

CANADA / JUDGMENT

R. v. Dubensky

2023 BCSC 486

COURT

Supreme Court of British Columbia

DECIDED

8 February 2023

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2023 BCSC 486 R. v. Dubensky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dubensky,

2023 BCSC 486

Date: 20230208

Docket: 87669-2

Registry: Nanaimo

Rex

v.

Michael John Dubensky

Corrected Judgment: The text of the judgment was
corrected at paras. 13 and 16 on September 26, 2025.

Before: The Honourable Madam Justice Young

Oral Ruling s. 24(2) of the Charter

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

February 6 - 8, 2023

Place and Date of Judgment:

Nanaimo, B.C.

February 8, 2023

- [1] THE COURT: In an earlier ruling I found that Mr. Dubensky's s. 9 Charter rights had not been breached. In the same ruling I found that, given my finding that the arrest of Mr. Dubensky was lawful, the search incidental to his arrest was also lawful and did not infringe his rights under s. 8 of the Charter.
- [2] Later in the same ruling I found that Constable Fowler's decision to book in Mr. Dubensky before facilitating access to counsel was unjustified in the circumstances and contributed to a further 21-to-22-minute delay in implementing Mr. Dubensky's right to speak to counsel. Accordingly, I found Mr. Dubensky's s. 10(b) implementational rights were breached.
- [3] Counsel for Mr. Dubensky has made submissions on excluding evidence found during the search incidental to arrest of Mr. Dubensky on June 26, 2020. He applies for an order excluding evidence pursuant to s. 24(2) of the Charter. Section 24(2) requires me to determine whether the evidence was obtained in a manner that infringed Mr. Dubensky's Charter rights and whether, having regard to all of the circumstances, the admission of the evidence would bring the administration of justice into disrepute.
- [4] The accused relies on *R. v. Choi*, 2021 BCCA 410, para. 61, for the B.C. Court of Appeal's interpretation of the wording "obtained in a manner" in s. 24(2):

At the threshold stage, in determining whether evidence was obtained in a Charter-infringing manner courts assess the nature of the connection between the violation and the evidence obtained employing a purposive and generous approach. Evidence will be found to be tainted if the breach and the discovery of the evidence are part of the same transaction or course of conduct. A causal relationship between the breach and the discovery is unnecessary; the required connection may be temporal, contextual, causal, or a combination of the three. However, a connection that is too tenuous or too remote is insufficient. A finding on the strength of the connection between impugned evidence and a Charter breach is a finding of fact: *R. v. Mack*, 2014 SCC 58 at paras. 38-39; *R. v. Pino*, 2016 ONCA 389 at para. 72.

- [5] The accused also relies on *R. v. Dill*, 2018 BCSC 2232 (Dill) for Justice Iyer's finding that there was a temporal and contextual connection between a Charter breach and evidence obtained.

- [6] In Dill, the court had found a breach of Mr. Dill's informational and implementational 10(b) rights. Similar to this case at bar, the court had found that Mr. Dill's detention was lawful and the search conducted incident to his eventual arrest was lawful. Nineteen minutes had elapsed between arrival at the detachment and Mr. Dill being given access to a phone call.
- [7] The court held that, although there was no causal connection between the breach and obtaining the evidence, the marihuana was discovered before the Charter breach had occurred and the search that resulted in discovery of other drugs would have occurred even if Mr. Dill had been informed immediately of his right to counsel. The court was satisfied that the contextual and temporal connection between the evidence and the breach were sufficiently close and that the "obtained in a manner" requirement had been met.
- [8] I note in that case the search was conducted before Mr. Dill was advised of his rights. Justice Iyer went through the s. 24(2) analysis and did not exclude the evidence.
- [9] The accused distinguishes the outcome in Dill by saying in Dill the evidence of drugs was essential to the Crown case, whereas in the case at bar the evidence of the cash found in Mr. Dubensky's pocket is not essential to the Crown's case. The Crown disagrees with that statement, which I will discuss below.
- [10] I also think there was more of a connection between the Charter breaches in Dill than in the case at bar because the searches were conducted before Mr. Dill was informed of his rights. In the case at bar, Mr. Dubensky had been warned twice, formally from a written card at 2124 hours before he was searched by Constable Ilioi at 2130 hours.
- [11] In this case, Mr. Dubensky was arrested and advised of his rights, then searched incidental to a lawful arrest, and the police found a cellphone, a key, and \$325 in cash in his pocket. Mr. Dubensky indicated he did wish to speak to counsel. There was then a 40-minute delay in providing his access to counsel, and I found that a 21-or-22-minute delay was unreasonable and a breach of his 10(b) rights.
- [12] Mr. Dubensky was not questioned during the delay. He did volunteer information about the keys to Constable Ilioi, and I agree with the Crown that this statement is not admissible.
- [13] The Crown referred to Kavanagh, 2017 ONSC 637, at para. 50, for its interpretation of the words "obtained in a manner" in s. 24(2) of the Charter. The trial judge found Mr. Kavanagh's 10(b) rights had been breached as he was not provided private access to counsel.
- [14] The Crown submits that the requirement in s. 24(2) that evidence sought to be excluded must be obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter has been softened by the Ontario Court of Appeal decision in Pino, where Mr. Justice Laskin, speaking for the court, held that the requirement should be approached in a generous manner, consistent with the purposes of s. 24(2). Justice Laskin held that:
- a) the court should consider the entire "chain of events" between the accused and the police;

