

CANADA / JUDGMENT

R. v. Gerezghier

2024 BCSC 780

COURT

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2024 BCSC 780 R. v. Gerezghier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gerezghier,

2024 BCSC 780

Date: 20240517

Docket: X084816

Registry: New Westminster

Rex

v.

Yonas Gerezghier

Before: The Honourable Justice Thomas

Reasons for Judgment on Voir Dire

Counsel for the Accused:

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R. Zakirova

Counsel for the Crown:

C.D.A Stanley

Place and Date of Trial/Hearing:

New Westminster, B.C.

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May 17, 2024

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[1] Yonas Gerezghier has been charged with robbery and unlawful confinement with respect to activities alleged to have occurred in October of 2021.

[2] This decision relates to a voir dire with respect to alleged Charter breaches that occurred on November 18, 2021 during and following the execution of search warrants in Alberta.

Background Facts

[3] The RCMP conducted an investigation into robberies that occurred in October of 2021.

[4] The investigation included a lengthy review of closed-circuit television ("CCTV") video evidence which indicated that three individuals were involved in the robberies.

[5] As a result of their investigations, the RCMP obtained warrants to be executed simultaneously in British Columbia and Alberta to arrest two of three suspects and seize drugs and phones linked to the robberies and the identified suspects at the suspects' residences. The third suspect was Black and had distinctive tattoos on his arms.

[6] Prior to executing the Alberta warrants there was a meeting of the tactical officers who would initially execute the warrant and Constable Maitland. The following decisions were made as a result of this meeting:

- a) The tactical officers would initially execute the warrant in full tactical gear with guns drawn and secure the residence. All individuals in the residences would be detained:
 - i. to ensure officer safety; and
 - ii. to ensure that no items subject to the warrants would be removed from the premises;
- b) Tactical officers Sergeant Emberly and Constable Bedoya would form part of the cut-off team whose duties included monitoring the sliding door at the rear of the residence while the majority of the tactical officers would enter through the front door;
- c) Calgary police officers would be outside the residence to provide assistance as needed. These officers were not part of the pre-search meeting. Constable Pugliese was such an officer;
- d) Constable Maitland had extensive knowledge of the investigation and would instruct the officers with respect to final determinations as to any issues that arose due to the execution of the warrants, including the ultimate status of detained individuals; and
- e) The lead officer was in British Columbia. Constable Maitland would report and obtain instructions from the lead officer as required.

Execution of the Warrants

- [7] Numerous tactical officers executed the warrant ultimately by knocking down the front door and entering the residence at approximately 11:00 am. The suspect identified in the warrant was detained.
- [8] During the initial execution of the warrant, Sergeant Emberly and Constable Bedoya observed two individuals exit the residence through the rear door. One of these individuals was Mr. Gerezghier.
- [9] Sergeant Emberly intercepted them with his rifle drawn ordering them to lie face down on the ground with their hands on the back of their heads. They complied with his order.
- [10] Constable Bedoya handcuffed them and performed a safety search on them. He found a knife on one of the suspects during his search.
- [11] Constable Bedoya noted the time that he detained Mr. Gerezghier. He testified that he told Mr. Gerezghier that he had a right to speak to counsel and be silent. He does not recall if Mr. Gerezghier said anything. He made no notes of this statement, but it is his practice that when he notes the time of detention he invariably provides this warning.
- [12] He then took a picture of Mr. Gerezghier. He testified that this was done for his notes so that he could identify who was detained and verify the physical condition of the person at the time of detention.
- [13] Sergeant Emberly provided cover during this process with his rifle pointed in their direction.
- [14] Constable Bedoya then passed control of Mr. Gerezghier and the other detainee to Constable Pugliese. He stated he always tells the officer in these circumstances that he has not provided a proper Charter briefing and caution.
- [15] Sergeant Emberly and Constable Bedoya then returned to their tactical duties.
- [16] Constable Pugliese testified that he was told by the arresting officer, Constable Bedoya, that Mr. Gerezghier was under arrest. Constable Pugliese believed that Mr. Gerezghier had been given a proper Charter briefing and caution.
- [17] Constable Maitland arrived once Mr. Gerezghier had been transferred to Constable Pugliese. Constable Pugliese had already emptied the pockets of both detained individuals and placed the items from their pockets on the roof of his police car. The items removed from Mr. Gerezghier's pockets included a debit card and a fob for a KIA car.
- [18] Constable Maitland recognized Mr. Gerezghier as the potential third suspect in the robberies. He instructed Constable Pugliese to release the other detainee.

