

CANADA / JUDGMENT

R. v. Gilliland

2025 BCSC 568

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 568 R. v. Gilliland

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gilliland,

2025 BCSC 568

Date: 20250310

Docket: 90511

Registry: Nanaimo

Rex

v.

Raymond Frederick Gilliland

Corrected Judgment: The text of the judgment was corrected at paragraph 14 on March 31, 2025.

Before: The Honourable Justice Thompson

Oral Reasons for Judgment on Voir Dire

Counsel for the Crown:

I. McFadgen

Counsel for the Accused:

T. Martin

Counsel appearing as Amicus Curiae:

K. Bradshaw

(February 24, 2025 only)

Place and Dates of Hearing:

Nanaimo, B.C.

February 24-25 & 27-28, 2025

Place and Date of Judgment:

Nanaimo, B.C.

March 10, 2025

- [1] The accused is charged on a seven-count indictment with possession of various controlled substances for the purpose of trafficking, and two weapons offences. The alleged offences arise out of a traffic stop of a van in downtown Nanaimo in the early morning hours of 20 February 2023.
- [2] This voir dire was declared to address the accused's application to exclude evidence obtained in a manner that infringed his rights guaranteed by ss. 8, 9, and 10 of the Charter. The s. 24(2) remedy issue will be addressed at a further hearing within this voir dire. These reasons address the question of whether and in what way the Charter rights were infringed. The Crown acknowledges one s. 8 breach, arising out of the failure to comply with the Criminal Code process to obtain authorization to retain certain items seized during the searches in question.
- [3] The evidence that grounds these charges was seized in the aftermath of the arrest of a front-seat passenger, alleged to be the accused. Identity is not admitted. The Crown's theory is that the accused was the front-seat passenger. On the basis of *R. v. Jones*, 2017 SCC 60, it is common ground that the accused has standing to make this Charter application.
- [4] The three RCMP officers who were on the scene testified on the voir dire: Constables Douglas, Martin, and Nelidov. The accused called no evidence on the voir dire.
- [5] In *R. v. Webber*, 2019 BCCA 208 at para. 1, Justice Savage began his reasons for the Court as follows:

The fundamental duty of the police is to protect life and safety. In the course of this duty police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others.

- [6] Stopping a vehicle with five occupants at 2:30 a.m. is a situation of heightened risk, especially if the police decide to make an arrest. Arrests are often made "quickly in volatile and rapidly changing situations" and "[t]he law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant": *R. v. Golub* (1997), 117 C.C.C. (3d) 193 at 202 (Ont. C.A.), leave to appeal refused 128 C.C.C. (3d) vi. "Determining whether sufficient grounds exist to

justify an exercise of police powers is not a 'scientific or metaphysical exercise,' but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience": R. v. Canary, 2018 ONCA 304 at para. 22. Both Golub and Canary were cited with approval by Justice Jamal, writing for the majority in R. v. Beaver, 2022 SCC 54 at para. 72.

- [7] The law does, however, expect that police officers will exercise care when making the decision to use their power to detain people without warrant, whether via arrest or investigative detention, because the state's interest in detecting crime must be balanced against the individual's "interest in being left alone" as Justice Dickson (as he then was) put it in his seminal judgment for the Court in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159. In *R. v. Kokesch*, [1990] 3 S.C.R. 3, a perimeter search case, Justice Sopinka wrote for the majority and said that "where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally" (p. 29). As will become clear, Justice Sopinka's words resonate in the case at bar.
- [8] Justice Doherty echoed these fundamental constitutional principles when writing for the Ontario Court of Appeal in *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (C.A.) at 251:

The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police. . . . The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.

- [9] The Supreme Court of Canada has made the same point clearly and repeatedly. In *R. v. Mann*, 2004 SCC 52 at para. 35, Justice Iacobucci said:

Police powers and police duties are not necessarily correlative. 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.

In his concurring judgment in *R. v. Clayton*, 2007 SCC 32 at para. 68, Justice Binnie said that "police powers are not co-extensive with their duties . A society that valued police efficiency and effectiveness above other values would be a police state."

