

CANADA / JUDGMENT

R. v. Dubensky

2023 BCSC 485

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 485 R. v. Dubensky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dubensky,

2023 BCSC 485

Date: 20230203

Docket: 87669-2; 87669-3

Registry: Nanaimo

Rex

v.

Michael John Dubensky

Before: The Honourable Madam Justice Young

Oral Ruling on Voir Dire #1 ss. 9 and 10(b) Charter Rights

Counsel for the Crown:

J. Rutherford

Counsel for the Accused:

J.D.A. Watt

Place and Date of Trial/Hearing:

Nanaimo, B.C.

January 30 - February 3, 2023

Place and Date of Judgment:

Nanaimo, B.C.

February 3, 2023

- [1] THE COURT: The accused, Michael Dubensky, is charged with trafficking in Carfentanil and Fentanyl, contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (the "CDSA") and with possession of Carfentanil and Fentanyl for the purpose of trafficking, contrary to s. 5(2). On his application, Mr. Dubensky alleges breaches of his rights under ss. 9 and 10(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter").
- [2] First, Mr. Dubensky alleges that he was arbitrarily detained in breach of his s. 9 Charter rights. He says the police lacked reasonable and probable grounds to arrest him. Mr. Dubensky submits that in determining whether the police had proper grounds to arrest him, this court should excise information that, since his arrest, has been found to have been obtained by an invalid arrest.
- [3] Mr. Dubensky says that, as a consequence of his unlawful arrest, the police search incidental to his arrest was also unlawful and in breach of his s. 8 Charter rights.
- [4] Second, Mr. Dubensky alleges that he was denied access to counsel immediately upon his arrest in breach of his s. 10(b) Charter rights.
- [5] The Crown submits that both the arrest and the incidental search of Mr. Dubensky were lawful and did not infringe either his s. 8 or s. 9 rights under the Charter. The Crown submits the delay in providing Mr. Dubensky access to counsel was brief and was reasonable in the circumstances.

Background Facts

- [6] In June 2020, in the City of Nanaimo, the City of Nanaimo had experienced several Fentanyl and Carfentanil deaths. Constable Fowler, who is a member of the Nanaimo Projects Team, was reviewing the circumstances surrounding one of those deaths. He reviewed two photographs of a cellphone screen from a deceased individual's phone which showed the last entry was from a telephone number later linked to Michael Dubensky.
- [7] This information is what drew the attention of the police to Mr. Dubensky. The Projects Unit started a surveillance of Michael Dubensky utilizing a team of five officers. They observed Mr. Dubensky during four brief meets with other individuals over the course of two days. Constable Fowler formed the decision to arrest him after the fourth meet.
- [8] Mr. Dubensky was arrested at 2124 hours on June 26, 2020. Constable Fowler read him the Charter warning at the scene. He was advised of his right to call a lawyer and offered a choice of using the officer's telephone at the scene or waiting until he reached the detachment where he could have a private call with his lawyer. Mr. Dubensky chose to wait

to place a private call. The call was placed at 2204 on June 26, 2020. Constable Ilioi searched Mr. Dubensky incident to arrest and found a plastic container with rolled cash, a cellphone, and a set of keys in his pocket.

Issue 1: Were there reasonable and probable grounds for the arrest of Mr. Dubensky?

The governing legal principles

[9] I begin with the consideration of the legal principle that governs a warrantless arrest, s. 495 of the Criminal Code, R.S.C. 1985, c. C-46 (the "Code"), which entitles police to make arrests without a warrant. Specifically, s. 495(1)(a) of the Code provides, among other things, that:

A peace officer may arrest without warrant

- (a) a person who ... on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- [10] The allegation of trafficking and possession of a controlled substance for the purpose of trafficking under ss. 5(1) and (2) of the CDSA is an indictable offence, and a peace officer as defined under s. 2 of the Criminal Code includes an RCMP officer. The question for the court is whether the arresting officer had reasonable grounds for believing that Mr. Dubensky had or was "about to commit an indictable offence".
- [11] The leading case on the principles relevant to warrantless arrest remains *R. v. Storrey*, [1990] 1 SCR 241. *Storrey* establishes a two-part test for grounds to justify a warrantless arrest under s. 495 of the Code. Writing for the court, Justice Cory stated at paras. 250 and 251 that:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[12] In *R. v. Beaver*, 2022 SCC 54, the Supreme Court of Canada clearly articulated the essential legal principles governing warrantless arrest at para. 72:

The essential legal principles governing a warrantless arrest are settled:

