

CANADA / JUDGMENT

R. v. Harper

2020 BCSC 2025

COURT

Supreme Court of British Columbia

DECIDED

30 September 2020

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2020 BCSC 2025 R. v. Harper IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Harper, 2020 BCSC 2025 Date: 20200930 Docket: 86457-2 Registry: Nanaimo Regina v. Robert John Harper Before: The Honourable Mr. Justice Baird Oral Ruling on Voir Dire #1 Re Infringement of Accused's Charter Rights (Re the Accused Harper) Counsel for the Crown: J. Rutherford Counsel for the Accused: S. Grewal Place and Date of Hearing: Nanaimo, B.C. September 29-30, 2020 Place and Date of Judgment: Nanaimo, B.C. September 30, 2020

- [1] THE COURT: This is a Charter voir dire concerning a street-level narcotics investigation that led to charges against the accused, Robert John Harper, of possession of fentanyl and methamphetamine for the purposes of trafficking. The accused claims that the evidence against him was produced by an arbitrary arrest, an unreasonable search of his person and backpack, and that his right to retain and instruct counsel without delay was infringed or denied by investigating police officers.
- [2] The investigation was conducted on August 19, 2019 at just after 5:00 p.m. A trio of Nanaimo RCMP members detailed to the street crimes unit were patrolling on Uplands Drive in the vicinity of a social housing project called Uplands Walk. This is a facility, I was reliably informed, reserved for "hard to house" people, many struggling with drug addictions, who in all likelihood would otherwise live on the streets. It is well known that Nanaimo, like many other towns and cities in B.C., is in the midst of a very serious public health crisis brought on by the distribution and use of narcotics, particularly opioids.
- [3] The police officers involved in this case were travelling together in an unmarked vehicle in which they patrolled the visitors parking area of Uplands Walk. There was an old Ford Explorer parked in a stall near the rear of the building. Cpl. Mooney ran the rear license plate number and received information from the police computer system that the plate belonged to an Oldsmobile, that it had expired, and that its owner was deceased. The officers resolved to check the vehicle to determine if it was uninsured, stolen, or both.

- [4] Cst. McGrath testified that when he first saw this Ford Explorer, the front passenger door was open and a male individual was leaning into it. By the time Cst. McGrath got out of his police unit and walked to the passenger side of the Explorer, the male at the door had got in and was now sitting on the front passenger seat. The accused, Mr. Harper, was beside him in the driver's seat with a grey backpack on his lap. The keys were in the ignition. A third male was seated in the rear of the Explorer.
- [5] Cst. McGrath said that all three occupants looked surprised or shocked when they realised that he was a police officer. Cst. McGrath testified that, in plain view on the Explorer's front dashboard, there was an open pouch containing crack pipes. He testified that he could see the pipes clearly, and he noted that at least one of them appeared to have a narcotic substance inside of it, indicating present rather than past possession and the likelihood of immediate use.
- [6] On this basis alone, Cst. McGrath placed all three of the Explorer's occupants under arrest for narcotics possession. The usual Charter warnings and cautions were given. It was Cst. Ligget who arrested Mr. Harper on Cst. McGrath's direction. He did not testify to any additional grounds for the arrest. Mr. Harper was noted to be compliant and cooperative throughout.
- [7] Mr. Harper was handcuffed and lodged in a marked police vehicle that had been driven to the scene by Cst. Cambray as backup. Cst. Ligget searched Mr. Harper's backpack. According to admissions filed on this proceeding its contents included: · 3.834 grams of ground fentanyl in a tied plastic bag · 24.431 grams of blue fentanyl in a blue container · A clear plastic sandwich bag coated with a blue powder fentanyl residue · 7.958 grams of crystal methamphetamine in a ziplock bag · 0.134 grams of crack cocaine in a clear vial There was also some cash found in the centre console of the vehicle in the amount of \$375.
- [8] Mr. Harper asked to speak to his lawyer immediately at the scene. Cst. McGrath facilitated this by contacting Mr. Harper's lawyer of choice, Ms. Kendra Waugh, on his work cell phone. Once he had Ms. Waugh on the line he shut Mr. Harper in the rear of Cst. Cambray's otherwise empty police cruiser. He placed his cell phone on Mr. Harper's lap on speaker mode as Mr. Harper was handcuffed and unable to handle the phone himself. Both Constables McGrath and Cambray retreated 10 to 15 feet to afford Mr. Harper privacy in his communications with his lawyer. Neither of them could hear anything that was said.
- [9] After a couple of minutes Mr. Harper signalled Cst. McGrath to come over, saying that his lawyer wanted a word with him. The lawyer asked Cst. McGrath if Mr. Harper was going to be detained, and said that she wanted to speak with him again once he arrived at the RCMP detachment. Mr. Harper was transported to the detachment for the usual processing procedures. These occupied about a quarter of an hour. Thereafter, Mr. Harper was given access to a private room and a secure telephone to speak with his lawyer.

