

CANADA / JUDGMENT

R. v. Cooke

2024 BCSC 665

COURT

Supreme Court of British Columbia

DECIDED

22 April 2024

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2024 BCSC 665 R. v. Cooke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cooke,

2024 BCSC 665

Date: 20240422

Docket: 183197

Registry: Victoria

Rex

v.

Zoran Cooke and Atta Otchere

Before: The Honourable Mr. Justice Milman

Oral Ruling on Voir Dire

Counsel for the Crown:

M. Adams

Counsel for the Accused, Zoran Cooke:

O. James

Counsel for the Accused, Atta Otchere:

P.A. Blokmanis

Place and Dates of Trial:

Victoria, B.C.

April 8-12, 2024

Place and Date of Judgment:

Victoria, B.C.

April 22, 2024

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I. Introduction

- [1] The defendants, Zoran Cooke and Atta Otchere, stand charged pursuant to a one-count indictment alleging a breach of s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, by being unlawfully in possession of cocaine for the purpose of trafficking. The Crown's case rests to a significant extent on the product of searches conducted by the police of the defendants' persons and the vehicle they were occupying when they were arrested on May 14, 2021. Among the items found in those searches were over 100 packages containing a total of over 37 grams of a substance that the defendants have admitted to have been analysed and found to be cocaine.
- [2] Both defendants have brought applications seeking to have that evidence excluded under s. 24 of the Canadian Charter of Rights and Freedoms [Charter]. Both allege that the police did not have objectively reasonable grounds to effect their arrest, thereby breaching their rights under s. 9 of the Charter not to be arbitrarily detained. On that basis, they seek declarations that the searches carried out incident to that arrest were unreasonable and, as such, in breach of their rights under s. 8 of the Charter. In addition, Mr. Otchere complains of a delay of approximately 40 minutes in being afforded access to counsel after invoking his right to counsel soon after his arrest, a delay which, he says, amounts to a breach of his rights under s. 10(b) of the Charter. He also complains that, while waiting to speak to counsel, he was exposed to an unreasonable strip search, in breach of his rights under s. 8 of the Charter.

- [3] On the first day of the trial, I declared a voir dire to determine the admissibility of the evidence gathered through the impugned searches. During that voir dire, I heard from four police officers about the circumstances of the arrest and the subsequent searches. The following reasons address whether the defendants have established one or more of the alleged breaches of their rights under the Charter. If I decide they have, the parties wish to address the question of the appropriate remedy at a later stage.

II. Facts

- [4] The essential facts are not disputed. Neither defendant adduced evidence of their own on the voir dire.
- [5] In or shortly before January 2021, the Saanich Police Department ("SPD") began receiving complaints from members of the public about what was seen to be suspicious activity in the vicinity of the 2900 block of Earl Grey Street in Saanich, near its intersection with Gorge Road. In particular, the police were told that local residents had observed a male pedestrian turning up on a daily basis in that area in the late morning and early afternoon hours. A number of different vehicles were seen to approach the pedestrian and have brief dealings with him, during which he would enter the vehicle, spend a short period of time inside it and exit before it drove off or he walked away. On one such occasion, the pedestrian was observed to put something in his pocket as he was exiting a vehicle.
- [6] In all, the police received reports of approximately four or five different vehicles interacting with the pedestrian. The civilian informants provided the SPD with some photographs and a video recording showing the pedestrian and some of the vehicles involved. In the video recording, the pedestrian can be seen exiting from one of the rear doors of a white Toyota sedan and placing something in his pocket. However, neither the photographs nor the video recording show what was occurring within the vehicles. Nor do they show the faces of any of the drivers or other occupants of the vehicles.
- [7] Following an SPD briefing in early February 2021, the investigation was taken over by the SPD bicycle section, which was then supervised by Sgt. Steven Kruk. Drawing on his experience from over 100 previous drug trafficking investigations, Sgt. Kruk suspected, based on the information the police had received to that point, that the pedestrian was purchasing illicit drugs from the occupants of those vehicles. In particular, Sgt. Kruk believed that the "short duration stops" described by the informants suggested drug dealing because, in Sgt. Kruk's experience, drug dealers prefer to conduct transactions within their vehicles to reduce the chances of being observed. He decided to set up police surveillance of the area so that the police could observe the suspicious activity themselves.
- [8] The first day of surveillance, February 10, 2021, proved uneventful.
- [9] On March 2 or 3, 2021 (there is some confusion in Cst. Reichert's notes as to which day it was), Cst. Steven Reichert and another officer were in the area riding their bicycles in uniform. They spotted the pedestrian depicted in the informant's photographs walking