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 CanLII 125 (SCC), [1990] 1 S.C.R. 241, at pp. 250-51; *R. v. Latimer*, 1997 CanLII 405 (SCC), [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 "hunc[h] 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), 1997 CanLII 6316 (ON CA), 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 CanLII 13 (SCC), [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, 1975 CanLII 13 (SCC), [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).
- [13] The accused cites paras. 14 and 15 of Storrey to emphasize the importance of the requirement for police to demonstrate that they have reasonable and probable grounds in the case of an arrest made without a warrant. The power to arrest without a warrant may be easily abused and become a danger to the community instead of a protection.
- [14] The accused relies on R. v. Pope, [2015] B.C.J. No. 2789, paras. 57 to 60, where the court emphasized that the assessment of whether or not objective grounds exist should be undertaken by looking at the observations of the officer through the lens of someone who has the same experience, training, knowledge and skill. That does not mean a police officer who holds a jaundiced and overly negative view of the panoply of behaviours that humans engage in. The court should be cautious about accepting the observations of an officer whose actions were made through jaded lenses or viewing otherwise benign activity as precipitously criminal.
- [15] In R. v. Oyston, [2019] B.C.J. No. 295, at para. 105, the court cautioned that one should focus on what the officer did, on what he knew at the time, and not what could have been done. Also, at para. 120, the court says that a further innocent alternative may not necessarily preclude the existence of reasonable grounds, however they undermine the grounds for arrest when the inference the officer drew is not reasonable. Police officers do not have to rule out other explanations if there is an objective basis for what they did.

- [16] The accused provided the court with a number of specific cases, including *R. v. Sandoval-Calderon*, 2019 BCPC 425; *R. v. Peacock*, 2008 BCPC 214; *R. v. N.O.*, 2009 ABCA 75; and *R. v. Brown*, 2012 ONCA 225. I have reviewed those decisions. It is useful to see specific examples of how other courts have assessed the evidence before them in determining whether grounds are objectively reasonable.
- [17] The Crown submits that the cases the accused had relied on had a common theme of creating an exhaustive wish list of things that could have been observed to support grounds but were not, and weighing of what was actually observed against the absence of the rest. The Crown further submits that the defence cases take apart the individual grounds on a piecemeal basis, subjecting each portion to a test of reasonableness rather than looking at the whole.
- [18] The Crown relies on the B.C. Court of Appeal decision in *R. v. Glendinning*, 2019 BCCA 365, in which Justice Newbury explained the standard for the reasonable grounds as follows. At para. 3 she states:

In my opinion, it is also well-established that "reasonable grounds" imports a test or standard that is lower than the standard of civil proof, or proof "on the balance of probabilities."

[emphasis in original]

- [19] At para. 24, Justice Newbury also notes that it is not necessary for the police to rule out innocent inferences, and this a quote:

... while innocent explanations might have been available for the two transactions, none was satisfactory from a common sense perspective. In any event, it was not necessary for the officers to rule out such possible explanations. As stated by Schultes J. in *R. v. Gill* 2015 BCSC 310, "the proper focus is on the objective reasonableness of what this officer did, based on what he knew at the time, not on what other steps he could have taken to acquire additional grounds."

- [20] The Crown has relied on a number of appellate cases where arrests were found to be in compliance with s. 9 of the Charter. They included *Glendinning*; *R. v. Tran*, 2007 BCCA 491; *R. v. Luong*, 2010 BCCA 158; and *R. v. Ha*, 2018 ABCA 233.
- [21] Having reviewed the accused's and the Crown's authorities, it appears to me that dissecting the evidence event by event is not the correct approach. Also, I am not required to list a string of other possible explanations for behaviour. I can see whether one event taken in isolation may or may not establish reasonable and probable grounds, but a collection of events may. I will consider the totality of the evidence, keeping the principles articulated in *Beaver* in mind. The results of many of the cases cited by counsel are very fact specific, but it is on the facts in this voir dire that I must focus my analysis.

The Evidence Concerning Reasonable and Probable Grounds

- [22] Constable Tanner Fowler was the officer responsible for making the decision to arrest Mr. Dubensky and it is on his evidence where I will focus. Constable Fowler had been an RCMP officer for six years at the time of the Dubensky investigation. He had five years of general duty experience before he joined the RCMP Projects Unit which specialized in the investigation of offences related to the Controlled Drugs and Substances Act as they related to street-level, mid-level, and multi-kilogram drug trafficking. He had also taken a five-day course in operational surveillance and a course in drug investigative techniques, among other RCMP training he had while on the job.
- [23] At the time of Mr. Dubensky's arrest, Constable Fowler had been involved in six to eight drug surveillance investigations with the Projects Unit. Prior to that he had been involved in approximately eight other drug trafficking arrests and many more possession arrests.
- [24] Accordingly, I would characterize Constable Fowler as an officer with some experience in drug trafficking and surveillance. He worked on a team with some officers who had a great deal more experience than he did.
- [25] The surveillance of Mr. Dubensky started with the two photographs of the cellphone screen of a deceased person. In direct evidence, Constable Fowler said he had died of a Carfentanil overdose, but he changed his evidence in cross-examination and agreed that the person died with Carfentanil in his body. Constable Fowler agreed that he could not say for sure what the cause of death was. I do not think much turns on this. He did, based on his reading of the toxicology report, make an assumption, but he was willing to admit on cross-examination that it might not have been accurate.
- [26] Constable Devoe inspected the deceased's phone but could not extract the data from it. Instead, she took two photographs from the screen. The top of p. 1 of voir dire Exhibit Number 2 starts with the heading "This month", and on the very first entry after that heading is a phone number and the date June 13, followed by a text that says "HWY we are at the pawn shop." Constable Fowler searched the police database PRIME for that phone number. It came up as a number for Michael Dubensky. As a result of the fact that this appeared to be the last text sent before the individual's death and the fact that it appeared to be an invitation for a meet, Constable Fowler decided to initiate surveillance of Mr. Dubensky to see if he was trafficking.
- [27] During cross-examination, Constable Fowler was challenged on the assumptions that he made that this was the last text. I found that a reasonable assumption, given it is the text at the top of the page, right under the heading "This month". Based on my knowledge of cellphones, texts usually are listed with the latest message at the top of the page. It does appear, because of the red word "failed", that the text was not delivered, but nothing arises out of that fact in my mind.