- [10] Having due regard for dynamic contexts and the risks inherent in such circumstances, police officers are expected to make careful and disciplined use of their warrantless powers of investigative detention and arrest, and associated search powers. Police officers who perform these warrantless arrests, detentions, or searches know that they may be called on to account for their decisions, especially when the use of those powers might lead to criminal charges and a trial.

- [11] Police officers know that they may be required to testify months or years later about their use of these powers by which they have interfered with an individual's prima facie right to be left alone. As I will explain, important parts of the narrative advanced by Cst. Douglas, the principal investigating officer are not reliable. My impression is that he has inaccurately reconstructed his evidence. This reconstruction would not have occurred if he had made a proper set of contemporaneous notes.
- [12] Contemporaneous notes are an invaluable aid to recalling the details of the sequence of events and what was in a police officer's mind at the time they decided to exercise powers of arrest, detention, or search. And, a police officer's duty to make contemporaneous notes has the salutary effect of reinforcing their obligation to turn their minds to their grounds for use of these powers before engaging them - it is part of a process that introduces a measure of rigour, discipline, and restraint into decisions to use police powers that impact on individual freedoms.
- [13] The scope of police powers of arrest, detention, and search, and the obligation to make careful notes when using these powers is, in the vernacular, "Policing 101." I heard some evidence about police training, and I do not have the slightest doubt that RCMP officers are taught, from their first days at Depot in Regina, about these fundamentally important subjects.
- [14] The section of the RCMP operations manual regarding investigators' notes is in evidence, and was acknowledged by Cst. Douglas to align with his training. The material part says:
- 1.1 Investigator's notes serve to refresh memory, justify decisions made, and record evidence. Well-documented notebook entries lend credibility to testimony and can substantiate information years after the original entry was made. Inadequate and inaccurate entries in a notebook can compromise an investigation and subsequent criminal, civil, and/or administrative proceedings.
- 1.2 Members must make written and/or electronic notes, as soon as practicable, in order to prepare accurate, detailed, and comprehensive notes articulating observations made and actions take during the course of their duties. See *Wood vs. Schaeffer*.
- ...
- 1.5 A Member's notebook is the property of the RCMP and will be provided to a supervisor for review at the mid-year and end-of-year performance review, or upon request.
- 1.6 Contents of forms, either written or electronic, which are not made contemporaneously to an event, are not considered notes and are not a substitute for an investigator's notebook.
- ...
- 3.1 Investigator's notes should thoroughly describe the details of the occurrence and answer: who, what, when, where, why, and how.

...

3.3 Notes should be factual and descriptive enough to explain decisions made.

[15] At s. 1.2, the RCMP policy refers to the judgment in *Wood v. Schaeffer*, 2013 SCC 71, wherein Justice Moldaver wrote about the police officer's duty to make notes:

[63] Although it is common ground among the parties that the duties of a police officer include a duty to make notes on the events that transpire during the officer's tour of duty, I recognize that neither side points to a definitive statement of this Court holding as much. [Footnote omitted.]

[64] However, reports by experienced jurists have concluded that such a duty exists. For example, in their 1993 report to the Attorney General of Ontario on charge screening, disclosure, and resolution discussions, a committee made up of experienced counsel and police officers and led by the Honourable G. A. Martin, observed that:

... the duty to make careful notes pertaining to an investigation is an important part of the investigator's broader duty to ensure that those who commit crimes are held accountable for them.

...

... inadequate note-taking, while it can hamper the conduct of the defence, also risks hampering an investigation and/or a prosecution. In short, inadequate note-taking does a disservice to both an accused and the community, [which] is entitled to expect that innocent people will be acquitted and guilty people properly convicted. [Emphasis added.]

(Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (1993) ("Martin Committee"), at pp. 151 and 153)

[65] In another instance, the Honourable R. E. Salhany considered the significance of police notes in the course of a public inquiry into a death caused by an off-duty officer. He explained the importance of notes in this way:

[Note-making] is not a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused. It is as important as obtaining an incriminating statement, discovering incriminating exhibits or locating helpful witnesses. The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator. [Emphasis added.]