- [19] Constable Maitland testified that there was a change in Mr. Gerezghier's jeopardy at this time. He was now a suspect in the robberies. He did not advise Mr. Gerezghier of a change in his jeopardy at this time, or later that day. He did not explain why he did not do so.

Constable Bedoya's Evidence

- [20] I do not accept that Constable Bedoya advised Mr. Gerezghier that he had a right to speak with counsel and to be silent. I say this for the following reasons:
- a) Constable Bedoya did not make a direct note of providing this warning; and
 - b) Although he testified that it was his practice to do so, I find that he did not follow his standard practice when he transferred custody of Mr. Gerezghier to Constable Pugliese. I accept that if he had followed his standard practice, Constable Pugliese would have known that Mr. Gerezghier had not been provided with the mandatory Charter warning and advised of his right to silence.
- [21] I accept Constable Bedoya's evidence that the photograph that he took of Mr. Gerezghier was taken as part of his notes to identify the person whom he detained and to establish the physical condition of the detainee.

The Amount of Control Exercised over Mr. Gerezghier

- [22] Constable Maitland then went into the residence to arrest the owner of the residence, liaise with the other officers and obtain instructions from the lead officer in British Columbia.
- [23] Constable Maitland entered the residence at approximately 11:05 am. There were approximately eight to 12 officers present. The residence was small. The owner was in his underwear sitting on a bar stool.
- [24] Constable Pugliese did a safety search of Mr. Gerezghier placing items in his possession on the roof of his police cruiser. He then put Mr. Gerezghier in the back seat of the cruiser and waited for further instructions on how to proceed.
- [25] In these circumstances, Constable Pugliese stated that he would have removed the handcuffs from Mr. Gerezghier and would not have placed Mr. Gerezghier in the cruiser if Mr. Gerezghier had not been arrested. That is, he would have removed the handcuffs and not placed Mr. Gerezghier into the cruiser if Mr. Gerezghier had only been detained. Throughout his entire period of detention, Mr. Gerezghier was compliant and cooperative with all police requests.
- [26] In my view, the decision to place Mr. Gerezghier into the police cruiser by Constable Pugliese was to increase the control over Mr. Gerezghier because he was under arrest. The decision was not motivated to keep Mr. Gerezghier warm as suggested by the Crown. I note that Constable Pugliese did not ask Mr. Gerezghier if he was warm; and would not have exercised this additional control over him had he not been under arrest.

- [27] Constable Maitland arrested the owner of the residence at 11:12 am. He then consulted with the lead officer about what to do with Mr. Gerezghier. He was instructed to identify him, release him and ask if he would like to give a statement. Constable Maitland was specifically instructed not to arrest Mr. Gerezghier.
- [28] Under cross-examination, Constable Maitland stated that "today" he believes there were sufficient grounds to arrest Mr. Gerezghier, but at the time the events occurred he was not sure if he had grounds to arrest. He noted it was difficult to put himself back in time and he is not sure what he was aware of at that time.
- [29] Constable Maitland did not make a note as to whether he had grounds to arrest. In his will-say statement, he stated that "they were not at the stage to arrest".

Constable Maitland's Evidence

- [30] I do not accept that Constable Maitland believed that he had grounds to arrest Mr. Gerezghier on November 18, 2021. I say this based on the uncertainty raised by his testimony on this issue, combined with:
- a) the fact that he did not have the CCTV evidence to compare with Mr. Gerezghier's appearance on November 18th; nor
 - b) was he able to see whether Mr. Gerezghier had the distinctive tattoos associated with the third suspect.

