

CANADA / JUDGMENT

R. v. Donovan

2025 BCCA 30

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 30 R. v. Donovan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Donovan,

2025 BCCA 30

Date: 20250204

Docket: CA49354

Between:

Rex

Respondent

And

Justin Thomas Gary Donovan

Appellant

Before:

The Honourable Justice Griffin

The Honourable Mr. Justice Abrioux

The Honourable Justice Fleming

On appeal from: An order of the Provincial Court of British Columbia, dated September 28, 2022 (conviction) (R. v. Donovan,

Nanaimo Dockets 87651-2-C, 87722-1).

Counsel for the Appellant:

D.J. McKay

Counsel for the Respondent:

M. Loda

Place and Date of Hearing:

Victoria, British Columbia

October 8, 2024

Place and Date of Judgment:

Vancouver, British Columbia

February 4, 2025

Written Reasons by:

The Honourable Justice Fleming

Concurred in by:

The Honourable Justice Griffin

The Honourable Mr. Justice Abrioux

Summary:

The appellant was convicted of a number of drug and firearms offences in relation to drugs and firearms seized pursuant to a search warrant. At trial, the appellant brought a s. 8 Charter challenge to the search warrant, which was summarily dismissed by the trial judge. The appellant appeals his convictions on the basis he was deprived of a fair hearing due to the conduct of the pre-trial proceedings. He further claims the trial judge erred in summarily dismissing his Charter challenge, convicting him on three counts of unauthorized possession of a firearm in the absence of evidence, in failing to apply the Kienapple principle to certain of the firearms convictions, and in rendering inconsistent verdicts in relation to the drug trafficking convictions.

Held: Appeal dismissed. The appellant was not deprived of a fair hearing despite the inadvertent mislabeling of certain pre-trial procedures. The trial judge did not err in declining to order a voir dire on the Charter challenge as it was bound to fail. The appellant's admission that he was subject to a firearms prohibition provided the requisite evidence that he possessed the firearms without authorization or licence. The Kienapple principle against multiple convictions does not apply in this case because the firearms offences in question are distinct. Further, there was no inconsistency in the drug trafficking and simple possession verdicts; it was not unreasonable for the trial judge to distinguish the drug convictions based primarily on the amount of each seized drug.

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Reasons for Judgment of the Honourable Justice Fleming:

Introduction

- [1] This is an appeal from 10 convictions for drug and firearms offences: two for possession of drugs (methamphetamine and MDMA); two for possession of drugs for the purpose of trafficking (cocaine and GHB); three firearms possession offences (without an authorization or licence) involving three separate firearms; and three offences for possession of those same firearms while subject to a firearms prohibition.
- [2] Police seized all of the drugs, four firearms and ammunition during the execution of a search warrant and the arrest of the appellant at his residence.

- [3] Tried in the Provincial Court, at the outset of the proceeding the appellant brought an application seeking to exclude the seized evidence under s. 24(2) of the Canadian Charter of Rights and Freedoms, based on a challenge to the validity of the search warrant and an alleged violation of his s. 8 Charter rights (the "Charter Application").
- [4] The Crown opposed an evidentiary voir dire or Garofoli hearing regarding the appellant's sub-facial challenge to the search warrant and asked that it be summarily dismissed, relying on *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193, 1996 CanLII 1005 (B.C.C.A.). Following a pre-trial hearing, the trial judge refused to order the voir dire.
- [5] The trial judge ultimately upheld the validity of the search warrant.
- [6] The primary issue at the trial regarding the drug charges was whether the Crown had proven possession for the purpose of trafficking. The evidence included admissions of the appellant and a police officer's expert evidence related to drug trafficking.
- [7] On appeal, the appellant contends the trial judge deprived him of trial fairness by failing to properly engage in, and conflating a Vukelich hearing with, an evidentiary voir dire or Garofoli hearing. He also contends she erred by declining to conduct an evidentiary voir dire; convicting him of unauthorized possession of firearms offences in the absence of evidence; failing to apply the Kienapple principle against multiple convictions to some of the firearms offence convictions; and rendering inconsistent verdicts regarding the drug convictions for possession for the purpose of trafficking and simple possession.
- [8] For the reasons that follow, I would dismiss the appeal.

Background

- [9] The appellant was charged in two indictments (87651-2-C and 87722-1) with 13 drug and firearms offences, which were tried together. Indictment 87651-2-C charged him with four possession for the purpose of trafficking ("PPT") offences related to the four different drugs; four unauthorized possession of a firearm offences involving four firearms; and one possession of a firearm offence knowing the serial number had been altered, defaced or removed. Indictment 87722-1 charged the appellant with four possession of a firearm while prohibited offences involving each of the same four firearms.
- [10] The charges arose after members of the Nanaimo RCMP executed a search warrant at the appellant's residence at 990 Milton Street in Nanaimo, B.C. and arrested him there on October 9, 2019.
- [11] Issued the day before under the telewarrant provision of the Criminal Code, R.S.C., 1985, c. C-46, s. 487.1, the search warrant authorized the seizure of a "butane torch, silver and black in colour"; security camera equipment used to record video feed from the front door; and cell phones.

- [12] During the execution of the search warrant, police found and seized from the appellant: a cellphone (that they were unable to search); \$4836 in cash; elastic bands; 7.67 grams of cocaine; and 7.08 grams of methamphetamine. From his bedroom, they seized: approximately 5.4 grams of cocaine from a nightstand drawer; 9.9 grams of MDMA from a plastic bag in a safe; approximately one litre of GHB in two 500 ml bottles; \$1100 in cash; a digital scale and other measuring instruments; a small monitor depicting the view from a security camera located outside the front door of the residence; a money counter; a Samsung cellphone; five grams of cocaine in a large Ziploc bag; and four firearms. The four firearms included: a stolen loaded Glock 9mm pistol (restricted firearm); an EMEI 5.56 calibre semi-automatic rifle (non-restricted firearm); a 410 calibre shotgun with a sawed-off barrel (prohibited firearm); and a Keltec shotgun. Various calibers of ammunition, including some appropriate for the Glock pistol were also seized from the bedroom. From the adjoining bathroom, police seized a magazine, more than 60 various calibre and "special" bullets and 13 shells.[1]
- [13] The application for the search warrant, supported by the information to obtain of Constable Michael Penton (the "ITO"), was brought during the investigation of an alleged violent incident against a named complainant in the appellant's residence on October 2, 2019 (the "Alleged Violent Incident").

ITO

- [14] In the ITO, Constable Penton deposed that during a 911 call on October 2, 2019, the complainant reported he had been held captive for four or five minutes at 990 Milton Street, where he was punched by two suspects named Justin and Shane (last names unknown). Justin had looked for a "torch" to burn him; both suspects had also looked for a knife to stab him; and his neck hurt from being choked. The complainant also referred to borrowing money from Justin, some of which was still owing.
- [15] Paragraph 11 of the ITO included a lengthy account of a statement the complainant gave to police on October 3, 2019 that included additional information about the Alleged Violent Incident, the preceding circumstances, communicating by cell phone with Justin regarding the money he owed, as well as descriptions of Justin, Shane, the residence and the torch or butane lighter the complainant alleged he was threatened with during the Alleged Violent Incident. According to para. 11, the complainant also referred to Justin as someone he knew for years indicating he previously bought drugs from Justin and would hang out at Justin's place located at 990 Milton Street.
- [16] Regarding cell phones and the butane torch, para. 11 also included the following details: Justin's cell phone number; the name Justin "Nagg" appeared on the complainant's call display; the complainant saw Justin using a cell phone shortly before the Alleged Violent Incident; Shane was the one who suggested they torture him; Shane grabbed/found a torch, lit it up/turned it on and tried to burn him; the complainant started kicking wildly and Shane backed up; Shane said "I should stab you"; Justin said "we will burn it so you don't bleed to

death" (from the stab wound); the torch was a butane torch, silver and black in colour and a hand held one that you can buy at a gas station.

- [17] The appellant did not dispute the accuracy of Constable Penton's account in the ITO of the complainant's initial report during the 911 call or his statement.
- [18] In response to the 911 call and the complainant's statement, Constable Penton attended 990 Milton Street and arrested the appellant on October 3, 2019.
- [19] Describing the events of October 3 in the ITO, Constable Penton deposed to observing a security camera at the front door of the residence that "would capture everyone walking up and down the stairs to get to the front door". He arrested the appellant for assault and uttering threats after he opened the door and intended to arrest "Shane" who remained unidentified, but the appellant said he was not there.
- [20] The ITO did not mention a cell phone being seized from the appellant when he was arrested that day. Constable Penton did describe reading him his Charter rights and transporting him to the detachment where he was fingerprinted and lodged in a cell after speaking with counsel.
- [21] At paras. 20 and 21 of the ITO, Constable Penton deposed to his reasonable grounds for believing the butane torch, the security camera equipment and the cell phones would be in the residence and would afford evidence of the "Named Offences". Regarding each of the items, he said:
- a) The complainant saw Shane locate the butane torch in Justin's room and turn it on in an attempt to burn him; finding the torch would corroborate the complainant's statement.
 - b) The security camera equipment "used to record video feed from the front door", would show the complainant entering the residence with Justin and Shane, whom he had not been able to identify.
 - c) Having a video of Shane entering the residence would assist the police in identifying him and provide further corroboration.
 - d) The complainant claimed he communicated with the appellant by cell phone and observed him use a cell phone to communicate with Shane; seizing the cell phones would corroborate the complainant's statement and reviewing phone records and data could assist in identifying Shane.