- [28] Constable Fowler could not say how recent the PRIME database entry was. He agreed that the address in the PRIME entry was wrong and that the telephone number could also be dated.
- [29] Based on finding a telephone number attached to Michael Dubensky on the telephone of the man who died with the Carfentanil in his system, Constable Fowler made the decision to commence a drug surveillance of Mr. Dubensky. Mr. Dubensky was not known to Constable Fowler. Prior to doing so, Constable Fowler examined the surveillance footage from a music store that is located in the same building as a pawn shop. He did not find any video footage of the now deceased person or Mr. Dubensky for June 13, 2020.
- [30] The surveillance commenced on June 23 on Doric Avenue in Nanaimo, and no observations were made on June 23 or June 24. Once the surveillance was moved to 31 Prideaux Street, which was the correct residence for Mr. Dubensky, observations were made of three events on June 25, and a fourth event on June 26, 2020. Mr. Dubensky was arrested after the fourth event, which occurred on June 26, 2020. The accumulation of observations from these four incidents led Constable Fowler to conclude that he had reasonable and probable grounds to arrest Mr. Dubensky for trafficking drugs. I will review the four events here.

The First Event

- [31] The first event was observed at 1836 hours on June 25, 2020. This event occurred near the Salvation Army New Hope Centre on Nicol Street in Nanaimo. This location was known for drug activity from Constable Fowler's experience in the Nanaimo area. Mr. Dubensky was observed on his phone in the area close to the TD Bank. He walked across the street toward the New Hope Centre. Another man was standing there. He and Mr. Dubensky walked around the corner of the building out of sight from the street. Less than a minute later Mr. Dubensky left and the other male was still standing in the parking lot. The male was not known to Constable Fowler.
- [32] Constable Fowler made part of his observation from a surveillance site on the parking lot nearby. He said that he had a clear view but he could not recall his exact location when testifying, or even what vehicle he was in when he made that observation.
- [33] In cross-examination, Constable Fowler agreed that the only thing he saw was the two individuals going around the corner of the building and that he did not see Mr. Dubensky leave. He did hear Constable Ilioi call out that Dubensky was walking away, and he did see the other man stay. He noted it was a transaction of short duration. Constable Ilioi made the observation that Mr. Dubensky was walking away in less than a minute. This was communicated to Constable Fowler. Constable Ilioi, an experienced officer, articulated the opinion that this event was consistent with a drug transaction. Constable Fowler was of the same opinion, based on it being a short-duration meet at a known drug-use location and because the two men went around the corner out of sight of the street.

- [34] Constable Ilioi's opinion carried weight for Constable Fowler because Constable Ilioi was a very experienced drug investigator and a court-qualified expert on drugs who had worked in the Nanaimo Projects Unit for two years before Constable Fowler started and had worked in the street crime unit and had done many more drug investigations. This was all in Constable Fowler's mind when he accepted Constable Ilioi's opinion. I find that reasonable. I have heard directly from Constable Ilioi about what his experience level was in 2020, and I find that Constable Fowler had good reason to rely on Constable Ilioi's opinion.
- [35] In cross-examination, Constable Fowler agreed that no one saw Mr. Dubensky touch the man or the man touch him. No one saw any transaction once the two men went around the corner of the building. No money or drugs were seen.
- [36] In cross-examination, the observations of Constable Fowler were challenged. He had poor recollection of where he was parked and whether he had driven there. He did not have a note of where his vantage point was. He was, however, clear about what he saw and what he was told.
- [37] There is some question as to whether Mr. Dubensky and the other man were engaged in a clandestine act when they went around the corner of the building because there was a parking lot around the corner. It appears in a photograph taken by Constable Ilioi that there was a truck parked in the lot and a man walking down the street. Constable Fowler was not cross-examined on this document, which was entered after he testified.
- [38] The accused submits that this shows that they were not hiding from view, the transaction took place in broad daylight in a parking lot where people were parking and walking, and he submits that one cannot jump to the assumption of secretiveness. I agree with that assessment. At best, I can conclude that they were moving away from the sight of the street in front of the New Hope Centre.
- [39] As a result of his own observations and his reliance on what Constable Ilioi told him, Constable Fowler formed his own opinion that this brief transaction or meeting was consistent with a drug deal. He did not believe it satisfied the requirements for arrest, and so no arrest was made. The surveillance continued.

