
CANADA / JUDGMENT

R. v. Glendinning

2018 BCSC 1575

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1575 R. v. Glendinning

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Glendinning,

2018 BCSC 1575

Date: 20180815

Docket: 85556-2

Registry: Kelowna

Regina

v.

Samuel David Glendinning

Before: The Honourable Madam Justice Marzari

Oral Ruling on Voir Dire re Reasonableness of Arrest

Counsel for the Crown:

C. Burnett

Counsel for the Accused:

D.W. Skogstad

Place and Date of Trial/Hearing:

Kelowna, B.C.

August 13 and 14, 2018

Place and Date of Judgment:

Kelowna, B.C.

August 15, 2018

- [1] THE COURT: Mr. Glendinning is charged with possession for the purpose of trafficking in controlled substances under s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. These offences are alleged to have occurred on the evening of August 11, 2016, at or near Kelowna, B.C.
- [2] In brief, Mr. Glendinning was the driver of a truck that was involved in two short duration interactions with two separate individuals, and was believed by members of the Kelowna RCMP drug section to be trafficking drugs by way of the "dial-a-dope" method. Mr. Glendinning was arrested at shortly after 9:10 p.m. on the evening of August 11, 2016 together with the passenger of the truck, Mr. Feeney, by members of the Kelowna RCMP drug section. A quantity of cocaine, and heroin mixed with fentanyl, was recovered from the accused subsequent to his arrest.
- [3] Mr. Glendinning has challenged the lawfulness of his arrest and says that the arrest and the search subsequent to the arrest of his person and the truck contravenes his ss. 9 and 8 Charter rights, and he seeks as a remedy the exclusion of all the evidence obtained by the Kelowna RCMP drug section subsequent to his arrest.
- [4] As the arrest of Mr. Glendinning was without warrant, the burden of proving that there existed reasonable and probable grounds for the arrest rests with the Crown. A voir dire was declared at the outset of the trial and the evidence of two police officers was led by the Crown in the voir dire. These officers were cross-examined by the defence, and no further evidence was led on behalf of the defence for the purposes of the voir dire.

The Evidence at Issue

- [5] The evidence at issue in this voir dire, the admissibility of which is challenged by Mr. Glendinning, consists of the following.
 - a) a number of items seized from Mr. Glendinning and the truck immediately after his arrest. These items include two bags containing drugs: one bag containing crack cocaine in 14 individually-packaged pieces, and one bag containing mixed heroin and fentanyl in 22 individually-packaged pieces, as well as three cellphones; and
 - b) oral evidence given by Constable Celli with respect to eight phone calls that he answered on one of the cellphones found in the truck, between 9:30 p.m. and 10:32 p.m., at least six of which he considered were from persons seeking to purchase crack cocaine, or heroin, or both.

- [6] In addition, the Crown seeks to adduce into evidence an agreed statement of facts marked as Exhibit "A in the voir dire which is admitted subject only to the admission of the evidence listed above.