along Earl Grey Street. They decided to conceal themselves behind some bushes and vehicles and observe what transpired. They saw the pedestrian using his cell phone. He appeared to be texting and making or receiving phone calls. He then looked around as if he expected someone else to turn up. They then saw a light beige Chrysler Sebring approach him. The pedestrian entered the Sebring, which then drove a short distance before letting the pedestrian out and driving away.

- [10] Constable Reichert was able to note the licence plate number of the Sebring. When he ran that number through a police database, he learned that the registered owner was Mr. Otchere. Police records also showed that Mr. Otchere had charges pending against him in Ontario.
- [11] On March 4, 2021, Sgt. Kruk and Cst. Reichert were conducting surveillance in plain clothes in the same area. At 11:15 a.m., Cst. Reichert spotted the pedestrian. Although the pedestrian was seen to be using his cell phone, the police officers did not see a vehicle arrive at that time. At 12:40 p.m. that afternoon, however, Cst. Reichert saw the pedestrian emerge from a silver Chrysler sedan (not the Sebring spotted one or two days before) that had just turned into the parking area of a nearby apartment complex on Gorge Road. Constable Reichert saw the pedestrian place a small white object in his pocket as he was exiting the Chrysler sedan.
- [12] Sgt. Kruk had decided that the officers on the scene would conduct a traffic stop of the Chrysler sedan with a view to arresting its occupants on suspicion of drug trafficking, but it sped away and the stop was therefore called off for safety reasons.
- [13] In his testimony-in-chief before me, Cst. Reichert described the driver of the Chrysler sedan as having a round face, dark skin and scruffy facial hair. In the police report to Crown counsel, however, Cst. Reichert is said to have observed that the driver was wearing a mask. In any event, Cst. Reichert was able to discern the licence plate number of the Chrysler sedan. A subsequent search revealed that it belonged to a car rental company in Sidney. Constable Reichert contacted that company and learned that the vehicle had been rented to a woman who was known to police as the common-law partner of a suspected drug dealer. Constable Reichert believed that the driver of the Chrysler sedan looked like that suspected drug dealer after reviewing photographs of that person in a police database.
- [14] In April and early May 2021, the SPD continued to receive complaints from local residents about similar suspicious activity involving the pedestrian in the area. In particular, they observed the pedestrian interacting in a similar manner with yet more vehicles, including a Hyundai and a silver Volkswagen Passat. After checking the licence plate numbers of those vehicles as reported and photographed by the civilian complainants, the police learned that they too were registered to car rental companies.