Charter Application

- [22] In the Charter Application the appellant sought: (1) a declaration that the search warrant was invalid and as a result, the search of the residence violated his s. 8 rights; (2) a declaration that there were no exigent circumstances or justification for issuing the search warrant under the telewarrant provision of the Criminal Code; (3) leave to cross-examine Constable Penton as the affiant of the ITO; and (4) an order excluding the evidence seized under the warrant pursuant to s. 24(2) of the Charter.
- [23] The Charter Application identified a facial as well as a sub-facial challenge to the validity of the search warrant. The facial challenge asserted the ITO did not contain sufficient information to support a reasonable belief that the items sought would be found in the residence. In support of this assertion the Charter Application specified there were no reasonable grounds to believe that the butane torch and the cell phones would still be in the residence seven days after the Alleged Violent Incident.
- [24] Regarding the sub-facial challenge, the Charter Application identified objectionable information to be excised from various paragraphs in the ITO, including para. 21(1)(c) regarding cell phones, based on an alleged failure to disclose in the ITO that the appellant's cell phone had been seized during his previous arrest, coupled with the absence of information suggesting he had more than one phone.
- [25] The Charter Application also emphasized the absence of information about whether the security system was operational and who owned it.
- [26] Regarding the application for leave to cross-examine, the Charter Application set out that cross-examination of the affiant would illicit evidence that he had no knowledge of the camera, the absence of urgency to justify the issuance of the telewarrant and that the affiant had seized the appellant's cell phone days prior to executing the search warrant.

Pre-Hearing Proceedings

- [27] The proceeding began with defence counsel advising the trial judge he was taking issue with the search warrant and providing her with a copy of the Charter Application and the ITO. Crown counsel then asked that a book of documents and other materials be marked as exhibits and specifically that the book of documents be marked as "Exhibit 1" on a "Vukelich inquiry" (the "Book of Documents"). Notably, the Book of Documents included a version of the ITO that had been highlighted and added to reflect the appellant's position in the Charter Application, a copy of the search warrant and the Crown's written submissions regarding the Charter Application. Crown counsel also asked that the Charter Application be marked for a "Garofoli voir dire" should "we get to that point", commenting that "Vukelich itself is not actually a voir dire"; "it's a threshold inquiry".

- [28] The trial judge responded by asking defence counsel if he objected to the Book of Documents being marked. When he said he did not, she directed the court clerk to mark it as the first exhibit "on the Vukelich hearing", before proposing to defence counsel that the Charter Application also be marked. He agreed, stating "Yes please on the voir dire". After that the trial judge referred to the Charter Application as Exhibit 2 "on the voir dire".
- [29] The trial judge went on to ask defence counsel "what information" was contested. He responded by identifying the butane torch, cell phones and the security camera equipment as the items provided for in the warrant, referring to the content of the ITO related to those items, and outlining specific objections related to each item.
- [30] Following his overview, the judge summarized: "so counsel are proposing that we enter into a Vukelich hearing to determine whether or not a voir dire is required" and asked counsel whether they intended to rely on case law and submissions. In addition to advising she would be providing case law and there were written submissions in the Book of Documents, Crown counsel outlined briefly the legal principles that apply to Charter based claims, as well as the "Vukelich analysis". She also informed the judge that she and defence counsel would be setting out (during the Vukelich hearing) what they expected the evidence would be if "we went into Garofoli". Further, she identified the version of the ITO in Exhibit 1 as the "Vukelich version", commenting: "I essentially give my friend his wish list of everything he says is wrong with the ITO".
- [31] The distinction between a Vukelich hearing and a voir dire was drawn again in the context of the judge asking counsel about time estimates and expressing concern about the need to use time efficiently. Referring to *R. v. Jordan*, 2016 SCC 27, she commented, "I don't want voir dires stretching four or five days. I don't want to be looking at January or February dates next year and having things continue". Crown counsel told her that if the court decided a voir dire was necessary, she would not oppose the appellant's application for leave to cross-examine the affiant, which would save some time. After comments from defence counsel, the judge asked, "So, when you say we can get this done in two days, you're talking about the Vukelich hearing and/or the voir dire?" Both counsel responded, "the voir dire".
- [32] Although at that point, the judge announced that they were entering into a voir dire, Crown counsel responded:
- "commencing with Vukelich Vukelich is traditionally just the submissions of counsel. If Your Honour is prepared to say, perhaps in the afternoon, whether or not we go into a Garofoli analysis, I can have my affiant, Constable Penton here at two o'clock "

Pre-Trial Hearing

- [33] During the submissions that followed, Crown counsel discussed the legal framework for Charter applications in criminal proceedings, challenges to the validity of a search warrant and the Vukelich "analysis", before turning to the appellant's facial and sub-facial challenges to the ITO. In addressing the sub-facial challenge, Crown counsel reviewed the Vukelich version of the ITO, identifying the highlighted portions as what should be excised, and the additional hand-written text as what should be added, according to the appellant.
- [34] The Crown argued the Charter Application should be dismissed because the Vukelich version of the ITO still provided an ample basis for the issuance of the search warrant and para. 11, on its own, was sufficient for the issuing justice to believe "a crime took place, that specific evidence of the crime exists and that [it] is linked close in time to this specific location".
- [35] Although the Crown's written submissions denied that police had seized a cell phone from the appellant before the ITO was prepared, during the hearing, Crown counsel informed the trial judge there were conflicting documents on this issue. After clarifying with defence counsel that he would seek excision as opposed to amplification related to a failure to disclose the cell phone seizure, she argued that even if all references to cell phones in the ITO were excised, the warrant would still stand with respect to the security camera and the butane torch.
- [36] During his submissions, defence counsel did not take issue with either the Crown's legal submissions or the Vukelich version of the ITO as accurately reflecting the appellant's sub-facial challenge to the search warrant.
- [37] Defence counsel began his submissions by impugning the credibility of the complainant based on the account of his police statement in para. 11 of the ITO. Defence counsel referred in particular to the butane torch allegations and commented police photos showed the complainant had no injuries. But as the Crown pointed out, para. 11 alleges threats and attempts to burn the complainant rather than actually burning him.
- [38] Defence counsel also made a number of submissions related to the facial challenges to the search warrant in the Charter Application including:
- a) attacking the reasonableness of the affiant's belief that the butane torch and cell phone(s) would remain in the residence; and
 - b) challenging the sufficiency of the ITO in relation to cell phones and the security camera, absent any information that the appellant had more than one phone, or that the camera was functional or the appellant owned/controlled it -- given the absence of information about who owned the residence.

- [39] An additional facial challenge involved characterizing the complainant's descriptions of the butane torch, like a mop or a broom, as too generic to provide probative evidence of the alleged offences.
- [40] Regarding the sub-facial challenge, defence counsel made submissions about the "cell phone issue" -- the ITO not disclosing police had seized a cell phone from the appellant during his earlier arrest. Although defence counsel described the omission as material and highly egregious, he made it clear he was not asserting bad faith or an abuse of process.
- [41] Defence counsel also reviewed the ITO paragraph by paragraph and discussed his reasons for seeking to cross-examine the affiant, which were broader and somewhat different from those in the Notice of Application. They included exploring what the officer expected to find on the cell phone(s); "some scepticism" he may have had about the complainant's "story" regarding a number of circumstances; and confirming the affiant did not have any more information about the security camera system.
- [42] After brief reply and surreply, counsel turned to the telewarrant issue.

Pre-Trial Hearing Reasons

- [43] Transcribed as "Ruling on Voir Dire", at the outset of her reasons, the trial judge indicated that counsel had agreed to a "Vukelich hearing" to address whether the court would grant the appellant's application for a voir dire. After commenting briefly on the background, she outlined each of the appellant's arguments in support of the Charter Application and the relief he was seeking. The trial judge then set out the Crown's position: the impugned information in the ITO was properly included, but even if it was excised, ample evidence to support the warrant remained and declaring the search warrant invalid "carried no reasonable prospect of success".
- [44] The trial judge went on to discuss the legal principles applicable to a Vukelich hearing involving a Charter application that relates to a challenge to the validity of a search warrant.
- [45] Addressing what she referred to as defence counsel's argument about overly broad generalizations in the ITO regarding the butane torch, cellphone and security cameras, the trial judge concluded there was some evidence in para. 11 that could support "a finding by a justice to issue a warrant". She also stated she was not persuaded by the submission that the generic descriptions of the items in the ITO meant the ITO was invalid, emphasizing the test is whether there is some evidence in the ITO based on which the warrant could have issued, and again identifying para. 11 as providing that evidence. The trial judge specifically rejected the assertion that the description of the butane torch as silver and black, without a brand name, was too generic, likening the item to a similarly described kitchen knife, found in many households.

