

CANADA / JUDGMENT

R. v. Gill

2021 BCSC 548

COURT

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2021 BCSC 548 R. v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gill,

2021 BCSC 548

Date: 20210223

Docket: 28285-2

Registry: Vancouver

Regina

v.

Dilraj Singh Gill

Before: The Honourable Madam Justice Ahmad

Oral Ruling on Voir Dire

re ss. 8, 9, & 10(b) Charter Applications

Counsel for the Crown:

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C.B.S. Muldoon

Place and Date of Trial/Hearing:

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Introduction

- [1] THE COURT: Mr. Gill is charged with two counts of possession of a controlled substance for the purpose of trafficking, and one count of trafficking under s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. These offences are alleged to have occurred on January 17, 2018, in North Vancouver.
- [2] In brief, Mr. Gill was the passenger of a minivan that was involved in two short-duration interactions at which members of the North Vancouver RCMP Strike Force Unit believed him to be trafficking drugs by way of a dial-a-dope operation. The driver of the minivan was Shakeel Patel.
- [3] Mr. Gill was arrested on January 17, 2018. A quantity of cocaine and heroin mixed with fentanyl was recovered from Mr. Gill subsequent to his arrest.
- [4] Mr. Gill has challenged the lawfulness of his arrest and says that the arrest and the searches subsequent to the arrest, including both a roadside search and a strip search conducted at the RCMP detachment, contravened his ss. 8 and 9 Charter rights. He has also alleged that his s. 10(b) right to counsel was also contravened.
- [5] At the outset of the trial, I declared a voir dire to hear evidence and submissions on those allegations. The parties agreed that the evidence relating to all allegations would be heard together as one blended voir dire.
- [6] These are my reasons on the voir dire.
- [7] I will start with my analysis of the arrest.

Were there reasonable grounds for arrest?

Factual background

- [8] At the voir dire, the Crown called the evidence of two office employees and the five officers who were part of the Strike Force team that observed and eventually arrested and searched Mr. Gill. The officers were Sergeant Chris Pillsworth, Corporal Andrew Banville, Corporal Lauren Kildaw, Corporal Brett Hakonson, and Constable Myung Choi.
- [9] As noted by counsel for Mr. Gill, there were some inconsistencies among the officers in respect of their recall and perceptions of the event that occurred on January 17, 2018. By way of brief example:
 - a) One of the officers testified that loud music was playing in the van at the time of the arrest. Other officers did not recall or said that there was no loud music playing.

- b) One officer's recollection that Sergeant Pillsworth had been knocked off his feet by the van at the scene of the arrest did not coincide with Sergeant Pillsworth's evidence.
 - c) Corporal Banville testified that he activated the police vehicle's emergency lights and sirens at the time of the arrest. Other officers did not recall him doing so.
- [10] I do not find any of the inconsistencies referred to by counsel for Mr. Gill to detract from the credibility or reliability of the officers' evidence. While some of their recall and perceptions were different, some even conflicting, I accept that it is the inevitable result of the three years that have passed since the day of the arrest.
- [11] For the most part, all of the officers were able to recall the events without reference to their notes. In the couple of instances where the notes did not match their evidence at the voir dire, the officers either conceded that their notes would contain the most accurate information or were able to explain the discrepancy.
- [12] I found all of the officers to be sincere and did their best to be forthright with the Court. I did not find anything in the evidence that would undermine the credibility or reliability of any of the officers' evidence.
- [13] I will now summarize my findings of fact based on the officers' evidence in direct and cross-examination.
- [14] On the morning of January 17, 2018, members of the North Vancouver Strike Force Unit met to discuss their plans for the day. There were no preplanned surveillance or specific projects for that day. As such, they were free to work on projects or make general observations in the community.
- [15] Prior to January 17, Corporal Kildaw had learned from an RCMP Crime Reduction Team about two incidents involving an older-model green minivan which, in their view, was typical of drug trafficking. He had also reviewed a file in which a person he had arrested many times in the past and knew to be a drug dealer had had some interaction with a green minivan. Although he knew the licence plate for the van when he reviewed the files, he did not specifically recall it at the planning meeting on January 17.
- [16] Sergeant Pillsworth also had information that linked a green minivan to possible drug-trafficking activity.
- [17] As there were no other specific targets or surveillance plans for the day, Corporal Kildaw asked the other members of the Strike Force team to keep a lookout for the green van.
- [18] Later that day, Corporal Kildaw was in a vehicle driven by Corporal Banville when he observed an older-model green minivan travelling north on St. Georges Avenue in North Vancouver. When they caught up with the van, Corporal Kildaw recognized the licence plate as one that he had reviewed in the files.

- [19] At that time, Corporal Banville notified the rest of the team to come to the area to assist in surveillance.
- [20] At approximately 13:34, Corporals Kildaw and Banville observed the van turn west from Chesterfield Street onto 19th Street, where the van came to a stop. There Corporal Kildaw observed an unidentified male walk up to the driver's side of the minivan where it appeared to Corporal Kildaw that he showed the driver something in an open hand. However, he did not observe a hand-to-hand transaction or any other type of exchange.
- [21] The unidentified male got into the side panel door of the van and the door closed. He exited the van five minutes later at 13:39, and got into a vehicle that had been parked on 19th Street.
- [22] The surveillance report that was prepared the day of the arrest indicated that two East Indian males were in the van.
- [23] Both Corporal Banville and Corporal Kildaw believed the interaction to be a drug transaction.
- [24] Sergeant Pillsworth next observed the van as it pulled into a Chevron gas station at 23rd Street and Lonsdale Avenue in North Vancouver, where Mr. Gill put gas in the tank and it appeared that Mr. Patel used the washroom. After that stop, both Mr. Patel and Mr. Gill left the Chevron in the van.
- [25] The Strike Force team continued their surveillance.
- [26] Both Sergeant Pillsworth and Corporal Kildaw next observed the van in the Westview Plaza at the intersection of Highway 1 and Westview Drive in North Vancouver where the van pulled up to the gas pumps at the Esso gas station.
- [27] While at the pumps at approximately 14:45, a male, later identified to be Andrew Gagnon, got into the van through the side panel door, after which the van drove what Corporal Kildaw estimated to be 10 to 15 metres before coming to a stop in the Esso parking lot.
- [28] Neither Corporal Kildaw nor Sergeant Pillsworth saw what happened while Mr. Gagnon was in the van.
- [29] Mr. Gagnon exited the van from the passenger side rear door approximately 30 seconds to one minute later and, with his right fist clenched, walked to a Ford F150 truck that had also been parked in the Esso parking lot.
- [30] At the direction of Corporal Banville, who was the "road boss" that day, Corporal Kildaw arrested the driver of the Ford F150, and Constable Gill, with the assistance of Sergeant Pillsworth, arrested and searched Mr. Gagnon. At the time of Mr. Gagnon's arrest, he dropped what Sergeant Pillsworth believed and was later confirmed to be a small bag of crack cocaine. Mr. Gagnon denied he had purchased the drugs from the occupants of the van.

