

CANADA / JUDGMENT

R. v. Gallant

2023 BCSC 1786

COURT

Supreme Court of British Columbia

DECIDED

18 September 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1786 R. v. Gallant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gallant,

2023 BCSC 1786

Date: 20230918

Docket: 87721

Registry: Nanaimo

Rex

v.

Michael William Gallant

Corrected Judgment: The text of the judgment was corrected at paragraph 24 on October 20, 2023.

Before: The Honourable Mr. Justice Baird

Oral Ruling on voir dres #1 & #2

Counsel for the Crown:

J. Rutherford

Counsel for the Defence:

K. Waugh

M. Winkel

Place and Date of Hearing:

Nanaimo, B.C.

August 22-25, 2023

Place and Date of Judgment:

Nanaimo, B.C.

September 18, 2023

- [1] THE COURT: The viability of this prosecution against Michael William Gallant on four charges of possession of Schedule I narcotics -- carfentanil, fentanyl, methamphetamine and cocaine -- turns upon the lawfulness of his arrest without warrant in the early morning hours of December 10, 2022. Section 495 of the Criminal Code permits a peace officer to undertake such an arrest where he believes on reasonable grounds that the subject has committed or is about to commit an indictable offence.
- [2] On voir dire proceedings declared to address Mr. Gallant's application to exclude evidence under s. 24(2) of the Charter, he seeks orders to the effect that:
- 1) his arrest was based on inadequate grounds and therefore constituted a violation of his right guaranteed by s. 9 of the Charter not to be arbitrarily detained or imprisoned;
 - 2) the search incidental to his arrest of the vehicle he was operating at the time constituted a violation of his right guaranteed by s. 8 of the Charter to be secure against unreasonable search or seizure;
 - 3) his s. 8 Charter right was violated a second time when he was strip searched without cause after he was transported to the Nanaimo RCMP detachment;
 - 4) his right guaranteed by s. 10 of the Charter to retain and instruct counsel without delay was denied without justification by officers failing to grant him access to counsel for over an hour after he had asked for it; and
 - 5) his s. 8 Charter right was infringed by police failures to comply with the notice and reporting procedures concerning detention of things seized required by ss. 487.1 and 490 of the Criminal Code.

EVIDENCE

- [3] Constable Reilly-Perry was the Crown's principal witness on these voir dire issues. On December 10, 2020, he had been a police officer for a mere 10 months. He conceded that he was inexperienced and unsure of himself at the time. He was patrolling in a squad car by himself in central Nanaimo. He spotted a vehicle moving in the parking lot of Brooks Landing Mall off the Island Highway. He ran the plate and learned that the registered owner of the vehicle, a Pontiac minivan, was a person called Stephanie Jack, who was listed on the system as a prohibited driver.

- [4] The minivan entered onto the Island Highway and headed north. By now it was around 1:30 a.m. Constable Reilly-Perry decided to pull this vehicle over to check the driver for licence and insurance. It was dark out but there was reasonably good ambient street lighting. When he arrived at the minivan's driver's side window, Constable Reilly-Perry saw immediately that it was Mr. Gallant behind the wheel, not Stephanie Jack. He told me that he recognised Mr. Gallant from a previous vehicle stop. He also knew that Mr. Gallant had recently been arrested for possession of narcotics for the purpose of trafficking and that his house had been searched with a warrant as a result.
- [5] Constable Reilly-Perry asked Mr. Gallant to produce his driver's licence, which he did without any objection. I find, in fact, that Mr. Gallant was cooperative and docile throughout his dealings with the police on the evening in question. In the midst of this, Constable Reilly-Perry told me that he shone his flashlight into the rear of the minivan, which he said was crammed with all kinds of duffel bags, totes and personal property. He saw a blue reusable shopping bag containing, amongst other things, a wodge of paper towel with a glass pipe sticking out of it. He said that he could see "white chunks" in this pipe. He said that he thought these "chunks" were some kind of narcotic, and that the pipe was "ready to smoke".
- [6] It was on this basis that Constable Reilly-Perry arrested Mr. Gallant without warrant for possession of a narcotic. As Mr. Justice Jamal noted in *R. v. Beaver*, 2022 SCC 54 at para. 72, the essential legal principles governing a warrantless arrest are settled. They include the following (citations omitted):
- 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.
 - 2) In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence. Subjective grounds for arrest are often established through the police officer's testimony. This requires the trial judge to evaluate the officer's credibility.
 - 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.
 - 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". Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the officer", deference is not necessarily owed to their view of the circumstances because of their training or experience. The arresting officer's grounds for arrest must be more than a "hunch or intuition".