- [46] The trial judge also dealt with the "timing argument", or the assertion it was unreasonable to believe the items would still remain in the residence one week after the Alleged Violent Incident. Her reasons on this issue include:
- [28] I am not persuaded by this line of thinking. There is no evidence that the defence has brought forward that the items have been moved.
- [29] The case law, of course, states that [a] voir dire cannot be brought forward on unsupported submissions by defence counsel. The test is not whether I believe the items are in the residence one week after the allegations took place, but whether the officer at the time had reasonable and probable grounds to believe the items were there.
- [47] The trial judge referred once more to para. 11 of the ITO as setting out reasonable and probable grounds that the items may have remained in the residence, and on that finding, "a search warrant could have been issued by a justice".
- [48] Identifying the ITO as omitting information regarding the seizure of the appellant's cell phone on October 3, 2019, the trial judge also accepted there was no proof of multiple cell phones in the appellant's residence. She observed however that even fraudulent errors do not invalidate a search warrant and found, having regard to the totality of the evidence, that there was some evidence upon which the justice could have issued a warrant, citing *R. v. Sadikov*, 2014 ONCA 72.
- [49] The trial judge went on to find the ITO met "all the criteria", meaning the alleged offences were "clearly named" and there was evidence those offences had taken place, the three items at issue would contain or provide evidence of those offences, and the items might reasonably be located in the residence: at para. 23.
- [50] At the end of her reasons, the trial judge discussed the question of whether the ITO established a basis for issuing the search warrant under the telewarrant provision. Noting that the ITO had "extremely limited information" about the practical circumstances of obtaining the telewarrant, she decided to allow a voir dire on the limited issue of the telewarrant challenge and granted the appellant leave to cross-examine Constable Penton on that issue.

Voir Dire

- [51] After hearing Constable Penton's testimony during the voir dire, defence counsel took no position or ceased the telewarrant part of the challenge to the search warrant.
- [52] In her ruling, the trial judge dismissed the telewarrant challenge and upheld the search warrant.

Trial

- [53] The Crown's evidence at trial included the Admissions as amended at para. 5, certificates of analysis regarding three of the four seized firearms (Glock pistol; EMEI rifle; and the Springfield shotgun), and the expert report and testimony of Constable Ilioi regarding the seized drugs and whether they were possessed for the purpose of trafficking.
- [54] The Crown's only witness, Constable Ilioi was qualified to provide expert opinion evidence regarding the methods of drug packaging, drug concealment, drug trafficking, drug prices, drug uses, usage, drug jargon and slang with respect to the drugs at issue.
- [55] His report addressed the various amounts of the four drugs seized, how they were packaged, where they were found (in the residence or on his person), the nature and effects of each of them, how they are used and packaged for sale on the street, their prices based on a range of amounts at the time of the alleged offences, and the rate of consumption for average and heavy users per day. His report also discussed the relevance of other items seized such as the scale(s), cash and firearms.
- [56] Regarding packaging, Constable Ilioi wrote that drug dealers break up larger quantities of drugs and weigh and package them in smaller amounts for sales. Plastic baggies are common packaging and smaller baggies are often used to package small amounts of drugs of various kinds. Constable Ilioi also opined that a frequent drug user knows their individual dose by sight and feel and does not need a scale to weight it. Although he acknowledged in cross-examination that drug users do use scales, he added that weighing drugs for sale is important because they are sold in low weights and an error in weight affects a dealer's profit margin.
- [57] Constable Ilioi's testimony also included:
- a) The 7.08 grams of methamphetamine seized from the appellant was packaged in the corner of a larger clear plastic bag that was then twisted and tied in a knot, a style of packaging which is "more common at dealing level".
 - b) The 9.9 grams of solid MDMA, found in a safe, was wrapped in a bag and tied with an elastic band. A safe is "one of the most common ways" for drug traffickers to secure and hide their drugs.
 - c) \$1100 cash in various denominations and a cash counter seized are consistent with a drug trafficking operation, for "ease of their tasks": counting the cash and the revenue from drug sales.
 - d) The firearms seized included a loaded handgun. It is common for drug users as well as drug traffickers to have some sort of weapon, but it is "very, very rare" for drug traffickers to not have a weapon for self defence and intimidation, or protection, given the dangerous and violent lifestyle associated with drug trafficking.

- e) The surveillance system found at the appellant's residence is another common tool used by drug traffickers; they provide advance warning of somebody trying to rob them or law enforcement, which translates into enough time maybe to access a weapon for protection, dispose of the drugs or even escape.
 - f) One of the amounts of powder cocaine, 5.0 grams, seized from the residence, was packaged in a sandwich-size Ziploc bag, which is "consistent with how large quantities of powder cocaine" may be prepared and is "consistent for drug trafficking".
- [58] Regarding daily use and purchases by drug users, in his report he opined that: an average user of powder cocaine can consume up to one gram per day and a heavy user, up to five grams; cocaine is most commonly purchased at the partial gram level on the street; the most common dose for the street sale of GHB and average daily use is a 5 ml capful (2 grams) -- 40 ml is known to be a lethal dose; it is very uncommon to find drug users carrying drugs that would last them several days; and the supply of all four drugs was abundant on Vancouver Island so there was no need to stockpile and run the risk of getting "ripped off" or the police seizing them.
- [59] Both in his report and during his testimony, Constable Ilioi expressed the view that all four drugs were possessed for the purpose of trafficking or their possession was consistent with that purpose, based on a number of factors:
- a. the presence of four different types of drugs, representing diverse product availability for clients;
 - b. the quantity of the drugs, based on his experience that drug users typically buy only the amount necessary for their next fix or to get over withdrawal symptoms, because they do not have the financial means to buy larger quantities;
 - c. the value of the drugs, which was \$4289-\$5070 if sold to the end user and \$1701-\$1954 if sold in the bulk quantities at which they were seized;
 - d. the amount of the drugs, which was sufficient to supply a drug user with 8.21 days of cocaine and methamphetamine and between 33 and 61 doses of MDMA and 200 doses of GHB; and
 - e. the digital scale(s), empty packaging and a security system in or at the residence.
- [60] In cross-examination, Constable Ilioi acknowledged drug users also use scales and as the appellant highlighted, the GHB was not packaged for sale. Also cross-examined about the fact no score sheets were found, Constable Ilioi agreed they were common with dealers although they take many forms including electronic versions which may be stored on phones.
- [61] The appellant does not dispute the trial judge's finding that the "Crown" was unable to extract information from his cellphone.
- [62] There was no defence evidence and defence counsel made no closing submissions.

- [63] After the trial, the Court invited counsel to make submissions regarding *R. v. Newell*, 2017 CanLII 2737, 137 W.C.B. (2d) 437 (O.N.S.C.) and the issue of whether the drugs were for personal use or for the purpose of trafficking.
- [64] In *Newell*, the relevant charges included trafficking and simple possession of fentanyl patches. The accused conceded possession. The sole question was whether the accused possessed the fentanyl for the purpose of trafficking. After considering the conflicting opinion evidence of the Crown and defence experts, the judge concluded the Crown had not established beyond a reasonable doubt that the possession of fentanyl was for the purpose of trafficking. In reaching this conclusion, she noted at para. 36 that "many other of the usual indicia of trafficking are absent in this case", apparently referring to her previous comment about the absence of evidence:
- [34] Because this is a circumstantial case it is important to note that the Crown did not seek to introduce evidence with respect to any of the following points:
- Mr. Newell's association with drug traffickers or addicts.
 - unexplained wealth on the part of Mr. Newell
 - that Mr. Newell was not a user of Fentanyl.
 - previous acts of trafficking or future intention to traffic.
 - any evidence from Mr. Newell's cell phone.
 - debt slips found in Mr. Newell's possession.
- [65] I would note the reasons in *Newell* do not explain the basis for the judge's identification of the "usual" indicia or how evidence of some of them, such as previous acts of trafficking, would be admissible at trial.
- [66] In any event, the judge in *Newell* also accepted the opinion of the defence expert and inferred the accused's "suspicious" activities were equally consistent with a person acquiring their own supply of fentanyl for personal use.
- [67] Both counsel made oral submissions regarding *Newell*. The Crown argued the case was distinguishable and in this case there was no rational inference to be drawn from the whole of the evidence other than the appellant possessed the drugs for the purpose of trafficking, citing *R. v. Silver*, 2007 YKCA 4.
- [68] In that case, the Yukon Court of Appeal upheld a conviction for trafficking in cocaine. In concluding the evidence supported the judge's finding the cocaine was possessed for the purpose of trafficking, the Court referred to the loaded firearm he was carrying as being only consistent with trafficking, and the absence of evidence that Mr. Silver was or might be a drug user.

[69] Defence counsel took the position that Newell should be followed as there were indicia of trafficking also missing in this case and the circumstantial evidence was not such that there was no other explanation.

Trial Decision

[70] The trial judge began the Trial Decision by outlining the pre-trial proceedings and identifying the exhibits in evidence including the admitted facts in the Admissions, the parties' positions regarding the purpose of the appellant's possession of the drugs and the fundamental legal principles that apply in every criminal trial: the presumption of innocence and the Crown's burden to prove the charged offences beyond a reasonable doubt.