- [31] By that time, Corporal Banville had been informed that Sergeant Pillsworth had arrested Mr. Gagnon and had found crack cocaine on him. He was not told that Mr. Gagnon denied purchasing the cocaine from the occupants of the van.
- [32] Relying on the two short meets, one on 19th Street and one at the Esso station, as well as the fact that Sergeant Pillsworth had found drugs on Mr. Gagnon, Corporal Banville formed the opinion that the occupants of the van were arrestable for trafficking of a controlled substance.
- [33] In the meantime, the van had left the Westview Mall parking lot and travelled to the Tsleil-Waututh Reserve south of Highway 1 and Mountain Highway, where the van remained parked in a residential driveway for approximately 10 minutes before leaving. No suspected trafficking activity was observed at that location.
- [34] After leaving the reserve, Corporal Banville and Corporal Kildaw followed the van on Mountain Highway, where it turned into a cul-de-sac on the 1300 block of East 8th Street. Mr. Gill and Mr. Patel were arrested there at 15:25.

Legal framework

- [35] Section 9 of the Charter provides that everyone has the right not to be arbitrarily detained or imprisoned.
- [36] However, s. 495 of the Criminal Code provides that:
- 495 (1) A peace officer may arrest without warrant
- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- ...
- [37] Where an accused challenges the validity of a warrantless arrest, the burden is on the Crown to establish, on a balance of probability, that the officer had reasonable grounds to believe the accused had committed or was about to commit an indictable offence when the accused was arrested.
- [38] As noted in *Mugesera v. Canada* (Minister of Citizenship and Immigration), 2005 SCC 40 at para. 114, the reasonable grounds standard is higher than that of mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probability.
- [39] In *R. v. Glendinning*, 2019 BCCA 365, conduct that was "highly suspicious" was sufficient to meet the reasonable grounds standard.
- [40] The test for determining whether an officer had reasonable and probable grounds to arrest the accused without a warrant is set out in the leading case of *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-51:

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.

- [41] In short, the test is twofold: first, I must be satisfied that the arresting officer subjectively believed he had reasonable grounds on which to base the arrest of Mr. Gill; and second, I must be satisfied those grounds were objectively justifiable.
- [42] The arresting officer is the officer who decides a subject should be arrested. That officer may or may not be the officer who actually arrests the suspect: *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166-67.
- [43] The assessment of whether the arresting officer has the requisite subjective belief to make an arrest must be considered in the "totality of the circumstances" that exists at the time of the actual arrest: *R. v. Jir*, 2010 BCCA 497 at para. 28 [Jir].
- [44] In assessing objective justification, the court's first task is to look at the observations of the officer through the lens of someone who has the same experience, training, knowledge, and skills as the arresting officer, not the lens of an untrained civilian or layperson. The police are entitled to rely on their training and experience, which can play an important role in assessing whether reasonable grounds exist: *R. v. Luong*, 2010 BCCA 158 at para. 24, cited in *R. v. Messina*, 2013 BCCA 499 at paras. 22-24, 26, 28 [Messina]; *R. v. MacKenzie*, 2013 SCC 50 at para. 62, cited in *R. v. Galye*, 2015 BCSC 1950 at para. 48 [Galye].
- [45] However, the courts have cautioned that an officer's assessment must not be drawn from an overly jaded, jaundiced, or negative perspective: *R. v. Lahtinen*, 2011 BCPC 490 [Lahtinen].
- [46] The courts have considered principles that apply in assessing subjective and objective justification in the context of dial-a-dope cases. Some of those principles include the following:
- a) In assessing objective justification in the context above, the courts have expressed reluctance to follow a checklist approach or assess whether there are reasonable grounds for arrest: *R. v. Lo*, 2015 BCSC 1159 at paras. 87-89 [Lo]; Galye at para. 52.
 - b) The absence of indicia of dial-a-dope operations are to be considered neutral: Lo at paras. 68-70, citing *R. v. Readhead*, 2008 BCCA 193; Jir at paras. 29-30.
 - c) In assessing the justification for the arrest, the police are not required to rule out all possible innocent explanations for the conduct: *R. v. Gill*, 2015 BCSC 310 at para. 49 [Gill].

Analysis

- [47] Noting that the grounds only need rise above "mere suspicion", the Crown argues that, in the totality of the circumstances and based on the officer's experience, Corporal Banville had both the subjective and objective grounds on which to base Mr. Gill's arrest. Although he does not concede the point, Mr. Gill does not strenuously dispute that Corporal Banville had the subjective grounds for the arrest. Rather, he argues that the arrest was not based on objectively reasonable grounds.
- [48] In my view, it was both subjectively and objectively reasonable for Corporal Banville to conclude that the two interactions were dial-a-dope drug transactions.
- [49] Although Corporal Banville had only been on the Strike Force Unit for three years, at the time of the arrest he had approximately nine years of policing experience, which included making arrests for drug-related activities. He had also completed a two-week drug investigation training course through the Canadian Policing College. As part of the Strike Force Unit, he had been involved with surveillance and investigation of approximately 20 to 30 dial-a-dope operations. He had been involved in 60 to 70 such investigations for units other than the Strike Force Unit.
- [50] In his experience, in a dial-a-dope operation, the buyer would contact the seller by cellphone, text message or third party messaging app to set up a time and place for a meet. If a vehicle was involved at the meet, the buyer would typically get into the back seat and be in and out of the vehicle within two to three minutes. Other times, the vehicle would drive a short distance, into a laneway, for example, before the buyer would exit the vehicle.
- [51] It was also Corporal Banville's experience that a dial-a-dope transaction would occur inside a vehicle to stay outside of the view of the public, and involve small quantities of drugs that could be hidden.
- [52] Corporal Kildaw, Sergeant Pillsworth, and Corporal Hakonson also described their experience with dial-a-dope operations in a similar way.
- [53] Corporal Banville's experience with dial-a-dope operations was consistent with what he knew of the activities involving Mr. Gill that transpired on the afternoon of January 17, 2018. Specifically, on two different occasions, the occupants of the van in which Mr. Gill was the passenger met with two different individuals. Both times those individuals got into the van only to exit to a waiting vehicle a few minutes later.
- [54] Counsel for Mr. Gill characterizes those transactions differently. He argues that the two interactions are equally consistent with innocent explanations. As an example, he notes that the transactions done through Craigslist are made through meetups between strangers.
- [55] I agree that Mr. Gill is correct that there are other explanations for what may have happened in each of the transactions. However, as the court has held in the Gill decision:

- [49] . . . Innocent alternatives only undermine grounds for arrest when the inference the officer drew that an offence was taking place was not reasonable. The officers do not have to rule out other explanations, if there is an objective basis for what they did infer concerning criminal activity.
- [56] In my view, there was an objective basis.
- [57] The grounds for the arrest were not based solely on the fact that Mr. Patel and Mr. Gill had stopped twice on the afternoon of January 17, 2018, to speak or interact with someone waiting for them. That may well have been innocent.
- [58] However, the two meets were part of a series of events, when taken together, form the objective basis for the arrest.
- [59] In this regard, I consider the following, all of which were known to Corporal Banville at the time of the arrest, to be most significant:
- a) through Corporal Kildaw, Corporal Banville was aware that the Crimes Reduction Unit had identified an older model green minivan as having possibly been involved in drug trafficking activity;
 - b) the meeting with the unidentified male at the first stop on 19th Street was consistent with his experience with dial-a-dope transactions; that is, the male appeared to have a conversation with the driver at the window before getting into the van for a short period of time and departing into a waiting vehicle;
 - c) Mr. Patel and Mr. Gill drove to the Esso station and pulled up to the gas pumps, having just put gas into the van earlier at the Chevron station. In my view, it was objectively reasonable to view that conduct with suspicion;
 - d) the interaction at the Esso station was the second one of the day in which a third party, in that case Mr. Gagnon, entered the van for a short period of time and exited to a waiting vehicle. Again, that is consistent with the officers' description and experience of a dial-a-dope transaction; and finally,
 - e) drugs were found on Mr. Gagnon after he exited the van, in circumstances that, in the officer's view, was consistent with a drug transaction.
- [60] With respect to those factors, Mr. Gill notes that there were no direct observations of anything being exchanged. Referring to the decision Lahtinen, he cites the reliance on opposite occurrences, being the individual's open hand at the 19th Street encounter and Mr. Gagnon's closed fist at the Esso station, as being indicative of an overly jaded, jaundiced, or negative perspective.
- [61] I do not agree.

- [62] As plainly stated in Messina at para. 24, the officers' interpretation of the scenarios they observe must be considered in light of their experience. In all of the officers' experience, money is exchanged and the drugs are typically sold in a dial-a-dope transaction in small quantities.
- [63] Although Corporal Kildaw was not able to see what was in the open hand on the 19th Street encounter, it was consistent with what he had experienced in other transactions.
- [64] Although Sergeant Pillsworth could not initially see what was in Mr. Gagnon's closed fist at the Esso station, it was consistent with having something of a small quantity in his hand. His interpretation was borne out when Mr. Gagnon dropped the drugs from his fist.
- [65] I accept that the interpretation of the events that occurred on the day of the arrest is based on the officers' experience and is not dependent on a jaded view of the occupants of the van's activities.
- [66] On the totality of the circumstances, I find that the events that took place on the day of the arrest were "highly suspicious". I find that Corporal Banville had both the subjective and objective grounds to believe that Mr. Gill had committed an offence before authorizing his arrest.
- [67] Accordingly, the arrest was lawful and did not breach Mr. Gill's s. 9 right.
- [68] I will now consider whether the searches of Mr. Gill were reasonable.

Were the searches reasonable?

Factual background

- [69] Prior to the arrest, Mr. Gill and Mr. Patel were seated in the van with their hands in the air. As Constable Choi approached the van, he observed Mr. Gill move his body forward and place his right hand behind him to his buttocks area. Mr. Gill's hand remained behind him for two to three seconds before he returned them to the air on Constable Choi's instruction to do so.
- [70] Constable Choi was concerned that Mr. Gill could be hiding drugs or reaching for a weapon. He told Corporal Hakonson what he saw and asked him to conduct a thorough search.
- [71] Through Corporal Hakonson, Sergeant Pillsworth was also aware of Constable Choi's observation.
- [72] At roadside, Sergeant Pillsworth conducted an initial pat-down of Mr. Gill's sweatpants. As a result of that pat-down, he found a large roll of cash in Mr. Gill's pants pockets. He did not find any drugs.

- [73] Sergeant Pillsworth then pulled at the side of Mr. Gill's pants at the pocket level and shook the rear waistband. When he did so, a plastic bag containing what was later determined to be crack cocaine and heroin/fentanyl mix fell from Mr. Gill's pant leg.
- [74] At the detachment, Sergeant Pillsworth advised Corporal Banville that he had located drugs that had come from the back of Mr. Gill's pants and that he did not know if there are more that he was not able to shake out.
- [75] Neither Sergeant Pillsworth nor Corporal Banville was satisfied that the roadside search had revealed all drugs that may have been concealed on Mr. Gill.
- [76] Because the initial pat-down did not reveal any drugs, Sergeant Pillsworth was of the view that the drugs did not come from the pant leg itself. Rather, he felt that they must have fallen from the waistband or crotch or buttocks area.
- [77] He testified that he had been involved in situations in which the arrestee had been patted down before going into cells, only to retrieve and consume drugs that had been concealed. Sergeant Pillsworth was concerned that unless a strip search was conducted, Mr. Gill could destroy evidence or, depending on his mental state given the arrest, could ingest any drugs that had been concealed and cause harm to himself.
- [78] Corporal Banville was also of the view that a strip search was necessary. He based that view on the fact that the pat-down search did not reveal the drugs that had fallen from Mr. Gill's pant leg. In his experience with dial-a-dope operations, it was quite common to find drugs in and around the waistband, under the testicles, and hidden in other areas that are not revealed on a standard pat-down search.
- [79] At the detachment, as the supervising officer, Sergeant Pillsworth authorized the strip search of Mr. Gill. He did so on the following basis:
- a) he had been advised that Mr. Gill had placed his hand down the back of his pants;
 - b) he was not certain that he had shaken out all of the drugs. He noted in particular that depending on the type of underwear, some drugs could have been lodged there. If so, he would not have been able to shake them out; and
 - c) his experience that even after a pat-down, people have been placed in cells only to pull out drug paraphernalia and drugs.
- [80] The strip search was conducted in one of the two holding cells at the detachment. Corporal Banville was responsible for conducting the search and positioned himself in the open doorway of the holding cell. He was the only one able to view the search.
- [81] Sergeant Pillsworth stayed in the hallway to act as a cover and ensure that no one else would be in a position to observe Mr. Gill during the strip search.

- [82] The strip search was recorded and the video was shown at the voir dire. I will describe the video in more detail later in these reasons.
- [83] The video of the strip search was broadcast and potentially could be viewed on monitors located at three locations in the detachment: the watch commander station, the sergeant's office, and the guard room.
- [84] In order to obtain and view the recording after the fact, an officer must submit a formal written request and obtain authorization to do so. In this case, no one did except for the purposes of this trial.