- 5) In evaluating the objective grounds to arrest, courts must recognise that, "[o]ften, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Determining whether sufficient grounds exist to justify an exercise of police powers calls for the application of '[c]ommon sense, flexibility, and practical everyday experience'."
- 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. Police do not require a prima facie case for conviction before making an arrest or even evidence establishing that the offence was committed on a balance of probabilities.
- 7) The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest.
- [7] In the present case, I lack confidence in Constable Reilly-Perry's stated grounds for arresting Mr. Gallant. Based on the photographs that Constable Reilly-Perry took and submitted in evidence, I am prepared to accept that he may have seen a glass pipe sticking out of the paper towels in the reusable bag, and it may be that there appeared to be smudges of a filmy residue in it indicating that someone might previously have used it for smoking drugs. But it is not illegal to possess such a glass pipe, and residue, even if it comes from drugs, cannot ground an arrest for narcotics possession. It gives rise to no reasonable belief that an indictable offence is being committed or is about to be committed.
- [8] I do not accept Constable Reilly-Perry's evidence that he saw "chunks" in this pipe, or that it contained narcotics "ready to smoke". In my view, his own scene photographs fail to confirm any such thing. Now, it turned out, upon closer examination at the police station, that the pipe contained a small shard of what was later analysed as methamphetamine, but I am strongly inclined to think that this would only have been visible after the pipe was pulled out of the paper towel, and this latter discovery cannot retrospectively justify Mr. Gallant's arrest. I do not believe that Constable Reilly-Perry had subjectively reasonable grounds to arrest, and I am not satisfied that the grounds that he expressed in any event are reliable or objectively reasonable.
- [9] I have reason to be suspicious about Constable Reilly-Perry's evidence. This was discussed with counsel during argument. After Mr. Gallant was arrested and transported to the Nanaimo RCMP detachment, Constable Reilly-Perry took him to the booking-in area where Mr. Gallant was searched and his personal effects were stowed away. Constable Reilly-Perry was joined by Sergeant Mayes while this was going on. Sergeant Mayes decided that a further search of Mr. Gallant's clothing was necessary, and so, accompanied by Constable Reilly-Perry, he escorted Mr. Gallant to a room ordinarily used by detainees to phone their lawyers. There he was ordered to remove his trousers which were taken from him briefly and searched more thoroughly.

- [10] Months later, as I understand it, in response to a query from Mr. Gallant's counsel asking why this "strip search" had been conducted, Sergeant Mayes replied in a continuation report that it was because, while he was booking-in Mr. Gallant, Mr. Gallant had displayed angry and volatile behaviour by taking coins from his pocket and "slamming" them on the booking-in room counter. Sergeant Mayes gave sworn evidence to this effect at Mr. Gallant's preliminary inquiry, and Constable Reilly-Perry confirmed it in his own testimony on the same proceeding. Constable Reilly-Perry testified, in other words, to having witnessed this "slamming down" of coins.
- [11] After the preliminary inquiry, as I understand it, Mr. Gallant's counsel sought disclosure of video footage taken by security cameras in the booking-in area. It turned out that Mr. Gallant's entire booking-in procedure was recorded by these cameras, and the footage was played for me in open court during the voir dire. In this footage there is absolutely no indication that Mr. Gallant ever became angry or upset, and I reject the notion that any such thing happened. To the contrary, it appeared to me that Mr. Gallant was compliant and as meek as a lamb throughout. He was complying with all instructions given to him by the police and he caused no sort of fuss at any time.
- [12] It is obvious from looking at the footage and observing the movements of the various individuals that Mr. Gallant was ordered to turn out his pockets and he did this, including taking some change out of his front trouser pocket. He did not slam the coins on the counter. What I saw, instead, what anyone would have seen, is that he spread the coins gently onto the booking-in counter as if he were going to count them, or in the manner that some people use at a shop counter when they want to pay for something. He was not acting out. He was behaving himself. He was doing what he was told.
- [13] Curiously, even after they were shown this footage in court, both Constable Reilly-Perry and Sergeant Mayes continued to insist that he had "slammed" the coins down. This to me is obvious nonsense. Both witnesses eventually conceded that this had not happened, but insisted that it was what they recalled. I will not make any bones about it. When it comes to Constable Reilly-Perry, I consider that this evidence was given in an effort to mislead me. I have no idea why he testified in this manner or what he thought he would achieve by it, but in my estimation, at any rate, it damaged his credibility. It cast doubt on all of his testimony, including his grounds for arrest.