[71] Dealing with the firearm charges, the trial judge found all the elements for three of the four counts in Indictment 87722-1 had been proven beyond a reasonable doubt. She also found that the appellant was prohibited from owning a firearm at the time of the offences. In acquitting him of Count 4, she noted the Crown had not provided a certificate of analysis for the Keltec shotgun.[2] Regarding Indictment 87651-2-C, the trial judge found the appellant guilty of Counts 5, 6, and 8 and acquitted him on Count 9 based on the following findings:

- i. with respect to Count 5, there was readily accessible ammunition for the Springfield 410 sawed-off shotgun (para. 18);
- ii. with respect to Count 6, the Glock 34 Gen4 semi-automatic handgun was loaded (para. 19);
- iii. with respect to Count 8, the appellant possessed the EMEI T97NSR semiautomatic rifle without being the holder of a licence (para. 20); and
- iv. with respect to Count 9, there was no evidence that the Glock handgun's serial number was "altered or removed" (para. 21).

[72] Regarding the drug charges, the trial judge set out the four elements of the offence of PPT, found the Crown had proven the first three elements beyond a reasonable doubt and identified the issue for determination as whether the appellant's possession was for the purpose of trafficking. Noting the Crown relied on circumstantial evidence to prove this element, the trial judge cited passages from *R. v. Villaroman*, 2016 SCC 33 (taken from para. 17 of *Newell*) and described para. 34 of *Newell* as "most compelling".

[73] With respect to the PPT charges for methamphetamine and MDMA, the trial judge said she was not satisfied the Crown had proven the appellant possessed either of them for the purpose of trafficking, based primarily on the amount of each drug. She specified that in coming to this conclusion with respect to MDMA, she put "a lot of weight" on the amount of the drug. Further, she described the appellant's possession of a large amount of cash, digital scale(s) and four different types of drugs as suspicious, but also consistent with personal use, stating further at para. 34: "Although one could speculate that Mr. Donovan possessed methamphetamine and MDMA for the purpose of trafficking, on the facts here, no such

logical inference can be drawn". In expressing this view, the trial judge considered the absence of evidence regarding the "usual indicia" of trafficking, stating:

- [32] There was no evidence of scoresheets put forward, although I noted Crown said perhaps it was on the cellphone of Mr. Donovan. Crown did not prove that Mr. Donovan was associated with other drug users or drug traffickers. Mr. Donovan's cell phone provided no evidence to refute or prove drug trafficking. Crown did not refute that Mr. Donovan could have used the drugs for his own personal use.
- [74] The trial judge also considered the "factors set out in Newell" referring to the absence of evidence of people coming to the household, Mr. Donovan being a drug user, and a history of drug trafficking or future intent to traffic, before concluding at para. 34: "[t]here was simply no evidence that Mr. Donovan was caught selling those drugs; that is, it was a circumstantial case".
- [75] The trial judge went on to find the appellant guilty of simple possession of methamphetamine and MDMA.
- [76] Turning to the PPT charges for cocaine and GHB, the trial judge found that all of the seized cocaine totaled 18.07 grams. In convicting the appellant of possessing cocaine for the purpose of trafficking, she explained at para. 36 "the larger amounts of cocaine convince me beyond a reasonable doubt, when combined with all the other evidence, albeit circumstantial evidence, that is the large amounts of cash, the multiple firearms, the loaded weapon, the digital scale(s), the money counter, and security camera" that the appellant possessed cocaine for the purpose of trafficking. Regarding GHB, the trial judge again relied on the quantity of the drug, enough for 200 doses, together with all the other circumstantial evidence in convicting the appellant of PPT.
- [77] The appellant was sentenced to a global jail sentence of 4.5 years imprisonment on both Indictments.

Issues on Appeal

- [78] The appellant identifies six issues on appeal. The first three are interrelated alleged errors involving the trial judge's response to his Charter Application. They include:
- a) Failing to properly engage in, and conflating, the Vukelich hearing procedure with the taking of evidence on a Charter voir dire;
 - b) Limiting cross-examination of the ITO affiant without conducting a proper Garofoli hearing; and
 - c) Declining to conduct a proper voir dire into the Charter breach allegation.
- [79] The three further issues include:

- d) Whether the trial judge erred in convicting the appellant of three counts of unauthorized firearm possession absent evidence on an element of the offence;
- e) Whether the trial judge erred by not staying some of the firearms convictions pursuant to the Kienapple principle; and
- f) Whether the trial judge rendered inconsistent verdicts in relation to the drug possession and PPT convictions.

Discussion

Issues 1 to 3

Legal Framework

- [80] Several principles governing the Charter Application, including most significantly the challenge to the search warrant and a Vukelich hearing, inform the first three issues.
- [81] The applicant bears the overall burden of proving an infringement of s. 8 on the balance of probabilities.

Search Warrant Review

- [82] A review of a search warrant starts with the presumption of validity; the party bringing the challenge must demonstrate its invalidity: Sadikov, at para. 83.
- [83] The foundational principles for search warrant review were set out in R. v. Garofoli, [1990] 2 S.C.R. 1421, 1990 CanLII 522, and developed in the cases that followed.
- [84] The purpose of a review is to determine whether the ITO filed in support of the application for the search warrant justified issuing the warrant.
- [85] An ITO affiant has an obligation to make full, frank and fair disclosure of the material facts, favourable or not: R. v. Araujo, 2000 SCC 65 at para. 46. Subject to compliance with that obligation, however, the affiant is not obliged to address things not seen or investigative steps not taken: R. v. Nguyen, 2011 ONCA 465 at para. 47. Also, the affiant is entitled to rely on hearsay in the ITO, as long as the source of the information is adequately identified along with information bearing on the credibility or reliability of the source.
- [86] The ITO must contain facts that could satisfy the authorizing justice that the preconditions for granting the search warrant under s. 487 of the Criminal Code are met. Those requirements include reasonable grounds to believe that an offence has been committed and that evidence of the offence will be located in the place to be searched: R. v. Morelli, 2010 SCC 8 at para. 39.

- [87] The reasonable grounds standard contemplates a credibly-based probability or reasonable probability. Not an exacting standard, it has been described as the point at which suspicion gives way to credibly-based probability: *R. v. Vu*, 2011 BCCA 536 at para. 39, *aff'd* on this point 2013 SCC 60 at paras. 9-15; *Stoughton v. Canada (Attorney General)*, 2022 BCCA 212 at paras. 28, 30.
- [88] As I have indicated, challenges to the ITO may be facial or sub-facial.
- [89] A facial challenge attacks the sufficiency of the ITO based only on the information it contains. The reviewing judge examines the ITO to determine whether the authorizing justice could have issued the warrant: *R. v. Vu*, 2013 SCC 60 at para. 16. In other words, for a facial challenge to succeed, the ITO as written must disclose no basis on which the authorizing judge could have found reasonable grounds to believe that an offence was committed or that evidence of the offence would be found at the place to be searched.
- [90] A sub-facial challenge goes behind the ITO to attack the reliability of its content, based on the amplified record before the reviewing judge. The task of the reviewing judge is to determine whether, based on the record before the authorizing justice as amplified on review, "there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued": *Araujo* at para. 54.
- [91] The scope of warrant review then is narrow. The question is not whether the reviewing judge would have issued the warrant but whether the issuing justice could be satisfied that the statutory preconditions for granting the warrant were met.
- [92] On a sub-facial challenge, cross-examining the ITO affiant is one way to attack its reliability and provide an amplified record. However, an accused does not have a right to cross-examine the affiant. Leave is required: *Sadikov*, at para. 39; *Garofoli* at 1465; and *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 at paras. 3, 31. To obtain leave, the accused must show the proposed cross-examination will elicit testimony that tends to discredit the existence of a pre-condition to the issuance of the warrant, such as reasonable and probable grounds: *Sadikov* at para. 39; *Garofoli* at 1465; and *Pires*; *Lising*, at para. 40.
- [93] In applying the reasonable grounds standard, the reviewing judge examines the totality of the circumstances in the ITO, taking a common-sense practical approach, and considers whether in light of all the grounds taken together or viewed cumulatively, the authorizing justice could have granted the search warrant: *R. v. Whitaker*, 2008 BCCA 174 at para. 41.
- [94] Where the amplified record includes evidence that undermines the information contained in the ITO, the reviewing judge engages in excision and amplification of the ITO. Statements in the ITO that the affiant knew or ought to have known were incorrect, misleading or false are excised. If the affiant omitted information they knew or ought to have known to make full, fair and frank disclosure, absent bad faith or a deliberate intention to mislead, that information may be added or should be considered when determining whether the warrant could have issued: *World Bank Group v. Wallace*, 2016 SCC 15 at paras. 121,123; *Morelli* at

paras. 59-60. The other form of amplification arises where the Crown seeks to correct an error in the ITO. The Crown's use of amplification, however, is restricted to correcting minor/technical errors made in good faith: Araujo, at para. 59.

