.

[37] This approach is exemplified in *R. v. Browne*, 2013 ONSC 5874, and in *R. v. Boussoulas*, 2014 ONSC 5542, where concern with respect to the presence of firearms in residences was found to afford reasonable grounds for a nighttime search.

Presence of the Appellant

[38] The fact no one is expected to be present in a residence is a significant factor weighing in favour of the execution of a warrant at night. In *L.V.R., Saunders J.A.* noted:

[27] On a practical level, the privacy interests of *L.V.R.* to a night free of police disruption in his home were attenuated by his absence and the fact the other occupant, his son, was not at home, to the knowledge of both the affiant and the justice of the peace. While the police still required specific authorization to search at night (s. 488), the absence of any resident is highly relevant, and the judge was correct to consider the diminished degree to which privacy interests would be affected in the circumstances by a search at night.

[39] Similarly, in *R. v. Brown*, 2008 ABQB 663, *R. v. Karim*, 2012 ABQB 470, and *R. v. Johnson*, 2009 MBQB 271, trial judges have considered the privacy and security interests described in *Sutherland* to be attenuated where the warrant is issued to permit the search of a residence known to be unoccupied.

Portability of the Evidence

[40] The fact the object of the search is easily transported is not generally considered to be material. The appellant's submission in this respect appears to be borne out in judicial analysis. In that regard, I agree with the view expressed by Gordon J. in *R. v. Phillips*, 2011 ONSC 1881:

[33] [T]he evidence in the ITO cannot support the authorization of a night time entry. The grounds alleged amount to an indication that some of the items to be searched for are portable and can easily be moved or destroyed and that other of the items may be sold or rented to other members of the public. I would venture to say that the vast majority of

search warrants issued in this country relate to items that are portable and are easily moved or destroyed. Surely, this trait alone is not sufficient to justify night time entry of a dwelling. Surely, what is contemplated is evidence of some additional reasonable grounds to believe that if the search warrant is not executed quickly the items to be searched for may disappear. For example, if observation of the premises revealed that boxes of items were being taken from the premises, such reasonable grounds might be found to exist. Or if an informant had provided evidence that the occupants were aware of the police investigation and had started to destroy evidence, such grounds might be found to exist. The simple statement that some of the items to be searched for may be easily moved or destroyed, without more, does not suffice.

Application of the Law

- [41] In my view, the appellant is correct to say there were insufficient grounds to authorize a nighttime search of the appellant's residence, and the judicial justice cannot have engaged in the balancing process required to assess the reasonableness of a nighttime search. Here, as in *Sutherland*, urgency was not dictated by any apparent threat to the public. The nature of the offence under investigation, possession of stolen goods, did not weigh significantly in favour of an urgent search. The fact the necklace was easily moveable cannot have tipped the scale in favour of a very intrusive search.
- [42] The fact this residence was known to be occupied was not a factor favouring a nighttime search. No weight could be placed upon the fact Mr. Carstairs had previously been awake in the middle of the night. Constable Lapierre did not claim to be familiar enough with Mr. Carstairs' circumstances to say whether he would be awake or alone at the time of the execution of the warrant. He knew only that he would be home. The issuing judicial justice had no basis to believe a nighttime search of the residence in this case would be anything other than the type of "unusually intrusive procedure" considered in *Sutherland*: at para. 33.
- [43] The only apparently relevant factor in the ITO was the fact there was an ongoing attempt to sell the necklace. However, the evidence was that the necklace had been listed for sale online for days. The warrant was not sought during the day on December 9, 2018, after Mr. Carstairs was seen wearing the necklace at 4:00 a.m. There is no evidence of a significant risk it would be sold in the interval between the execution of the search at 4:00 am and the end of Mr. Carstairs' curfew at 6:00 am on the morning of December 10, 2018, which is also the time that marks the beginning of the "day" under s. 2 of the Code.
- [44] In short, the evidence contained in the amplified record is not a sufficient basis upon which the warrant could have issued. On that basis the warrant may be invalidated. Justice Watt in *R. v. Sadikov*, 2014 ONCA 72 summarizes the role of a court reviewing the validity of a warrant:

[88] It is no part of the reviewing judge's mandate to determine whether she would issue the warrant on the basis of the amplified record. Nor is it the reviewing judge's role to draw inferences, or to prefer one inference over another. The inquiry begins and ends with an assessment of whether the amplified record contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued: Morelli, at para. 40.

[Emphasis original.]

[45] This case is not a matter of preferring one inference over another or determining whether this Court would authorize the nighttime search. In my view the factors this Court identified in L.V.R. weighed against authorizing the execution of this warrant by night:

- a) the gravity of the substance of the investigation did not call for an urgent search;
- b) it was known that the residence was likely to be occupied;
- c) the item sought was unlikely to pose a danger to the public;
- d) the necklace (unlike the computer data sought in L.V.R.) was unlikely to be disposed of except by sale, and Mr. Carstairs was being monitored and was barred from leaving the motel at night; and
- e) the needs of the investigation could be served by a search in the morning.