The Second Event

- [40] About five minutes later, at 1841 hours on June 25, 2020, the second event occurred. Corporal Nguyen, who was Constable Fowler's supervisor, and who, in 2020, had over 26 years' experience with the RCMP, reported that he saw Mr. Dubensky get a ride to Selby Street in Nanaimo. Selby Street was known for drug activity. A male was seen exiting 405 Selby Street. Corporal Nguyen saw a hand-to-hand transaction consistent with a drug transaction. The entire event took less than a minute and Mr. Dubensky returned to his vehicle. Constable Fowler did not see the transaction, but he relied on the observation of a senior officer. Corporal Nguyen did not see money or drugs, but clearly stated to Constable Fowler that he did see the hand-to-hand transaction consistent with a drug transaction.

Based on those observations of the hand-to-hand transaction and the short duration of the meet, and the fact that it appeared to be a planned meeting in an area known for drug activity, Constable Fowler formed the opinion that this was a drug transaction.

- [41] I will not rely on any other details Corporal Nguyen gave in re-examination for what he saw because this detail was never conveyed to Constable Fowler and only Constable Fowler's knowledge is relevant in this analysis.
- [42] After this event, Mr. Dubensky returned to his residence at 31 Prideaux Street.
- [43] The accused said that there was not enough detail in Constable Fowler's evidence to objectively evaluate this event. More detail than that which was provided by Constable Fowler would have assisted the court. However, I find that it is reasonable for Constable Fowler to accept the opinion of a senior officer who had vast experience in drug trafficking. Constable Fowler did accept this opinion but still waited to build further grounds.

The Third Event

- [44] Thirty minutes later, on June 25, 2020, a third event occurred. Constable Ilioi observed Mr. Dubensky leaving 31 Prideaux Street and walking back to the alley behind the music store and pawn shop. He approached the passenger side of a vehicle in the alley. The interaction was not seen, but about two minutes after Mr. Dubensky approached the vehicle he returned to his residence, which is about a four-minute walk away.
- [45] In cross-examination, Constable Fowler recalled that after Mr. Dubensky approached the vehicle he heard (from the radio) that someone at the scene "looked hard" at the surveillance vehicle, and so no further observations were made.
- [46] Constable Ilioi gave the opinion that the event was consistent with a drug transaction because of the short duration of the meeting. He did not see the use of a cellular telephone or an exchange. He testified that he called out on the police radio that someone was "looking hard" at him, so he kept driving.
- [47] Constable Fowler took Constable Ilioi's opinion into account and he shared that opinion that this brief transaction in an alley near a pawn shop was consistent with a drug transaction.
- [48] Constable Fowler was cross-examined on what he meant by "meet" or "met up with". All that was seen was that Mr. Dubensky approached the vehicle and within two minutes left and returned home. No hands were seen exchanging anything. As far as Constable Fowler knew, Mr. Dubensky had not been seen speaking to the individuals in the vehicle or even touching the vehicle. Constable Fowler believed that this event was still consistent with a drug transaction because of the approach and the brief duration of the event. He also relied on the opinion of Constable Ilioi.

- [49] Constable Fowler decided that he wanted to strengthen his grounds before he arrested Mr. Dubensky. He alerted the team that if another event consistent with a drug transaction occurred the next day, they should be ready to arrest Mr. Dubensky.

The Fourth Event

- [50] On June 26, 2020, at 2115 hours, observations were made and reported by Constable Devoe. She had one year more experience with the Projects Unit than Constable Fowler had. She communicated to the team that Mr. Dubensky left 31 Prideaux Street on foot and walked directly to the same pawn shop where the third event had occurred. A male, later known as Mr. Mickey, was sitting on the bench in front of the pawn shop. Mr. Dubensky put his hand in the hoodie pocket of Mr. Mickey. Mr. Mickey handed something to Mr. Dubensky, which Mr. Dubensky put in his own right shorts pocket. Based on the description called out by Constable Devoe, Constable Fowler formed the opinion that this was a drug transaction and he made the decision after this fourth event that he had sufficient grounds to arrest Mr. Dubensky and Mr. Mickey.
- [51] In total, the factors that led to his making this decision to arrest Mr. Dubensky were:
- (1) The phone number matched Mr. Dubensky's phone number on the cellphone of the deceased person.
 - (2) Three short meets were observed on June 25 that Constable Fowler and two experienced officers, Ilioi and Nguyen, believed were drug transactions.
 - (3) Two of the short meets were in areas known for drug activity.
 - (4) The meets appeared to be prearranged.
 - (5) At one short meet on June 25 a hand-to-hand transaction was observed by a very experienced officer.
 - (6) The fourth short meet on June 26 where Constable Devoe saw Mr. Dubensky put something in the pocket of Mr. Mickey, and Mr. Mickey handed something to Mr. Dubensky.

