

CANADA / JUDGMENT

R. v. Higgins

2017 BCSC 642

COURT

Supreme Court of British Columbia

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2017 BCSC 642 R. v. Higgins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Higgins,

2017 BCSC 642

Date: 20170421

Docket: X077726

Registry: New Westminster

Regina

v.

Matthew James Higgins and Hernan Osvaldo Veloso

Before: The Honourable Mr. Justice Blok

Reasons on Sections 8 and 9 Ruling

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Counsel for the Accused, M. Higgins:

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Place and Dates of Hearing:

New Westminster, B.C.

April 4-8, 11-15, 18-26

May 13, and August 19, 2016

Place and Date of Judgment:

New Westminster, B.C.

April 21, 2017

I. Introduction

- [1] On August 19, 2016 I dismissed, with reasons to follow, an application brought by Hernan Veloso, one of the accuseds in this case. These are those reasons.
- [2] Mr. Veloso was the driver of a vehicle stopped by police on August 21, 2008 that was found to contain approximately 117,000 pills of MDMA (also called ecstasy) weighing about 23.5 kilograms in total.
- [3] Mr. Veloso applied mid-trial for an order excluding evidence seized at the time of his arrest. Mr. Veloso alleges that the police did not have reasonable grounds to arrest him and thus his arrest and the subsequent search contravene ss. 8 and 9 of the Charter.

II. Background

- [4] This case originates in a joint Canada-U.S. drug investigation of suspected cross-border drug activities. The U.S. investigation, called Project Goosebomb, was led by the U.S. Drug Enforcement Administration ("DEA"). The Canadian investigation, called Project E-Pistology, was led by the Combined Forces Special Enforcement Unit ("CFSEU"). The essential feature of these investigations was the use of an undercover, encrypted BlackBerry server and the distribution of associated BlackBerry devices to targets of interest. The use of the undercover server enabled the DEA and the CFSEU to receive and monitor communications involving the distributed BlackBerry devices.
- [5] One of these devices was put in the hands of a person the police identified as Matthew Higgins, the co-accused in this case. The police say he received a device having the address "harley@goosebomb.com". Evidence led at the trial proper indicates that DEA agents arranged for the distribution of the "Harley" BlackBerry device to Mr. Higgins through a confidential police source. A DEA agent observed the apparent handover of the device to Mr. Higgins at a restaurant in the Los Angeles area on August 6, 2008.

- [6] Other Goosebomb BlackBerry devices were also distributed. In the month prior, two devices had been distributed to another Canadian, Jeremy Stark, by couriering them to Mr. Stark at his Langley, B.C. business address. These devices had the Goosebomb addresses "Dragon" and "Yamaha".
- [7] At this trial DEA agents testified that four more BlackBerry devices, including those with addresses "Tiger" and "Pitbull", were distributed to Mr. Higgins at a meeting on August 12, 2008.
- [8] As noted earlier, the distribution of these BlackBerry devices, which communicated by means of an undercover server located in the DEA's Los Angeles office, enabled the DEA to receive and monitor all messages received and sent on those devices, and to do so essentially in real time. Any messages having a Canadian connection were forwarded by the DEA to the CFSEU.
- [9] Evidence at trial was given by several CFSEU officers about various surveillance operations targeting Jeremy Stark and, later, Matthew Higgins and Hernan Veloso. Evidence on the voir dire itself was given by the lead investigator, Sgt. William Spearn, and by Cpl. Brent Wilcott, who carried out the arrest of Mr. Veloso and searched his vehicle.
- [10] From the intercepted emails the CFSEU investigators believed that Mr. Higgins had arranged for the acquisition of two kilograms of cocaine, which were coming from the United States, that were to be exchanged for 100,000 pills of MDMA (ecstasy), which was to go in the opposite direction. The border crossings were to take place near Creston B.C. and the actual crossings were to be done by someone on foot.
- [11] Since these reasons relate to a ruling made following a defence application, I emphasize I am not making findings relating to the trial proper. I emphasize this because I will refer to various individuals by their names, as both the witnesses and counsel did, and I do not wish it to be assumed or concluded that I have made findings of fact on, for example, identification for the purposes of trial. So, for example, if I refer to "Mr. Higgins" or "Mr. Veloso" it should be read as "the person police believed to be Mr. Higgins or Mr. Veloso".
- [12] Mr. Higgins first came to the attention of the police as a result of surveillance conducted on July 25, 2008, when a man police later identified as Mr. Higgins was seen meeting Mr. Stark at a pub parking lot in North Vancouver.
- [13] There were many details of the surveillance operations given in testimony at trial, but for present purposes the essential evidence is as follows:

- a) on August 18, 2008 police observed a meeting between a person they identified as Mr. Higgins and two males at a McDonald's restaurant parking lot near the intersection of Lougheed Highway and Boundary Road. One of the males was later identified by police as Mr. Veloso. The other male retrieved a white plastic bag from a Ford Focus and handed it to the person the police said was Mr. Higgins. The police believed this was the handover of the cocaine;
 - b) on August 20, 2008, at about 4:30 p.m., Mr. Higgins was observed at that same McDonald's parking lot, meeting with Mr. Veloso. Mr. Veloso was in a Dodge Caravan minivan. Surveillance officers followed that minivan to an apartment complex on Madison Avenue in Burnaby, where again Mr. Veloso was seen with Mr. Higgins. Both then entered an apartment building. They exited a short time later and departed in separate vehicles. The police believed the purpose of this meeting was for Mr. Higgins to introduce the courier, Mr. Veloso, to the person or intermediary who would hand over the ecstasy;
 - c) At 5:19 p.m. Mr. Veloso was seen at a fast-food restaurant at Grandview and Boundary. Later, around 6:30 p.m., Mr. Veloso was again seen at the Madison Avenue address, this time walking away from the building entrance while carrying a large cardboard box that he placed in his minivan. Police followed the Dodge minivan and it ultimately ended up at a townhouse complex on Blake Street in Vancouver. From intercepted emails the police investigators believed that Mr. Veloso was waiting for the ecstasy to arrive at the pickup spot, and he then picked up the ecstasy and took it away in a large cardboard box; and
 - d) around 8:00 a.m. the next morning Mr. Veloso was seen loading an older brown sedan and then driving eastbound on Highway 1 in the company of a female passenger. The investigators believed that this was the transport of the ecstasy to the Creston area.
- [14] The vehicle in which Mr. Veloso was travelling was stopped by police at a traffic-style roadblock, set up as a ruse, in Princeton, B.C. Mr. Veloso and his companion were arrested and the car was searched. It is this arrest and search that is the subject of this voir dire.

III. Voir Dire Evidence

A. Sergeant William Spearn

- [15] Sgt. Spearn was the primary witness on the voir dire. He was the lead investigator on E-Pistology. He reviewed his extensive experience in drug investigations and said he was first qualified to give expert testimony on drug trafficking in 2001.
- [16] Sgt. Spearn testified that he believed that the "Harley" BlackBerry device was used by Mr. Higgins and he articulated various reasons for that belief.

- [17] Sgt. Spearn testified that every BlackBerry message received by the DEA that had a Canadian connection was sent to CFSEU's offices and then forwarded to his own BlackBerry device. There were days when he read hundreds of emails. He also had a close working relationship with the DEA agent in charge of the American side of the investigation, Special Agent Keuler.
- [18] As an aside, I note that although various witnesses described intercepted messages as "emails", they would be more fairly characterized as text messages because they were typically very brief and the content was in text message style.
- [19] Sgt. Spearn testified that the email messages he reviewed indicated Mr. Higgins had concluded an arrangement with the person using the "Tiger" BlackBerry device (who Sgt. Spearn believed was a man named Brian Edwards) to exchange two kilograms of cocaine for 100,000 (or perhaps 105,000) pills of ecstasy. The messages indicated to him that: (1) the cocaine was coming from the United States; (2) it was being walked over the border by a person using the "Pitbull" BlackBerry device, who Sgt. Spearn believed was a man named Greg Gay; (3) once over the border it would take 10 hours to get the cocaine to the Vancouver area; and (4) the border crossing was going to occur near Creston, B.C.
- [20] The messages indicated to Sgt. Spearn that the original plan was for the drug exchange to be "box for box", but that did not occur because the ecstasy was not ready.
- [21] Intercepts showed that Mr. Higgins had received the cocaine (Mr. Higgins even mentioned that one cocaine package was "mint" but the other one smelled of diesel), but there was a delay in the delivery of the ecstasy pills because of problems with the supplier.
- [22] Sgt. Spearn said subsequent intercepted messages showed that Mr. Higgins was going to pick up the ecstasy at a residence located at Madison Avenue in Burnaby associated with a person named "Stretch". In their messages Mr. Gay and Mr. Edwards told Mr. Higgins he was not to bring the courier to Stretch's place and, instead, they wanted Higgins to be "hands-on" and personally involved in the exchange. That changed later on. Sgt. Spearn also said there was a lot of discussion in the messages about the experience of the courier, whom they called "Nano", and that he was travelling back and forth with his girlfriend and/or wife.
- [23] Intercepts revealed that just before August 21 the ecstasy was ready. Sgt. Spearn said they knew from the intercepts that the ecstasy was going to Stretch's place on Madison Avenue. The messages showed Mr. Higgins wanted to introduce the courier to Stretch so that he (Mr. Higgins) would not have to be directly involved in later deliveries. Surveillance officers saw both Mr. Higgins and Mr. Veloso at the Madison Avenue address. Intercepts indicated to Sgt. Spearn that, after a short interval, Mr. Veloso returned to the Madison Avenue location and, shortly thereafter, left with a large box. Sgt. Spearn said it was clear to him from the emails that Mr. Higgins was not the one who would be driving the ecstasy to Creston, so he had the surveillance team follow Mr. Veloso, who led them to an address on Blake Street in Vancouver.