(Report of the Taman Inquiry (2008), at p. 133)

[66] These conclusions, in my view, stand on firm ground. The importance of police notes to the criminal justice system is obvious. As Mr. Martin observed of properly-made notes:

The notes of an investigator are often the most immediate source of the evidence relevant to the commission of a crime. The notes may be closest to what the witness actually saw or experienced. As the earliest record created, they may be the most accurate. [p. 152]

- [67] Against that background, I have little difficulty concluding that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Drawing on the remarks of Mr. Martin, such a duty to prepare notes is, at a minimum, implicit in an officer's duty to assist in the laying of charges and in prosecutions
- [68] None of this, of course, comes as news to police officers. In this case, for example, OPP policy confirms the duty to make notes by requiring constables to record "concise, comprehensive particulars of each occurrence" during their tour of duty and to "make all original investigative notes . . . during an investigation or as soon thereafter practicable" (OPP Order 2.50, Member Note Taking, SIU Record, at pp. 48-52). More generally, police manuals have long emphasized the importance of accurate, detailed, and comprehensive notes; see, e.g., R. E. Salhany, *The Police Manual of Arrest, Seizure & Interrogation* (7th ed. 1997), at pp. 270-78.
- [16] The burden on the Crown to justify the police use of warrantless powers is made more difficult to carry in the absence of proper contemporary notes, but the absence of notes does not invariably frustrate the Court's ability to determine if there were subjective grounds for use of the power and whether the information known to the police at the time makes the objective grade: *Beaver*, at paras. 74-76.
- [17] The RCMP members who attended this traffic stop were on general duty, and I am sure made regular use of their powers of warrantless arrest, detention, and search prior to and since this stop two years ago. Cst. Douglas testified that he has worked full time on general duties since, and in this time he has likely conducted over a hundred searches. This highlights the challenge for Cst. Douglas - which I find he has not been able to meet - to remember the critical details surrounding his use of police powers two years ago.
- [18] Cst. Douglas was the lead investigator in this case, first on the scene, and he knew in the moments after taking the front-seat passenger into custody that very serious charges were likely to result; the stakes are obviously high both for the individual and society. In these circumstances, it is a dereliction of a fundamentally important police duty to fail to make proper contemporaneous notes of the sequence of key fast-moving events and the grounds for his exercise of police powers, and to put in jeopardy his ability to properly account for his actions.
- [19] Cst. Douglas' evidence conflicts in critical ways with the evidence of Cst. Martin who arrived at the vehicle stop moments after Cst. Douglas. As I said a moment ago, and for reasons that I will more fully explain in due course, I conclude that Cst. Douglas' evidence on important events was reconstructed and inaccurate and I have approached his evidence with care, particularly when it is uncorroborated by other cogent evidence. I find that Cst. Martin's evidence on the important events is a better fit with the surrounding probabilities, and I

prefer it when it is at odds with the evidence of Cst. Douglas. I make the following findings:

1. It is common ground, and I agree that the 2:33 a.m. traffic stop conducted by Cst. Douglas was lawful - he had seen the Honda Odyssey van being driven erratically, and he wanted to check on the driver's sobriety.
2. Before engaging with any of the five occupants of the van, Cst. Douglas learned that the vehicle was registered to Edward Long, that Mr. Long did not have a valid driver's license, and that the vehicle had not been reported stolen.
3. Cst. Douglas approached the driver's side of the vehicle. The driver, Terri Campbell, produced a driver's license but was not able to produce insurance documents. She said the van belonged to a friend, but could not say who the friend was or how she came into possession of the vehicle.
4. The front-seat passenger was sweating profusely, and appeared to Cst. Douglas to be nervous. I find that Cst. Douglas suspected the van was stolen and, in this connection, he wanted to identify the front-seat passenger who seemed nervous.
5. The front-seat passenger may or may not have had his seatbelt on. The only evidence that he did not have his seatbelt buckled is from Cst. Douglas, and it is not supported by any contemporaneous note. I am not prepared to accept his uncorroborated evidence on this point as reliable, and I do not accept that any of Cst. Douglas' decisions related in any way to seatbelt use - my impression is that his evidence regarding seatbelt use is an example of reconstruction.
6. Cst. Martin arrived at the van in his own police vehicle, shortly after Cst. Douglas began engaging with the driver. Cst. Martin was initially at the front passenger side of the van. He overheard Cst. Douglas' questions of the driver and the front-seat passenger, and saw the front-seat passenger fumbling around in the glovebox looking for the van's insurance documents. There were three backseat passengers, and each were known to Cst. Martin. Each appeared to be under the influence of drugs - one began to light up a meth pipe.
7. Cst. Douglas told the driver - and only the driver - that she was detained for possession of stolen property. Although the front-seat passenger had been asked his name, I am not persuaded that he was detained at this point. I do have my doubts about whether the police would have allowed the front-seat passenger to open the door and walk away. For reasons that I will explain, I was left with the firm impression that neither Cst. Douglas nor Cst. Martin have a proper grasp on the limits of their powers of arrest, detention, or search, and I think there is a chance that if the front-seat passenger had attempted to leave at that point he would have been stopped. That said, I find that it was the driver that had been told she was detained, and no other occupant - i.e., the driver had been singled out, and the only interaction between the police and the front-seat passenger was the request for his name. I think the reasonable person in the front-seat passenger's circumstances would probably feel free to walk away. See *R. v. Grant*, 2009 SCC 32 at para. 44.