- [15] In the morning of May 14, 2021, Sgt. Kruk, Cst. Reichert and Cst. Miguel Alexander Rosales returned to the area in order to conduct more surveillance. Their intention was, once again, to stop any vehicle that they observed interacting with the pedestrian and to arrest the occupant or occupants of that vehicle on suspicion of drug trafficking.
- [16] Soon after Cst. Reichert arrived in the area, at 11:02 a.m., he spotted the pedestrian walking along Earl Grey Street. Sgt. Kruk arrived soon after that and parked his unmarked police vehicle in a nearby driveway. The pedestrian continued to walk toward Sgt. Kruk's parked vehicle. Sgt. Kruk observed the pedestrian sit down near the intersection of Earl Grey Street and Gorge Road, where he began texting and speaking with someone on his cell phone. Soon after that, Cst. Reichert spotted the same silver Volkswagen Passat that the civilian informant had spotted interacting with the pedestrian a few days earlier. He radioed the other officers to warn them of its approach, stating "heads up - suspect vehicle inbound". The Passat drove up to the pedestrian. Sgt. Kruk saw the pedestrian enter the rear passenger side door of the Passat, only to exit after approximately five seconds and then walk away along Gorge Road.
- [17] Having made that observation, Sgt. Kruk ordered Cst. Reichert to carry out a traffic stop of the Passat and to assist him in the arrest of its occupant or occupants, whose identities were unknown to the police at that time.
- [18] As it turned out, Mr. Otchere was in the driver's seat and Mr. Cooke in the front passenger seat. Sgt. Kruk ordered them to show him their hands as he approached the passenger side of the Passat. Constable Reichert approached the Passat from the driver's side. Initially, he believed that the occupants were not complying with Sgt. Kruk's demand. He briefly drew his firearm but quickly re-holstered it when he realised that they were indeed complying.
- [19] At 11:20 a.m., once the defendants had been removed from the Passat, Sgt. Kruk conducted what he described as a cursory search of the vehicle for safety and to prepare it be towed to the police station. Between then and 11:44 a.m., when the Passat was towed away, he took photographs of its contents. He seized four cell phones and observed, in the centre console, a small bag wrapped in black plastic that he believed to contain illicit drugs.
- [20] Both of the defendants were cursorily searched before being placed in police vehicles to be transported to the police station. Constable Rosales searched Mr. Cooke's person and found \$40 in cash and a Tylenol bottle containing a number of smaller packages wrapped in tinfoil that appeared to him to be illicit drugs.
- [21] Upon their arrest, both of the defendants were advised of their right to consult with counsel. At 11:23 a.m., when Cst. Reichert gave that advice to Mr. Otchere, Mr. Otchere responded that he wished to obtain legal advice but did not have a lawyer. Constable Reichert gave him the option to call legal aid duty counsel and Mr. Otchere stated that he wished to do so. At 11:27 a.m., Cst. Reichert, using his own cell phone, placed a call to the legal aid office and asked that duty counsel call him back.

- [22] At 11:40 a.m., another police officer, Cst. Benjamin Scoones, arrived on the scene to assist in transporting Mr. Otchere to the police station. Constable Reichert informed Cst. Scoones that Mr. Otchere was awaiting a return call from legal aid. He took Cst. Scoones' cell phone number in case duty counsel called back while Mr. Otchere was being transported back to the station.
- [23] Sgt. Kruk, concerned that the defendants might be concealing weapons or drugs, asked the officer in charge at the station to arrange for the defendants to be strip-searched when they arrived. It was, he testified, the first time he had given such an order.
- [24] At 11:45 a.m., Cst. Rosales received the return call from legal aid for Mr. Cooke, but by then, the defendants had already been taken away. Constable Rosales told the legal aid office to call the police station and ask for Mr. Cooke there.
- [25] Constable Scoones had departed the scene with Mr. Otchere at 11:38 a.m. They arrived at the police station at 11:49 a.m. After their arrival, Cst. Scoones was ordered to carry out a strip search of Mr. Otchere for the purpose, he was told, of checking for concealed drugs. Mr. Otchere was placed alone in a holding cell. Constable Scoones entered the cell at 11:55 a.m. He temporarily closed the screen covering the surveillance camera display to provide Mr. Otchere with a greater degree of privacy. He had another officer stand at the door to prevent anyone from looking in through the window. He then instructed Mr. Otchere to remove his shorts and then his underwear, which he did. Mr. Otchere was not wearing a shirt at the time so this left him completely naked. Constable Scoones told Mr. Otchere that he needed to see between his legs. Mr. Otchere responded by raising his genitals and then turning around and bending over to expose his buttocks. Having satisfied himself that there was nothing to be found on Mr. Otchere's person, Cst. Scoones told Mr. Otchere that he could get dressed again. Soon after that, another police officer brought Mr. Otchere a shirt that had been found in the Passat.
- [26] Mr. Otchere received the return call from legal aid and spoke to duty counsel at 11:56 a.m., barely a minute after Cst. Scoones had completed the strip search. The defendants were released later that afternoon, at 4:10 p.m.
- [27] The Passat was towed to a secure bay at the police station. It was then searched by Cst. Reichert, with Cst. Rosales acting as exhibit officer. As I noted earlier, the search yielded over 100 packages containing a total of over 37 grams of cocaine.