- [24] Sgt. Spearn said he had to intercept the drugs yet maintain the integrity of the investigation. To do so, he devised a method to stop the Veloso vehicle and arrest the occupants in a way that would not reveal their investigative methods and the intercepted messages in particular. Arrangements were made to set up a traffic-style roadblock in Princeton, B.C. and to have a police dog present in order to plausibly explain to the occupant or occupants of the vehicle why the police thought there were drugs in the vehicle without revealing how they had come to that conclusion.
- [25] On the morning of August 21 the surveillance team observed the departure of Mr. Veloso and a female passenger in an older Buick. They followed that vehicle east to Princeton.
- [26] Sgt. Spearn said he instructed Sgt. Michael Wilson and Cpl. Wilcott to travel to Princeton and intercept the vehicle. He testified that he believed on reasonable grounds that the vehicle in question was transporting ecstasy east to Creston to be given to Greg Gay, who was then going to walk the drugs over the border. Sgt. Spearn said he did not have any specific information or any specific belief about which vehicle would be used or where in the vehicle the drugs would be found. He testified that he knew Mr. Veloso had been associated with a minivan and a Ford Focus at certain times prior, but he considered that whatever vehicle Mr. Veloso left in to drive east would contain 100,000 to 105,000 pills of ecstasy.
- [27] Sgt. Spearn testified that from the various intercepts and the surveillance observations it was obvious to him what was going to occur.
- [28] Sgt. Spearn spent considerable time reviewing the various intercepted emails he said gave rise to his belief. I have summarized these emails in the attached Schedule. In preparing the summary, I emphasize that where a particular target is identified by name, the identification reflects who the police believed was the person sending or receiving the message. I also emphasize that the interpretations indicated or summarized for the emails are those of Sgt. Spearn.
- [29] As indicated in the attached summary, Sgt. Spearn testified that after reading in the intercepts that the courier had been introduced to Stretch and told to leave in the morning (emails ending at Email 498), and having learned what his surveillance teams had seen relating to these same events, he believed that the transfer of 105,000 pills of MDMA would take place the next day. Accordingly, he dispatched officers to arrest the driver.
- [30] In cross-examination, Sgt. Spearn elaborated on his decision to have a police dog at the scene of the arrest. He said:

I had absolutely no doubt there was going to be drugs in that vehicle. To protect the ongoing nature of this investigation, I had to make the vehicle stop look random, even though the occupants were going to be arrested immediately. So I came up with the idea that there was going to be a roadblock and a dog, whether or not that dog could detect drugs wasn't really anything I was concerned with. I just wanted to make it look like the dog indicated for drugs and these people would be arrested immediately and the vehicle searched. So if for some reason the vehicle

is pulled over and the occupants were arrested for drugs immediately, then the ongoing nature of this investigation would have been compromised. So it was very important to not let the driver know that this was a planned event. I had no doubt that there were going to be drugs inside that car.

[31] Later, Sgt. Spearn explained the purpose of the surveillance in this case:

The surveillance team was deployed to confirm what we were intercepting in the emails. When targets were to meet at A and they went to A, that confirmed that what was being said in the emails was true. When the targets were told to go to Madison Avenue and a box would be on its way, the box showed up. When the targets said that the courier would have to bring the stuff back out, the "vits", the "tabs", which I verily believed to be MDMA, back out to Creston, the surveillance team is telling me that they have someone meeting where they are supposed to meet, picking up something that they are supposed to be picking up, going back to a residence in Vancouver, supposed to be leaving the next day and then leaving exactly when they are supposed to leave, heading in the direction they are supposed to be going, I don't think I've had anything that was such a sure thing as this was. The surveillance team's observations confirmed exactly what the emails were telling us.

B. Corporal Brent Wilcott

[32] Cpl. Wilcott is an RCMP officer who was seconded to the CFSEU from 2007 to 2012. At CFSEU he was part of a 10 to 12 member investigative team. On E-Pistology he was the affiant. He confirmed that Sgt. Spearn was the primary investigator. Cpl. Wilcott said that he himself was not responsible for any operational decisions.

[33] On August 20, 2008 Cpl. Wilcott was assigned to prepare a vehicle stop to intercept ecstasy that was on its way to Creston.

[34] Cpl. Wilcott recalled that Sgt. Spearn spoke to him around 4:00 p.m. on August 20 to convey his instructions. Sgt. Spearn told him that he believed a vehicle would be travelling from Vancouver to Creston with ecstasy in it. Cpl. Wilcott was directed to arrest the occupants for possession of controlled substances.

[35] Cpl. Wilcott was given the licence plate number associated with an older Buick Skylark. Sgt. Spearn also showed Cpl. Wilcott email intercepts showing, as Cpl. Wilcott recalled, ecstasy coming to Mr. Higgins, a meeting taking place in Burnaby, surveillance observing a meeting between Mr. Higgins and another man, a package being delivered, a box going into the Buick and the vehicle going to Vancouver where it was seen going into a garage.

[36] Princeton was selected as the location for the traffic stop. They were not sure when the shipment was going to be travelling east, so in the early evening of August 20 Cpl. Wilcott moved to a location near Chilliwack and stayed there, on call, until 10 p.m. He carried on to Princeton the next morning. The plan was to initiate a road block using general duty members of the Princeton RCMP detachment. They selected an area near the detachment

that had a curve so that the roadblock would not be visible much in advance. Police officers driving unmarked cars were to position their vehicles both in front and behind the subject vehicle as it approached the roadblock. They also had a police dog available as part of the general roadblock ruse.