8. When Cst. Douglas told the driver she was detained, Cst. Martin moved over to the driver's side of the van, and assumed conduct of her, while Cst. Douglas went to the front-seat passenger's side of the vehicle.
9. The driver was told by Cst. Martin to get out of the van, and when she did so, a shotgun shell rolled out from the driver's side of the van onto the ground. Cst. Martin told Cst. Douglas that he saw a shotgun shell. Cst. Martin did not see any weapons or see any drugs at that point, and he said nothing to Cst. Douglas about weapons or drugs. Cst. Martin and Cst. Douglas had a brief discussion over the top of the van, and they decided to arrest all of the van occupants for possession of a weapon. At this point, only the driver was out of the van.
10. The three backseat passengers stepped out of the van at Cst. Martin's request. He marshalled the driver and the three backseat passengers to the curb behind the van, where he advised each they were under arrest, chartered and warned them, and conducted pat down searches. As he completed the pat down searches, he heard shouting between Cst. Douglas and the front-seat passenger. The process of taking these four people to the back of the van, and the interactions with them described by Cst. Martin must have taken at least a minute or two, if not more.
11. The shouting and commotion that Cst. Martin heard began after the front-seat passenger exited the van, when Cst. Duncan was attempting to handcuff the front-seat passenger. In the midst of this emerging affray, one of Cst. Martin's arrestees ran, and Cst. Martin began chasing him. However, Cst. Martin sensibly soon thought better of this and returned to help Cst. Douglas subdue the front-seat passenger.
12. Cst. Nelidov had arrived on the scene when the front-seat passenger was already out of the van, and no more than a minute before the struggle began. When he saw Cst. Douglas struggling with the front-seat passenger, he joined in the eventually successful effort to handcuff the front-seat passenger.
13. The decision having been made by Cst. Martin and Cst. Douglas to arrest all the van occupants for possession of a weapon before the front-seat passenger left the vehicle, I think it is more likely than not that Cst. Douglas told the front-seat passenger that he was under arrest for this reason and told him to get out of the van. Cst. Martin does not remember hearing the front-seat passenger being advised that he was under arrest, but I think it unlikely that he would have: he had his hands full with the arrests of the other four occupants. (I appreciate that Cst. Douglas did not testify to advising the front-seat passenger that he was under arrest for weapon possession at this point in the sequence of events - his evidence, which I do not accept, is that he was dealing with the front-seat passenger on the basis of having told all occupants of the van that they were under detention for possession of stolen property.)
14. There is a period of time during which Cst. Martin is corralling the other four and attending to arrests, provision of s. 10 information, and searches incident to arrest, when there is apparently no struggle going on - Cst. Martin was close by and would have noticed it. Cst.

Nelidov arrived when the front-seat passenger was already out of the vehicle and there was up to a minute from the time of his arrival until the struggle began. During this time between the front-seat passenger's exit from the van and the attempt to handcuff him that I find triggered the struggle, it is reasonable to assume that Cst. Douglas was advising the front-seat passenger of his right to counsel. The burden of proving non-compliance with s. 10 is on the accused. I find there to be no clear, convincing, and cogent evidence - direct or circumstantial - of the failure to advise the front-seat passenger of the reason for his arrest, or of his right to counsel.