Legal framework

- [85] Section 8 of the Charter provides that every person has the right to be secure against unreasonable search or seizure.
- [86] Searches of the person incident to arrest are an established exception to the general rule that warrantless searches are presumptively unreasonable: *R. v. Majedi*, 2009 BCCA 276 at para. 18.
- [87] The onus is on the Crown to establish the reasonableness of a warrantless search on a balance of probabilities.
- [88] Generally speaking, the common law search incident to arrest does not require additional grounds beyond the reasonable grounds necessary to justify the lawfulness of the arrest itself: *R. v. Golden*, 2001 SCC 83 at para. 98 [Golden].
- [89] Strip searches are different. To comply with s. 8 of the Charter, a strip search must be incidental to the lawful arrest; conducted for the purpose of discovering evidence related to the reason for the arrest; must be justified by reasonable and probable grounds; and carried out in a reasonable manner: *R. v. Johal*, 2015 BCCA 246 at para. 25 [Johal], citing *Golden* at para. 99.
- [90] With regard to strip searches conducted for the purpose of preserving evidence, in *Golden*, the Supreme Court of Canada observed at para. 93:

93 The reasonableness of a search for evidence is governed by the need to preserve the evidence and to prevent its disposal by the arrestee. Where arresting officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in the circumstances. . . .

Analysis

- [91] I will start with my analysis of the roadside search.
- [92] I have concluded that the arrest was lawful. I also accept that the roadside search of Mr. Gill was conducted for the purpose of preserving evidence, including drugs.

[93] In light of that finding, I have no hesitation in concluding that the roadside search did not contravene Mr. Gill's right to be secure against unreasonable search or seizure.

[94] The strip search that was conducted at the detachment is less straightforward. Again referring to the decision in Golden, it requires the additional two-part analysis:

- a) were there reasonable and probable grounds to conduct a strip search; and
- b) was the strip search conducted in a reasonable manner.

[95] I will start with the first.

Reasonable and probable grounds for the strip search

[96] To establish reasonable grounds for a strip search, there must be some evidence suggesting the possibility of concealment of drugs: Golden at para. 111.

[97] "Mere suspicion" is insufficient to justify a strip search. However, the threshold is not as high as the standard of reasonable and probable grounds for the arrest of a person: R. v. Vixaysongkham, 2007 BCSC 183 at para. 33.

[98] Although based in part on the fact that no drugs were found prior to the strip search, and finding there were reasonable grounds for the strip search, in Johal at para. 27, the Court of Appeal relied in part on evidence that, "in the experience of the arresting officers, traffickers sometimes conceal drugs in their underpants or rectum".

[99] By contrast, in Golden, the officers did find what they thought to be crack cocaine under the table where another suspect was arrested and observed the appellant crushing a substance that looked like crack cocaine between his fingers during the arrest.

[100] In addition, the officers did have some experience, albeit in relatively few cases, with drug arrests involving suspects who secreted evidence in their groin or buttocks areas. In Golden, the Court concluded that:

112 Taken together, these circumstances would have been sufficient to create reasonable and probable grounds to conduct a strip search of the appellant at the police station. . . .

[101] Likewise, in the experience of the officers in this case, arrestees had, in the past, been able to conceal drugs even after a pat-down had occurred.

[102] In my view, it was reasonable for the officers, including the supervising officer, Sergeant Pillsworth, to conclude that might be the case with Mr. Gill. In fact, there was no need for Sergeant Pillsworth to speculate whether Mr. Gill had concealed drugs; he had in fact done so.

- [103] As the initial pat-down did not reveal those drugs, it was also reasonable for Sergeant Pillsworth to conclude that Mr. Gill had concealed those drugs in his waistband, in his underwear, or in the crotch area; in other words, areas where the drugs would not be revealed in a standard pat-down.
- [104] Counsel for Mr. Gill notes that unlike the situation in Johal, the officers found the concealed drugs on Mr. Gill prior to the strip search. Having found drugs, he argues there was no need to conduct the strip search.
- [105] I do not agree with that submission. In my view, the opposite is true.
- [106] Mr. Gill concealed drugs. He concealed them in a way that they were not detectable on a standard pat-down search. Having conducted himself in that way, Sergeant Pillsworth could not fully discount the possibility that more drugs were concealed.
- [107] In my view, the manner in which the drugs were found on Mr. Gill reinforced, not detracted from, the reasonableness of the strip search.
- [108] That is not to suggest that a strip search will be justified in every case that drugs or other evidence is found on an arrestee. However, in the circumstances of this case where Mr. Gill had placed his hands towards his buttocks area, the initial pat-down did not reveal the drugs, and it appeared that the drugs were concealed in his waistband, his underwear, or the crotch area, I am satisfied that the officers were justified in concluding not only that Mr. Gill had concealed drugs, but that it was possible there may be more.
- [109] I conclude, on a balance of probabilities, that the strip search was reasonable.

Was the strip search conducted reasonably?

- [110] I now turn to the second part of the additional analysis of the strip search--whether the strip search was conducted reasonably.
- [111] At para, 101 of Golden, the Supreme Court of Canada set out the framework to guide that analysis in the form of 11 questions:
1. Can the strip search be conducted at the police station and, if not, why not?
 2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
 3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
 4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
 5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
 6. What is the minimum of force necessary to conduct the strip search?

7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[112] The 11 questions have been described in *Johal* at para. 29 as "useful indicators of the reasonableness of a strip search". "[M]inor deviations from the Golden guidelines" will be insufficient to find a Charter breach: *R. v. Davis*, 2020 ONCA 748 at para. 22 [Davis].

[113] *R. v. Lantz*, 2017 ABQB 207 and *Johal* were cited as two decisions in which deviations from the Golden guidelines were not sufficient to find an infringement of an accused's s. 8 Charter rights.

[114] I now turn to a consideration of those 11 questions.

[115] Of the 11 avenues of inquiry set out in *Golden*, Mr. Gill does not take issue with questions numbered 1, 2, 3, 6, 8, 9, and 10 in *Golden*. I am satisfied on the evidence, including the video evidence of the strip search, that none of those seven guidelines give rise to the conclusion that the strip search was not conducted in a reasonable manner.

[116] The four guidelines that Mr. Gill says were not complied with are questions numbered 4, 5, 7, and 11 in *Golden*. They are:

4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[117] Although they form three separate bases for complaint, Mr. Gill's objection to guidelines 4, 5, and 7 can be broadly described as an issue of privacy. Although three distinct issues, I will address those complaints together under one general category of privacy.

[118] I now turn to that analysis.