- [37] Cpl. Wilcott and Sgt. Wilson met with detachment members in the morning of August 21. The roadblock was put in place just before noon, based on information from the surveillance team about the likely arrival time of the target vehicle. Cpl. Wilcott was directed to stop the vehicle and arrest the occupants. He was in a full RCMP uniform and had a marked police vehicle.
- [38] He recalled the vehicle coming into sight around 12:40 p.m. It was a brown, two-tone 1980s Buick Regal, with two occupants in it. Its licence plate corresponded with the licence plate number he had been provided. The police officer driving the unmarked car just ahead of the Buick also nodded to him as a signal to confirm the subject vehicle was behind.
- [39] Mr. Veloso was the driver. He had a female passenger. Cpl. Wilcott asked the driver to pull the vehicle over, and he did. The unmarked police vehicle was also pulled over as part of the ruse. He asked the driver for his licence and registration. Another officer walked by with a police dog. Cpl. Wilcott told Mr. Veloso to turn off his vehicle and then told him he was under arrest for possession of a controlled substance. He escorted him to the back of his vehicle, handcuffed him and advised him of his brief rights (he Chartered him more extensively later). Another officer arrested the female passenger.
- [40] In his direct examination Cpl. Wilcott testified that he did a cursory search in the front of the Buick (while looking for a trunk release latch), looking for a large box in the passenger area, and then searched the trunk. In cross-examination he recalled that, instead, he retrieved the keys from the ignition and used them to open the trunk. There was nothing in the trunk, but the presence of Bondo sealant in the trunk led him to believe there might be a concealed compartment. He then requested assistance from two other officers, Csts. McLeod and Brisebois.
- [41] Cst. McLeod then searched the back seat and reported finding "a few bags of ecstasy pills" underneath the rear seat. Cpl. Wilcott himself saw four vacuum-sealed bags, each of which had different coloured pills.
- [42] Cpl. Wilcott then updated Sgt. Spearn, who said there should be a lot more drugs, so the officers continued their search of the Buick. The other two officers found a compartment in the side panel next to the rear seat, below the window. They had to use a tire iron to pop off the cover. There was a similar compartment on the opposite side. Ultimately 29 bags of pills were found in these compartments.

- [43] Cpl. Wilcott said he did not consider ending the search earlier, before he found any ecstasy, because he and his superior believed the ecstasy would be there. That belief was based on his review of the surveillance reports, Sgt. Spearn's instructions and the fact that everything to that point had played out exactly as indicated in the intercepts.
- [44] In cross-examination Cpl. Wilcott said that in his role as affiant on the file he kept up to date by reviewing the email intercepts and all investigators' reports, including surveillance reports. He also attended team meetings and gleaned information by talking to other officers working on the file.
- [45] Cpl. Wilcott said he spoke to Sgt. Spearn around 4 p.m. on August 20 but he did not leave for Chilliwack until 6 or 7 p.m. In between those times he had further conversations with Sgt. Spearn. Sgt. Spearn reviewed with him his reasons for implementing a roadblock and in doing so he reviewed the intercepted emails with Cpl. Wilcott. He testified that "we came to the conclusion that controlled substances were being transported to Creston". He did not recall if he and Sgt. Spearn discussed who they expected to be occupying the vehicle. While in Princeton, before the roadblock commenced, Cpl. Wilcott communicated further with Sgt. Spearn and the surveillance team, mainly concerning updates on the location of the target vehicle.
- [46] Cpl. Wilcott acknowledged that he wrote the following in his notebook while in Princeton, before the roadblock: "VCR box, re packaging". He said that this was information that was relayed from the surveillance observation – that a box was handed over – and they believed at the time that the ecstasy was inside.
- [47] Cpl. Wilcott said he expected the ecstasy to be in the trunk, based on the fact that it would be hidden (which I took to mean out of plain view). He acknowledged, however, that he wrote in his later report that the "ecstasy was believed to be in the trunk" based on surveillance reports.
- [48] He did not consider using a drug detector dog when he failed to find ecstasy in the trunk because he had been in touch with Sgt. Spearn, who said there would "definitely be more" than the four bags of ecstasy which had already been located, and he expected there was more ecstasy somewhere in the vehicle.

IV. Positions of Mr. Veloso and the Crown

A. Mr. Veloso

- [49] Mr. Veloso conceded that Sgt. Spearn had a subjective belief that the vehicle that departed the Blake Street address and headed east on Highway 1 would contain approximately 100,000 ecstasy pills. He submitted, however, that errors in Sgt. Spearn's analysis of the available information were such that there was no objective basis for his subjective belief.

[50] As for Cpl Wilcott, Mr. Veloso submitted that whatever the reasonable and probable grounds offered by Sgt. Spearn for a search incidental to arrest effectively disappeared because the police expected the ecstasy to be in a VCR box inside the trunk and nothing of the sort was found there.

B. Crown

[51] The Crown submitted that the evidence of Sgt. Spearn establishes both his subjective belief that the occupants of the Buick were arrestable for possession of drugs for the purpose of trafficking and that his belief was objectively reasonable.