The Length of Mr. Gerezghier's Detention

- [31] Constable Maitland returned to the police cruiser which contained Mr. Gerezghier after approximately 20 minutes, around 11:30 am.
- [32] He does not recall whether Mr. Gerezghier was inside or outside of the vehicle. I infer, given the circumstances, that Mr. Gerezghier remained in the vehicle until shortly before he was released at 11:56 am.
- [33] Constable Maitland obtained Mr. Gerezghier's name and his passport from the residence. Mr. Gerezghier asked for a phone, but would not say whether it was his phone. The phone was subsequently seized under the existing search warrant and data was obtained from the phone.
- [34] Constable Maitland removed Mr. Gerezghier from the police cruiser and took two pictures of him. Then, while he was handcuffed, he rolled up Mr. Gerezghier's sleeves, discovered distinctive tattoos consistent with those on the third suspect and took photographs of Mr. Gerezghier's tattoos.
- [35] Constable Maitland then released Mr. Gerezghier from custody.

1. Initial Detention

General Principles Governing Detention

- [36] Section 9 of the Charter protects an individual from arbitrary detention. Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent they are empowered to do so by law: *R. v. Mann*, 2004 SCC 52 at para. 15.
- [37] Investigative detentions must be premised on reasonable grounds as stated in *Mann*:
- 34 ... The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

Detention by Sergeant Emberly and Constable Bedoya

- [38] I found the principles set out in *R. v. Cade, Ceal, and Whaling*, 2022 BCSC 2294 at paras. 52 and 53 of assistance in assessing the facts pertaining to this initial detention.
- [39] Mr. Gerezghier was detained by Sergeant Emberly and Constable Bedoya working together. The basis for the detention was that two individuals were leaving the back door of a residence while the police were entering the front door in the execution of a search warrant. This exact scenario had been planned for, and in my view, the initial detention was necessary in these circumstances to prevent the removal of property subject to the warrant. In this case, the subjective grounds of detention relied upon by the officers matched the objective grounds.
- [40] Although there was a high degree of force involved, with police wearing tactical gearing and pointing rifles--combined with the use of handcuffs and forcing the detainees to lie face down with their hands on their heads--the detention was initially brief and limited to the securing of the residence and to a safety search.
- [41] I do not find that the second person who left the residence through the back door with Mr. Gerezghier and was released by Constable Maitland shortly thereafter was unlawfully detained for the few minutes that he was in police custody.

General Principles Governing Safety Searches

[42] The power of the police officer to conduct a search incident to arrest is an exception to the general rule that warrantless searches are unreasonable, provided that (1) the arrest itself is lawful, (2) the search is undertaken for a valid law enforcement purpose connected to the arrest and (3) the search is conducted reasonably: *R. v. Stairs*, 2022 SCC 11 at para. 35. Under the second criterion, valid law enforcement purposes include:

- a) Ensuring the safety of the police and the public;
- b) Preventing the destruction of evidence; and
- c) Discovering evidence of the offence or offences for which the accused was arrested: *Stairs* at para. 36.

[43] Police officers are entitled to conduct a protective search of a lawfully detained person if they believe on reasonable grounds that his or her own safety, or the safety of others, is at risk: *Mann* at para. 45.

[44] A safety search must not be greater than is required. It will generally be conducted by the police as a reactionary measure" and carried out "in response to dangerous situations created by individuals, to which the police must react "on the sudden" and in a sense are "driven by exigent circumstances": *R. v. MacDonald*, 2014 SCC 3 at para. 32.

[45] The legality of the protective search turns on its reasonable, objectively verifiable necessity. As stated by Justice Iacobucci in *Mann* at para. 37:

The power to search incident to an investigative detention [...] is not a license to search for evidence and must, in this respect, be distinguished from the power to search incidental to a lawful arrest.

[46] The Court discusses this power before summarizing the search power incident to an investigative detention at para. 45:

To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case.

[47] The fundamental difference between the search powers authorized by a warrantless arrest and those authorized by an investigative detention is whether officers can search for evidence. During an arrest, officers are entitled to search for evidence or prevent evidence from being destroyed. During investigative detention, the only basis to conduct any search is for officer safety purposes. Any other search or seizure will be unlawful.