The Stated Grounds for Arrest

- [7] Two officers gave evidence with respect to the events leading up to the arrest and their grounds for arrest of Mr. Glendinning. The Crown's summary of this evidence was generally unchallenged by the defence, and I find this evidence established the following.
- [8] On August 11, 2016, Constable Celli was on duty and in plainclothes. He was participating in undercover surveillance as part of a team of officers specifically focused on the drug trade in Kelowna. He was located near Richter Street, which is on the edge of downtown Kelowna, and also near the edge of an area known for higher levels of street level drug use dealing known as the "red zone".
- [9] Shortly before 8:40 p.m., Constable Celli observed a female drug user, Marie Martin, who was well known to him, walking south on Richter Street. Constable Celli had conducted surveillance of Ms. Martin in the past, and had observed Ms. Martin to have purchased drugs in the same area two years earlier that had resulted in a trafficking investigation. He decided to observe her because, based on his knowledge of Ms. Martin, he believed she may be in the process of acquiring drugs.
- [10] He watched Ms. Martin walk down Richter and turn right onto Rowcliffe Avenue and walk west about two-thirds down that street and stop in front of a dog park. This area was still within, but on the edges of, the "red zone". She did not go into the park, but proceeded to wait on the north side of Rowcliffe Avenue. Constable Celli stated it was apparent to him that Ms. Martin was waiting for a vehicle to arrive, as she was paying attention to each car as they approached her.
- [11] After approximately 5 minutes of waiting, a black Dodge pickup truck with the licence plate KP 9791 (the "Truck") drove down Rowcliffe Avenue, stopping where Ms. Martin was waiting. Constable Celli observed two occupants of the Truck: a driver and a passenger. The Truck stopped in the street a few feet away from Ms. Martin and she "ran up" to the passenger side. She remained there for a brief period of approximately ten seconds, and then walked away from the Truck. The Truck then departed.
- [12] Constable Celli drove past the Truck and Ms. Martin in his unmarked vehicle as they were meeting and noted the passenger door of the Truck was open. He was not able to see what they were doing.

- [13] Constable Celli testified that he believed the occupants of the Truck had just sold drugs to Ms. Martin. This belief was based, at least in part, on his knowledge of Ms. Martin. He determined to follow the Truck to conduct surveillance on it and to see if it continued to meet with other drug users. He contacted his fellow officers in the Kelowna drug section who were working that night to inform them of his observations and to seek their assistance in surveillance on the Truck.
- [14] Shortly afterwards, Constable Celli lost sight of the Truck.
- [15] Corporal Hare, a member of the Kelowna drug section, travelled to the location where Constable Celli observed Ms. Martin interacting with the occupants of the Truck to see if he could locate the Truck. He travelled throughout the general area, as did Constable Celli, in an effort to locate the Truck.
- [16] At 9:07 p.m. Corporal Hare located the Truck travelling south on Richter a short distance away. Corporal Hare noted that there were two occupants in it. He followed the Truck straight down Richter to KLO Road. The Truck turned left on KLO Road and headed east to De Montreuil Court. The Truck did not stop from the time Corporal Hare initially observed it until it arrived at De Montreuil Court about five minutes later.
- [17] When he was in the vicinity of the corner of KLO Road and De Montreuil Court, Corporal Hare observed a male in his twenties waiting at the corner. He considered it to be an odd location for someone to wait as there was no bus stop or cab rack.
- [18] Corporal Hare observed the Truck stop in front of the male and the male get into the rear passenger side of the Truck. The truck then moved at a slow pace into De Montreuil Court, travelled 20 to 30 metres partway around the cul-de-sac, and then stopped again, facing the opposite direction. The male then exited the Truck and walked to the rear and away from it.
- [19] Corporal Hare was relaying these observations to Constable Celli as he entered De Montreuil Court in his own unmarked police vehicle. The two officers discussed their observations and determined that grounds existed to arrest both occupants for trafficking drugs. Corporal Hare based his grounds to arrest the Truck's occupants on the fact that Constable Celli had observed a short duration meet with a drug user that was known to Constable Celli at a location known for drug sales earlier that evening, and on the fact that he observed what he believed to be a second short-duration drug transaction between the occupants of the Truck and the 20-year-old male.
- [20] The officers then moved their police vehicles, such that they boxed in the Truck on De Montreuil Court. The officers' account of how they did this is not fully consistent, but the defence did not raise any challenges to the officers' evidence on the basis of these discrepancies, and I find that little turns on them.
- [21] On all the evidence I find that Constable Celli drove up De Montreuil Court facing the Truck and Corporal Hare stopped his vehicle in such a way as to prevent the Truck from moving as well. Constable Celli turned on his police siren as he manoeuvred his police vehicle in front

of the Truck. Corporal Hare turned on his police lights. Constable Hare stated that the Truck initially appeared to lurch as though it might try to drive away, but that it was effectively boxed in. Constable Celli observed the driver (whom he recognized as the same individual who was driving at the time of the initial "meet" with Ms. Martin) appeared "panicky" and fidgeting with his arms. Constable Celli then arrested the passenger of the Truck and Corporal Hare arrested the driver, Mr. Glendinning.

