

CANADA / JUDGMENT

R. v. Harper

2020 BCSC 2026

COURT

Supreme Court of British Columbia

DECIDED

13 October 2020

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2020 BCSC 2026 R. v. Harper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Harper,

2020 BCSC 2026

Date: 20201013

Docket: 86457-2

Registry: Nanaimo

Regina

v.

Robert John Harper

Corrected Judgment: The text of the judgment was corrected at paragraph [12] on January 7, 2021.

Before: The Honourable Mr. Justice Baird

Oral Ruling on Voir Dire #2

Re Exclusion of Seized Evidence

Pursuant to s. 24(2) of the Charter

(Re the Accused Harper)

Counsel for the Crown:

J. Rutherford

Counsel for the Accused, Harper,

appearing by teleconference:

S. Grewal

Place and Date of Hearing:

Nanaimo, B.C.

October 1, 2020

Place and Date of Judgment:

Nanaimo, B.C.

October 13, 2020

- [1] THE COURT: On September 30, 2020, I made a ruling that the accused's Charter rights to be free from arbitrary arrest and unreasonable search were infringed or denied during an investigation conducted by the Nanaimo RCMP street crimes unit on August 19, 2019: see 2020 BCSC 2025. The accused now argues that I should exclude the evidence of fentanyl and methamphetamine seized from a search of his backpack.
- [2] Section 24(2) of the Charter provides that, where evidence was obtained in a manner that infringed or denied rights guaranteed therein, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
- [3] The exclusion of evidence is not automatic. The decision to do so requires a balancing of factors in three lines of inquiry mandated by *R. v. Grant*, 2009 SCC 32 at para. 71, namely: 1) the seriousness of the Charter infringing conduct; 2) the impact on the accused's Charter protected interests; and 3) society's interest in the adjudication of the case on its merits. The underlying assumption is that there will be a negative impact on public confidence in the criminal justice system if unlawfully gathered evidence is admitted routinely into evidence, but that circumstances will arise in which the exclusion of evidence will have a similar negative effect.
- [4] The inquiry is objective. It asks whether a reasonable person, informed of all the relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute. It requires an assessment of the overall impact that the admission in criminal proceedings of unconstitutionally obtained evidence would have on society's confidence in the justice system over the long term. The onus is on the accused to establish that the impugned evidence should be excluded.
- [5] The s. 24(2) procedure enjoins me to consider all the circumstances of the case from start to finish. To summarise, the police found Mr. Harper in an old Ford Explorer that did not belong to him bearing a rear licence plate that was probably stolen. He was in the visitor's

parking lot of a social housing project populated in material measure by people struggling with drug addictions. I was told that criminal activity, especially related to narcotics distribution and consumption, is common in and around the place. Mr. Harper was in the driver's seat of the vehicle with the keys in the ignition, leading to the common sense inference that he was its operator with a degree of control over its contents and occupants.

- [6] When Cst. McGrath first saw this vehicle, there was a person on the pavement outside its open front passenger door leaning into it. By the time Cst. McGrath walked up to the vehicle this person had got in and was now sitting in the front passenger seat. Within his reach in plain view on the dashboard there was an open pouch with crack pipes in it. Mr. Harper was sitting directly beside this person with a backpack on his lap. He had immediate access to its contents, which included not insignificant quantities of fentanyl and methamphetamine.
- [7] On the dashboard directly beside the crack pipes there was a car stereo assembly that, on the basis of photographs taken shortly after the arrest, does not appear to be part of the vehicle's stock interior appointments, leading to the suspicion that it came from another vehicle. There was \$375 in cash in plain view in the centre console. There was a rear passenger who also had a backpack containing drug paraphernalia, a laptop computer, bear spray, a knife and a hatchet. Elsewhere in the vehicle there were unopened boxes containing brand new electronic equipment.
- [8] Cst. McGrath based his direction to arrest and search Mr. Harper solely on his subjective belief that the crack pipes in the pouch on the dashboard contained illegal narcotics. While I have no particular reason to doubt the honesty or sincerity of that belief, I repeat and affirm my earlier judgment that it was not objectively reasonable, and for that reason the law is clear that Cst. McGrath cannot be said to have acted in good faith: *R. v. Paterson*, 2017 SCC 15 at para. 44.
- [9] That said, there is no doubt that Cst. McGrath had good reason to detain and investigate all three occupants of the vehicle; in my view there was plenty of cause to suspect that illegal activity might be ongoing. And no one could quarrel with Cst. McGrath's instincts: his suspicions turned out to be well founded, and as a result a reasonably large quantity of illegal and frequently lethal narcotics were removed from the street. His mistake, in my view, lay only in his failure to take adequate stock of the situation and to properly evaluate the grounds available for a lawful arrest. He acted prematurely on subjective grounds that did not survive an objective audit. This is the most that can be said against him. His conduct otherwise was unimpeachable. There was no pattern of Charter breaches.
- [10] In all of the circumstances, I would place Cst. McGrath's conduct at the lower end of the scale of culpability ranging from minor to serious Charter rights violations. A reasonable, well-informed citizen would doubtless be concerned about the general notion of police officers rushing to arrest citizens on objectively insufficient grounds, but this would be tempered in the present case by a sense that Cst. McGrath had legitimate cause to investigate, that there were additional arrest grounds available that he had not yet reflected