Discussion

- [52] I found Constable Fowler to be a credible witness who presented the details of surveillance in a careful manner. A limitation in his evidence was that it did lack detail and his recollection was not strong. He did candidly acknowledge weakness in his evidence where he had no memory and where he had not made a note that he would refer to.
- [53] When forming his grounds for arrest, he did not attempt to embellish his evidence or overstate what he actually knew. Constable Fowler was careful in his analysis of his grounds and did not jump to arrest too soon until he was satisfied that he had sufficient grounds.

- [54] I take no issue with Constable Fowler relying on the observation of other members of his team who were trained in drug surveillance. He accepted the opinion of senior officers Nguyen and Ilioi and agreed with them. He formed his own opinion from the details provided by Constable Devoe of the fourth event.
- [55] Subjectively, Constable Fowler believed that Mr. Dubensky was trafficking drugs. The more difficult task is to evaluate the evidence to see if there is enough evidence to support the same finding objectively or whether Constable Fowler was jaded or biased in his assessment of the facts.
- [56] The accused has referred the court to the decision in *R. v. Barnes*, 2018 BCPC 99, where the court was critical of an officer's notetaking, and submits that this case is similar. The accused submits that Constable Fowler made up his mind that Mr. Dubensky was dealing drugs and nothing could move him off what he had concluded, his notetaking was poor and it lacked detail on which the court could rely to evaluate its grounds objectively.
- [57] I agree with the accused's comments about the sparse notetaking. I do not, however, find that Constable Fowler was jaded and biased in his assessment. He did not jump to arrest until he was satisfied that the pattern of observation or observed activity justified an arrest.
- [58] I place more weight on the observation of the two events where hand-to-hand transactions were observed. Four short meets observed in a two-day period that appeared to be prearranged objectively looks like drug activity.
- [59] I reiterate that Storrey, and more recently Beaver, made clear that the reasonable-and-probable-ground threshold does not require prima facie case for conviction before making an arrest, Beaver, at para. 72, point 6, and when evaluating the objective grounds to arrest, the court must apply common sense flexibility and practical everyday experience. That is from Beaver, para. 72, at point 5.
- [60] I do not agree with the accused's approach of evaluating each event separately and considering whether there should be another innocent explanation. I view the totality of the evidence. One suspicious meet might not establish objective grounds, but four in a relatively short period of time does. I find the above reviewed evidence provided an objective basis to reach the conclusion relevant to Mr. Dubensky. Upon reviewing the totality of the circumstances, I conclude that Constable Fowler's subjective grounds for arrest were objectively reasonable. In other words, I am satisfied that Constable Fowler had reasonable and probable grounds to believe that Mr. Dubensky was trafficking drugs.
- [61] The grounds Constable Fowler found went beyond a hunch or intuition, and objectively justified his reasonable belief that Mr. Dubensky was trafficking drugs. Thus, I am satisfied that Constable Fowler's grounds to arrest are justifiable and form an objective viewpoint basis on compelling and credible information.

[62] Having determined that the warrantless arrest of Mr. Dubensky was lawful, I conclude that Mr. Dubensky's detention was not arbitrary. I therefore dismiss Mr. Dubensky's allegation of breach on his rights under s. 9 of the Charter.

Issue 2: Was the search incidental to arrest, a breach of s. 8

[63] Given my findings that the arrest of Dubensky was lawful, it follows that the search incidental to his arrest was also lawful and did not infringe his rights under s. 8 of the Charter.

Issue 3: Did the police violate the s. 10(b) implemental right to counsel?

[64] I will now address the accused's application under s. 10(b) of the Charter.

The governing legal principles

[65] Section 10(b) of the Charter provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

[66] Section 10(b) imposes both informational and implementational duties on the police. First, it obliges the police to advise a detained person of the right to retain and instruct counsel without delay (the informational duty). If the detained person requests to exercise their right to counsel, the police must then provide the detainee with a reasonable opportunity to speak with counsel (the implementational duty). The police must refrain from eliciting incriminating evidence from the detainee until he or she has had a reasonable opportunity to speak with a lawyer or has unequivocally waived the right to do so. (*R. v. Bartle*, [1994] 3 S.C.R. 173, at paras. 191, 192).

[67] In *Bartle*, the Supreme Court of Canada discussed the general provisions of the right to counsel and why it is necessary for it to be facilitated without delay at para. 191:

... [W]hen an individual is detained by state authorities he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination ...