- [22] The evidence of the officers with respect to their experience on the force, and their knowledge of drug investigations, and dial-a-dope operations in particular, was generally unchallenged by the defence. I summarize my findings in this regard below.
- [23] Constable Celli is a nine-year member of the RCMP. He has worked his entire policing career in Kelowna. He was a general duty officer for three years immediately following his graduation and his posting to Kelowna. He then was with the Kelowna Downtown Enforcement Unit for three and a half years, and then he joined the Kelowna drug section. Up to the time of the investigation and arrest in this case he had experience as a police officer investigating numerous types of drug trafficking from street-level trafficking, undercover trafficking, and dial-a-dope trafficking. He also had experience with the Kelowna downtown core. He had been involved in approximately 30 specific dial-a-dope trafficking investigations prior to the arrest at issue in August 2016.
- [24] Constable Celli testified that he was familiar with dial-a-dope drug trafficking from his prior investigative experience. He described it as a mobile type of trafficking where purchasers arrange to purchase drugs by way of cellphone or text, and then wait at a pre-determined location for drugs to be delivered to them. It was his experience that the purchaser usually is the first person at the "meet" location. When the trafficker arrives, usually in a vehicle, a short duration meet of less than a minute occurs between the purchaser and the occupant or occupants of the vehicle. The meeting involves the purchaser getting into the vehicle for a short period of time or meeting at the door or window of the vehicle for a short period of time. Sometimes the vehicle will drive the purchaser a short distance. Once the transaction occurs, the parties depart separately.
- [25] Corporal Hare is an 18-year veteran of the RCMP. He was posted to the Northwest Territories for 12 years prior to his posting in Kelowna. He has been policing in Kelowna for six years. At the time of this investigation and arrest he oversaw the Kelowna drug section. In his career he has held a variety of positions within the RCMP. He is an experienced drug investigator. He has investigated street level trafficking, high level trafficking, and trafficking involving the importation of drugs. He has been involved as an undercover investigator. He estimated that he had been involved in 50 to 75 specific dial-a-dope drug investigations throughout his career in the Northwest Territories and in Kelowna. He described the "hallmarks" of this type of drug activity in similar terms to how Constable Celli described them above.

- [26] In response to cross-examination, Constable Celli agreed that street-level drug trafficking was most common in an area located in downtown Kelowna, also known as the "red zone", but that dial-a-dope operations were generally at the edges of that red zone or beyond, in part to avoid detection by police. Constable Celli did not agree with the proposition put to him that street prostitution was also dispersed from the "red zone" or south of Harvey Avenue due to police attention. Nor did either of the officers agree that dial-a-dope operators tended to avoid publicly-visible areas more generally.
- [27] In cross-examination the officers acknowledged that in addition to the circumstances they considered consistent with dial-a-dope operations in this case, many elements that could be helpful in establishing the existence of a drug transaction were not present, and in particular the following characteristics of some dial-a-dope operations found in other cases were not observed by them in this case:
- a) The Truck used by the accused was not a rental;
 - b) The individuals operating the Truck were not known to the police;
 - c) The truck was not known to police;
 - d) The driver did not engage in any typical behaviours of a dial-a-dope seller to detect police surveillance, referred to as a "heat check";
 - e) There was no hand-to-hand exchange observed nor any related activity such as reaching in a pocket, or putting things away in a pocket or purse;
 - f) There was no cellphone use observed;
 - g) There was no tip, this investigation occurred simply as a result of observations during a patrol; and
 - h) One of the transactions took place in an area that was not known to these officers as a drug "hot spot".