on or absorbed, that in any event his instincts were perfectly sound, and that ultimately the public interest was well served by his intervention.

- [11] All of these things considered, I do not believe that a reasonable observer would feel any compelling sense of grievance over Cst. McGrath's decision to arrest Mr. Harper, even if it was a touch precipitous, nor do I feel any particular inclination to disassociate this court from his conduct. It may be that the first Grant line of inquiry pulls in favour of exclusion of the evidence, but in my assessment it does so only weakly.
- [12] As for the impact of Cst. McGrath's conduct on Mr. Harper's Charter protected interests, once again I must consider the whole of the circumstances, including those beyond Cst. McGrath's subjective grounds for the arrest. The relevant considerations are the interests engaged by the rights in question, and the extent of the negative impact on those rights created by the conduct found to have infringed them.
- [13] The question, as ever, is what a reasonable, well-informed objective observer would make of what Cst. McGrath did. We all enjoy the constitutional right to be free from arbitrary detention and unreasonable search, and it goes without saying that any breach must be taken seriously. But evidence will only be excluded if the accused establishes on a balance of probabilities that its admission would bring the administration of justice into disrepute. Wound up in this inquiry is what a reasonable person would consider Mr. Harper's legitimate expectations to have been in the situation in which he was found. What negative impact, if any, would be caused to long-term reputation of the criminal justice system by the admission of the evidence produced by Cst. McGrath's premature decision to arrest him?
- [14] I have already reviewed the overall situation in which the identified infringement of Mr. Harper's rights must be evaluated. In my view, on all of the facts, including the location of the vehicle in a public place known for drug dealing, the stolen plate, the crack pipes, the money in the console, the property of dubious provenance here and there in the vehicle, all in plain view, and the fact that Mr. Harper, as the operator of the vehicle, exercised some measure of control over all of it, a reasonable person considering the matter objectively would likely conclude that, at the relevant time, Mr. Harper's right to be left alone by police, and his expectation of privacy in his person and effects, were at the very least sharply reduced.
- [15] The logical corollary of this is that the impact of Cst. McGrath's conduct on Mr. Harper's Charter-protected interests was diminished in equivalent measure. I conclude that the second of the Grant lines of inquiry produces a more or less neutral result. If it favours exclusion, it does so minimally.
- [16] When it comes to society's interest in the adjudication of the case on its merits, the question, succinctly stated, is whether the long term reputation of the justice system will be better served by the inclusion or exclusion of the evidence. The charges against Mr. Harper are serious. Public concern about the prevalence of lethal drugs on our streets is widespread and substantial. For years now people have been dying from fentanyl overdoses in shocking

numbers in our city, on our island, and elsewhere in our province. Public awareness of the carnage caused by fentanyl use was well established by August 2019, when Cst. McGrath stopped Mr. Harper from selling it to some of our most vulnerable citizens in doses that could easily have been fatal. The evidence sought to be excluded is highly reliable. It is essential to the Crown's case.

- [17] I bear firmly in mind that the seriousness of the charges cuts both ways. If Mr. Harper is convicted on the basis of the evidence seized from his backpack he will be exposed to a significant penalty. However, given my conclusion that Cst. McGrath's Charter-infringing conduct was at the lower end of culpability, and that it was committed in circumstances where the impact on Mr. Harper's Charter-protected interests was greatly attenuated, in my view this third factor decisively tips the balance in favour of inclusion of the evidence. This is especially so, as I have already said and will repeat for emphasis, in light of the ongoing opioid crisis, the many fatalities caused by it, and the pressing public concern about the manner in which it, and the illicit drug trade generally, impairs the health, safety and security of our community.
- [18] In summary, in my view a reasonable person, informed of all the relevant circumstances and the values underlying the Charter, would conclude that it would be the exclusion of the evidence, rather than its admission, that would bring the administration of justice into disrepute in this case. The impugned evidence is admissible. I hereby order that the evidence taken on the voir dire will form part of the trial record without the necessity of repetition.

"Baird J."

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