Initial Safety Search Conducted by Constable Bedoya

[48] Constable Bedoya conducted a safety search to ensure that there were no weapons present which might impact officer safety in the execution of the warrant and to ensure that the detainees were not removing evidence from the residence, which was the subject of a valid search warrant. One of the people leaving the residence had a knife in his possession which was removed during the search.

[49] In my view, the safety search conducted by Constable Bedoya was based on a reasonable concern for officer safety and conducted in a reasonable manner in the circumstances.

General Principles with Respect to Photographs

[50] To establish whether a photograph constitutes a search requiring a warrant, the court must determine whether the person had an expectation of privacy over his or her image in light of the totality of the circumstances.

[51] Whether an applicant has a reasonable expectation of privacy is determined based on the totality of the circumstances, with particular emphasis on the existence of a subjective and objectively reasonable expectation of privacy: *R. v. Bykovets*, 2024 SCC 6 at para. 31.

[52] Courts analyze whether an expectation of privacy is reasonable by considering multiple interrelated factors, which the Court grouped under four categories in *Bykovets* at para. 31 as follows:

- (1) the subject matter of the search;
- (2) the claimant's interest in the subject matter;
- (3) the claimant's subjective expectation of privacy; and
- (4) whether the subjective expectation of privacy was objectively reasonable.

Constable Bedoya's Photograph

[53] I accept Constable Bedoya's testimony that the purpose for which he took Mr. Gerezghier's photograph was for his notes and not to further the investigation into the robberies. Given the circumstances in which the photograph was taken, it is both a reasonable and practical method of obtaining information for which Mr. Gerezghier had a low expectation of privacy. He was wearing his street clothes--jeans, a hoodie and sneakers--and was outside in public view. At the time, he was lawfully the subject of an investigative detention and was not yet a

suspect.

[54] In my view, the photograph did not constitute an unlawful search. I say this because:

- a) the low expectation of privacy attributable to the subject matter of the picture; and
- b) my finding that the picture was not intended to be used as part of a specific investigative process but was used as a form of expeditious note-taking during the execution of a warrant

Initial Charter Rights and Right to Silence

[55] I have already determined Constable Bedoya did not give Mr. Gerezghier an initial abbreviated Charter warning and advise him of the right to silence; and that Constable Pugliese did not provide the initial full Charter warning and advise Mr. Gerezghier of the right to silence.

[56] The Crown concedes that these should have been provided and the failure to do so constitutes a breach of Mr. Gerezghier's ss. 10(a) and (b) rights under the Charter.

Constable Pugliese

[57] Constable Pugliese had no knowledge of the details of the search or investigation into the robberies. He was there to assist the officers involved in the execution of the warrants and the investigation.

[58] When custody was transferred to him by Constable Bedoya, Constable Pugliese did not have any grounds to detain Mr. Gerezghier. He was acting pursuant to Constable Bedoya's authority and simply took custody of the individuals until he received further instructions.

[59] In my view, although Constable Pugliese was physically detaining Mr. Gerezghier, the authority for the detention arose from the grounds established by Constable Bedoya. This principle was discussed in *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CanLII 13, in which the Supreme Court of Canada confirmed that where one officer carries out an order from another officer to conduct a search, the officer conducting the search is entitled to assume that the officer who ordered the search had the requisite grounds for doing so: at 1166-1167.

[60] The same analysis applies with respect to Constable Maitland. When Constable Maitland arrived at the scene he instructed Constable Pugliese to release one of the detainees, but not to release Mr. Gerezghier. Constable Maitland was the officer in charge at the scene. Constable Pugliese was following orders. In my view custody was transferred from Constable Bedoya to Constable Maitland at this time. Therefore the authority for the continued detention of Mr. Gerezghier is based upon Constable Maitland's knowledge and beliefs despite the fact that Mr. Gerezghier was under the control of Constable Pugliese.