Legal Framework

- [28] Mr. Glendinning challenges the grounds to arrest him on the basis that the arrest was unlawful and arbitrary, contrary to s. 9 of the Charter, and therefore the search of him and the Truck subsequent to his arrest are also unlawful. As his arrest was without warrant, the burden is on the Crown to justify the lawfulness of it.
- [29] Under s. 495(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, an officer may arrest without a warrant a person that the officer has reasonable grounds to believe has committed or is about to commit an indictable offence.

[30] In *R. v. Storrey*, [1990] 1 S.C.R. 241 [Storrey], the Supreme Court of Canada set out a two-part test to establish grounds for arrest without a warrant which were summarized by our Court of Appeal in *R. v. Messina*, 2013 BCCA 499 [Messina] at paragraph 20:

The first step requires the arresting officer to have a subjective, personal belief that there are reasonable grounds for the arrest. The second part requires objective justification for the officer's subjective belief. In assessing objective justification, the consideration is whether a reasonable person, "standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest": *Storrey*. The test requires reasonable probability or reasonable belief and not proof beyond a reasonable doubt: *R v. Debot*, 1989 2 SCR 1140 at 1166.

[31] In *R. v. Luong*, 2010 BCCA 158 [Luong] at paragraph 24, our Court of Appeal further explained the objective element of this test:

The assessment of whether objective grounds exist undertaken by a trial judge is conducted by first looking at the observations of the officer (which the trial judge has found as facts) through the lens of someone who has the same experience training knowledge and skills as the officer who is making the observations, and then deciding if a reasonable person with the same lens but come to the same conclusion as the police officer.

[32] The vantage point of the officer must be that of a "prudent, reasonable, and cautious police officer similarly experienced as the arresting officer": *Messina* at paragraph 24.

[33] While the objective element of the test requires taking into account the officer's special knowledge, this is not the same as deferring the objective assessment of grounds to the officer's intuition. That would make the objective assessment meaningless: see *R. v. Payette*, 2010 BCCA 392.

[34] The objective aspect of the test can include consideration of observations made after the officers had formed their subjective belief, but before the arrest was actually carried out: *R. v. Cornwell*, 2017 BCSC 1340; *R. v. Gill*, 2015 BCSC 310 [Gill]; and *R. v. Clayton*, 2007 SCC 32.

Position of the Crown

[35] The Crown says that the standard of proof to establish reasonable grounds is not a very onerous one. It is one of "reasonable probability", which it says is less than what is required for a conviction and also less than a balance of probabilities.

[36] The Crown emphasizes that numerous authorities from our Court of Appeal and Supreme Court have held that when assessing grounds to arrest an individual who a police officer believes is committing an indictable offence, the evidence to support the police officer's belief in that regard is not to be assessed on a piecemeal basis. In addition, when assessing the reasonable grounds to arrest from an objective point of view, the court must approach it from "a reasonable person placed in the position of the officer which includes considering the officer's experience, training, and knowledge".

- [37] Although emphasizing that each case must turn on its own facts, the Crown points to a number of cases that it says are somewhat comparable in terms of the extensiveness of the grounds established by the evidence, and where the arrests were found to be based on reasonable grounds, including *Luong, Messina, R. v. Lo*, 2015 BCSC 1159 [Lo] and *R. v. Tran*, 2007 BCCA 491 [Tran].
- [38] The Crown notes that the evidence in *Tran* involved only a single suspected dial-a-dope transaction between a known drug user and the driver of a vehicle unknown to the police. The trial judge found the officers had reasonable grounds to arrest the accused. The Court of Appeal upheld the trial court's decision. The Crown argues that the facts of *Tran* are similar to the facts of the first interaction observed by Constable Celli in this case in that the officers were surveilling a known drug addict and user, and arrested the driver of a vehicle that interacted with that known drug addict for about 15 seconds. As in this case, that vehicle was not a rental, and not known to police. Nor was there any evidence that the driver was recognized or known to police as a drug trafficker in *Tran*. The basis of the arrest in that case was the officer's strong belief that the known drug user was purchasing drugs from the vehicle, and this was found to be reasonable grounds in the totality of the circumstances and upheld by the Court of Appeal as such. In that case there was only one encounter, and although the Crown is careful to emphasize that two encounters are not always better than one, it says that the evidence here is essentially stronger as a result of the second transaction observed within about 30 minutes of the first.