[52] Similarly, Cpl. Wilcott, who carried out the actual arrest, also had subjective grounds to believe the car he stopped contained a large quantity of ecstasy, and his belief was likewise based on objectively reasonable grounds. His grounds to arrest and search did not cease to exist merely because he did not find a box with drugs in the Buick's trunk. He was entitled to search, and to continue to search, in an attempt to achieve a valid purpose connected to the reason for the arrest.

V. Discussion

A. Basis for Arrest – General Principles

[53] The authority for a police officer to effect a warrantless arrest in circumstances such as the present is found in s. 495 of the Criminal Code:

495 (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

[54] The burden of demonstrating that the police had reasonable and probable grounds to arrest is on the Crown: *R. v. Storrey*, [1990] 1 S.C.R. 241 [Storrey] at 249.

[55] The Supreme Court of Canada in *Storrey* described the standard that must be met in order to ensure that a warrantless arrest (and, in this case, a search incidental to a warrantless arrest) is not arbitrary and thus passes constitutional muster. The court said (at 250-251):

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[56] The court also said (at 250):

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.

- [57] Since the relevant point of view is that of a reasonable person "standing in the shoes of the police officer", that "reasonable person" is presumed to have the knowledge and experience of the officer or officers in question including, if the matter involves the drug trade, the expertise of the officers in that field: *R. v. Juan*, 2007 BCCA 351, at paras. 27 and 28; *R. v. Luong*, 2010 BCCA 158, at para. 24. An officer's reasons for arrest must be assessed "from the vantage point of a prudent, reasonable and cautious police officer, similarly experienced as the arresting officer": *R. v. Messina*, 2013 BCCA 499, at para. 24.
- [58] Although the requirement for objective reasonableness must be viewed in light of the arresting officer's background and experience, deference to an officer's intuition must not be such that it renders the objective element of the inquiry meaningless: *R. v. Payette*, 2010 BCCA 392, at para. 25.
- [59] In *R. v. Debot*, [1989] 2 S.C.R. 1140 [Debot], the court noted (at 1166) that the standard of proof required to establish reasonable grounds for a search is "reasonable probability" rather than proof beyond a reasonable doubt or a *prima facie* case. The court added that the phrase "reasonable belief" also approximates the requisite standard. In *R. v. Jir*, 2010 BCCA 497 [Jir], our Court of Appeal said:
- [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* [].

More recently, in *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40, [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 [citations omitted].

- [60] Case authorities also establish the following principles:
- a) 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: *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 at 367 (Ont. Ct. (Gen. Div.)), quoted with approval in *Jir* at para. 27 and in *R. v. MacCannell*, 2014 BCCA 254 [MacCannell], at para. 45;
 - b) a reasonable grounds determination involves a consideration of the "totality of the circumstances": *Debot*, at 1168; *Jir*, at para. 28;

- c) an officer is not required to rule out potential innocent explanations before it may be said he or she had reasonable grounds for the arrest: MacCannell, at para. 46. Similarly, the fact that the police could have done more to investigate the case is not relevant because the assessment of "objective basis" must be based on matters known to police at the time the arrest decision was made: Jir, at para. 29;
- d) in making a decision to arrest an officer is entitled to put "two and two together": R. v. Arason (1992), 78 C.C.C. (3d) 1 (B.C.C.A.) at 33;
- e) there is no requirement that the officer who carries out the arrest personally have reasonable and probable grounds as it is the officer who makes the decision to arrest who must have those grounds: Debot, at 1166-1167; R. v. Le, 2006 BCCA 463, at para. 25; and
- f) the objective strength of the police grounds can include information or knowledge that comes to their attention after they have formed their subjective belief but before the arrest is actually carried out: R. v. Clayton, 2007 SCC 32, [2007] 2 S.C.R. 725, at para. 48; R. v. Gill, 2015 BCSC 310, at para. 24.

B. Analysis – Objective Basis for Sgt. Spearn's Belief

- [61] I will first address the defence arguments on the "objective basis" issue.
- [62] As already noted, Mr. Veloso concedes that Sgt. Spearn subjectively believed he had reasonable and probable grounds to arrest him and search his vehicle. He submits, however, that Sgt. Spearn's belief was not objectively reasonable.
- [63] In advancing this argument Mr. Veloso submits that Sgt. Spearn ignored surveillance observations that contradicted his view that there would be ecstasy in the Veloso vehicle. He advanced five points that he said Sgt. Spearn failed to take into account. I have reduced these to four because two points were closely related to one another. These four points are as follows:
- a) intercepted emails referred to a courier bringing cocaine from Creston to Vancouver, yet it was not one, but two males who met Mr. Higgins at the McDonald's parking lot on August 18 and, police believed, handed over two kilograms of cocaine. Furthermore, Sgt. Spearn was under the mistaken belief that, at that meeting, the actual handover was made by Mr. Veloso to Mr. Higgins, when in fact it was the other male who handed to Mr. Higgins a bag purportedly containing cocaine;
 - b) Sgt. Spearn based his arrest and search decision on his erroneous understanding that the Ford Focus associated with the apparent cocaine delivery in the McDonald's parking lot on August 18 was registered to the same person who owned the Dodge Caravan driven by Mr. Veloso on August 20, when he met with Mr. Higgins in the same McDonald's parking lot and was later seen with Mr. Higgins at the Madison Avenue address. In fact, although the two vehicles were both registered in the names of persons with the same surname (Quiroz), and both had the same registered address on Blake Street, they had different first names and

were two different persons;

- c) the police established no connection between Mr. Higgins, Mr. Veloso and the large cardboard box Mr. Veloso was seen carrying as he left the Madison Avenue address on August 20;
- d) the police had no reason to believe that the box, supposedly containing ecstasy, was ever present at the Blake Street address.