[46] Here, as in Sutherland, the "obvious and only reasonable approach was for the officer to obtain the warrant and greet the appellant at his [motel] door in the morning": at para. 18.

Exclusion of the Evidence: s. 24(2) of the Charter

[47] The appellant says if he succeeds in satisfying us that the warrant was improperly issued, we should engage in a s. 24(2) analysis, conclude that the agreed statement of facts should not have been admitted into evidence, set aside his conviction, and enter an acquittal. Relying upon R. v. Pawlivsky, 2020 SKCA 75 at para. 25, he says there is an adequate factual record for this Court to conduct its own s. 24(2) analysis, utilizing the framework prescribed in R. v. Grant, 2009 SCC 32. The Crown agrees we are capable of conducting a s. 24(2) analysis and should do so.

[48] The Crown says the appellant has not discharged the onus under s. 24(2) of the Charter to demonstrate that it is more probable than not that admission of the evidence would bring the administration of justice into disrepute: R. v. Collins, [1987] 1 S.C.R. 265 at 280.

[49] I turn to submissions with respect to the factors considered in Grant.

The Seriousness of the Charter-Infringing State Conduct

- [50] The appellant says exclusion of the evidence obtained on the search in this case is warranted because there was a clear violation of well-established rules governing state conduct: *R. v. Paterson*, 2017 SCC 15 at para. 44; see also: *R. v. Phillips*, 2011 ONSC 3890 at para. 14.
- [51] In my view, there is no reason to conclude the police violated a well-established rule in the investigation, the completion of the ITO or the execution of the warrant. Nor should the issuance of the warrant by the judicial justice be characterized as a serious breach of the rules of state conduct.
- [52] In *Paterson*, Brown J. for the majority wrote that "[e]ven where the Charter infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 at paras. 24-25)": at para. 44. However, the Court in that case was considering what was referred to in para. 46 as "the well-established legal principles governing the authority of police to enter a residence without a warrant" of which Brown J. wrote: "[t]he presumptive unreasonableness of warrantless searches, and the high privacy interest attaching to a person's residence have long been fundamental to our understanding of the proper relationship between citizen and state".
- [53] Justice Moldaver, in dissent, noted that the Court should be wary of characterizing the warrantless search as a violation of well-established rules of state conduct where on review and appeal (in this Court) the search had not been considered to be illegal. He considered it would be inappropriate to conclude that "the police should have known what the trial judge and three judges of the Court of Appeal did not know": at para. 70.
- [54] In the case at bar, while in my view the judicial justice cannot have engaged in the balancing process required before issuing the warrant sought, there was some evidence the search was time-sensitive. It is not suggested the affiant erred in any way in the manner in which he completed the ITO. There was no material inaccuracy or omission. The officers were expressly permitted by the warrant to execute the search at night. They did so by the letter. In my view, the words of Moldaver J. at para. 93 of his dissent in *Paterson* are apt here: "[t]he seriousness of the breach is clearly attenuated by the uncertainty surrounding the interpretation of [the statute] ... and the strong findings of the trial judge that the police were acting in good faith throughout".
- [55] That was not the case in *Phillips*, where the Charter breach was the execution of a warrant at night with authorization, but no apparent grounds for doing so were set out in the ITO. The Court noted:

- [14] [T]he required reasonable grounds for the night search were practically non-existent. In my view, the circumstances of this case did not warrant even a request for a night time search. The officer's inclusion of the request and his failure to particularize sufficient grounds in support of the request reflect a carelessness or casualness towards the rights of the accused protected by the Charter.
- [56] Further, while it is correct to say that an unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy is more serious than one that does not (Grant, at para. 78; R. v. Pawar, 2020 BCCA 251 at para. 79), a search pursuant to a warrant by officers who believed they were acting on legal authority favours admission of the evidence: R. v. Morelli, 2010 SCC 8 at para. 99; R. v. Bacon, 2012 BCCA 323 at paras. 27, 29.
- [57] In Morelli, Fish J. for the majority wrote:
- [99] [T]he Charter-infringing state conduct in this case was the search of the accused's home and the seizure of his personal computer, his wife's laptop computer, several videotapes, and other items. The search and seizure were unwarranted, but not warrantless: they were conducted pursuant to a search warrant by officers who believed they were acting under lawful authority. The executing officers did not wilfully or even negligently breach the Charter. These considerations favour admission of the evidence. To that extent, the search and seizure cannot be characterized as particularly egregious.
- [100] The opposite is true on considering the ITO upon which the warrant was obtained. The officer who prepared the ITO was neither reasonably diligent nor mindful of his duty to make full and frank disclosure. At best, the ITO was improvidently and carelessly drafted.

[Emphasis original.]