Position of the Defence

- [39] Counsel for Mr. Glendinning concedes the subjective element of the grounds for arrest requirement, but challenges the arrest on the basis of a lack of objectively reasonable grounds. He argues that the Crown must establish the probability, and not the mere possibility, of an indictable offence having been committed in order to sustain the arrest. He says that the grounds in this case fell far short of establishing the likelihood of such an offence having been committed, which he says has to be established on a standard of more likely than not, or on a balance of probabilities.
- [40] Counsel for Mr. Glendinning characterizes the evidence of the officers in this case as being essentially two observations of two brief encounters, with two individuals, one of whom was known to be a drug user and purchaser, with only the first of the encounters being in an area known for drug trafficking.
- [41] In addition to the cases referenced above, the defence refers to *R. v. Lahtinen*, 2011 BCPC 490, for the principle that an officer's assessment must not be drawn from an overly jaded, jaundiced or negative perspective.

- [42] The defence also points to a series of cases in which the courts have: (1) found observations of ambiguous or inconclusive conduct insufficient to meet the required objective threshold to justify an arrest in a so-called dial-a-dope situation; or (2) have upheld searches as objectively reasonable only on what he says is much more extensive observations than those present in this case.
- [43] In particular, Mr. Glendinning relies on the following cases where the evidence was found to be insufficient to establish objectively reasonable grounds for a search or arrest:
- a) In *R. v. Pope*, 2015 BCSC 2391 [Pope], reasonable grounds for arrest were found not to exist. In that case the police observed two interactions between the driver of a vehicle and other persons who approached the vehicle in their own cars, got out and had a conversation with the driver through a window. Both interactions were in different locations and occurred within a two-and-a-half-hour period from their first observation of the vehicle and the arrest of the driver, with little surveillance of the vehicle in the interim period. At least one of the officers believed that a "hand-to-hand" drug transaction had been observed consistent with a dial-a-dope operation, but the court found that in fact no such transaction had been observed. The officers were experienced. The police witnessed the accused using a cellular phone at another location earlier in the evening and then again before the arrest.
 - b) In *R. v. Barnes*, 2018 BCPC 99 [Barnes], the court found there were insufficient grounds for arrest. The evidence was of a transaction with a person who had the general appearance of a drug user, combined with information from a police database connecting the accused with drug trafficking.
 - c) In *R. v. Hoof*, 2011 BCPC 104, the court found that there were insufficient grounds to affect a search. In that case the officers saw a number of persons huddled close together in what they believed was a drug transaction, and one of those persons who they had not seen directly transact anything was holding plastic in his hand. The accused did not immediately open his hand when asked to do so by an officer, and the officer opened his hand for him.
 - d) In *R. v. St. Germaine*, 2017 BCPC 34 [St. Germaine], there was extensive video evidence of the entrance to an apartment of a person tipped off to be a drug dealer (although the court found that there was no evidence showing any illicit activity in the residence overall). The accused St. Germaine attended about six times over the course of three weeks of surveillance; some of those times were brief, some longer. The court found that there was no evidence to link his attendances at the residence to drugs.
- [44] Counsel for Mr. Glendinning argues that this case is nearly factually identical to the cases in *Pope* and *Barnes* involving minimal transactions giving rise to the arrest.