DISCUSSION

- [14] I am not prepared to accept that there were lawful grounds for Mr. Gallant's arrest. I do not accept that the grounds articulated by Constable Reilly-Perry are reliable or accurate, or that considered objectively they amount to reasonable grounds for a warrantless arrest. The arrest was arbitrary and constituted a violation of Mr. Gallant's s. 9 Charter rights.

- [15] It follows that the search of the van that he was operating leading to the discovery of narcotic drugs in a duffel bag on the back seat was also unlawful. The only legal justification given for this search was as an incident to a lawful arrest, and I have decided that the arrest was not lawful. Accordingly, this search violated Mr. Gallant's s. 8 right to be free from unreasonable search or seizure.
- [16] I said in my remarks the other day that in my judgment a s. 10(b) Charter violation occurred here. Mr. Gallant was arrested at 1:41 a.m. He was read his Charter rights. He said immediately that he wished to speak to a lawyer whom he identified by name. No efforts, or insufficient efforts, were made to connect him with counsel at the scene, even though Constable Reilly-Perry had a cellphone with internet access which he could have used to get a contact number for Mr. Gallant's lawyer.
- [17] Constable Nowicki was also on scene. Constable Reilly-Perry asked him to take care of granting Mr. Gallant access to counsel. Constable Nowicki said that Mr. Gallant told him that he would call his lawyer from the detachment, but Constable Nowicki departed the scene leaving Mr. Gallant locked up in Constable Reilly-Perry's squad car. The Crown concedes that Constable Nowicki could have taken Mr. Gallant back to the detachment right away. There was another constable who attended the scene, Constable Mohsen, who could have done the same thing. Instead, Mr. Gallant was left to wait for over an hour before any attempt was made to connect him with counsel.
- [18] In my view, there was no reasonable justification for this delay. The law has been clear now for decades that s. 10(b) requires immediate access to counsel when a detainee asks for it. No plausible explanation was given for ignoring this clear constitutional requirement in this case. I am satisfied that Mr. Gallant has established on the balance of probabilities that his s. 10(b) Charter rights were infringed or denied.
- [19] On the issue of the strip search, I will address first of all Sergeant Mayes' avowed reasons for conducting it. They were two-fold. First, he said that Mr. Gallant had displayed the volatile and unstable behaviour in the booking-in room which I have already said I do not accept, and in any event, I do not see how any such behaviour could properly ground a strip search. Second, Sergeant Mayes said that Mr. Gallant had been arrested for the possession of highly toxic narcotic drugs, and he felt that a closer examination of his trousers was necessary to ensure that there were no such drugs secreted on his person within his trousers with which Mr. Gallant might harm himself, or another prisoner, or a police officer.
- [20] I am prepared to accept that Sergeant Mayes may have had good cause to order Mr. Gallant to remove his trousers so that they could be more thoroughly searched. I do not expect law enforcement officers to take any chances when it comes to the possession of fentanyl and especially carfentanil. However, the manner in which this search was conducted in my view was not reasonable. The law requires, and Sergeant Mayes himself now recognises, that such a search, that is a search in which the subject is required to remove garments down to his underwear, should have taken place in a private room, whereas here it was conducted in

a telephone room linked by video to other places in the detachment, including the jailer's office. To this extent I conclude there was a breach of Mr. Gallant's s. 8 rights, but I do not view it as being a particularly serious or damaging one.