Search by Constable Pugliese

- [61] Constable Pugliese completed a search of Mr. Gerezghier after receiving custody, but prior to the attendance of Constable Maitland. Therefore, the detention and search was based upon Constable Bedoya's grounds.
- [62] I have already determined that:
- a) at this time the investigative detention was to prevent the removal of property subject to the warrant; and
 - b) the subjective grounds of detention relied upon by Constable Bedoya matched the objective grounds which I found to be present.
- [63] Mr. Gerezghier's pockets were emptied and the contents were placed on the police car. The contents included small personal items that posed no threat to personal safety.
- [64] In my view, the search that Constable Pugliese conducted of Mr. Gerezghier, which included emptying the contents of his pockets, was based on Constable Pugliese's mistaken assumption that Mr. Gerezghier was under arrest.
- [65] A search warrant of a residence does not in and of itself authorize the search of a person found in the residence: *R. v. Le*, 2011 BCSC 1584 at para. 44.
- [66] As this was not yet an arrest, the only authority that Constable Bedoya had to search--or order the search of--Mr. Gerezghier was the common law power to conduct a safety search incidental to investigative detention. The Court addressed search powers incidental to investigative detention in *Mann*, establishing that "the general duty of officers to protect life may in some circumstances" authorize a search, albeit only when "the officer believes on reasonable grounds that his or her own safety, or the safety of others, is at risk". In addition:
- [40] The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.
- [67] Each case will turn on its own facts. In *Mann*, a pat-down search was justified, but reaching into the accused's pocket was not. This was true despite the accused matching the description of a suspect who had reportedly committed a recent break-and-enter only two or three blocks away and was in possession of break-and-enter tools, which could be used as weapons: at paras. 47-48. In *R. v. Ellis*, 2016 ONCA 598, an officer feeling hard objects in the accused's pockets during a pat-down search--paired with the information that the accused was a gang member, was potentially armed and dangerous and had a previous conviction for a firearms offence--justified searching the accused's pockets to ensure those objects were not weapons: at paras. 29-30.

- [68] Here, it was necessary for Constable Pugliese to pat down Mr. Gerezghier to conduct a safety search incidental to his valid investigative detention, in part due to the fact that a knife had already been found in the pocket of the other individual who was detained. However, I do not find that it was necessary to go a step further by searching and emptying Mr. Gerezghier's pockets and seizing his debit card and fob to ensure officer safety.
- [69] In my view, the search and removal of the contents of Mr. Gerezghier's pockets, including his debit card and fob, constituted an illegal search violating Mr. Gerezghier's s. 8 Charter rights.

2. Continued Detention

General Principles on Investigative Detention

- [70] The leading decision on investigative detention is *Mann*. In *Mann*, the Supreme Court of Canada recognized at para. 45 that the police have a common law power to briefly detain individuals for investigative purposes "if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary".
- [71] In order for an investigative detention not to be arbitrary and thereby offend s. 9 of the Charter, it must fulfill two conditions: (1) the police have "reasonable grounds to detain" in the sense that they reasonably suspect, on an objective view of the circumstances, that the individual detained was involved in a crime under investigation, for which there must be both a subjective and objective basis; and (2) the detention must be "reasonably necessary" in all the circumstances, including the nature of the liberty interfered with and the public purpose the interference serves.
- [72] With respect to the first question, the law was stated at para. 34 of *R. v. Greaves*, 2004 BCCA 484, quoting *Mann* at paras. 34-35, where the Court notes:

The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference

While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.

- [73] As stated by Justice Binnie in *R. v. Kang-Brown*, 2008 SCC 18, about the difference between the reasonable suspicion required for investigative detention and the higher threshold of reasonable grounds (i.e., credibly-based probability) required for an arrest:

- [75] A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.
- [74] There must be objective indicia to support an officer's subjective belief that the individual they are detaining is involved in a crime under investigation.