- [10] I reject the arguments attempted by counsel to the effect that the police officers had no business conducting an investigation of the Ford Explorer because it was on private property. As far as I have been made aware, this incident took place in the parking lot of a social housing project to which the public has access or is invited for the purpose of parking vehicles, and thus it qualifies as a "highway" under provincial law.
- [11] However, I agree that Cst. McGrath articulated insufficient grounds for Mr. Harper's arrest without warrant. The arrest hinges on Cst. McGrath's assertion that he could actually see narcotics within one of the crack pipes inside the open pouch on the dashboard. The evidence does not support this claim. I have seen photos of both pipes taken in the position in which they were found on the Ford Explorer's dashboard, one of which was enlarged to several times its original size, and I have concluded that there was no basis upon which Cst. McGrath could have concluded that there was a narcotic substance in either pipe.
- [12] At its highest and best, it might plausibly be said that the pipes were visible, that they were of a type commonly used for smoking narcotics, and perhaps that they had been used for that purpose in the past. In my view, however, there was nothing about them giving rise to an objectively reasonable belief that they contained narcotics at the relevant time or that possession of narcotics was ongoing in Cst. McGrath's presence.
- [13] Quite apart from all of that, Cst. McGrath testified that the aperture of the pouch in which the crack pipes were partially concealed was facing toward him on the passenger side of the vehicle and away from Mr. Harper sitting in the driver's seat. It seems possible on the evidence, as well, that the pouch itself may have been concealed from Mr. Harper's view by a radio assembly placed on the dashboard between him and the pouch. Finally, I do not think it speculative, in the circumstances, to suppose that the recently arrived person in the front passenger seat may have brought the pouch into the vehicle without Mr. Harper's knowledge or consent.
- [14] This is all to say that even if Cst. McGrath subjectively believed that he had grounds for arrest because of what he supposed to be the presence of narcotics within the crack pipe that he had seen, the grounds articulated are not sustainable from an objective point of view. It follows that Mr. Harper's arrest without warrant was not lawfully justified. The search of his person and pack proceeded from this wrongful arrest and was similarly unlawful and unreasonable.
- [15] I can make out no denial or infringement of Mr. Harper's right to retain and instruct counsel without delay. He was afforded a consultation as soon as practicable at the very scene of his arrest. The consultation appears to have been private in the sense that no one else was able to hear what passed between Mr. Harper and his lawyer. Furthermore, he was afforded a second opportunity to speak in private with his lawyer soon after his arrival at the RCMP detachment. No self-conscribed evidence was elicited from him in any event.

[16] For all of these reasons, I conclude that the accused has established that his rights not to be arbitrarily arrested or detained and against unreasonable search or seizure have been infringed. He has failed to establish that he was denied the right to retain and instruct counsel without delay upon arrest. "Baird J."

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