III. Discussion

A. Did Sgt. Kruk have sufficient grounds to arrest the defendants?

- [28] The defendants contend that their right under s. 9 of the Charter to be free from arbitrary detention was violated, insofar as Sgt. Kruk lacked the requisite reasonable and probable grounds to order their arrest when he did.
- [29] The parties do not disagree on the applicable legal principles.

- [30] Pursuant to s. 495 of the Criminal Code, R.S.C. 1985, c. C-46, police officers are authorised to arrest a person without a warrant if they have reasonable grounds to believe that the person has committed an indictable offence. In *R. v. Storrey*, [1990] 1 S.C.R. 241, it was held that, in order to comply with that provision, the arresting officer must subjectively believe he or she has reasonable grounds to make the arrest and those grounds must be objectively reasonable. In this case, the defendants do not challenge Sgt. Kruk's evidence that he subjectively believed that he had sufficient grounds to order the arrest. The issue before me is whether those grounds were objectively reasonable.
- [31] In *R. v. Beaver*, 2022 SCC 54, the Court, at para. 72, listed the following principles to be applied in determining whether the police had reasonable grounds to make a warrantless arrest:
1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint (*R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51; *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 26; *R. v. Tim*, 2022 SCC 12, at para. 24).
 2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 17). Subjective grounds for arrest are often established through the police officer's testimony (see, for example, *Storrey*, at p. 251; *Latimer*, at para. 27; *Tim*, at para. 38). This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal (*R. v. G.F.*, 2021 SCC 20, at para. 81; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 4).
 3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer (*Storrey*, at pp. 250-51; *Latimer*, at para. 26; *Tim*, at para. 24).
 4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism" (*R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at paras. 64-65). Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting] officer", deference is not necessarily owed to their view of the circumstances because of their training or experience (*R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 45 and 47; *MacKenzie*, at para. 63). The arresting officer's grounds for arrest must be more than a "hunch or intuition" (*Chehil*, at para. 47).
 5. In evaluating the objective grounds to arrest, courts must recognize that, "[o]ften, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete" (*R. v.*

Golub (1997), 34 O.R. (3d) 743 (C.A.), at p. 750, per Doherty J.A.). Courts must also remember that "[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a 'scientific or metaphysical exercise', but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience'" (R. v. Canary, 2018 ONCA 304, 361 C.C.C. (3d) 63, at para. 22, per Fairburn J.A. (as she then was), citing MacKenzie, at para. 73).

6. "Reasonable and probable grounds" is a higher standard than "reasonable suspicion". Reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime (Chehil, at para. 27; R. v. Debot, [1989] 2 S.C.R. 1140, at p. 1166). At the same time, police do not require a prima facie case for conviction before making an arrest (Storrey, at p. 251; Shepherd, at para. 23; Tim, at para. 24). Nor do the police need to establish that the offence was committed on a balance of probabilities (Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114; see also R. v. Henareh, 2017 BCCA 7, at para. 39 (CanLII); R. v. Loewen, 2010 ABCA 255, 490 A.R. 72, at para. 18). Instead, the reasonable and probable grounds standard requires "a reasonable belief that an individual is connected to the offence" (MacKenzie, at para. 74 (emphasis deleted); Debot, at p. 1166). A reasonable belief exists when "there is an objective basis for the belief which is based on compelling and credible information" (Mugesera, at para. 114; see also R. v. Al Askari, 2021 ABCA 204, 28 Alta. L.R. (7th) 129, at para. 25; R. v. Omeasoo, 2019 MBCA 43, [2019] 6 W.W.R. 280, at para. 30; R. v. Summers, 2019 NLCA 11, 4 C.A.N.L.R. 156, at para. 21). The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest (Chehil, at para. 34; Shepherd, at para. 23; R. v. Ha, 2018 ABCA 233, 71 Alta. L.R. (6th) 46, at para. 34; R. v. MacCannell, 2014 BCCA 254, 359 B.C.A.C. 1, at paras. 44-45; R. v. Rezansoff, 2014 SKCA 80, 442 Sask. R. 1, at para. 28; E. G. Ewaschuk, Criminal Pleadings & Practice in Canada (3rd ed. (loose-leaf)), at § 5:40).
 7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest (R. v. Biron, [1976] 2 S.C.R. 56, at p. 72; R. v. Brayton, 2021 ABCA 316, 33 Alta. L.R. (7th) 241, at para. 43; Ha, at paras. 20-23; R. v. Montgomery, 2009 BCCA 41, 265 B.C.A.C. 284, at para. 27; Ewaschuk, at § 5:40).
 8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds (Debot, at pp. 1166-67).
- [32] In his testimony on the voir dire, Sgt. Kruk stated that his decision to order the arrest was based on the following grounds:
- a) for several months, the pedestrian had been observed having brief interactions with multiple vehicles at the same time of day;