[68] The Court in *R. v. Suberu*, 2009 SCC 33, held that "without delay" means "immediately", and reasoned as follows at paras. 41 and 42:

[41] A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by

detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

- [42] The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.
- [69] Whether delay in implementing the right to counsel violates s. 10(b) is a factual inquiry. The burden rests on the Crown to show that the delay was reasonable in the circumstances, citing *R. v. Taylor*, 2014 SCC 50, at para. 24 and referring to *R. v. Luong*, 2000 ABCA 301, at para. 12.
- [70] To that end, in *R. v. Fan*, 2017 BCCA 99, our Court of Appeal examined the practical meaning of the term "immediacy" as used in *Suberu*. The court held, at paras. 53 to 55:

[53]... "immediate" is not necessarily synonymous with "instantaneous". Sometimes practical considerations play a role in what is immediate for purposes of s. 10(b), particularly with respect to the implementational duty.

Excerpted from para. 54:

A police officer's duty is to facilitate access to counsel upon a detainee's request at the first reasonably available opportunity.

Excerpted from para. 55:

Where a telephone is available and a detainee asks to speak with counsel, police must grant the request if it would be reasonable to do so. A lack of privacy for the call will not necessarily justify refusal of such a request ... On the contrary, failure to give a detainee the option of contacting counsel without privacy may amount to an infringement of s. 10(b), as occurred in *R. v. Bui*, 2005 BCCA 482. The touchstone is reasonableness, given all of the circumstances of the case.

- [71] In *Taylor*, Justice Abella, at paras. 27 and 28, agreed with the Crown that, in light of privacy and safety issues, the police are under no legal duty to provide their cellphone to a detained individual, but have a duty to provide phone access as soon as practicable to reduce the possibility of accidental self-incrimination. Section 10(b) does not create the right to use a specific phone but does guarantee that an individual has access to a phone to exercise their right to counsel at the first reasonable opportunity.

- [72] In Taylor, at para. 31, Justice Abella noted that there may well be circumstances when it will not be possible to facilitate private access to a lawyer in urgent or dangerous circumstances, but found that those attenuating circumstances need to be analyzed on the facts of each case. The court found there were no attenuating circumstances in Taylor just because they were in a hospital setting. Mr. Taylor's right to speak privately to counsel could have been accommodated.
- [73] The Crown relies on R. v. Waboose, 2019 BCSC 1929, where Justice Blok considered 10(b) challenges also involving the Nanaimo detachment where the accused's 10(b) implementational right to speak to counsel was delayed because there were several detained individuals being booked in. For reasons of officer and prisoner safety, the police avoided processing more than one individual at a time and prisoners were dealt with on a first-come-first-served basis. At para. 74, Justice Blok found the booking-in process to be the bottleneck in granting the accused's right to speak to counsel, but in the circumstances of that case he found it reasonable for practicality and safety reasons. The officers testified about the importance of having only one prisoner in the booking-in area at a time to avoid prisoner interaction. In that case, one of the prisoners was being uncooperative and there were a number of prisoners brought to the detachment all from the same arrest scene.
- [74] Justice Ker came to a different conclusion on different facts in R. v. Smith, 2011 BCSC 1695. In the unique facts of that case the accused had been arrested in the bush where there was no cellphone service in the immediate area. The police failed to check for service along the drive and elected to wait until they were at the detachment. The delay was exacerbated by a 15-to-18-minute delay between arriving at the police station and the booking-in process and the cursory pat-down search. Justice Ker considered the practical considerations of cellphone service and the fact that there was no evidence of safety concern. She found the delay in booking Mr. Smith into police custody before permitting the phone call constituted a further unnecessary delay in facilitating access to counsel without delay, and factored that into her analysis of the breach of Mr. Smith's 10(b) rights. With respect to the booking-in delay, Justice Ker found, at para. 196:

The only apparent reason for delaying access to counsel until after the booking-in process was completed arises from Corporal Keen's evidence that it was his usual process to conduct and complete the booking-in procedure first. Here, too, it appears the officers were more focused on process than actually turning their minds to the substantive content of their duty to facilitate access to counsel without delay.

- [75] I will review the evidence in this voir dire related to Mr. Dubensky's 10(b) rights.
- [76] Immediately upon being advised of Constable Devoe's observation of the fourth event, Constable Fowler gave direction to the team to arrest Mr. Dubensky. The arrest was made by the first officer on the scene, who was Constable McGrath. Constable McGrath parked his vehicle on Prideaux Street off Comox Road and saw Mr. Dubensky standing behind the bench and another individual now known as Mr. Mickey sitting on the bench in front of the

pawn shop. Constable McGrath had been involved in the surveillance throughout the day and was familiar with what Mr. Dubensky looked like and what he was wearing. He got out of his vehicle and said to Mr. Dubensky, "Stop, you're under arrest." He immediately brought Mr. Dubensky's hands behind his back where he could control him. His partner was dealing with Mr. Mickey.