[64] I deal with these points under the sub-headings that follow.

One Courier/Two Couriers and the Handover

[65] The point made by Mr. Veloso is that police understood from intercepts that a courier was coming from Creston, yet two males were present when the cocaine was allegedly handed over, and so Mr. Veloso could not have been reliably identified as "the courier" by reason of the surveillance team's observations. Furthermore, since the actual handover was made by the other male in the McDonald's parking lot, not Mr. Veloso, this should have indicated to the police that Mr. Veloso was not the courier.

[66] The difficulty with this argument is that it fails to take into account all of the circumstances known to police at the time the arrest decision was made (and, in fact, up the time of the actual arrest), including all of the later intercepts and surveillance observations. This argument also takes an unduly narrow view of those pieces of information referred to.

[67] The intercepts speak of a "limo" transporting the (apparent) cocaine, and also reference a "he", "him", "your boy" and "the driver". At one point on August 18, when concerns arose about the whereabouts of the "limo", "Tiger" (the cocaine supplier) emailed to say (Email 297):

Yea he was with a girl maybe his wife or girlfriend or something driving a mini van

[68] In Email 310a, sent at 4:24 p.m. on August 18, "Tiger" told "Harley" (who police believed to be Mr. Higgins) that the courier's name is "Nano" and gave him the courier's telephone number (in coded form).

[69] At 5:11 p.m. "Harley" (Mr. Higgins) emailed "Tiger" (Email 337) and said "Met buddy. I'll get a hold of u in 20 mins". At 6:05 p.m. "Harley" emailed "Tiger" as follows (Email 339):

Hay so I saw your buddy and stuff and dropped off and all safe I am seeing your buddy at noon tommorrow he said he drove all night and stuff and was tired and I still needed to vac seal so will have them done and get to your buddy tommorrow

[70] There was also surveillance evidence relating to these events. Sgt. Gerry Proctor said that on August 18 he was at the intersection of Boundary Road and Lougheed Highway when he saw Mr. Higgins' Dodge pickup (with which Sgt. Proctor was familiar) drive into the parking lot of the nearby McDonald's restaurant at 5:06 p.m. One of the males ("UM1") retrieved a white

plastic bag from a black Ford Focus and handed it to Mr. Higgins. Sgt. Proctor said UM1 was the driver of the Ford Focus. Sgt. Proctor video-recorded some of this interaction. From later information the police concluded the other male ("UM2") was Mr. Veloso.

- [71] There was therefore a reasonable body of information on which to conclude that Mr. Higgins had in fact met with the courier on August 18 shortly after 5 p.m. in the McDonald's parking lot located at the intersection of Lougheed Highway and Boundary Road. Which of the two men actually handed something to Mr. Higgins does not strike me as being particularly important given that the issue on this voir dire is whether the police had reasonable grounds to arrest Mr. Veloso on August 21, not whether they had grounds to do so on August 18. The meeting on August 18 in the McDonald's parking lot was only one component of a longer narrative that ultimately caused Sgt. Spearn to believe that Mr. Veloso was the courier.
- [72] Some of that further information included later email intercepts. These indicated that the ecstasy shipment was not yet ready and so the exchange could not be carried out "box for box" as planned. A number of delays ensued. The targets exchanged many messages on this topic. However, the intercepted emails revealed that around noon on August 20 the supplier had indicated to Mr. Higgins that the ecstasy delivery would be available for pickup at the intermediary's place ("Stretch's") on Madison Avenue by 5 p.m. that day (Emails 426 and 432-435 and 442a). In Emails 436 and 437, sent shortly after noon, Mr. Higgins and the supplier confirmed a meeting to take place at Stretch's where Mr. Higgins was bringing "the driver".
- [73] Accordingly, based on emails sent shortly after noon on August 20 there were reasonable grounds to believe that the person who was going to transport the ecstasy shipment to Creston was going to be at the Madison Avenue address around 5 p.m. on August 20 to pick up the shipment.
- [74] Subsequent surveillance bore this out. The observations of officers Proctor, Bhayami and Ketcheson reveal that at 4:30 p.m. on August 20 Mr. Higgins met with an Hispanic male (later identified by police as Mr. Veloso) in the parking lot of the same McDonald's restaurant at Boundary and Lougheed. They then travelled in separate vehicles (with Mr. Veloso driving a Dodge Caravan) to the apartment complex on Madison Avenue, about nine blocks away. They entered the east tower together shortly after 5 p.m. and left six minutes later in their separate vehicles.
- [75] Insp. Ghalib Bhayami testified that he saw the person later identified as Mr. Veloso at a Wendy's restaurant located at the intersection of Boundary Road and Grandview Highway at 5:19 p.m.