15. Once all three officers were engaged with the front-seat passenger, and he had been taken to the ground, but before he was handcuffed - Cst. Nelidov perceived that the front-seat passenger was reaching for a sheathed knife in his waistband. Cst. Nelidov immediately took a firmer grip on the front-seat passenger's hands. Curiously, Cst. Martin does not remember hearing anything about a knife in the midst of the melee - but I nevertheless accept Cst. Nelidov's evidence that he saw the knife and that he, naturally enough, told the other officers that the front-seat passenger was reaching for it. The knife was removed from the front-seat passenger's waistband after he was handcuffed.
16. The only arrest of the front-seat passenger - after his initial arrest arising out of Cst. Martin seeing the shotgun shell - was when the front-seat passenger was in Cst. Douglas' police car some minutes later after he and his belongings had been searched. This was at 3:09 a.m. and is reflected in the only note in Cst. Douglas' notebook, which focuses principally on this PPT arrest, and associated Charter advice and police warning. I find that Cst. Douglas' evidence that he made arrests for possession of a weapon dangerous to the public peace in relation to the waistband knife, and for PPT during the search process, and each time chartered the front-seat passenger, to be unreliable reconstruction. Notably, neither Cst. Martin nor Cst. Nelidov heard Cst. Douglas arrest or charter the front-seat passenger when Cst. Douglas said he did (i.e., immediately after when the threat posed by the knife was neutralized), and none of these purported additional arrests and chartering are referenced in Cst. Douglas' notebook.
17. The searches of the front-seat passenger and his bags were conducted incident to the initial arrest, i.e., the one made further to the decision to arrest all occupants of the van for possession of a weapon following Cst. Martin seeing the shotgun shell.
18. Cst. Douglas had decided by 2:56 a.m., at the latest, to arrest the front-seat passenger for PPT. It was at that time he sent a broadcast to dispatch to ask that a PPT file be opened. I find that Cst. Douglas was busy conducting searches incident to his original arrest during the period from the time the front-seat passenger was subdued until he was arrested for PPT and chartered at 3:09 a.m. At some point in this time leading up to 2:56 a.m. he would have located the material that led him to conclude that there were grounds for a PPT arrest. There is nothing by way of officer or public safety or any other reason that arises from the evidence to explain or excuse the delay in complying with the informational components of s. 10 in relation to PPT.

19. The front-seat passenger was released from Cst. Douglas' custody to the care of ambulance attendants at the scene because he was sweating profusely, moaning, and grunting.

The Unreliability of Constable Douglas' Evidence

- [20] I lack confidence in the reliability of Cst. Douglas' evidence, either as it stood alone, or when considered in the totality of the evidence on the voir dire. I begin with the plain fact that his work on this file - a matter of considerable importance - lacked proper attention to detail. His notebook entries comprised six lines that dealt almost exclusively with the 3:09 a.m. arrest for PPT, and the associated s. 10 advice and police caution. He processed the exhibits without noting on the exhibit flowchart where at the scene any of the 70 items were found. He neglected to file a Form 5.2 for any of these items. His reports, including his Report to Crown Counsel ("RCC"), refer to the front-seat passenger as Raymond Gilliland, presumably based on three documents found in the front-seat passenger's backpack: a Ministry of Social Development document, a Scotiabank account summary, and a Fido document summarizing a recent transaction; each of these documents in fact has the name Raymond Gilliland on it. He was asked by the Crown to prepare an ITO in support of a production order in aid of proving the identity of the front-seat passenger, and his December 2023 ITO does not mention the apparent Gilliland/Gilliland mix-up.
- [21] Cst. Douglas testified, based on his usual practice, that the 21-line synopsis portion of his RCC was prepared before returning to the detachment, while he was in his police vehicle. If accurate, this would be important because these lines would significantly augment his other, very limited, contemporaneous notes about the use of police powers. However, I am satisfied that this did not happen in this case. Cst. Douglas conceded in cross-examination that the synopsis contained information that he must have obtained from Cst. Martin or Cst. Nelidov, and I think it is unlikely that this happened at the scene. Cst. Douglas acknowledged that he does not know when the main body of the RCC was prepared. And, it is impossible to know on the evidence if the synopsis portion was prepared at the same time as the rest of the RCC.
- [22] The synopsis says that upon exit of the occupants from the vehicle, "shotgun shells, a bag within arms reach of the driver and weapons were observed." The next sentences are: "Parties arrested for weapons possession. One male fought with police upon handcuff placement."
- [23] Cst. Douglas testified that he did not see shotgun shells, drugs, or weapons. This was information received from the other constables. He testified that while he was in the midst of the struggle to put handcuffs on the front-seat passenger for what he maintained was a detention for possession of stolen property (i.e., the van), he heard Cst. Martin, and perhaps Cst. Nelidov as well, say they saw shotgun shells, drugs, and weapons.