- [77] Constable McGrath told Mr. Dubensky that he was under arrest for trafficking a controlled substance. He told him that he had the right to talk to a lawyer and that he did not have to speak to Constable McGrath, but anything he did say could be used against him. This warning was given from Constable McGrath's memory and not read from a card. Constable McGrath put handcuffs on Mr. Dubensky and did a quick pat-down of his pockets and waistband for weapons. He was executing this brief search for officer safety. Mr. Dubensky was cooperative and did not resist.
- [78] Within moments, Constable Fowler and Constable Ilioi arrived at the scene.
- [79] Constable Ilioi did a more extensive search of Mr. Dubensky's pockets looking for evidence or weapons. He located a phone, keys, and some cash, and removed them from Mr. Dubensky's pockets.
- [80] Constable Fowler repeated that Mr. Dubensky was being arrested for trafficking of a controlled substance, and asked him if he understood. Mr. Dubensky said he did. He told Mr. Dubensky that he had a right to call a lawyer and asked if he understood. Mr. Dubensky said he did and that he wanted to speak with a lawyer. Constable Fowler then offered Mr. Dubensky the use of his own cellphone on the scene, but explained that he would have to be present during the call because, "We don't give out our phones." He offered the alternative option of allowing Mr. Dubensky to call his lawyer in private at the detachment. Constable Fowler said that Mr. Dubensky wanted to wait until he arrived at the detachment. Constable Fowler then explained to Mr. Dubensky that he was a police officer and Mr. Dubensky did not have to speak with him. He read the Charter warnings from the card.
- [81] After checking his notes, Constable Fowler was able to confirm that he told Mr. Dubensky he was under arrest and read him his 10(b) right to speak to a lawyer at 2124 hours.
- [82] Constable Fowler said that he was unable to facilitate a private call at the scene of the arrest. His cellphone had the ability to dial out and he does not allow people to use his cellphone in private. He has to be aware that they are speaking only with their lawyer. Constable Fowler was asked why he could not put Mr. Dubensky in the police vehicle with his phone to speak to a lawyer and walk away, and he answered, no, he needed to monitor him so that he would know who he was talking to on the cellphone.
- [83] Once Mr. Dubensky had been cautioned, he was transported to the detachment. Constable Fowler did not have a marked police vehicle, so arrangements were made to call another constable who did have a marked vehicle.

- [84] Constable Sammoun was working general duty that day and received a request from the Projects Unit to do a transport. She noted that the marked police vehicle has emergency equipment and has a plexiglass divider between the backseat and the driver, which is not found in the unmarked vehicle. She arrived at the scene at Prideaux Street and Comox Road at 2127 hours. Mr. Dubensky was placed in the rear seat of her vehicle and she left the scene at 2134 hours.
- [85] Constable Sammoun arrived at the secure parking bay in the Nanaimo RCMP detachment at 2137 hours. She checked her notes for that time.
- [86] Constable Sammoun was advised that there was another individual being processed, and so she left Mr. Dubensky in the vehicle and they waited for approximately 21 to 22 minutes in the secured parking area.
- [87] Constable Sammoun explained that the system used in the Nanaimo detachment is to bring detained individuals into a secured area in the cellblock booking-in area where information is entered into a prisoner report by the guard. A search is conducted and usually handcuffs are removed. The individual is then moved to a cell or directly to a secure room to speak to legal counsel, depending on whether that room is available.
- [88] Constable Sammoun estimates that the area where the search is conducted in the booking-in area in the Nanaimo detachment is about six feet by six feet in area. It is protocol to process one detained individual at a time because there are a lot of unknowns during searches and removal of handcuffs. It is not uncommon to have an individual resist when handcuffs are removed.
- [89] Constable Sammoun did not recall whether she was told that Mr. Dubensky had already been searched. She recalls turning Mr. Dubensky over to Constable Fowler at 2128 hours in the cellblock booking-in area. Constable Sammoun did not speak to Mr. Dubensky at all during transport.
- [90] When asked why there was a delay in processing Mr. Dubensky at the detachment and getting him to the room to telephone his lawyer, Constable Fowler said when he arrived at the detachment Mr. Dubensky had not yet arrived but the other man, Mr. Mickey, was there, and so he processed Mr. Mickey. This took 15 minutes. A prisoner report was obtained for Mr. Mickey and he was searched again. He was then given access to the private room to call counsel at 2151 hours. When Mr. Mickey was finished, he was taken to a cell at 2158 hours. Constable Fowler then processed Mr. Dubensky at 2158 hours. Mr. Dubensky was brought to the booking-in area and was searched again.
- [91] In cross-examination, Constable Fowler was asked why Mr. Dubensky had to be searched again. Constable Ilioi and McGrath had already searched him at the scene of the arrest. Constable Fowler answered that every detained person is searched again once they reach the cellblock for officer safety. This was done before a prisoner gets access to counsel. During this process they have to remove all clothing down to one layer of clothing. Mr.

Dubensky's search took very little time because he was wearing shorts and a t-shirt and did not have to remove any clothing.