[76] These observations accord with the emails sent during this time (Emails 483a, 484a, 485a, 486a, 492 and 494a). To put the first four emails in context, in an email sent at 4:27 p.m. Stretch told Mr. Higgins that he was not yet at home but expected to be there in "20 or so" (Email 472). As to the latter two emails, "Waldo" was a person involved in supplying the ecstasy:

4:55 p.m. Higgins to Stretch: Hay can you stop and see me in the parking lot

4:58 p.m. Stretch to Higgins: Just come up when I buzz you

4:58 p.m. Higgins to Stretch: Ok I am having to tak pritty soon to go to van island so sorry for bugging you

5:03 p.m. Stretch to Higgins: Np bud I'm here come up

5:08 p.m. Higgins to Waldo: K they met and stuff and I am off to the boat

5:12 p.m. Higgins to Waldo: I gave buddy mony to get a bite and wait for strech to call

[77] Mr. Higgins then exchanged emails with "Tiger" (Edwards) reporting on the events that had just occurred (Emails 495-500):

5:14 p.m. Higgins to Tiger: So met driver and took him there and stuff and he is going to pac the way he wants and stuff and bring to you he will call me soon and tell me to buzz you so all good

5:17 p.m. Tiger to Higgins: Great thanks can u call him and ask him to leave in the morning? I would like him there around 6 tomorrow night

5:17 p.m. Higgins to Tiger: Ok

5:19 p.m. Tiger to Higgins: Thanks sorry I just don't have a phone and dnt want him driving through the night there is no point plus I have to take a ferry back to where I meet him I won't be able to till afternoon tomorrow. If you could pin me and let me know he's kool with that?

5:20 p.m. Higgins to Tiger: I just talked to him and told him morning and stuff he was all good

5:20 p.m. Tiger to Higgins: K kool so he's leaving in morning?

[78] Tiger then reported to a person using the "Tehya" BlackBerry device (Email 501)(according to police, "Brando" was Mr. Higgins):

5:26 p.m. Tiger to Tehya: Ok so brando gave vits to limo limo is leaving tomorrow morning be to me right around 6 tomorrow night so we are all good

[79] Mr. Higgins then communicated further with Stretch (Emails 505a to 511a) (the time stamps seem to be off as between the devices but the following sequence is correct):

6:11 p.m. Higgins to Stretch: Buzz me when done please

6:15 p.m. Stretch to Higgins: What's that

6:13 p.m. Higgins to Stretch: When my buddy gets the box that was coming

6:17 p.m. Stretch to Higgins: Ya bud think he's here now

6:15 p.m. Higgins to Stretch: Good please buzz when chillie is been and gone

6:29 p.m. Stretch to Higgins: He's gone

6:27 p.m. Higgins to Stretch: Thanks so much buddy it was great to see you again hope we can do reg

[80] The context suggests "chillie" was a name used by the courier.

[81] Mr. Higgins then emailed "Tiger" (Email 513):

6:48 p.m. Higgins to Tiger: So I was driving but your buddy has it safe and sound so my job done good luck see you on fri I guess hay buddy

[82] The latter emails between Mr. Higgins and Stretch accord with surveillance observations made by Sgt. Proctor on August 20. At 6:26 p.m. he saw the same UM2 (Mr. Veloso) that he had seen meeting Mr. Higgins two days prior, walking away from the front doors of the east tower while carrying a large cardboard box that appeared to be heavy. Sgt. Proctor testified that he saw the person put the box in a parked Dodge Caravan and then drive off. Sgt. Proctor video-recorded part of the event (Ex. 22).

[83] Later that evening he saw the same Dodge Caravan parked at the Blake Street address. In the carport of the subject address there was an older model brown sedan with licence plate 203 DVR.

[84] The next morning (August 21) Sgt. Proctor was again on duty at the Blake Street address, where at around 8:00 a.m. he observed Mr. Veloso depart in the brown sedan in the company of a female.

[85] I have reviewed this evidence in some detail as I consider it necessary to set out a reasonably full account of the information available to the police prior to the arrest. As indicated earlier, the police had much more information at hand than the mere fact that Mr. Veloso was one of two males who met with Mr. Higgins on August 18. The emails and surveillance observations provide a sound basis for the police to have concluded that: (1) the courier who was to take the ecstasy to Creston was introduced by Mr. Higgins to Stretch shortly after 5:00 p.m. on August 20; and (2) that courier was Mr. Veloso. The emails and surveillance observations also provide a sound basis for the police to conclude that Mr. Veloso picked up the ecstasy shipment around 6:26 p.m. on August 20.