Investigative Detention

- [75] Constable Maitland testified that he had a reasonable suspicion that Mr. Gerezghier was the third suspect based on his physical appearance given his review of the CCTV evidence. I accept that this was his subjective view and that the objective evidence supports this conclusion.
- [76] I have already determined, however, that Constable Maitland did not have a subjective belief that there were reasonable and probable grounds to arrest Mr. Gerezghier.
- [77] For similar reasons I find that objective grounds to arrest did not exist. I base this on the following:
- a) The CCTV evidence was not available at the scene to compare Mr. Gerezghier's appearance to that of the third suspect;
 - b) There was no evidence with respect to how recently Constable Maitland had reviewed the CCTV evidence with respect to the third suspect; and
 - c) The most identifying feature of the third suspect, the tattoos, were not visible to Constable Maitland.
- [78] The result of this analysis is that Constable Maitland breached Mr. Gerezghier's Charter rights pursuant to ss. 10(a) and 10(b) when the nature of Mr. Gerezghier's detention changed to that of the third suspect in the robberies; and Constable Maitland did not inform Mr. Gerezghier of the change in his status at any time during Mr. Gerezghier's detention.

De Facto Arrest

- [79] The Crown concedes that a de facto arrest of Mr. Gerezghier occurred by the time Constable Maitland removed Mr. Gerezghier from the car to photograph him, given the amount of time that he was handcuffed and in the back of the police car. This is a breach of Mr. Gerezghier's s. 9 Charter rights. The breach occurred prior to the time that Constable Maitland took the photographs of Mr. Gerezghier. As of this time, Mr. Gerezghier was no longer being lawfully detained by Constable Maitland; his detention had become arbitrary.
3. Additional Photographs

Photographs I

- [80] Constable Maitland removed Mr. Gerezghier from the police car and took two photographs of him. This occurred outside of the residence. Mr. Gerezghier was wearing his street clothes. The purpose of the photographs was to enable them to be compared with the images of the third suspect contained in the CCTV footage.
- [81] The same general principles considered with respect to the picture obtained by Constable Bedoya apply to this analysis. Although the pictures taken are essentially the same, the purpose for which the pictures were obtained is fundamentally different. Constable Maitland took the pictures for the specific purpose of using them to compare against the images of the third suspect in the CCTV footage. Taking the pictures amounted to gathering evidence about the commission of the offence--it had nothing to do with protecting officer or public safety.
- [82] The Crown directs me to *R. v. Dilling*, [1993] B.C.J. No. 865, 1993 CarswellBC 505 (C.A.) for the authority that photographing a person who is detained does not constitute a search, and therefore, it does not amount to an infringement of one's rights under s. 8 of the Charter. However, *Dilling* concerned a photograph taken using a polaroid camera--a fact that was highly relevant in Justice Goldie's analysis:

15 In my view the taking of an unposed photograph is not an inappropriate way to preserve evidence of identity in less serious crimes. Because of the polaroid technology employed there is no negative from which additional prints can be easily made. The one positive print was appended to Constable Rogers' notes, recording in visual form what the police constable could have preserved in written form.

- [83] In my view, this reasoning is factually out-of-date and therefore inapplicable to these facts. I am prepared to take judicial notice of the fact that the information contained in a photograph taken of someone's face using modern technology is far greater than that which would be revealed by a polaroid photograph. With current technology, a digital photograph records more than "what the eye of each police officer could see at the moment it was taken": *Dilling* at para. 14. Further, unlike polaroid photographs, modern digital photographs are easily reproducible.
- [84] *Dilling* may also be legally out-of-date, in that it was decided before the Supreme Court of Canada decided in *Mann* that the common law power to search incidental to an investigative detention permits only safety searches, not searches intended to collect evidence.
- [85] The relevant question, rather, is whether taking Mr. Gerezghier's photo constituted an invasion of his reasonable expectation of privacy and was therefore an unlawful search under s. 8 of the Charter. In *R. v. Bruno*, 2021 QCCQ 9659, Judge Marchi found that taking a photograph of the clothing a person was wearing while they were under investigative detention constituted a breach of that person's s. 8 rights: at paras. 35-36.