Vukelich

- [95] The notion of a Vukelich hearing originates in the Vukelich decision. Writing for this Court, Chief Justice McEachern upheld the trial judge's refusal to hold a voir dire on the constitutionality of a search warrant. The defence challenged the warrant relying on Garofoli, with the successfully challenged portions of the ITO being excised and the trial judge then determining if what remains supports the issuance of the warrant. The trial judge in Vukelich applied this framework and concluded on the face of the record, accepting all the defence allegations as true and excising the impugned information, there was still sufficient information in the ITO to issue the warrant.
- [96] Opining a voir dire would not have assisted "the proper trial of the real issues" and emphasizing trial judges must control the course of proceedings, McEachern C.J. endorsed a flexible procedure in deciding whether to embark on a voir dire and how one should be conducted: at paras. 23, 26; see also R. v. Haevischer, 2023 SCC 11 at paras. 43-44. He contemplated the utility of a voir dire to test admissibility in most cases being determined based on the statements of counsel. Along with explaining and particularizing the basis for the claim, McEachern C.J. reasoned, counsel could identify the anticipated evidence in support of the constitutional challenge. If their statements proved insufficient for a threshold screening, greater material could be necessary, such as an affidavit setting out the evidence likely to support the constitutional challenge. He also commented there would be nothing to prevent defence counsel from advancing its full position in the first instance: at paras. 17, 21.
- [97] Vukelich did not articulate a general standard for summary dismissal of an application in a criminal trial, which the Court in Haevischer accepted was because of the nature of the underlying application: at para. 44.

Summary Dismissal and Haevischer

- [98] Decided after the Trial Decision, Haevischer clarified that general standard.
- [99] Writing for a unanimous Court, Justice Martin explained that trial efficiency and trial fairness, the values underlying a summary dismissal on a Vukelich type hearing, mandate the rigorous standard of manifestly frivolous: at paras. 66-71. She determined, in other words, that while dismissing unmeritorious applications in the criminal law context helps ensure trials occur within a reasonable time, trial fairness due to its constitutional dimension, requires a low threshold for holding a voir dire.
- [100] Justice Martin went on to prescribe how this standard is to be applied, which I summarize as follows:

- a) The party seeking summary dismissal bears the burden;
- b) The judge must assume the facts alleged by the applicant are true and take their arguments at their highest;
- c) The application should explain the factual foundation and point towards anticipated evidence that could establish their alleged facts;
- d) Where the applicant cannot point towards any anticipated evidence that could establish a necessary fact, the judge can reject the factual allegation as manifestly frivolous;
- e) The judge ought to generally assume the inferences suggested by the applicant are true, even if competing inferences are proffered; unless the inference is manifestly frivolous, meaning there is no reasoning path to the proposed inference; and
- f) A similar approach should be taken to the overall application, which will only be manifestly frivolous where there is a fundamental flaw in its legal pathway: that is, the remedy cannot be reached.

[101] Justice Martin made the point that an application may be manifestly frivolous if the remedy sought could never issue on the facts of the application.

[102] Addressing the scope of the manifestly frivolous standard, Martin J. held it applies to summary dismissal motions that are not otherwise subject to a legislated or judicial threshold, along with:

[80] Nor does this standard eclipse the bodies of law that have developed around particular types of applications, such as Garofoli and Pires [leave to cross examine] applications to challenge the lawfulness of a search warrant.

[Emphasis added.]

[103] At para. 86, she again referred to Garofoli applications specifically. Consistent with the trial judge's approach in Vukelich, Martin J. commented that where the ITO could still support the issuance of the warrant with the challenged portions excised, the application can be summarily dismissed because the sought after remedy -- exclusion of evidence under the warrant -- would not follow.

[104] I would highlight then, that although the Crown "concedes" the manifestly frivolous standard would apply to the Vukelich application regarding the appellant's (sub-facial) challenge to the validity of the search warrant, it is not clear that Haevischer changes the approach to summary dismissal when the underlying application is a Garofoli application.

[105] At the same time, Haevischer did affirm the Garofoli framework and did not change the Pires test for leave to cross-examine in this context.

Issue One - Trial Fairness

- [106] For clarity I would rephrase this issue to ask whether the appellant was deprived of a fair trial by the manner in which the trial judge conducted the pre-trial proceedings.
- [107] Haevischer recognized that summary dismissal of a criminal application can curtail the accused's right to full answer and defence and the right to a fair trial protected by ss. 7 and 11(d) of the Charter by stopping the accused from fully making arguments and eliciting evidence on their application: at para. 56. But Haevischer also recognized it remains the case that an accused is not entitled to a voir dire and the trial judge decides if and how the voir dire proceeds: at para. 56.
- [108] I start by observing it is somewhat difficult to discern arguments about trial fairness that are separate from the appellant's assertion she erred in dismissing his Charter or Garofoli application without an evidentiary voir dire.
- [109] In his factum, the appellant describes what occurred pre-trial as a "confusing and improper process between the Vukelich application made by the Crown and a Garofoli application by the defence and an argument regarding the alleged Charter breach". Identifying these as "legally discrete issues", the appellant says they were intermingled to the point where none of them were properly addressed by the trial judge and her reasons reflect an impermissible procedural confusion and misunderstanding of the law.
- [110] Yet where as here counsel agree to a Vukelich hearing, a Garofoli hearing or a voir dire regarding a sub-facial challenge to a search warrant only occurs if the Garofoli application is not summarily dismissed.
- [111] The appellant also complains that the trial judge prioritized trial efficiency over trial fairness based on "an immediate and unwarranted concern for trial expedience". I agree with the Crown's submission that the concern she expressed was for his s. 11(b) Charter rights and doing so was entirely appropriate. Nothing suggests that trial fairness was sacrificed as a result.
- [112] Acknowledging the proceedings began with defence counsel summarizing his reasons for challenging the search warrant, the appellant says it is "not clear" that the trial judge was aware of the purpose of those submissions in relation to a Vukelich hearing and she never indicated she understood they were to be part of the yet to be commenced Vukelich hearing.
- [113] Neither the transcript nor the "Ruling on Voir Dire" indicate to me that she failed to consider defence counsel's overview or initial submissions.
- [114] The appellant also complains that after confirming counsel wanted a Vukelich hearing, the trial judge incorrectly declared a voir dire. Although the Crown responded by proposing she "go first" on the Vukelich hearing, what followed was actually a voir dire and yet the "Ruling on Voir Dire" reads as a dismissal of the Charter application on the merits.

- [115] In my view, misdescribing the pre-trial hearing as a voir dire (more than once) as opposed to describing it as a hearing or ruling on "whether a voir dire was necessary", was inconsequential. What the transcript and the trial judge's reasons show is that she conducted a pre-trial hearing that included a Vukelich hearing.
- [116] The pre-trial hearing also dealt with the appellant's facial challenge to the search warrant which did not require a discrete hearing or an evidentiary voir dire because it had to be decided based only on the information in the ITO and the submissions of counsel.
- [117] Although the appellant argues defence counsel did not make the submissions he would have made in a Garofoli hearing, and he was denied a proper hearing on the application for leave to cross-examine, the appellant did not identify any additional submissions that defence counsel was prevented from making. And there is no suggestion the trial judge restricted defence counsel's submissions at any point during the pre-trial proceedings. Further, the transcript shows defence counsel's submissions both before and during the pre-trial/Vukelich hearing were directed at convincing the trial judge there was a basis for ordering a voir dire and allowing cross-examination of the affiant, as well as the invalidity of the warrant based on the facial challenge. Certainly, the Vukelich hearing was the appropriate forum for seeking leave to cross-examine.
- [118] As the Crown points out, the procedure followed during the Vukelich hearing accorded with the procedure endorsed in Vukelich, as well as Haevischer at para. 32. As the applicant for summary dismissal, the Crown proceeded first and the trial judge was asked to decide the sub-facial challenge on the Vukelich version of the ITO and the submissions of counsel, which for the Crown included ignoring any remaining cell phone information in the ITO. Essentially then, the trial judge was asked to assume all of the facts alleged by the appellant were true and to take his arguments at their highest.
- [119] Ultimately, I do not agree the appellant was in any way deprived of a fair trial and would dismiss this ground of appeal.

Issues Two and Three - Declining a Voir Dire

- [120] I would reframe issues two and three as one issue that asks whether the trial judge erred in declining an evidentiary voir dire regarding his (sub-facial) challenge to the validity of the search warrant, which involved a summary dismissal of the Charter Application.
- [121] It is only if she erred in concluding the ITO still contained sufficient information for the issuance of the warrant, that she could have also erred, as the appellant suggests, by failing to consider the alleged violation of his s. 8 Charter rights, and if a violation was found, by failing to exclude the seized evidence under s. 24(2).
- [122] To clarify the scope of the issue, I will deal first with the appellant's facial challenge to the search warrant, which on appeal, neither party clearly differentiated from his sub-facial challenge.

[123] Again the facial challenge included:

- a) The absence of information in the ITO indicating:
 - i. the butane torch and the cell phones would still be in the residence and relevant footage from the security system would not have been deleted several days after the Alleged Violent Incident;
 - ii. that the appellant had more than one cell phone; and
 - iii. whether the security camera equipment was operational and who owned it; and
- b) The description of the butane torch in the ITO was too generic to provide probative evidence.