- [45] In addition, the defence distinguishes the Crown's cases, and others where reasonable grounds were found on the basis that in those cases numerous transactions were generally observed, often in areas known to be common for drug trafficking, and often involving transactions with a known drug user. In those cases where only a single transaction was found to be sufficient, the defence argues that the quality of the evidence in those cases was stronger than the evidence in this case.
- [46] For example, the defence argues that in Tran the officers were targeting a known drug user and purchaser based on a credible tip that he was engaged in breaking and entering to support his habit. They saw this individual spend about 15 seconds in a motor vehicle and he was kneeling in the front passenger seat before the police arrested the driver of the vehicle.
- [47] Overall, counsel for Mr. Glendinning concedes that where numerous transactions occur, even if each transaction may be innocuous, they may begin to provide reasonable grounds. An experienced officer recognizing specific elements of the transactions may require less overtly suspicious activity than a layperson would do to establish objectively reasonable grounds, but the fewer transactions that exist, the more clear the evidence is required that relate to a drug transaction. He says that clear evidence was not present in this case.

Determination

- [48] I will first deal with the standard of proof. The standard of proof that the Crown must meet to establish reasonable grounds for an arrest under s. 495 of the Criminal Code was described by the Court of Appeal in *R. v. Jir*, 2010 BCCA 497 at paragraphs 27 and 28:
- [27] As has been stated many times, the "reasonable grounds" standard is not only less than that required for conviction, but is also less than the civil standard of proof. Madam Justice Wilson put it this way in *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.

More recently, in *Mugesera v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 100, the Court stated (at para. 114):

the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities

Further, as Mr. Justice Hill noted in *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 at 367 (Ont. Ct. (G.D)):

The appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted.

- [28] It is well established that a reasonable grounds determination involves a consideration of the "totality of the circumstances"
- [49] I find that the Crown is not required to establish that it was more likely than not that an indictable offence was about to or had occurred as the defence suggests. Rather, the Crown must establish a reasonable belief or probability on the totality of the circumstances.
- [50] In argument, the defence raised the possibility that the officers did not know that the occupants of the Truck were the same at the second encounter as in the first because they had lost track of the Truck for approximately 15 to 20 minutes in between the encounters. I accept Constable Celli's evidence that he recognized the occupants of the Truck, including Mr. Glendinning as the driver, as being the same in both interactions.
- [51] Regarding the case law and comparisons to other cases that were provided by counsel, I find this review to be helpful in providing an overview of the principles and factors that have informed findings over the years that an arrest was or was not objectively reasonable. A review of the case law in Pope is helpful in this regard.
- [52] This review makes clear that every case must turn on its facts and be based on a consideration of the totality of the evidence. In Tran, for example, a single transaction, which in itself would not have been suspicious, supported the arrest on a consideration of the totality of the circumstances. On the other hand, cases such as St. Germaine show that even where more transactions are observed this may still result in findings that the arrest was not reasonable where the detailed and reliable evidence connecting recounted events to drug operations are not present or are insufficient.
- [53] Overall, a review of the cases tends to confirm the observation of Mr. Justice Schultes in Gill:
- 45 Looking at the cases cited for that purpose, I think that Crown counsel is correct that the more closely that what the police observed comes to demonstrating an actual purchase and sale of drugs, then the less repetitive conduct that the suspect will be required to meet the requirement of objective reasonableness.
- [54] In approaching this case, I am mindful of the Supreme Court of Canada's caution in Storrey at paragraph 14 that police officers must have reasonable grounds to believe that someone has committed or is about to commit an indictable offence before arresting them, and that, "[w]ithout such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state".
- [55] In my view, it would not be objectively reasonable for the officers to have arrested the accused in this case if the facts were simply that Mr. Glendinning had stopped twice over the course of approximately 30 minutes to speak or interact with someone standing on the sidewalk or waiting for him. It cannot be that someone exposes themselves to arrest in Canada simply by interacting with acquaintances or even strangers, as they drive down the street.