[21] With respect to the remaining areas of inquiry referred to in Mr. Gallant's notice of application, the Crown concedes the following breaches:

- 1) that while Constable Reilly-Perry filled out a Form 5.2 report to a justice listing an inventory of items of Mr. Gallant's property seized during the search of his vehicle for the 90-day time period specified in s. 490(2), including a cellphone allegedly belonging to Mr. Gallant, he did not file a renewal application on the expiry of the 90-day period. This amounts to an infringement of his s. 8 rights: see *R. v. Craig*, 2016 BCCA 154. He also did not specifically list the data contained within the phone on his original Form 5.2 report: see *R. v. Teixeira*, 2022 BCSC 344.
- 2) that after a telewarrant was issued by a justice authorising Constable Reilly-Perry to search Mr. Gallant's cellphone, he failed to comply with the then existing requirements, since repealed, of s. 487.1(9), to file a written report with the clerk of the court as soon as practicable but within a period not exceeding seven days after the warrant has been executed. I would note that this also constituted a failure by Constable Reilly-Perry to abide by a term of the warrant itself requiring him to file such a report within the same period of time.

[22] In this connection, defence counsel makes the additional argument that Constable Reilly-Perry also failed in his duties imposed by s. 487.1(7) and (8), as they applied at the time, on the footing that he did not give a copy of the warrant to Mr. Gallant or otherwise notify him that the warrant had been issued or executed.

[23] As I understand it the argument goes as follows. The telewarrant section of the Criminal Code permits a peace officer in given circumstances to apply for an ordinary s. 487 warrant by means of telecommunication rather than in person. Section 487 authorises warrants to be issued where there are reasonable grounds to believe that evidence of crime will be found in a building, receptacle or place. I am prepared to accept for the purposes of this proceeding, of this argument, that Mr. Gallant's cellphone might be described as a receptacle. I accept defence counsel's argument that a telewarrant granted to search this sort of receptacle is accompanied by an obligation imposed by s. 487.1(7), as it then applied, to give Mr. Gallant notice that the search had taken place by giving him a copy of the warrant.

[24] In my view, however, s. 487.1(8), as it then existed, referring as it did to the obligation upon police to leave a copy of the warrant at the premises or place where it was executed, has no application to the present facts.

SUMMARY

[25] I hereby declare and order that:

- 1) Mr. Gallant's arrest without warrant at approximately 1:41 a.m. on December 10, 2020 was not based on reasonable grounds and was therefore unlawful;
- 2) The search of the motor vehicle that Mr. Gallant was operating at the time, which was conducted on the sole basis that he had been properly arrested, was similarly unlawful and unreasonable;
- 3) Mr. Gallant's right to retain and instruct counsel without delay was infringed or denied when he was kept without justification for over an hour without being granted access to counsel after he had clearly asserted his right to do so;
- 4) Mr. Gallant's s. 8 right to be secure from unreasonable search was infringed by the strip search at the police detachment. The search itself was justifiable, but the means of executing it were not reasonable;
- 5) Mr. Gallant's s. 8 rights were infringed or denied by Constable Reilly-Perry's failure to file a s. 490 extension application for detention of things seized after the 90-day period set out in s. 490(2) had expired. He also did not specifically list the data within Mr. Gallant's cellphone on the initial Form 5.2; and
- 6) When the cellphone was finally searched, Constable Reilly-Perry filed no Form 5.2 report to a justice concerning the data extracted from it and he failed in his duty under s. 487.1(7) to provide Mr. Gallant with a copy of the warrant and his duties under s. 487.1(9) requiring him to report to a justice seven days after the warrant was executed.

[26] That is the end of this ruling. Have I covered everything?

[27] CNSL J. RUTHERFORD: Yes, I think so, Justice.

[28] THE COURT: Right. That is that for now, then.

[DISCUSSION RE FIX DATE]

"Baird J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/17/2023BCSC1786cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-gallant-2023-bcsc-1786>

Prepared on 28 October 2026 · Esheria