Was Mr. Gill afforded privacy: questions 4, 5 & 7

[119] I begin this analysis noting, as the Supreme Court of Canada observed in *Golden* at para. 99, that the inevitable consequence of a strip search is a "serious infringement of privacy and personal dignity". There is no doubt that care must be taken to minimize that serious infringement.

[120] In this case, having viewed the video of the strip search and having heard the evidence of Corporal Banville and Sergeant Pillsworth, I am satisfied those officers did what they could to ensure that Mr. Gill had privacy and that the search was conducted in the least intrusive way possible. In that regard, I note the following from the video evidence:

- a) the strip search was conducted in an empty holding cell at the police station;
- b) the strip search was conducted quickly, taking approximately three minutes from its start to conclusion;
- c) with one exception comprising seconds where Mr. Gill was clad only in socks and underwear, Corporal Banville conducted the search so that one item of clothing was removed at a time;
- d) at no time did Corporal Banville have any physical contact with Mr. Gill;
- e) Sergeant Pillsworth stayed in the hallway to act as a cover and to ensure that no one else would be in a position to observe Mr. Gill during the strip search;
- f) the officers positioned themselves so that only Corporal Banville could see Mr. Gill; and
- g) no one other than Corporal Banville entered the holding cell during the strip search.

[121] Indeed, Mr. Gill did not appear to exhibit any signs of distress or obvious discomfort with the manner in which the strip search was conducted.

[122] I am also satisfied that to ensure the safety of the officer conducting the search, it was not feasible to conduct the search with the door to the holding cell closed.

[123] Notwithstanding those factors, Mr. Gill argues that the search was not conducted in a way to ensure his privacy in two ways. Firstly, he says that given the location of the holding cell relative to the other cells, it was possible that in an emergency situation, other individuals, including other prisoners or detachment employees, can be routed past the holding cell where the search is being conducted.

- [124] I do not accept this argument. As noted, I am satisfied that the officers kept the door open to ensure the safety of Corporal Banville who was conducting the search. I am also satisfied that placing Sergeant Pillsworth in the hallway near the door, they took appropriate steps to ensure that no one else, including Sergeant Pillsworth, could be in a position to observe the strip search, despite the open door.
- [125] I do not discount the possibility that an emergency situation may have resulted in other individuals proceeding past the holding cell in the three minutes it took to conduct the strip search. Indeed, it is possible to imagine a myriad of hypothetical situations that may have jeopardized Mr. Gill's right to privacy, regardless of where the strip search was conducted or whether the door was open or not.
- [126] Although not wholly determinative, it is notable that none of the hypothetical situations postulated by Mr. Gill's counsel occurred. In my view, the officers did what they could to ensure that no passers-by, in a hypothetical situation Mr. Gill has suggested or otherwise, would come past the holding cell at the time the strip search was being conducted.
- [127] I am satisfied that in the circumstances, conducting the strip search in the holding cell with the door open did not unreasonably compromise Mr. Gill's privacy.
- [128] In addition, Mr. Gill argues that the fact that the strip search was video recorded, broadcast, and stored in the detachment electronic files violates Golden guidelines 4, 5 and 7 regarding privacy. He argues the live feed of the video was viewable in monitors located in three locations within the detachment and, as a result, the strip search could be observed by individuals, including those of the opposite gender, as it happened. He also argues that the video footage was retained and available to be viewed by individuals at a later point in time.
- [129] I start my analysis on this point with the observation that the fact that the strip search was videotaped is not, in and of itself, enough to conclude that Mr. Gill was not afforded the privacy dictated by Golden: *R. v. Vader*, 2017 ABQB 48 at para. 230; *R. v. Mohamed* (June 2017), Vancouver 233195-1 (BCPC) at para. 81 [Mohamed].
- [130] The broadcast of the recording to the three locations within the detachment is potentially more problematic.
- [131] That was the case in *R. v. Fine*, 2015 BCPC 0003 [Fine]. In *Fine*, the primary focus of the court was the fact that the video was broadcast to a central monitoring room and the detainee had expressed a right to privacy:
- [77] While there may be some merit to the suggestion that videotaping a strip search protects both the officer involved and the detainee by preserving the event in case of improper behaviour, the presence of the second officer (as mandated under Golden), as a witness to the interaction between the detainee being searched and the searching officer, also provides a measure of assurance against police misconduct. That person can observe and make notes of improper behaviour. Even if the police could justify the need to video tape a strip search, such videotaping should only be captured to a recorder located in the private search room,

and accessible only to a very limited number of people if allegations of misconduct arise. Here, it appears videotaping inside strip search rooms and simultaneous broadcasting to a central monitoring location is a routine policy at the Kelowna detachment, and not related to the unique circumstances of any individual case. That "routine policy", breaches the intent and spirit of Golden. The interests of the police of maintaining safety in the search rooms and preserving evidence are not so compelling that they outweigh Ms. Fine's expectation of privacy that her strip search not be videotaped and monitored remotely.

- [132] In that case, the court found at para. 78 that Ms. Fine's s. 8 rights were violated when the police "videotaped and broadcast that video to a monitoring room while she was being strip searched." It also found that she had a "subjective expectation of privacy and that her subjective expectation was reasonably held in all of the circumstances."
- [133] By contrast, in Mohamed, the court held that a strip search conducted in circumstances quite similar to the case at bar did not violate the detainee's s. 8 rights.
- [134] Although the court in Mohamed did not single out the broadcast for specific discussion, it did note that the video monitor to which the video was broadcast "was located in an alcove not visible to passers-by" and that "if an officer wanted to view the video, a form had to be filled out". The request for the video during the trial was the first time any request was made to view the video in the Mohamed decision.
- [135] Finally, R. v. S.N. (4 October 2019), North Vancouver 4786-2-C (BCPC) [S.N.], the court considered the evidence of a jail guard on duty during a strip search that was videotaped and broadcast at the same detachment as the case at bar.
- [136] In that case, the jail guard monitored the prison cells in other areas of the detachment by way of video display. However, the monitors did not display empty cells. As such, a person entering the guard room would not have seen the strip search. In any event, the jail guard's evidence was that only guards enter the guard room. He was the only guard on duty the day of the strip search.
- [137] As was the case in Mohamed, the only way to access the video would be through the watch commander, who would have to go to the cell guards, who would have to request it from their bosses, requiring authorizations at each stage.
- [138] Given that evidence, the court in S.N. found that the videotape of the strip search did not amount to a breach of the accused's right to privacy as contemplated by Golden.
- [139] In my view, the circumstances of this case more closely align with those in the Mohamed and S.N. decisions than the circumstances in Fine in two material ways.
- [140] Firstly, in Fine, there was no evidence before the court about who may or who may not have viewed the broadcast. Although not absolute, there was evidence in Mohamed and S.N., that in the circumstances similar to the case at bar, it was unlikely that anyone viewed the broadcast of the search.