[124] Because a review of a facial challenge involves determining whether the issuing justice could have reasonably been satisfied with the sufficiency of the grounds based on the ITO alone, in general there is no amplified record to consider. In any event, it follows logically that deciding whether the ITO alone provided sufficient information for the warrant to issue, would not be assisted by cross-examining the affiant about the generic description of the butane torch or whether the items would still be in the residence. These are suggestions that could not be assisted by the opinion of the affiant.

[125] *R. v. Perkins*, 2021 BCCA 9, provides that a deferential standard applies in reviewing a trial judge's findings regarding warrant review. Absent an error of law, a misapprehension of evidence, or a failure to consider relevant evidence, this Court should decline to interfere with the trial judge's decision. In *R. v. Goodkey*, 2015 BCCA 64 at para. 141, however, this Court identified the question of whether an ITO could support the issuance of a warrant is a legal one, subject to the correctness standard of review, citing *R. v. Shepherd*, 2009 SCC 35 at paras. 18-20.

[126] Confined to the ITO, it cannot be that the trial judge erred by refusing a voir dire regarding the appellant's facial challenge. Nor do her reasons reflect any misapprehension of the evidence or a failure to consider relevant evidence, here the content of the ITO. Instead she identified and then considered the arguments of defence counsel about the ITO's facial insufficiencies, which she referred to as overbroad generalizations, generic descriptions and the timing argument.

[127] The appellant does not grapple with how the trial judge may have erred with respect to his sub-facial challenge, which primarily involved the "cell phone issue" or the affiant's omission of information about the prior cell phone seizure. Instead he simply says that she erred in not granting him an evidentiary voir dire or Garofoli hearing.

- [128] Similarly, with respect to her related decision to deny leave to cross examine the ITO affiant in support of the sub-facial challenge, the appellant made no arguments apart from asserting she deprived him of a fair trial by not allowing a "proper hearing" of the leave application.
- [129] Aside from disclosed documents related to the cell phone omission and defence counsel's assertion about the complainant's absence of injuries, the only evidence he referred as supporting the sub-facial challenge during the Vukelich hearing was the testimony he intended to elicit during the proposed cross-examination of the ITO affiant.
- [130] Again, defence counsel's submissions in support of the application for leave focused on the appellant's reasons for the proposed cross-examination, such as the prior seizure of his cell phone and what the affiant expected to find on the cell phone(s); "some skepticism" the affiant may have had about the complainant's "story"; and confirming the affiant did not have any more information about the security camera system, including its functionality and ownership.
- [131] Some of these reasons in my view engage the facial and not the sub-facial challenge.
- [132] In any event, regarding the last reason, defence counsel did not refer to any disclosed documents or other anticipated evidence that would indicate the affiant did or might know more when he prepared the ITO.
- [133] At para. 14 of the ITO, Constable Penton deposed to observing a security camera at the front door of the appellant's residence that would capture people at the front door.
- [134] In the Vukelich version the words "if functioning" were added and "would" was changed to "could".
- [135] Defence counsel's submissions regarding the complainant's credibility involved juxtaposing the absence of injury with the butane torch allegations, which as I highlighted earlier were undermined by the ITO's allegation of threats or attempts to burn the complainant and not actual burns.
- [136] Again, to obtain leave the appellant was required to demonstrate the proposed cross-examination was likely to elicit evidence that tends to discredit the existence of a pre-condition to the issuance of the warrant, such as reasonable and probable grounds. This requirement is considered in light of the test on review of a sub-facial challenge as set out in Garofoli, that is, whether there remains a sufficient basis for issuing the warrant, after excising any information found to be false, misleading or inaccurate.
- [137] Here the Vukelich version of the ITO and the Crown's submission about further ignoring any other references to the appellant's cell phone provided this context. In other words, the grounds for seeking leave to cross-examine the affiant regarding the sub-facial challenge were addressed by the record before the trial judge and the submissions of counsel at the Vukelich hearing.

- [138] Further, in relation to the security camera equipment, as the trial judge noted, defence counsel argued the ITO made assumptions that the appellant owned the equipment, it was working and the relevant "data" had not been overridden. This is plainly inaccurate. All that Constable Penton said in the ITO is that he observed a security camera outside the front door when he went to the residence some days before the search warrant application to arrest the appellant. The ITO is silent regarding ownership of 990 Milton Street and the security camera equipment, and its functionality, before the amplification in the Vukelich version.
- [139] Absent any assertion of insufficient reasons, given the record, the submissions of counsel, the test on review of a sub-facial challenge and the trial judge's reasons for refusing an evidentiary voir dire, I am satisfied she did not err in refusing leave. It is clear to me the proposed cross-examination was unlikely to elicit evidence that tended to discredit the existence of a pre-condition to the issuance of the warrant.
- [140] Turning then to the trial judge's refusal to grant the voir dire, I would note neither party addressed the standard of review that applies to summary dismissal.
- [141] *R. v. Orr*, 2021 BCCA 42, affirmed a deferential standard applies to summary dismissal of a Charter claim, which in that case was also a s. 8 challenge. Referring to summary dismissal as a case management power within the discretion of the trial judge, Orr emphasized the decision to refuse a voir dire should not be disturbed unless it is shown the judge did not exercise their discretion judicially: at paras. 53-54. Haevischer does not appear to have impacted the standard of review. Citing both Haevischer and Orr, in *R. v. Chartrand*, 2023 NSCA 43, the Nova Scotia Court of Appeal applied the deferential standard of review to a summary dismissal of a constitutional challenge related to a provision of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. This standard of review contrasts with the correctness standard applied in Chartrand to the trial judge's finding there was no breach of s. 8 based on Shepherd.
- [142] Applying the deferential or even a correctness standard, in my view the trial judge did not err in declining to order a voir dire on the appellant's sub-facial challenge.
- [143] I say this recognizing her reasons on the issue are sparse. The trial judge correctly recited the test on review. In addressing defence counsel's argument about the omission in the ITO regarding the seized cell phone, the trial judge commented that even fraudulent errors do not invalidate a warrant. This indicates that she accepted the omission was improper for the purpose of the Vukelich hearing. She also commented the appellant was correct about the absence of proof of multiple cell phones, before concluding based on the totality of the evidence, that there remained some evidence upon which the justice could have issued a warrant.

- [144] Although her reasons do not specify whether she limited this conclusion to the items other than cell phones, as the Crown submitted during the Vukelich hearing and on appeal, an insufficiency in the ITO with respect to cell phones would not prevent the warrant from being validly issued with respect to the butane torch and the security camera equipment.
- [145] The doctrine of severability provides that even if the reviewing court finds the grounds in the ITO are not capable of satisfying the issuing justice that certain items would be located in the place to be searched, it does not follow that the warrant is invalid with respect to the authorized seizure of other items: *Whitaker*, at para. 47; *R. v. James*, 2018 BCSC 405 at paras. 40, 60. Where the invalid part of the warrant is clearly severable from "the good", the warrant remains valid insofar as the ITO supports its issuance regarding the other items. This is plainly the case here.
- [146] If then, in summarily dismissing the appellant's sub-facial challenge, the trial judge erred by not disregarding the impugned cell phone information as suggested by the Crown, or by concluding the warrant still could have issued for cell phones in the absence of any evidence regarding this item, any such errors would be immaterial. This is because the search warrant still could have issued for the seizure of the butane torch and the security camera equipment. In other words, the ITO still contained sufficient information to provide reasonable grounds to believe the identified alleged crime(s) had been committed, evidence of that crime(s) would be contained in the remaining items and they might reasonably be located in the residence.
- [147] Consequently, an evidentiary voir dire in this case, based on the proposed cross-examination of the affiant, was bound to fail. Because of the Crown's concession, I assume without deciding that the manifestly frivolous standard applies in this context and conclude it was met.
- [148] I would therefore dismiss this ground of appeal.

Issue 4 - No Evidence

- [149] The appellant argues the judge erred in convicting him of the three firearm offences under ss. 91(1) and 95(1) of the Criminal Code, because there was no evidence to establish the requisite element that he was not a holder of an authorization or licence and a registration certificate.
- [150] The Admissions include at para. 7 that the appellant was prohibited from possessing any firearms at the time of the alleged offences.
- [151] He takes the position his admission is not sufficient because the actual order prohibiting him from possessing firearms was not in evidence. As a result, the appellant says, it is unknown whether the prohibition order was granted pursuant to s. 114 of the Criminal Code, which reads:

114 A competent authority that makes a prohibition order against a person may, in the order, require the person to surrender to a peace officer, a firearms officer or a chief firearms officer

- (a) any thing the possession of which is prohibited by the order that is in the possession of the person on the commencement of the order, and
- (b) every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by the order that is held by the person on the commencement of the order,

and where the competent authority does so, it shall specify in the order a reasonable period for surrendering such things and documents and during which section 117.01 does not apply to that person.

[152] According to the appellant, under s. 114 a person can be subject to a prohibition order and still be the holder of an authorization licence or registration certificate if a surrender order is not made.