[24] Most of this evidence on a critical issue was given during cross-examination. Cst. Douglas testified that fairly early in his dealings with the front-seat passenger, he heard Cst. Martin say that he saw a shotgun shell fall out of the driver's side as soon as the driver was getting out. And, he testified that at the time he was in the struggle with the front-seat passenger, he heard Cst. Martin (and he believes Cst. Nelidov also) say that shotgun shells and weapons were observed. That said, Cst. Douglas admitted that it was possible that Cst. Nelidov was not there yet.

[25] In the narrative part of the RCC, Cst. Douglas recorded:

All occupants were detained for possession of stolen property and asked to exit the vehicle. While this was happening and all occupants had exited, Cst. Douglas was advised by Cst. Martin and Cst. Nelidov that there were weapons, shotgun shells and drugs in plain view in the vehicle.

Cst. Douglas testified that he does not remember the mention of drugs now, but on the basis of his report he maintains that either Cst. Martin or Cst. Nelidov said they saw drugs.

[26] The synopsis portion of the RCC reads, in material part:

All occupants detained for possession of stolen property (PSP), and removed from the vehicle. Upon exit shotgun shells, a bag within arms reach of the driver and weapons were observed. Parties arrested for weapons possession. One male fought with police upon handcuff placement and reached several times for knives in his possession.

[27] Cst. Douglas acknowledged that this passage reads like he was given the information about shells and weapons, and then everyone in the van was arrested for weapons possession, and then the front-seat passenger began to fight with police. However, he maintains that this is not how events unfolded.

[28] Cst. Martin says that to the best of his recollection it was only the driver that was detained for possession of stolen property, and the only one who was at that point asked to get out of the vehicle. He saw the shotgun shell fall out of the van, but did not see any weapons and, other than his earlier observation of one of the backseat passengers lighting up a meth pipe, observed no drugs. He told Cst. Douglas about the shotgun shell, but he did not say anything to him about either weapons or drugs because he had not observed either. It was after telling Cst. Douglas about the shotgun shell that they, together, made the decision to arrest all the van occupants for possession of a weapon.

[29] Cst. Nelidov testified that when he arrived, the front-seat passenger was already out of the van. And, before the struggle with the front-seat passenger began, he had looked inside the car and seen a shotgun shell in the driver's side doorway pocket and told Cst. Martin about his observation. Cst. Nelidov gave no evidence that he saw either drugs or a weapon in the van, or that he had told Cst. Douglas that he had. He said he told Cst. Douglas about the shotgun shell he had seen in the driver's side door pocket, but this was after the front-seat passenger was handcuffed and subdued.

- [30] I prefer the evidence of Cst. Martin and Cst. Nelidov. I conclude that parts of Cst. Douglas' synopsis and the other portion of the RCC were reconstructed, inaccurately, some time after the event, and his evidence at trial was cobbled together based on his earlier inaccurate reconstructions to present a narrative that might be seen to justify his actions. If he has actual memories of the events, I think they are not reliable.
- [31] A further example of Cst. Douglas giving evidence that was inaccurate - perhaps it might be called embroidery - was his evidence that in the midst of the struggle with the front-seat passenger, when Cst. Nelidov grabbed the knife in its sheath from the front-seat passenger, Cst. Nelidov threw the knife away. I accept Cst. Nelidov's rather less dramatic evidence: after he saw the knife, he tightened his grip on the front-seat passenger's arms, and the knife was removed from the front-seat passenger's waistband after the front-seat passenger was handcuffed and subdued.
- [32] While it does not directly reflect on the quality of Cst. Douglas' memory of this event two years ago, I take note of the apparent deficiencies in Cst. Douglas' memory of important aspects of his police training. He testified that he always handcuffs and searches individuals that he detains for investigation. And, he seemed completely perplexed when it was suggested to him that a person arrested or detained by police without grounds is entitled to resist.