- [92] When asked if it was not possible to have someone else search and provide Mr. Dubensky with access to counsel, Constable Fowler said that Constable Sammoun was a female, so she could not search a male. Constable Fowler was unaware of whether there were any other officers there at the time. Part of the reason for delay in implementing Mr. Dubensky's implementational right was that Constable Fowler was dealing with both arrested individuals rather than delegating to another officer. He was very clear that it was not protocol to search two individuals at the same time for safety reasons.
- [93] Mr. Dubensky was taken to the telephone room at 2204 hours. Constable Fowler could not remember whether there were two telephone rooms in the Nanaimo detachment or one.
- [94] As I expressed to counsel during submissions, I have concern about placing administrative tasks in higher priority than an accused's right to speak to counsel. In *R. v. Hamdan*, 2017 BCSC 467, the accused was arrested for several terrorism-related offences, including counts for counselling murder. The accused repeatedly stated, after being informed of his 10(b) rights, that he wanted to speak to counsel right now. Instead, the accused was first driven to the detachment and underwent a booking-in process before the police contacted legal aid on his behalf approximately 37 minutes post arrest. The court held that the police did not fulfil their implementational duties under s. 10(b) of the Charter for reasons that are analogous to this case. First, the court rejected the Crown's argument that officers were entitled to not offer their phones for the accused's use at the arrest scene on the basis of privacy and safety. I have to assume that Justice Abella's comments in *Taylor*, which I referred to above, were not shared with the trial judge.
- [95] In *Hamdan*, the court noted that the arrest, as in this case, was carefully planned and the police could have brought a secured phone for the purpose of implementation at the scene. Furthermore, again like in this case, the police did not adequately turn their mind to the possibility of ensuring privacy at the arrest for a phone call.
- [96] The Crown submits that the delay in this case was reasonable because Constable Fowler was booking Mr. Mickey, so then Mr. Dubensky had to wait until he was finished. They rely on Justice Blok's decision in *Waboose*. I do not take issue with the practice of only booking in one prisoner at a time in the small six-by-six space for safety's sake.
- [97] In *Waboose* there were several prisoners all being booked in for the same criminal activity, and at least one person was being uncooperative. Clearly there were safety issues in that case that do not arise here.
- [98] Mr. Dubensky was being cooperative and quiet, he had been searched twice before being placed in the police car, he only had a thin layer of clothing on. There were several officers involved in this planned surveillance and arrest, even more involved in transporting two cooperative prisoners. One of the many officers involved in this arrest, including Constable

Sammoun, could have taken Mr. Dubensky to the secure phone room and allowed him to make his call prior to being booked in. It seems unreasonable to me to make Mr. Dubensky wait in the back of a police car for 21 to 22 minutes until Mr. Mickey was booked in before he had access to the phone room.

[99] The phone room is locked. I see no safety risk in placing him in the phone room and supervising him through the window.

[100] In my view, Constable Fowler's decision to book Mr. Dubensky before facilitating access to counsel was unjustified in the circumstances and contributed to a further 21-to-22-minute delay. He was following procedure in putting administrative protocol ahead of the constitutional right of Mr. Dubensky. It did not occur to him to prioritize Mr. Dubensky's access to counsel. In fact, he did not know where Mr. Dubensky was while he was booking in Mr. Mickey.

[101] In *Smith*, the comments of Justice Ker at paras. 198 and 199 are applicable to this case:

The need to record and mark Mr. Smith's entry into the system and properly document all his possessions as they were removed could have occurred after he had contact with counsel. As I understood the evidence, the interview room used for the purposes of contacting counsel was in the booking-in area. Mr. Smith was locked in that room when he contacted counsel, and Corporal Keen watched him through the plexiglass window. He certainly was not going to be able to go anywhere else in the detachment and was under a measure of control, both in observation and recorded timing. There is nothing in the evidence to support the notion that the administrative act of booking Mr. Smith into cells had to take priority to facilitating access to counsel, apart from convenience to the officers and following usual procedure.

At para. 199:

In the circumstances then, I am satisfied that the further delay in facilitating Mr. Smith's access to counsel, by electing to first conduct the booking-in procedure, is an extension of the initial delay and part of the violation of Mr. Smith's s. 10(b) Charter rights.

[102] The constitutional right to access counsel without delay cannot be displaced by assumptions of impracticality. Barriers to access must be proven, not assumed, and proactive steps are required to turn the right to counsel into access to counsel (*Taylor* at para. 33).

[103] It may be standard policy for police to process and book in an accused person immediately upon arrival at the police station before providing access to counsel. However, delay of the immediate duty to implement s. 10(b) cannot be justified by standard policy and, in the absence of safety concerns or other exigent circumstances, 10(b) must be prioritized over the booking-in process. I am citing *R. v. Dill*, 2018 BCSC 2232, at para. 46, citing *Smith* as above, and *R. v. Hayes*, 2014 BCPC 109, at para. 29. Any safety concerns or other exigency justifying the delay must be legitimate and proven on the facts (*R. v. Suberu*, 2007 ONCA 60 at para. 47, *aff'd* 2009 SCC 33).

[104] In conclusion, I find Mr. Dubensky's s. 10(b) rights were breached. The remedy for breach of s. 10(b) of the Charter can be determined after hearing submissions from counsel on that issue.

"B. M. Young, J."

The Honourable Madam Justice Young

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