- [86] The circumstances in which Constable Maitland took the pictures are troubling. Mr. Gerezghier was being arbitrarily detained at the time. Therefore his acquiescence in the photographs occurred within the context of unlawful coercion by the police. While the pictures were taken in public and he was wearing street clothes, they were nevertheless taken following Constable Maitland removing Mr. Gerezghier from the police car to pose for the photograph, with the intention of comparing the photos against the CCTV footage in a criminal investigation. The police had no valid power at the time to search Mr. Gerezghier for reasons other than to protect officer and public safety. In these circumstances, Mr. Gerezghier had a reasonable expectation of privacy.
- [87] This is compared against the very low expectation of privacy accorded to the two images obtained by Constable Maitland.
- [88] In my view, despite the low expectation of privacy accorded to the images taken of people in public generally, the purpose for which the images were obtained, combined with the circumstances in which they were obtained, tips the scales in favour of finding that taking these photographs was a search in violation of s. 8 of Mr. Gerezghier's Charter rights.

Photographs II

- [89] Constable Maitland then took additional photographs of Mr. Gerezghier's tattoos. Mr. Gerezghier was handcuffed while Constable Maitland rolled up his sleeves revealing his tattoos and then photographed them. The purpose of obtaining the photographs was to compare them with the tattoos on the CCTV footage.
- [90] Although the circumstances in which the photographs were taken were similar to the previous ones, there is a relatively higher expectation of privacy over tattoos that are covered by sleeves than merely taking a picture of someone in his or her street clothes. There is also a larger element of conscripting Mr. Gerezghier against himself since the photographs require either the accused or the police to roll up the accused's sleeves.
- [91] Justice Hill found in *R. v. Lam*, 2014 ONSC 3538 that an officer pulling up a detainee's shirt, specifically to see whether he had a tattoo on his back, constituted an unlawful warrantless search:
- [226] ... While not an intimate body search, the state action did intrude upon a reasonable expectation of privacy. Whether or not exposure of an individual's skin would reveal a tattoo, an old wound or scar, a deformity, or evidence of a disease, or simply uncovered skin, the naked skin of a detainee is private - not available for warrantless scrutiny to satisfy the curiosity of the state.

[92] Although revealing the tattoos did not require the complete removal of Mr. Gerezghier's shirt, it still engaged relatively greater privacy interests than taking images of Mr. Gerezghier in his street clothes. I accept that there is a lower expectation of privacy for tattoos on forearms than on more private areas of the body. Mr. Gerezghier was handcuffed--while arbitrarily detained--when Constable Maitland rolled up his sleeves to take photographs of his previously unexposed skin.

[93] In my view, even if I am wrong about the first photographs taken by Constable Maitland, the photographs of the tattoos are subject to a reasonable expectation of privacy, and the circumstances pertaining to how they were obtained raise even greater concerns than those of the first photographs.

[94] The taking of the photographs of Mr. Gerezghier's tattoos constitutes a search in violation of s. 8 of Mr. Gerezghier's Charter rights.

4. Seizure of Cell Phone and Data

[95] The Crown has conceded that the seizure of Mr. Gerezghier's cell phone and data constituted a breach of Mr. Gerezghier's s. 8 Charter rights.

5. Total Number of Charter Breaches

[96] I therefore find that the officers infringed Mr. Gerezghier's Charter rights in the following ways:

- a) Constable Bedoya violated Mr. Gerezghier's s. 10(a) and (b) rights by failing to inform him of the reasons for his initial investigative detention and his right to retain and instruct counsel without delay;
- b) Constable Pugliese violated Mr. Gerezghier's s. 8 rights by searching and removing the contents of his pockets when conducting a safety search;
- c) Constable Pugliese violated Mr. Gerezghier's s. 9 rights when Mr. Gerezghier's investigative detention turned into a de facto arrest without reasonable and probable grounds;
- d) Constable Maitland violated Mr. Gerezghier's s. 10(a) and (b) rights by failing to inform him of the reasons for his arrest and his right to retain and instruct counsel without delay, given his change in jeopardy;
- e) Constable Maitland violated Mr. Gerezghier's s. 8 rights by taking photographs of Mr. Gerezghier outside of the police cruiser;
- f) Constable Maitland again violated Mr. Gerezghier's s. 8 rights by rolling up Mr. Gerezghier's sleeves and taking photographs of his tattoos; and
- g) The officers violated Mr. Gerezghier's s. 8 rights by seizing his cell phone and data.

"Thomas J."

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