The Arrest and Search Issue

- [33] Section 9 of the Charter provides that everyone has the right not to be arbitrarily detained or imprisoned. An illegal arrest is an arbitrary detention: *Grant*, at para. 54. The Crown accepts that if it is established that the front-seat passenger was arrested, the Crown has the onus of establishing on a balance of probabilities that the arrest was lawful. In his judgment for the Court in *F.H. v. McDougall*, 2008 SCC 53 at paras. 45-46, Justice Rothstein cautioned that to meet the balance of probabilities standard, evidence "must be scrutinized with care" and "must always be clear, convincing and cogent." These descriptors are relative, not absolute - the quality of the evidence necessary to meet the balance of probabilities threshold depends on the nature of the case and the evidence capable of being adduced: *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 40.
- [34] The power to arrest that is relevant to this case is found in s. 495(1) of the Criminal Code which authorizes an arrest without warrant where a peace officer believes, on reasonable grounds, that the person has committed an indictable offence, or a person he finds committing a criminal offence. The Crown does not suggest that the front-seat passenger was found committing a criminal offence. The lawfulness of the arrest in this case depends on the arresting officer having had the subjective belief that he had reasonable grounds and those grounds must be objectively justifiable: *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-251.

- [35] The standard to be applied in assessing whether or not there were reasonable grounds is not proof beyond a reasonable doubt or even a *prima facie* case or proof that meets the civil standard. The appropriate standard is one of "reasonable probability" which envisions a practical and non-technical analysis of whether the totality of the circumstances support a probability as to the facts constituting commission of the offence. See *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166; *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40 at para. 114; *R. v. Jir*, 2010 BCCA 497 at para. 27. The objective assessment is made by looking at the observations and other information from the point of view of someone with the same experience, training, knowledge, and skills as the arresting officer: *R. v. Luong*, 2010 BCCA 158 at para. 24.
- [36] The "cumulative effect of the evidence is taken into account," and the evidence is not to be assessed on a "piece meal basis": *Luong*, at para. 17. While the totality of the circumstances must be examined when making an objective assessment of the grounds for arrest, where there are multiple persons arrested the analysis must be carried out separately for each. It is an individual assessment, and care must be taken that it is the totality of the circumstances that bear on the individual that are brought into account. "The police are not entitled to arrest first and then determine whether the person arrested is connected to the offence(s) under investigation": *R. v. Whitaker*, 2008 BCCA 174 at para. 60, leave to appeal refused, [2008] S.C.C.A. No. 296.
- [37] I reject the Crown submission that the front-seat passenger was initially detained for investigation of possession of stolen property and that he was not arrested for possession of a weapon at the time he exited the car, because this submission is rooted in evidence from Cst. Douglas that I find unreliable. Likewise, I reject the argument that the front-seat passenger was arrested at any point for possession of a weapon dangerous to the public peace. My findings of fact reflect my conclusion on a balance of probabilities that the front-seat passenger was, in fact, arrested for "possession of a weapon" and searched incident to that arrest. Whether he could have been the subject of a detention for possession of stolen property or arrested at some point during the struggle for an offence, and searched incident to such a detention or arrest, is not relevant. As Frankel J.A. put it in *Whitaker*, at para. 65, "[i]n deciding whether the police infringed Charter rights, they are to be judged on what they did, not what they could have done."
- [38] I will not mince words. I conclude that the front-seat passenger's arrest was flagrantly illegal. It has not been shown that the officers formed subjective grounds when they made the decision to arrest all occupants of the vehicle. Acknowledging but putting to the side Mr. Martin's argument that there is no such offence as "possession of a weapon," I find that neither Cst. Martin nor Cst. Douglas exercised any judgement about whether there were grounds to believe that the elements of a weapon possession offence were satisfied. Cst. Martin candidly testified that he was following what he understood from his training to be the proper protocol when he saw ammunition: to arrest everyone in the vehicle so they and the vehicle could be searched. To this end, he told Cst. Douglas what he had seen and, as

mentioned previously, I accept his evidence that they forthwith and jointly decided to arrest all occupants.