- b) the police themselves observed the pedestrian engage in at least two short duration stops, including the incident that culminated with the defendants' arrest on May 14, 2021;
 - c) the Passat in which they were stopped had, a few days before, been observed by a civilian informant engaging with the pedestrian in a suspicious manner;
 - d) many of the vehicles with which the pedestrian interacted, including the Passat, were rental vehicles, which are known to be favoured by drug dealers;
 - e) two of the licence plate numbers of the vehicles observed to be interacting suspiciously with the pedestrian were linked to persons believed by police to be associated with drug dealing; and
 - f) both a civilian informant and Cst. Reichert had observed the pedestrian put an object in his pocket after interacting with a vehicle.
- [33] The Crown argues that those grounds suffice to satisfy the legal test. In support of that submission, crown counsel cites *R. v. Luong*, 2010 BCCA 158, *R. v. Messina*, 2013 BCCA 499 and *R. v. Glendinning*, 2019 BCCA 365, as examples of cases in which the police were found to have had objectively reasonable grounds to arrest in comparable circumstances.
- [34] The defendants disagree.
- [35] Counsel for Mr. Otchere argues that the following factors suggest that Sgt. Kruk lacked objectively reasonable grounds to arrest at the material time:
- a) the information received from the civilian informants was vague and lacking in detail, particularly as to the conduct of the pedestrian and his interactions with the vehicles;
 - b) there was no prior observation of a transaction in the vehicle or an identifiable vehicle occupant;
 - c) none of the investigating officers were specialized drug investigators; and
 - d) Sgt. Kruk was overly hasty and should at least have waited to learn the identity of the occupants of the Passat before arresting them.
- [36] He distinguishes the cases relied upon by Crown counsel on the basis that, in this case, the short duration stops that were observed involved more than one vehicle. He relies on *R. v. Mutneja*, 2019 BCSC 1676, in which Crossin J. found that the police had lacked objectively reasonable grounds to arrest in a case involving more transactions and more observations than were in evidence here.
- [37] Counsel for Mr. Cooke echoed the submission that Sgt. Kruk was overzealous. He argues that, having no idea who might be in the Passat, Sgt. Kruk leapt to a hasty conclusion, rather than exercising the caution and prudence mandated by the authorities. He cites *R. v. Pope*, 2015 BCSC 2391, where an observation by police of only two suspicious exchanges was found to be insufficient to justify an arrest.

- [38] Counsel for Mr. Cooke also emphasized the following alleged gaps in the police investigation:
- a) Sgt. Kruk did not investigate the reliability of the civilian informants;
 - b) there were no photographs of the drivers of the vehicles involved;
 - c) there was no clear observation of any drugs;
 - d) there was no observation of any hand-to-hand transactions;
 - e) there was no information gathered about the buyer;
 - f) the police observed only two short duration stops - namely, those on March 2 and May 14;
 - g) the police had no knowledge as to who would be found in the Passat when the arrests were made; and
 - h) the location in issue was not known as a hot spot for drug dealing, a factor noted in some cases to contribute to the grounds for an arrest.
- [39] Counsel for Mr. Cooke cites *R. v. Barnes*, 2018 BCPC 99 and *R. v. Wong*, 2003 BCPC 350, as examples of cases with facts said to be similar to those of this case, in which the police were found to have lacked sufficient grounds to arrest.
- [40] Having reviewed the authorities cited by the parties in light of the evidence adduced on the voir dire in this case, it is apparent that none of the authorities cited by the parties are entirely on point. Rather, each case falls to be determined on its own facts. In my view, this case more closely resembles those cited by the Crown than it does those cited by the defence. I say this because this was not a case in which the police observed only two suspicious transactions involving two different vehicles. Rather, in this case, the unifying element was the one pedestrian engaging in a similar pattern of behaviour over many months. Sgt. Kruk noted the use of rental vehicles and the fact that two of the vehicles interacting with the pedestrian were connected to persons suspected of drug dealing. Further, on two separate occasions prior to May 14, 2021, the pedestrian was seen to place an object in his pocket after interacting with a vehicle.
- [41] In my view, it was not necessary for the police to have observed any hand-to-hand transactions or to know who was in the Passat when they saw it engage, for the second time, in a short duration stop with the pedestrian, given the established pattern of behaviour they and the civilian informants had observed in the months leading up to the arrest.
- [42] In summary, I am satisfied that Sgt. Kruk had the requisite reasonable and probable grounds to arrest the defendants, and that their arrest was therefore lawful.