[56] However, the facts in this case go significantly beyond such interaction, such that, in my view, it was both subjectively and objectively reasonable for the officers to consider that the two interactions they independently observed were dial-a-dope drug transactions when viewed in their totality. In this regard, I consider the following factors to be of most significance:

- a) Ms. Martin was known to Constable Celli as a drug user and drug addict. I find that the evidence establishes that Constable Celli had general knowledge of her addiction and habits at the time of the arrest;
- b) Ms. Martin was observed by Constable Celli to be walking in a specific area that was known to Constable Celli as being an area that Ms. Martin has previously arranged for and met with a drug supplier;
- c) Ms. Martin's behaviour while waiting in that location for five minutes gives rise to a reasonable inference that she was waiting for a specific vehicle or signal from a vehicle;
- d) When the Truck arrived, she "ran up" to it but only remained at the passenger's side for approximately ten seconds, which is not consistent with meeting an awaited friend. Furthermore, the passenger side door was open, which is more than one would expect for a quick conversation between acquaintances or strangers;
- e) This interaction occurred in an area on the edge of the "red zone", which is known to Constable Celli as a preferred area for dial-a-dope drug transactions serving the users of Kelowna's downtown core;
- f) I do not find that this interaction was consistent with a meeting by Ms. Martin with a john or a potential john for the purposes of potential prostitution as the defence suggests. It had hallmarks of a prearranged meeting, but was generally inconsistent with a prostitution related interaction based on Constable Celli's knowledge of these activities in Kelowna, and Ms. Martin's activities in particular;
- g) The second interaction on De Montreuil Court involved the picking up of another person, apparently also waiting on the side of the street. The slow movement of the Truck down that dead end cul-de-sac with that passenger for less than a minute before the passenger left the truck again is consistent with both officers' description of a dial-a-dope transaction, and not easily accounted for by alternative explanations; and
- h) Finally, both sets of interactions within approximately 30 minutes of each other had many consistencies with the officers' knowledge and descriptions of dial-a-dope transactions, including the presence of a waiting purchaser on the side of the road, the short interaction time, the open door, and the occasional entry into the vehicle by the purchaser for a short duration, a vehicle ride that does not change the location of the purchaser substantially, and the parting of the purchaser and the seller in different directions. With respect to the first interaction, its location was also consistent with known dial-a-dope drug transactions generally, and for that drug purchaser in particular.

[57] These factors were, in my view, more than generic circumstances. They describe a series of distinct elements, which, when put together with the evidence regarding common characteristics of dial-a-dope drug transactions in the Kelowna area, amount to something more than innocuous meetings and give rise to an objectively reasonable probability that a drug sale had occurred. In my view, such a conclusion would not have to rely on a jaded view of the occupants of the Truck's activities. Nor does it depend merely on the bald assertions of the officers' beliefs in this case.

[58] While potential innocent explanations may also be available for these two interactions, I do not find any such proposed explanations to be satisfactory from a common sense perspective. It is not necessary for the officers to rule out such possible explanations, in any event. As was stated in Gill at paragraph 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.

[59] With respect to all the potential elements of a dial-a-dope transaction not specifically observed in this case and pointed out by the defence, I agree that these factors, when present and supported by evidence, can be relevant to the assessment of the existence of reasonable grounds. But if there are sufficient grounds on the totality of the circumstances, the absence of one or more such elements is not significant. In this regard I note the words of Madam Justice Gropper in Lo at paragraph 89:

There are some factors that occur in some cases and not in others. There can be an absence of factors in some cases and not in others. It is the totality of the evidence that is there which must be considered, not the totality of what is not present

[60] A similar sentiment was expressed by Justice Schultes in Gill:

[33] However, the criticism of an officer's failure to take additional investigative steps runs contrary to the decision of our Court of Appeal in R. v. Jir, 2010 BCCA 497 at para. 27, and so I could not give effect to it, even if I found it to be applicable here. The proper focus is on the objective reasonableness of what this officer did, based on what he knew at the time, not on what other steps he could have taken to acquire additional grounds.

[61] It follows that the application to exclude the evidence must be dismissed, and the evidence obtained in the search incidental to the arrest noted above is admissible in Mr. Glendinning's trial.

[62] In this case, the Crown is not seeking a ruling in the alternative to a finding of a breach pursuant to s. 24(2) of the Charter, and it would not be appropriate to do so in any event given my findings above.

"Marzari J."

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