- [39] It is conceivable that Cst. Douglas had different reasons in mind than Cst. Martin to support his arrest of the front-seat passenger for possession of a weapon, but I have no evidence from him on this issue because he denied that this weapon possession arrest took place. If he turned his mind to the elements of a weapon possession offence, the most he could have had in the circumstances was bare suspicion. I think it unlikely that he considered whether he had grounds to arrest the front-seat passenger, but if he did he was operating on suspicion, and he charged ahead and obtained evidence illegally.
- [40] The Golub case makes the point that context is important when assessing the legality of an arrest. But this principle and the dynamic nature of the situation do not shake loose the baseline requirements. In the first rank of these is the condition that before any arrest is made without warrant, a peace officer must believe that they have grounds for arrest. That is, they must believe that an indictable offence has been committed, and they must believe that the target of the arrest has committed the offence. If the Crown is to be able to carry its burden of justifying an arrest without warrant, there must be evidence that allows the Court to assess what was in the mind of the arresting officer at the time, i.e. their grounds for belief.
- [41] I conclude that neither of these officers had an honest belief that there were reasonable grounds to arrest the front-seat passenger for a weapon possession offence. If I had found the subjective component of the Storrey test to be satisfied, I would find without hesitation that this arrest was not objectively justifiable. The cumulative effect of what was known to them does not amount to reasonable grounds to believe that the front-seat passenger possessed a weapon.
- [42] The searches of the front-seat passenger were conducted incident to arrest. Searches incident to arrest are unreasonable if the underlying arrest is unlawful: *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 27; *R v. Caslake*, [1998] 1 S.C.R. 51 at para. 13.

The Section 10 Delay Issue

- [43] Section 10(a) of the Charter provides that everyone has the right on arrest or detention to be informed promptly of the reasons therefor. More than 30 years ago, Justice McLachlin (as she then was) spoke to the purpose of s. 10(a) in the course of her reasons in *R. v. Evans*, [1991] 1 S.C.R. 869 at 886-87:

The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to arrest if one does not know the reasons for it: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 (Ont. C.A.), at p. 424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the Court in *R. v. Black*, 2 S.C.R. 138, at pp. 152-153, "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his

jeopardy".

- [144] In *R. v. Gonzales*, 2017 ONCA 543, Watt J.A. discussed the substance of the s. 10(a) right to be informed promptly of the reasons for arrest or detention:
- [122] Section 10(a) includes both temporal and substantive aspects. The beneficiaries are those who are arrested or detained. The phrase "on arrest or detention" serves not only to define the class of beneficiaries - those arrested or detained - but also to assist, together with the adverb "promptly", in marking out when the right accrues. The provision describes the substance of the information to be conveyed - "the reasons" for the arrest or detention. At a minimum, s. 10(a) requires that individuals who are arrested or detained for investigative purposes be advised, in clear and simple language, of the reasons for their detention: Mann, at para. 21.
- [123] A functional equivalent of the term "promptly" in s. 10(a) is the phrase "without delay", which appears in s. 10(b). There, the phrase is synonymous with "immediately", but does permit delay on the basis of concerns for officer or public safety: *R. v. Suberu*, [2009] 2 S.C.R. 460, [2009] S.C.J. No. 33, 2009 SCC 33 at paras. 2 and 41.
- [45] In *R. v. Mian*, 2014 SCC 54 at para. 74, the Court observed that its jurisprudence recognized the suspension of s. 10(b) informational rights in exceptional circumstances, but did not resolve the question of whether exceptional circumstances can delay the implementation of s. 10(a) rights, holding that even if they could, the facts in that case did not amount to exceptional circumstances.
- [46] Proceeding on the basis of the reasoning in *R. v. Gonzales* that safety concerns can give context to the obligation to attend to the s. 10(a) duty promptly, or to suspend that duty until the safety concerns have passed, the delay after the search that uncovered evidence of PPT until compliance with s. 10 occurred at a time when any safety concerns had passed. The front-seat passenger was handcuffed, under emotional control, and locked away in the back of Cst. Douglas' police vehicle during the delay period. I find there is no explanation in the evidence for waiting at least 13 minutes after when the front-seat passenger's jeopardy had changed to comply with the informational components of s. 10.

"Thompson J."

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