B. Did the police meet their obligation to provide Mr. Otchere with access to counsel upon his arrest?

- [43] Mr. Otchere contends that his right to counsel under s. 10(b) of the Charter was violated by virtue of the delay from the time of his arrest until the time he received the return call from duty counsel. His complaint is not so much about the amount of time that elapsed in that period, but rather the failure of the police to take the steps necessary to ensure that he received access to counsel at the earliest reasonably available opportunity, or at least before he was subjected to a strip search.
- [44] With respect to the interplay between s. 10(b) and s. 8 in respect of the strip search, Mr. Otchere relies heavily on *R. v. Sekhon*, 2020 BCSC 2180. In that case, Sharma J. concluded that the police had violated a detainee's right to counsel by conducting a strip search before affording him access to counsel. Justice Sharma helpfully set out the relevant principles governing the s. 10(b) analysis at paras. 95-111. She began by canvassing the leading cases of *R. v. Taylor*, 2014 SCC 50, *R. v. Suberu*, 2009 SCC 33 and *R. v. Bartle*, [1994] 3 S.C.R. 173.
- [45] In *Bartle*, the Court distinguished between the so-called "informational" and "implementational" components of a detainee's rights under s. 10(b). At issue here, as in *Sekhon*, is the latter. In that regard, once a detainee like Mr. Otchere indicates a desire to exercise his right to retain and instruct counsel, the police are obligated, except in urgent or dangerous circumstances, to provide the detainee with a reasonable opportunity to do so, and that right arises at the first reasonably available opportunity.
- [46] In *Sekhon*, Sharma J. found that the delay in affording access to counsel was unreasonable, primarily because the police elected to prioritise the strip search over their obligation to afford Mr. Sekhon with access to counsel. She found that there was no reason to conduct the strip search first in Mr. Sekhon's case because the driver of the vehicle in which he was detained had already been booked and completed his call to counsel before Mr. Sekhon was taken out of the vehicle at the police station. In my view, this case is distinguishable from *Sekhon* for that reason. In this case, the police did not decide to prioritise the strip search over providing Mr. Otchere with access to counsel. This is not a case like *R. v. Rezaei*, 2017 BCSC 1639 or *R. v. Chahine*, 2020 BCPC 294, where access to counsel was delayed for safety reasons, because the police believed it necessary to conduct a strip search first.
- [47] In this case, Cst. Reichert attempted to provide Mr. Otchere with access to counsel almost immediately at roadside, before there was any consideration of conducting a strip search. Although not strictly required to do so, he used his own cell phone to contact legal aid on Mr. Otchere's behalf. Had duty counsel been available at that time, Cst. Reichert intended to allow Mr. Otchere the use of his cell phone to have that conversation. The delay that occurred thereafter was due entirely to the time that duty counsel took to call back.
- [48] In arguing that the police fulfilled their s. 10(b) duties in this case, Crown counsel relies on a line of Ontario cases holding that a delay that arises while the police wait for legal aid to call back is not unreasonable: see, e.g., *R. v. Imam*, 2022 ONSC 1573 and *R. v. Cazzola*, 2012 ONSC 7129, where delays of much longer duration were found to be constitutionally justified on that basis. I find those cases helpful and persuasive.