[153] The Crown identifies s. 116 of the Criminal Code as dispelling his argument:

116 (1) Subject to subsection (2), every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by a prohibition order and issued to a person against whom the prohibition order is made is, on the commencement of the prohibition order, revoked, or amended, as the case may be, to the extent of the prohibitions in the order.

[154] I agree with the Crown.

[155] Although the appellant also suggests the two provisions are in conflict and s. 114 would be rendered superfluous, if s. 116 is interpreted as overriding it, they have different objects or purposes. Clearly s. 116 operates to automatically revoke every authorization, licence and registration certificate relating to item(s) that a prohibition order prohibits the person from possessing. Section 114 specifically empowers the authority that makes the prohibition order to also order the person subject to the prohibition order to surrender the prohibited item and the authorization and other documents related to that item. In other words, under s. 114, a prohibition order may be, but is not required to be, accompanied by a surrender order. But it is not the surrender order that results in revocation.

[156] I conclude then that the trial judge did not err in convicting the appellant of the ss. 91(1) and 95(1) offences, as the requisite element he says was unproven was established by the effect of the admitted-to prohibition order.

Issue 5 - Failure to Apply Kienapple

[157] The appellant takes the position the judge erred in not applying the principle against multiple convictions, set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14, and not entering (conditional) stays for some of the convictions for firearms offences.

- [158] The Kienapple principle reflects the long-standing recognition that multiple convictions should not be entered for multiple offences involving the same criminal "delict" (cause or matter): *R. v. Mohsenipour*, 2023 BCCA 6 at para. 282.
- [159] Although there is no indication the judge was asked to consider the Kienapple principle before entering the convictions, and the Crown argues the appellant's position is without merit, the Crown does not dispute that the issue is properly raised on appeal.
- [160] Indeed, the jurisprudence requires the principle to be considered when a person is charged with more than one offence that has the same or substantially the same elements, unless Parliament has clearly expressed an intention to displace it: *Mohsenipour*, at para. 282; *R. v. Prince*, [1986] 2 S.C.R. 480 at 498, 1986 CanLII 40.
- [161] The failure to apply Kienapple, when properly engaged, amounts to an error of law that is therefore reviewed on a correctness standard: *R. v. Kennedy*, 2016 MBCA 5 at para. 23.
- [162] Both parties rely on *R. v. Thomas*, 2024 BCCA 20 for its discussion of the analytical framework regarding the Kienapple principle established in *R. v. Andrew* [1990] 57 C.C.C. (3d) 301, 1990 CanLII 11057 (B.C.C.A.).
- [163] At para. 71 *Thomas* recites four situations or "keys" identified in *Andrew* that are intended to assist in determining whether Kienapple should be applied:
- 1) Where the offences are of unequal gravity, Kienapple may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided there are no distinct additional elements in the lesser offence. (*Prince* p. 499)
 - 2) Where an element of one offence is a particularization of essentially the same element in the other offence. (*Prince* p. 500)
 - 3) Where there is more than one method, embodied in more than one offence, to prove a single criminal act. (*Prince*, p. 501)
 - 4) Where Parliament has deemed a particular element to be satisfied on proof of another element. (*Prince* p. 501)
- [164] *Thomas* also reiterated the so-called "double test" articulated in *Andrew* at para. 72:
- A. Look at the facts, in the context of the offences, and ask whether only one wrongful act, in both its physical and mental elements, is involved.
- B. Look at the offences, in the context of the facts, and ask whether there is an additional or distinguishing element in one offence that is not contained in the other. If there is, the Kienapple principle does not apply unless the additional and distinguishing element is covered by one of the four types of situations enumerated [in *Prince*]

The two tests which I have described should be undertaken together. Each of the test becomes an empty exercise unless the two tests complement each other. It is a double test; not two consecutive tests.

[165] In general, the assessment requires the trial judge to consider the statutory provisions that create the relevant offences, and the application of those provisions to the circumstances of the case: *Mohsenipour*, at para. 283.

[166] The appellant was convicted of six firearms offences, under ss. 91(1), 95(1) and 117.01(1) of the Criminal Code.

[167] The offence provisions include:

91 (1) Subject to subsection (4), every person commits an offence who possesses a prohibited firearm, a restricted firearm or a non-restricted firearm without being the holder of

- (a) a licence under which the person may possess it; and
- (b) in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

95 (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

- (a) an authorization or a licence under which the person may possess the firearm in that place; and
- (b) the registration certificate for the firearm.

117.01 (1) Subject to subsection (4), every person commits an offence who possesses a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition, any prohibited ammunition or an explosive substance while the person is prohibited from doing so by any order made under this Act or any other Act of Parliament.

[168] The s. 91(1) offence is the least serious of the three, with a maximum sentence of five years imprisonment. The maximum sentence for the s. 95(1) offence is the longest at 14 years. The s. 117.01 offence carries a maximum sentence of 10 years.

[169] Under s. 91(1) the appellant was convicted of:

Possession of a non-restricted firearm - EMEI Rifle without being the holder of an authorization or a licence under which he may possess the firearm in that place and registration certification for the firearm.

[170] Two of his firearm convictions are for s. 95(1) offences:

Possession of an unloaded prohibited firearm - Springfield Sawed Off Shotgun, with readily accessible ammunition, without being the holder of an authorization or a licence under which he may possess the prohibited firearm in that place and a registration certificate for the firearm.

Possession of a loaded restricted firearm - Glock Pistol, without being the holder of an authorization or a licence under which he may possess the firearm in that place and registration certificate for the firearm.

[171] The remaining three convictions, one for each of the same firearms, are pursuant to s. 117.01(1).

[172] In his factum the appellant took the position that only the convictions for the s. 95(1) offences should be entered because there are no distinct elements in the lesser s. 91(1) offence, although the conviction involves a different firearm. He also relied on his theory that a person who is prohibited from possessing firearms is not prohibited from being the holder of an authorization etc. unless a further order is made under s. 114. He did not explain his theory as to why this would lead to the s. 117.01(1) convictions, as opposed to the s. 95(1) convictions, being conditionally stayed.

[173] At the hearing of the appeal, the appellant asserted that only one firearm conviction from each Indictment should be entered, referring I presume to one of the two s. 95(1) offences and one of the three s. 117.01(1) offences, arguing that Kienapple bars multiple convictions for offences involving the possession of different firearms.

[174] The Crown asserts this new argument should not be entertained because it would involve a substantial change to how the law applies to firearms convictions, in the absence of any notice to the Provincial Crown, in particular. Although not expressly discussed in the factum, suggesting the s. 91(1) conviction should be conditionally stayed relies on the same position about the possession of different firearms.

[175] In the alternative, the Crown submits the appellant's oral argument should be rejected because possessing each firearm constitutes an offence involving a separate individual social harm.

[176] I agree. The factual differences between each firearm and their classification (loaded restricted; prohibited with readily accessible ammunition; and non-restricted) and the number of them -- three, not one and not two -- only serve to highlight this reality. The same is true for multiple convictions for the same type of offence committed in the same circumstances, including those here: two drug offence convictions for simple possession and two for PPT. According to the appellant's logic only one possession conviction and one PPT conviction should stand, although two different drugs were involved for each set of convictions.

[177] Addressing the appellant's original argument, the Crown emphasizes that he was convicted of three different firearm offences involving the possession of three different firearms:

Firearm

Indictment 87651-2-C

Indictment 87722-1

Glock 34 Gen4 semi-automatic handgun (loaded)

Section 95(1)

Section 117.01(1)

Springfield 410 sawed-off shotgun (with readily accessible ammunition)

Section 95(1)

Section 117.01(1)

EMEI T97NSR semiautomatic rifle

(non-restricted)

Section 91(1)

Section 117.01(1)

[178] The Crown also highlights that in addition to possessing three different firearms, each of the three different firearm offences have distinct physical and/or mental elements:

Section 95(1)

Section 91(1)

Section 117.01(1)

Possession of a firearm.

The handgun was restricted.

The shotgun was prohibited.

The handgun was loaded.

The shotgun had readily accessible ammunition.

The appellant did not have an authorization or licence to possess the firearms and registration certificates.

The appellant knew the firearms were loaded/had readily accessible ammunition.

The appellant knew the shotgun was prohibited.

Possession of a firearm.

The appellant did not have a licence to possess the firearm, or in the case of a prohibited or restricted firearm, a registration certificate.

Possession of a firearm.

The appellant was subject to a prohibition order.

The appellant knew that he was subject to a prohibition order.

[179] The Crown argues a conditional stay of any of the firearm convictions pursuant to Kienapple is unsupportable for several reasons:

- a) The only common element in the firearms offences under ss. 91(1), 95(1) and 117.01(1) is possession.
- b) The nature and knowledge of the possession for each, however, is substantively different.
- c) This Court has acknowledged that sentences for s. 117.01 offences are generally consecutive to s. 95 offences, which is inconsistent with the principle against multiple convictions (see: *R. v. Ball*, 2014 BCCA 120 at para. 24 and *R. v. Melnick*, 2019 BCCA 390 at para. 23).
- d) In jury trials, s. 117 breaches are generally not tried alongside substantive firearms offences, to avoid the jury being influenced by the knowledge of the existence of the firearm prohibition.
- e) The nature of a breach offence involves an action done in contravention of an order and the courts have consistently held that convictions for a substantive offence and the offence charging the same action in violation of an order does not violate the Kienapple principle, because the convictions are for different social harms.