- [141] Such evidence exists in this case.
- [142] Here, Staff Sergeant Sanford, the watch commander, and Ms. Swift, the jail guard on duty at the time of the strip search, were the only people with direct access to the monitors on which the strip search was broadcast. Neither, both of whom are female, viewed the strip search.
- [143] Although neither Staff Sergeant Sanford nor Ms. Swift could wholly discount the possibility that someone could have viewed the monitors in any of their three locations, both thought it was unlikely.
- [144] Again, those locations were the watch commander's office, the sergeant's office, and the guard room.
- [145] Staff Sergeant Sanford testified that she typically set the three monitors in the watch commander's office to observe the booking counter, the most commonly-used cell, the prisoner bays, the fingerprint room, and the phone room. She only put the holding cell on her monitor if someone was in the restraint chair that was usually located there. On this day, that chair was removed from the holding cell.
- [146] The display on the monitor in the sergeant's office was set at the sergeant's preference. Staff Sergeant Sanford was quite certain that the sergeant was not at the detachment on the day of the strip search and would not have been in his office to view the broadcast if it was displayed.
- [147] Ms. Swift was the only jail guard on duty when the strip search was conducted. She did not view the broadcast and testified it was not common for anyone other than the jail guard on duty to be in the guard room.
- [148] On that evidence, I accept that it was unlikely that anyone viewed the live broadcast of the strip search as it occurred.
- [149] Furthermore, to view the stored video, the person would have to make a formal written request and obtain authorization to do so. No one did so or accessed the archived videotape after the event, except for the purposes of this trial. Even the technician who extracted the video recording for that purpose was under specific orders not to watch the video.
- [150] On the basis of the above, I am satisfied that, other than in preparation for this trial, no one viewed the video of the strip search, either live through the broadcast at the time that it was conducted or subsequently from the archives.
- [151] Secondly, the decision in *Fine* rests in large part on Ms. Fine's subjective and objective expectation of privacy. Noting that the nature of a strip search alone gives rise to a subjective expectation of privacy, the court in *Fine* then turned its consideration to whether that subjective expectation was objectively reasonable in the circumstances.

- [152] At para. 68 of the Fine decision, the court referenced other decisions in which there were signs advising detainees of the presence of video cameras throughout the cell area. Noting that Ms. Fine was not advised that her activities were being videotaped or monitored or that the strip search could be viewed in the monitoring room, the court held that her subjective expectation of privacy was reasonable.
- [153] By contrast, in both the Mohamed and S.N. decisions, signs advising that the area was under video surveillance were located in the area where the strip search was conducted. In the Mohamed decision, one of the officers was seen in the video pointing out the camera to Mr. Mohamed.
- [154] In this case, there were signs in the booking area and on the doors to the jail bay indicating that: "This area is under audio and visual surveillance and is recorded for your protection". Mr. Gill argues that because he was not booked as a prisoner, the evidence is at best unclear whether he was in the booking area to see those signs.
- [155] I accept that submission. However, Corporal Banville testified that they brought Mr. Gill into the detachment through one of the two jail bays. Although he could not recall which one, both had the warning sign posted on it.
- [156] In any event, regardless of whether Mr. Gill saw the warning signs, a photograph of the holding cell in which the strip search was conducted reveals a plainly-visible camera in the corner of the ceiling. In the recording of the strip search, Mr. Gill can be observed looking directly up at the camera prior to the strip search being conducted.
- [157] I am satisfied, at the very least, that Mr. Gill was aware of the camera in the holding cell.
- [158] On that basis, unlike the case in Fine, any expectation that Mr. Gill may have had regarding privacy was not reasonably held. Following the decisions in Mohamed and S.N., I find that the videotaping and the broadcast of the strip search did not violate any of the privacy guidelines and, in particular, questions 4, 5, or 7 as set out in Golden.

Will a proper record be kept of the reasons for and the manner in which a strip search was conducted?

- [159] I now turn to guideline 11 as set out in Golden.
- [160] The only written record recording the strip search before the Court was the prisoner report referred to as the C-13 that was completed on January 17, 2018, the day of the arrest and the strip search. The face of that report indicates that the strip search was approved and the reason given was, "Drugs located in crotch area".
- [161] In addition to the C-13, Sergeant Pillsworth provided an additional statement dated May 29, 2019, detailing the reasons for the strip search. He did not recall making that statement at the voir dire, nor was that statement before the Court.
- [162] There is no documentary evidence of the manner in which the strip search was conducted.

- [163] The record kept in this case was similar to that considered by the court in *R. v. Lantz*, 2017 ABQB 207 [Lantz]. In that case, there was only one line in the officer's report averting to the reason for the strip search. That one line spoke to the quantity of drugs found in a garage. There were no notes as to the manner in which the strip search was conducted. The only documentary record was limited to the facility log showing that the strip search took place at a certain time.
- [164] Referring to the "lack of a proper record" at para. 67 of that case, the court went on to consider "the purpose for having the record and whether that purpose can still be achieved in its absence". It held that it could.
- [165] At para. 67, the court stated: "It seems obvious that the purpose of having an adequate record is to ensure transparency and accountability of police action", and that one way to demonstrate accountability is by having a documentary record.
- [166] However, a documentary record is not the only way to achieve that purpose. At paras. 70 to 71, the court in *Lantz* confirmed that detailed viva voce evidence can make up for a lack of paper record to achieve that purpose, and also held that the absence of an adequate documentary record does not lead to an automatic Charter breach:
- [70] In my view, the absence of an adequate documentary record does not lead to an automatic Charter breach. It would have been preferable to have a more robust record of both the reasons for the strip search and manner in which it was carried out and, as the Crown rightly concedes, the absence of a record is a concern. However, there was still an opportunity to hold both Cst. Simmons and Cst. Healy accountable for their actions. In addition to her one line reference in her report to the reasons for the strip search, she gave fairly detailed evidence as to those reasons, all of which accorded with known facts which are documented elsewhere. Her notes and her report of her activities that evening before transporting Lantz to West Division all constitute documentation from which the reasons that she gave for the strip search are ascertainable. While the record is not ideal, there is a means by which her evidence as to her reasons for the strip search can be tested by reference to established facts of which she had knowledge, and in that way she can be held accountable.
- [71] With regard to the manner of search, there are no notes whatsoever from Cst. Healy. However, he gave quite precise evidence that was specific to the strip search of Lantz. The description of how Cst. Healy carried out the strip search was not challenged during cross-examination.
- [167] In *Mohamed*, the court was of the view at para. 82 that:
- ... the fact the search was recorded compensates for the fact that there are no notes of the search process.