- [58] In Bacon, Saunders J.A. for this Court wrote:
- [29] In this case, the police who discovered the evidence were acting on warrants that could reasonably be thought of as valid. This fact weighs in favour of admissibility: R. v. Evans, [1996] 1 S.C.R. 8, 104 C.C.C. (3d) 23; Grant; and R. v. Caron, 2011 BCCA 56, 269 C.C.C. (3d) 15. ...

The Impact on the Charter-Protected Interests of the Accused Person

- [59] The impact of the alleged Charter breach is said by the appellant to be particularly significant because: (a) there is such a high expectation of privacy in one's home that Charter breaches committed in the course of residential searches will generally lead to exclusion (Paterson, at para. 49), and (b) there is a heightened expectation of privacy at night (Sutherland, at para. 30).

- [60] Further, he says, the search had an impact on third parties who were present during the search; in this case, his girlfriend: citing the judgment of La Forest J., in dissent in *R. v. Silveira*, [1995] 2 S.C.R. 297, considered by Fitch J.A. for this Court in *Pawar*.
- [61] In my opinion, the Crown is correct to say that the seriousness of the Charter breach flows solely from the unjustified execution of a warrant at night. The seriousness of the breach was not aggravated in any way by police conduct.
- [62] In *Pawar*, the appellant argued that the police had engaged in a pattern of disregarding protected Charter rights (an argument similar to that weighed in *R. v. Lauriente*, 2010 BCCA 72, and distinguished from an allegation that a s. 24(2) remedy might be available as a result of the breach of another's Charter rights). That pattern was said to include disregard for the constitutional rights of a woman in the appellant's company when he was arrested. The Court held:
- [46] [T]he appellant submits that the judge failed to consider the police conduct in relation to the female arrestee, whether that conduct formed part of a pattern of disregard for constitutional rights and, if it did, whether the court should have excluded the evidence against him in order to maintain the good repute of the administration of justice.
- [47] I see no merit in this ground of appeal. It would appear that the appellant's counsel gave no notice that this issue would be a live one on the voir dire and the particulars of the female person's arrest and subsequent detention were not developed in the evidence. The onus was on the appellant to lay an evidentiary foundation sufficient to ground the conclusion that the conduct of the police as a whole evinced a pattern of disregard for constitutional rights. He failed to do so. In my view, there is no basis upon which the judge could have concluded on the record before her that the police breached the female person's constitutional rights and were thereby engaged in a pattern of abusive behaviour. In these circumstances, the judge committed no error in principle by failing to treat this as a circumstance favouring exclusion of the evidence.
- [63] Similarly, here, there was no evidentiary foundation for the argument that the treatment of the appellant's girlfriend, present in the motel room at the time of the search, exacerbated the impact of the Charter breach. The appellant's girlfriend did not testify on the voir dire and there was no evidence of any specific impact on her.

Society's Interest in Adjudication of the Case on its Merits

- [64] The appellant acknowledges the material evidence was reliable and critical to the Crown's case, and that this factor weighs in favour of admitting the evidence. In assessing this factor, we have to consider society's interest in the adjudication on the merits of all of the offences founded upon the evidence from the search. This includes the three drug offences, one of which is for possession of fentanyl for the purposes of trafficking. While the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways: Grant, at para. 84. Nonetheless, this Court has been clear that trafficking of fentanyl is a serious

offence that puts the public at risk, and as such society has a strong interest in the prosecution of offences of this type on the merits: *R. v. Pipping*, 2020 BCCA 104 at para. 79, leave to appeal to Supreme Court of Canada refused [2020] S.C.C.A. No. 179; *R. v. Smith*, 2017 BCCA 112 at paras. 44, 48. This factor weighs in favour of admission of the evidence.

Balancing of the Factors

- [65] The balancing exercise prescribed by Grant was discussed in *Paterson*. Brown J. wrote that even in that case, where there was a serious departure from well-established rules:
- [54] This is a close call. As was observed in *Grant* 2009, at para. 140, "[t]he balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision." Indeed, because the *Grant* 2009 factors are mutually incommensurable -- balancing seriousness of state conduct, seriousness of the infringement of Charter rights and the impact upon society's interest in adjudication -- the "balancing" will never be an entirely objective exercise. A reviewing court must, however, come to a reasoned conclusion.
- [66] The appellant argues that where the first two Grant factors favour excluding the evidence, the third factor will rarely tip the balance in favour of admitting it (*R. v. McGuffie*, 2016 ONCA 365 at para. 63), and it should not do so here. As I have noted, I do not accept the appellant's characterization of the seriousness of the Charter breach. The first two factors do not strongly favour the exclusion of the evidence. Balancing the seriousness of the state conduct, the seriousness of the infringement of Charter rights, and the impact upon society's interest in adjudication, it is my opinion that the exclusion of the evidence in this case, rather than its admission, would bring the administration of justice into disrepute.

Disposition

[67] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Voith"

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Prepared on 27 October 2026 · Esheria