- b) the requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct; [and]
 - c) the connection between the evidence and the breach may be causal, temporal or contextual, or any combination of these three connections;
- [15] Pino held that s. 24(2) can be used for the exclusion of evidence that was obtained prior to the breach and is not causally connected to the breach so long as the evidence and the breach are connected in a temporal, contextual, or causal way (Kavanagh at para. 27).
- [16] In Kavanagh, the Ontario Superior Court of Justice found that the arrest transaction was completed by a constable who formed the requisite grounds and gave a proper demand, and took Mr. Kavanagh into custody for the purpose of a breath test. No Charter breach occurred during this transaction. The second transaction involved the exercise of Mr. Kavanagh's right to counsel, and no breach occurred. The third transaction involved analysis of the breath sample done by a qualified technician. No breach occurred. Kavanagh was formally charged and served with various documents, and no Charter breach occurred.
- [17] The final transaction was the decision to keep Mr. Kavanagh in custody until he was sober. He was detained in the detachment between 1:30 a.m. and 9:05 a.m., when it can be said it was no longer in the public interest to detain him. The court held that there was simply no connection causally, temporally, or contextually between obtaining the breath sample results and the decision to keep Mr. Kavanagh in custody for his own protection.
- [18] The Crown encourages a similar analysis in the case at bar. In this case, the police conducted a lawful surveillance, they properly arrested Mr. Dubensky, and no Charter breach was found. Mr. Dubensky's 10(b) rights were read to him immediately and he answered that he wanted to speak to counsel. He was searched incidental to arrest. He was taken in a secured vehicle by another constable. By this time the evidence had already been collected. No further evidence was collected from him. Constable Sammoun waited in the parking area of the detachment. She was merely transporting Mr. Dubensky. Constable Fowler and Constable Sammoun did not turn their mind to facilitating Mr. Dubensky's right to counsel prior to the booking-in process.
- [19] The Crown submits that the collection of evidence incidental to arrest was a separate transaction from the 10(b) breach, with one exception which I referred to above, and there is no dispute. When Constable Ilioi was searching the pockets of Mr. Dubensky incidental to arrest, Mr. Dubensky volunteered information about his keys. That statement made by Mr. Dubensky prior to exercising his right to counsel will be excluded.
- [20] I found the evidence located in Mr. Dubensky's pocket was properly seized incidental to arrest, where no Charter breach occurred. I find it is a separate transaction to that which led to the 10(b) breach. It is temporally separated only by 40 minutes. However, there is no real connection between the search and the delay in implementing Mr. Dubensky's right to counsel. On that analysis, I would not exclude the evidence.

- [21] Alternatively, when I conclude a s. 24(2) analysis, I come to the same conclusion. I find the breach of Mr. Dubensky's s. 10(b) rights were not egregious. The delay was approximately 22 minutes where he was sitting in a police vehicle. He was not exposed to the public and there was no evidence that he was uncomfortable. No one was trying to get evidence from him, and the breach had minimal impact on him other than a delay in speaking to counsel.
- [22] First, I find the Charter infringement conduct is at the lower end of seriousness. Second, the impact of the breach on Charter-protected rights of the accused were minimal. Third, the evidence the accused seeks to exclude is cash. This is reliable evidence. The Crown submits, and I agree, that it is essential to the Crown's case that they establish there was exchange of cash for drugs on June 26, 2020. This factor supports admission of the evidence.
- [23] The long-term reputation of the justice system and society's confidence is best served by admitting the evidence. The evidence is reliable and central to the Crown's case. The evidence would have been obtained even if Mr. Dubensky had been accorded his s. 10(b) rights in the timely manner. The police were entitled to search his pockets incidental to that arrest.
- [24] I dismiss the application for exclusion of evidence pursuant to s. 24(2), firstly because I do not find a temporal, contextual, or causal connection between the breach and obtaining the evidence. And alternatively, even if there were a connection, on a s. 24(2) analysis I would not exclude the evidence.
- [25] The remaining issue to be determined is what to do with the evidence referring to the seized cash in the ITO. The Crown refers the court to the auto excision rule, which refers to removal of improperly-obtained information from an ITO. Typically, the doctrine arises where the information has been obtained in breach of the Charter. The rule has its roots in Garofoli. It calls for the excision of unconstitutionally-obtained information from the ITO. I do not find that the evidence obtained incidental to arrest of Mr. Dubensky was unconstitutionally obtained. The evidence need not be excluded from the ITO.

"B. M. Young, J."

The Honourable Madam Justice Young

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