- [168] Like the record in Lantz, the paucity of the written record in this case is notable. Mr. Gill argues that it is worse in that the written record of "drugs located in the crotch area" is indicative of the officer's failure to accurately record the details of the search. On that basis, together with the scant written record that is available, he argues that not having complied with this Golden factor, the strip search was not reasonably conducted.
- [169] I do not agree with that submission.
- [170] As was the case in Lantz, both of the officers involved with the strip search, being Corporal Banville and Sergeant Pillsworth, gave evidence and were cross-examined on the details of both the reasons for and the manner in which the strip search was conducted.
- [171] As previously set out in these reasons, both gave reasons for the strip search that were consistent with the notation that "drugs located in the crotch area".
- [172] Although Corporal Banville conceded in cross-examination that he did not find "drugs located in the crotch area", based on the fact that drugs fell out of Mr. Gill's pant leg, it was his belief that drugs may have been located in that area.
- [173] Sergeant Pillsworth explained further; he was of the view that because the drugs were not revealed on his pat-down search, the drugs that fell out of the pant leg must have been located in his waistband, his underwear, or in other words "in the crotch area".
- [174] I am satisfied that the recorded reason for the strip search, as set out in the C-13, was consistent with the detailed and unshaken evidence that both Corporal Banville and Sergeant Pillsworth gave in direct and on cross-examination.
- [175] The evidence regarding the manner in which the strip search was conducted can be tested by reference to the video evidence of the search. The video confirmed the officer's recall and description of the search.
- [176] In my view, the tested evidence of Sergeant Pillsworth and Corporal Banville, together with the video of the search, sufficiently set out the reasons for the strip search and the manner in which it was conducted and meet the purpose for requiring a record.
- [177] In any event, it has been held in several cases that the failure to comply with the record requirement of Golden will not, by itself, be sufficient to automatically render the strip search unreasonable: Johal at paras. 31-32; Davis at para. 22.
- [178] Especially given the evidence that was available to mitigate against the failure to keep a record of a strip search, I conclude that, in any event, the failure in this case is insufficient to find a Charter breach.

Conclusion on the reasonableness of the searches

- [179] To summarize, I conclude that:

- a) both the roadside search and the strip search were incidental to arrest and were both for the purpose of recovering evidence related to the arrest;
- b) there were reasonable grounds justifying the strip search; and
- c) the strip search was conducted in a reasonable manner.

[180] Accordingly, I find there was no breach of s. 8 in respect of either the roadside search or the strip search.

[181] I now turn to the analysis of Mr. Gill's s. 10(b) argument.

Access to counsel

Factual background

[182] After the arrest at 15:30, Constable Choi informed Mr. Gill of his Charter rights, including the s. 10(b) right to counsel. In response, Mr. Gill told Constable Choi that he wanted to speak to counsel. He did not say who.

[183] Without taking any further action to facilitate that request, Constable Choi handed custody of Mr. Gill to Corporal Hakonson so that he could search the van. Corporal Hakonson, together with Sergeant Pillsworth, searched Mr. Gill, at which time they found cash, drugs, and two cellphones.

[184] At 15:43, Corporal Banville also informed Mr. Gill of his Charter rights, at which time Mr. Gill reasserted the right to counsel, but this time provided the name of counsel and his phone number. Although Corporal Banville had access to a work-issued cellphone, he did not provide that cellphone to Mr. Gill. He testified that there was no area that would afford Mr. Gill privacy or that would be safe and secure for everyone involved.

[185] At 15:47, Mr. Gill was transported to the RCMP detachment with Mr. Patel. They arrived at the detachment five minutes later at 15:53.

[186] Once at the detachment, Corporal Banville made the following attempts to contact counsel for Mr. Gill:

- a) at 16:01, he called the number provided but was not able to contact counsel; he did not leave a message;
- b) at 16:07, Corporal Banville called counsel's law firm and spoke to a person named Ruth who told him that counsel was in court and unavailable to take a call; and
- c) at 16:18, Corporal Banville called Ruth again and provided her with a number to the RCMP detachment.

[187] The strip search was conducted before Mr. Gill was able to speak with counsel.

[188] At 16:33, counsel called the RCMP detachment, at which time Mr. Gill was placed in a private phone room to take the call.

Legal framework

[189] 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.

The importance of a person's s. 10 rights is well established in the case law: *R. v. Taylor*, 2014 SCC 50 at paras. 21, 22 [Taylor]. In *Taylor* at para. 24, Madam Justice Abella, for the Court, confirmed that the duty to facilitate access to a lawyer arises immediately upon the detainee's request to speak to counsel and without delay. She held that:

[24] . . . The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity.

[190] At para. 107 of *R. v. Oswald*, 2019 BCSC 705 [Oswald], Mr. Justice Kent of this court more thoroughly summarized the principles that apply to a consideration of the s. 10(b) rights, including that the burden is on the Crown to show that any given delay in facilitating access to counsel was reasonable in the circumstances.

[191] Numerous cases support the position that where it is not impractical to permit a telephone call prior to arriving at the police detachment, the detainee should be afforded the opportunity to do so: *R. v. Camacho*, 2011 BCSC 175 at para. 44 [Camacho]; *R. v. Smith*, 2011 BCSC 1695 at para. 179 [Smith].

[192] However, the court has also acknowledged that "there are also valid reasons for the call to happen at police cells, such as the security and privacy afforded by the room designated for that purpose at the detachment, a lack of phone at the scene, or the inability to facilitate that type of call": *R. v. Brown*, 2014 BCSC 112 at para. 109 [Brown].

Mr. Gill's position

[193] Mr. Gill argues that his s. 10(b) rights were violated in two ways:

- a) the delay of approximately 63 minutes from the time he first asserted his right to counsel at 15:30 to 16:33 when he actually spoke to counsel did not meet the requirement of immediacy and was unreasonable; and
- b) the strip search was conducted prior to him speaking with counsel.

[194] I will address each of those arguments in turn.

Analysis

Was the 63-minute delay reasonable?

[195] I will start my analysis by noting Mr. Gill's access to counsel was not facilitated roadside.