[180] Related to the last reason, the Crown points to the recognition in *Prince* that a single act of an accused can involve two or more delicts against society "which bear little or no connection the one to the other" and the examples it identified such as driving while suspended and impaired driving: at 494-495.

[181] While I would not say a conviction for possession of a particular firearm without authorization bears little or no connection to possession of that same firearm while prohibited, I accept that the two offences in relation to the same firearm constitute two separate social harms. One involves possessing the particular firearm (without an authorization) and the other involves possessing it in breach of an order that prohibits the possession of any firearm. Although the element of without an authorization flows from the existence of the prohibition order, that does not change the fact that the offences involve different delicts -- the "substantive" offence and the breach offence.

[182] Looking then at the facts in the context of the offences and the offences in the context of the facts as required by the double test in *Andrew*, I am satisfied that with respect to the two convictions for each firearm, there are two wrongful acts involved and it is not the case that an additional or distinguishing element is covered by the four keys enumerated in *Prince*. As a result, I conclude the Kienapple principle is not engaged and the trial judge did not err by failing to conditionally stay any of the appellant's firearm convictions.

Issue 6 - Inconsistent Verdicts

- [183] The appellant asserts the trafficking convictions for cocaine and GHB are inconsistent with the convictions for simple possession of methamphetamine and MDMA. Suggesting the judge relied solely on the differences in the amount of the drugs in reaching her decision, he argues she erred because personal possession of cocaine and GHB was a reasonable inference available on the whole of the evidence and the expert evidence in particular. In other words, Constable Illoi's evidence when considered in the context of the evidence as a whole, supported the inference that all of the drugs were possessed for personal use.
- [184] Regarding GHB, the appellant noted that Constable Illoi testified that it can be prescribed for narcolepsy; it is also believed to increase testosterone and has been used by body builders for muscle building and reducing fat. The appellant argued it is therefore plausible he was using GHB for personal health reasons even though there is no evidence he had narcolepsy or was involved in body building, and again defence counsel made no closing submissions so the trial judge was never asked to consider them as alternative inferences.
- [185] The Crown submits the judge was entitled to place primary emphasis on the amount of the drugs as a distinguishing factor, emphasizing that her conclusions on the cocaine and GHB also relied on the other circumstantial evidence including the large amounts of cash, the digital scale, the money counter, the firearms and the presence of the other different drugs.
- [186] According to the Crown, the trial judge reasoned the amounts of methamphetamine and MDMA were too small to close the inferential gap between possession for personal use and "distribution", even in the presence of the indicia of trafficking. This was not an error, says the Crown. Instead, the judge's reasoning reflected a proper consideration of the circumstantial evidence count by count.
- [187] A conviction may be interfered with on the ground it is inconsistent with another verdict arising from the same circumstances only if the conviction is unreasonable: *R. v. R.V.*, 2021 SCC 10 at para. 28; *R. v. Jansen*, 2023 BCCA 387 at paras. 19-22. A conviction is unreasonable where the verdicts "cannot be reconciled on any rationale or logical basis and no properly instructed jury, acting reasonably, could have rendered [them] based on the evidence": *R.V.* at para. 29.

- [188] As the Court observed in *R. v. Pittiman*, 2006 SCC 9, the test for establishing an inconsistent verdict "is a difficult one to meet because the jury, as the sole judge of the facts, has a very wide latitude in its assessment of the evidence": at para. 7.
- [189] When the impugned verdict rests wholly or substantially on circumstantial evidence, the question is whether the judge could reasonably be satisfied that the guilt of the accused was the only reasonable inference available on the totality of the evidence: *Villaroman* at para. 55.
- [190] *Villaroman* remains the leading authority on the proper approach to circumstantial evidence and proof beyond a reasonable doubt. Where one or more elements of the offence depend exclusively or largely on circumstantial evidence, the trier of fact must be satisfied beyond a reasonable doubt that the accused's guilt is the only reasonable inference to be drawn from the circumstantial evidence, assessed cumulatively and in the context of the evidence as a whole. If there are reasonable inferences other than guilt, the Crown has not met their burden of proof: *Villaroman* at para. 35.
- [191] When assessing circumstantial evidence, the trier of fact must consider other plausible theories and other reasonable possibilities inconsistent with guilt. Reasonable alternative inferences need not be based on proven facts. Instead, they may be based on the evidence or a lack of evidence. While the Crown must negate reasonable inferences inconsistent with guilt, they are not required to negate every possible conjecture no matter how "fanciful or irrational", which might be consistent with the innocence of the accused. It is "still fundamentally for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a reasonable doubt: *Villaroman* at para. 56. *Villaroman* also emphasized that "a verdict is not unreasonable simply because the alternatives do not raise a doubt in the jury's mind": at para. 56.
- [192] For the trial judge then, the core question was whether the circumstantial evidence assessed cumulatively and viewed logically and in light of human experience, was reasonably capable of supporting an inference other than guilt: *Villaroman* at para. 38.
- [193] As I have indicated, she identified the only issue regarding the four drug offence counts as whether they were possessed for the purpose of trafficking or for personal use.
- [194] The same circumstantial evidence applied to all four counts: the different types of drugs and their packaging, the scale, the money counter, the large amounts of cash, the firearms including a loaded firearm, and the surveillance camera.
- [195] The trial judge found that this evidence, given the absence of evidence regarding the "usual indicia" of trafficking, but most significantly the small amounts of MDMA and methamphetamine, did not convince her beyond a reasonable doubt that the appellant possessed either of them for the purpose of trafficking. She also highlighted that based on the evidence, she would have no difficulty finding the appellant guilty of PPT, if the standard of proof was on a balance of probabilities.

- [196] The trial judge then found when paired with the much larger amounts of seized GHB and cocaine and the very large amounts of GHB, the same circumstantial evidence was sufficient to find the appellant guilty of the PPT offences in respect of those substances.
- [197] Drawing a distinction based primarily on the differing amounts of the drugs is not an unreasonable conclusion. In Pittiman, the Court recognized that different verdicts may be reconcilable where "[t]he strength of the evidence relating to each count may not be the same, leaving the jury with a reasonable doubt on one count but not on the other": at para. 8. In this case, the evidence of PPT was stronger in respect of the cocaine and GHB because those drugs were possessed in larger quantities consistent with commercial, rather than personal, use. In the context of the circumstantial evidence as a whole, it was certainly not illogical or irrational for the trial judge to conclude that the only reasonable inference with respect to the GHB and cocaine was that they were possessed for the purpose of trafficking.
- [198] I do note the trial judge made no reference to the absence of evidence in her analysis of the appellant's possession of GHB and cocaine. Although the point was not argued, to the extent the trial judge erred, in my view, it was in considering the "usual indicia" of trafficking set out in Newell, to reach her conclusion the evidence supported only a suspicion and not a reasonable inference of trafficking with respect to MDMA and cocaine. Although the trial judge was permitted to draw inferences from the absence of evidence and it was for the Crown to negate reasonable inferences inconsistent with PPT, the judge's finding in Newell regarding the usual indicia of trafficking was simply that, not a proposition or principle. Additionally, as I have indicated, some of the Newell factors, such as previous acts of trafficking as well as association with drug traffickers, are troubling from an admissibility standpoint. Relying on the Newell factors is also complicated by the expert opinion evidence that was admitted to address the question of whether the drugs were possessed for the purpose of trafficking, which means the trial judge found expert opinion evidence was necessary to assist her in drawing inferences from the circumstantial evidence on this question. While free to accept some, none or all of the expert opinion evidence, Constable Illoi was never asked about the Newell factors as indicia of trafficking and common sense dictates that the "usual indicia" of trafficking are not universal. They may vary, for example, with the sophistication and size of the trafficking operation involved.
- [199] As a result, I see the trial judge's conclusion that the appellant possessed cocaine and GHB for the purpose of trafficking as strengthened rather than undermined by not considering the absence of evidence based on the Newell factors. There is nothing illogical or irrational about convicting the appellant of possessing those two drugs for trafficking and the other two for his own personal use. Simply put it is not unreasonable to find an accused guilty of using and trafficking in different drugs at the same time.

[200] In my view, the appellant has failed to show the trial judge could not reasonably have been satisfied that his guilt as to PPT in cocaine and GHB was the only reasonable inference available on the totality of the evidence.

[201] Accordingly, the appellant's claim that the verdicts on the PPT drug counts are inconsistent with those regarding simple possession fails.

Disposition

[202] I would dismiss the appeal.

"The Honourable Justice Fleming"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Abrioux"

[1] Paragraphs 4-6 of the admissions made by the appellant pursuant to s. 655 of the Criminal Code (the "Admissions").

[2] The appellant was also acquitted by consent of Count 7 in Indictment 87651-2-C in relation to the Keltec shotgun due to lack of evidence.

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