[49] Mr. Otchere argues that the police should have done more to arrange for access to counsel, such as finding another number to call before proceeding to conduct the strip search. I am not persuaded that is so. The police did not know how long it would be before duty counsel called back. There is, in any event, no support in the authorities for imposing that added obligation on the police in those circumstance.

[50] In summary, I have concluded that Mr. Otchere has failed to establish any violation of his right to counsel under s. 10(b) of the Charter.

C. Did the strip search violate Mr. Otchere's rights under s. 8?

[51] Mr. Otchere contends that the strip search violated his right under s. 8 of the Charter to be free from unreasonable searches. The strip search was unreasonable, he says, both because it was unjustified and by virtue of the manner in which it was conducted.

[52] The test to be applied in assessing the reasonableness of a strip search carried out as an incident to an arrest was set out by the majority in the leading case of *R. v. Golden*, 2001 SCC 83. There, Iacobucci and Arbour JJ., writing for the majority, noted that strip searches are inherently humiliating and degrading, regardless of how they are carried out. Accordingly, it was held, strip searches should not be performed as a matter of routine. Instead, for a strip search to withstand constitutional scrutiny, the Crown must show:

- a) the arrest was lawfully made;
- b) there were reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest (in particular, there was some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest); and
- c) the strip search was conducted in a manner that did not infringe s. 8 of the Charter.

See also *R. v. Ali*, 2022 SCC 1.

[53] I have already found the first branch of that test to have been met in this case. At issue now is whether the Crown has met its burden on the other two.

[54] Dealing first with the sufficiency of Sgt. Kruk's grounds for ordering the defendants to be strip-searched, the Crown relies on the following grounds articulated by Sgt. Kruk in his voir dire evidence:

- a) He was surprised that no weapons were found when the police conducted the cursory searches of the defendants and the Passat at roadside, given his experience that drug traffickers tend to carry weapons;
- b) The holding cells at the SPD station do not prevent detainees from exchanging materials in their possession, giving rise to a heightened safety concern; and
- c) In his experience, drug traffickers tend to hide weapons and illicit drugs on their person.

[55] In *Golden*, the majority noted that strip searches are more easily justified in a custodial setting:

96 It may be useful to distinguish between strip searches immediately incidental to arrest, and searches related to safety issues in a custodial setting. We acknowledge the reality that where individuals are going to be entering the prison population, there is a greater need to ensure that they are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment. However, this is not the situation in the present case. The type of searching that may be appropriate before an individual is integrated into the prison population cannot be used as a means of justifying extensive strip searches on the street or routine strip searches of individuals who are detained briefly by police, such as intoxicated individuals held overnight in police cells: *R. v. Toulouse*, [1994] O.J. No. 2746 (QL) (Prov. Div.).

[56] Unlike *Golden*, *R. v. Menzies*, 2017 BCSC 377, was a case involving, like this one, a custodial setting. Justice Baird found the strip search that occurred in that case to be justified on grounds similar in several respects to those relied upon by the Crown in this one. He explained his conclusion as follows:

[29] Here, Ms. Menzies was lawfully arrested, and the reason for the strip search was directly and rationally connected to the grounds for the arrest, namely drug offences. Constable Kitchen candidly testified that she was following detachment routine, and if this were the only justification for the search, I would find it to be unreasonable. But she also referred to the well-known fact that drug traffickers often hide narcotics in their bodies, and she conducted the search for this reason as well. This was recently held to be reason enough in *R. v. Johal*, 2015 BCCA 246, and I would draw the same conclusion here.

[30] *Golden* makes it clear, as well, that different considerations apply when a detainee is going to be lodged in cells or required to enter a prison population. In such circumstances, I would hold that a superordinate vigilance is required to ensure that hidden cargos of contraband are not permitted to compromise health or discipline within supposedly secure settings. In this case, I doubt that Ms. Menzies was detained in cells for any great length of time, and it may be that this concern was not as pressing as it might have been had she been poised for a stay of some duration. The point, I believe, is nevertheless an important one: preventative measures to ensure that toxins are not imported into jails and lockups are not unreasonable.