- [196] In assessing that failure, I am mindful of the comments in *Camacho and Smith* that where it is not impractical, a detainee should be given the opportunity to call counsel prior to being taken to the detachment. However, as was the case in *Brown and Oswald*, I found that it was not practical in this case to do so.
- [197] Two cellphones were seized from the vehicle during the search incidental to arrest, one of which kept ringing and was answered by Corporal Hakonson three times. I accept that there was a reasonable need to preserve those phones as evidence in the investigation. On that basis, I also find it was reasonable to deny Mr. Gill access to those phones for the purpose of calling counsel or otherwise.
- [198] Although Corporal Banville had a work-issued cellphone, he was concerned about Mr. Gill's privacy as residents had come outside to see what was happening. On that point, I note that other officers who were at the scene either did not recall or testified that no residents were outside at the time of the arrest. However, given the significance of the residents' presence to Corporal Banville, who had to assess the possibility that Mr. Gill could make a call in private, I accept his evidence on the point.
- [199] I also accept that it was impracticable to allow Mr. Gill access to a police vehicle to make the call. With one exception, none of the police vehicles had what the officers described as a cage, which meant that Mr. Gill would have access to a police radio and other equipment. In my view, it was not reasonable to leave Mr. Gill unattended in one of those vehicles. Mr. Patel was in the one police vehicle that did have a cage.
- [200] In the circumstances, and given that the detachment was a five-minute drive away, I conclude that the delay in facilitating Mr. Gill's right to counsel at roadside was reasonable.
- [201] I come to the same conclusion regarding the delay in facilitating Mr. Gill's access to counsel once they arrived at the detachment at 15:53.
- [202] At 16:01, eight minutes after arriving at the detachment, Corporal Banville had attempted to call Mr. Gill's counsel of choice. The delay between 16:01 and 16:33 when Mr. Gill actually spoke to counsel was the result of counsel's availability, and not the result of any failure on the part of the RCMP to facilitate Mr. Gill's right to counsel.
- [203] At no time between 15:30 and 16:33 did the police attempt to elicit any evidence from Mr. Gill.
- [204] In the circumstances, I conclude that the delay in facilitating Mr. Gill's right to counsel does not constitute a breach of s. 10(b).

Should Mr. Gill have been provided with the opportunity to speak to counsel prior to the strip search?

- [205] As noted, Mr. Gill argues that the strip search imposes further obligations on the police with respect to Mr. Gill's s. 10(b) rights. Relying on the decision in *R. v. Tonkin*, 2020 ONSC 5206 at para. 28 [Tonkin], he argues that "section 10(b) of the Charter requires that detainees be provided with an opportunity to speak to counsel prior to being strip searched."
- [206] The Crown disagrees. It says that the strip search is a search incident to arrest and that officers are not required to refrain from conducting that search until after Mr. Gill had spoken with counsel.
- [207] I accept the Crown's position on this matter.
- [208] On its face, *Tonkin* does appear to stand for the proposition relied on by Mr. Gill. Relying on the Ontario Court of Appeal decision in *R. v. McGuffie*, 2016 ONCA 365 [McGuffie], the court in *Tonkin* at para. 28 plainly states: "section 10(b) of the Charter requires that detainees be provided with an opportunity to speak to counsel prior to being strip searched."
- [209] However, in my view, the court's reliance on McGuffie for the proposition it cites is misplaced.
- [210] At paras. 26 and 27 of *Tonkin*, the court set out paragraphs 22 and 68 from McGuffie on which it bases its conclusion relied on by Mr. Gill. However, as the court in *Tonkin* accurately notes, the two quoted paragraphs from McGuffie are a recounting of the facts. They are not conclusions of law:
- [26] The right of a detainee to consult with counsel prior to being strip searched arose in McGuffie, 2016 ONCA 365. The accused in McGuffie suffered multiple, egregious violations of his Charter rights. He was arbitrarily detained for an unconscionable length of time. He was not advised of his right to counsel at the outset of his detention and, during the time that he was being denied his right to counsel, he was subjected to an unlawful and degrading strip search. In recounting the facts of the case, Justice Doherty said at paragraph 22:
- Nothing was said about giving the appellant an opportunity to speak to a lawyer before the search was conducted, despite Constable Greenwood knowing that the appellant wanted to speak to a lawyer. Nor did any of the officers allude to the possibility that the police should refrain from conducting the strip search until the appellant had an opportunity to speak with counsel.
- [27] Later, when considering the exclusion of the evidence, Justice Doherty wrote:
- [68] When Constable Greenwood finally got the appellant to the police station, his superiors did not express any concern about the appellant's s. 10(b) rights or, more specifically, any concern about whether the appellant had been given the opportunity to speak to his lawyer before undergoing the proposed strip search.

[Emphasis added.]

- [211] The issue before the Ontario Court of Appeal in McGuffie was not whether conducting the strip search prior to facilitating access to counsel violated Mr. McGuffie's s. 10(b) right. I note parenthetically that the circumstances surrounding a strip search in McGuffie were more egregious than in the case at bar.
- [212] The issue was whether the trial judge erred in his analysis under s. 24(2) in declining to exclude evidence, notwithstanding the violations of Mr. McGuffie's Charter rights. That is a different analysis than whether the Charter rights were violated.
- [213] The Court of Appeal did not expressly consider or decide the issue of whether the Charter requires detainees to be provided with an opportunity to speak to counsel prior to being strip searched.
- [214] Given what in my view is an incorrect reading of the outcome of McGuffie, I decline to follow the decision in Tonkin for that proposition.
- [215] In my view, R. v. Debot, [1989] 2 S.C.R. 1140 [Debot], a decision of the Supreme Court of Canada, remains the law in British Columbia.
- [216] At paras. 1 to 3 of the Debot decision, Justice Lamer, as he then was, for the majority explicitly rejected the suggestion that s. 10(b) requires the police to hold off conducting strip searches unless the 10(b) right was waived by the detainee. Specifically, Lamer J. wrote:

The right to search incident to arrest derives from the fact of arrest or detention of the person. The right to retain and instruct counsel derives from the arrest or detention, not from the fact of being searched. Therefore immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel. There are, in my view, exceptions to this general rule. One is where the lawfulness of the search is dependent on the detainee's consent. That situation is governed by this Court's decision in R. v. Ross, [1989] 1 S.C.R. 3, at p. 12:

In my view, the right to counsel also means that, once an accused or detained person has asserted that right, the police cannot, in any way, compel the detainee or accused person to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right.

- [217] Accordingly, as I have concluded that the strip search was a valid search incidental to arrest, the police did not breach Mr. Gill's right under s. 10(b) by proceeding with the strip search without having him speak with a lawyer first.

Conclusion

[218] To summarize, I have concluded that each of the arrest, the searches, and the facilitation of Mr. Gill's right to counsel were conducted lawfully and there were no violations of Mr. Gill's ss. 8, 9, or 10(b) Charter rights.

[219] As a result, the evidence that was obtained can be admitted into evidence at trial.

[220] Counsel have not made any s. 24(2) arguments in the case and I am told it was their intention to defer that argument pending the outcome of these reasons. In light of my ruling, I anticipate that those arguments will not be necessary, but I will wait to hear further from counsel in that regard.

[221] Subject to anything arising, that concludes the voir dire.

"Ahmad J."

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