[57] *Menzies* was discussed by Sharma J. in *Sekhon*. She disagreed with the Crown's submission, relying on *Menzies* and *Johal*, that a strip search can be justified solely on the basis that, in the police officer's experience, drug traffickers often hide illicit drugs on their person. To allow justification for a strip search to rest on that ground alone, she found, would be tantamount to accepting strip searches as justified in every case where a detainee is arrested on suspicion of drug trafficking. Instead, she distinguished *Menzies* on the basis that the strip search in that case was conducted for reasons of safety, before the defendants were about to be lodged in police cells, rather than as part of a search for evidence, as in *Sekhon*.

She also noted that the case for a strip search was bolstered in *Menzies* by Ms. *Menzies*' erratic behaviour and the presence of a knife in the vehicle in which she was arrested.

- [58] Justice Sharma also distinguished the facts of *Sekhon* from those of *Johal*. In *Johal*, the police found no drugs in the vehicle and therefore surmised that drugs were likely to be found on the detainee's person. In *Sekhon*, as in this case, the police had already found what they believed to be illicit drugs in the vehicle.
- [59] Relying on those distinctions, Sharma J. held the strip search at issue in *Sekhon* to have been unreasonable. However, this case is more like *Menzies* and *Johal* than *Sekhon*. Here, part of the rationale for the strip search was safety - particularly, the concern that the defendants were about to be lodged in cells with access to other detainees. Further, Sgt. Kruk was surprised that there were no weapons found in the cursory roadside searches of the defendants and the *Passat*. That factor makes this case similar, if not identical, to *Johal*, where, contrary to police expectations, it was not the absence of weapons in the vehicle but the absence of illicit drugs that was held to justify the strip search.
- [60] Mr. Otchere argues that the concern about hidden weapons cannot have been a serious one because the officers who transported the defendants to the police station testified that they would not have done so if they thought that the defendants might be carrying concealed weapons on their person. I do not find that argument persuasive. It was Sgt. Kruk's decision to have a strip search conducted, not the transporting officers. There had been no opportunity to conduct a thorough search of either the defendants or the *Passat* at roadside. Sgt. Kruk ordered the strip search to take place at the first reasonably available opportunity, soon after the defendants arrived at the police station, but before they were lodged in the cells with access to other detainees.
- [61] In light of those circumstances, I am satisfied that Sgt. Kruk had sufficient grounds to order the strip search.
- [62] I turn finally to the manner in which the strip search was conducted. In setting out the test to be applied in that regard, the majority in *Golden* adopted the following guidelines from English law as to the questions that should be asked:
- a) Can the strip search be conducted at the police station and, if not, why not;
 - b) Will the strip search be conducted in a manner that ensures the health and safety of all involved;
 - c) Will the strip search be authorised by a police officer acting in a supervisory capacity;
 - d) Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched;
 - e) Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances;

- f) What is the minimum of force necessary to conduct the strip search;
- g) Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search;
- h) Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time;
- i) Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact;
- j) If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional; and
- k) Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[63] The only question on that list that gives rise to an issue here is the one asking if the detainee will be left completely undressed at any one time, as Mr. Otchere was. I am not persuaded that the strip search was unreasonable for that reason. Mr. Otchere was not told to remove his shirt during the strip search. Rather, he was not wearing one when he arrived at the police station. Therefore, the fact that he was completely undressed for several seconds while being strip-searched was not entirely the product of police conduct.

[64] Nevertheless, Mr. Otchere argues that the police could have given him one of the disposable paper suits available for detainees who soil their clothing. I am not persuaded that this was necessary, given the brevity of the period during which Mr. Otchere was left completely undressed. In any event, the officers were, a short time later, able to retrieve a shirt for him to wear from the Passat, soon after the search of the Passat was completed.

[65] I have already addressed Mr. Otchere's complaint that he was strip-searched before being afforded access to counsel.

[66] Overall, I have concluded that, even though Mr. Otchere was left completely undressed for a brief period, before receiving access to counsel, the strip search was, nevertheless, reasonably conducted and there was no breach of s. 8.

IV. Summary and Conclusion

[67] In summary, I have found that the defendants have failed to show any of the alleged breaches of their rights under the Charter.

"Milman J."

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