Erroneous Understanding of Vehicle Registrations

[86] Sgt. Spearn conceded that he had recorded in his notes (based on information provided by the surveillance team) that the Dodge Caravan seen at the Madison Avenue address and the Ford Focus seen two days earlier had the same registered owner. The defence argument on this point is as follows:

The identity of the ownership of the two vehicles must have been of significance to Sgt. Spearn as he made rare note of it. Moreover, it must have featured importantly in his decision to arrest as it was close in time to that very decision; he testified that he made the decision to arrest on August 20, 2008.

[87] The primary difficulty with the defence argument on this point is that it is speculative ("must have been of significance" and "must have featured importantly"). The propositions currently advanced were never put to Sgt. Spearn in cross-examination and he did not mention these in direct examination as having had any bearing on his arrest decision.

[88] While that probably should be the end of the analysis, I will go further and discuss the relevance of that information.

[89] Sgt. Spearn emphasized that his interest was in the driver. When he was asked in direct examination whether he had any specific belief about what vehicle would be used to transport the ecstasy, he said:

No. I wasn't sure which vehicle was going to be used. I knew there was a van and a black Ford Focus involved and in the end [it was] a 1981 Buick Regal with some expired plates and a temporary operating permit – that was the vehicle that was used. There had been some talk earlier in the intercepted emails about a van possibly being used, but whatever vehicle Veloso left in and was driving east on Highway 1 and east on Highway 3 with, that's the vehicle I believed would contain 100-105,000 MDMA pills.

[90] This evidence does not support the defence speculation that the registered ownership of the two vehicles figured, or ought to have figured, in some way in the decision to arrest. Mr. Veloso had been identified through a combination of intercepted messages and on-scene surveillance as the courier who had been introduced to Stretch by Mr. Higgins, who had taken possession of the ecstasy and who was going to be transporting those drugs to the Creston area. The vehicle Mr. Veloso used to do this was not important to Sgt. Spearn given the other information he knew. Although the ownership of the vehicles would no doubt have been of interest to the police in a general sense, this information was overshadowed by the more specific information identifying the courier as Mr. Veloso. Given the nature of that other information, I am unable to discern how the registered ownership of the two vehicles should have caused Sgt. Spearn to reconsider his conclusion about the identity of the courier, as Mr. Veloso submits.

- [91] As a final point, I observe in any event that the differing owners of the Ford Focus and Dodge Caravan did not mean that there was absolutely no connection between the two vehicles. Both vehicles were registered to persons with the surname Quiroz and both listed the Blake Street address as the address of the owner.
- [92] For those reasons I am unable to conclude, as urged by the defence, that Sgt. Spearn's misapprehension about who owned the Ford Focus and Dodge Caravan undermined the objective grounds to arrest in any material way.

Lack of Connection between Higgins, Veloso and the Box

- [93] The basis for this defence submission is Sgt. Spearn's testimony that he understood from the surveillance team that Mr. Higgins and Mr. Veloso were observed leaving the Madison Avenue apartment complex with a large box, yet in fact there was only one person involved and Mr. Higgins was not there at that time.
- [94] Sgt. Spearn testified to this effect relatively early in his direct examination but, as I have already mentioned, he went on to review in detail numerous emails, including those I have referred to earlier. Those emails indicated: (1) Mr. Higgins merely introduced Mr. Veloso to Stretch so that Mr. Higgins would not have to be present for future exchanges and also because Mr. Higgins wanted to catch a ferry; (2) once Mr. Higgins made the introduction then both Mr. Higgins and Mr. Veloso left the Madison Avenue location; (3) Mr. Higgins gave the courier some money to "get a bite" while the courier waited for the ecstasy shipment to arrive at Stretch's; (4) Mr. Higgins asked Stretch to confirm when the courier had picked up the drugs; and (5) Stretch subsequently confirmed that the courier had been and gone. The email evidence did not in any way suggest that the box with suspected ecstasy in it was picked up by both Mr. Higgins and Mr. Veloso.
- [95] Sgt. Spearn testified that his conclusion from these emails was as follows:
- I believed that the ecstasy had been delivered from Waldo to Stretch at Madison. I believed that the ecstasy was given to Mr. Veloso and that he left Madison and took it back to his residence. And that when he arrived back at his residence, that he was going to leave early the next morning, on August 21st, and drive it to Creston in order to be there before 6:00 p.m. on August 21st.
- [96] Sgt. Spearn's earlier evidence is somewhat contradictory on the matter of his understanding about who was present when the box was carried from the Madison Avenue location. Given Sgt. Spearn's detailed review of the relevant emails, the video showing Mr. Veloso carrying the box (of which Sgt. Spearn was aware) and Sgt. Spearn's conclusion that I have just quoted, I suspect his earlier testimony may have been a misstatement. The contradiction was not put to Sgt. Spearn directly either in cross-examination or in re-examination and so the matter was never clarified, although in his cross-examination the one version was put to him this way:

Q: My understanding of your evidence about the box in Madison Avenue is that you saw people who you claim are Mr. Higgins and Mr. Veloso come out of the Madison Avenue building with a box. Am I correct or did I misunderstand you?

A: I know that the box came out and the person that took the box went back to Blake Street. I knew everything about Mr. Higgins at the time. I needed to know about the courier. So they went with the person, I believe, who was going to be the driver/courier back to their residence, which was to Blake Street. I knew that Mr. Higgins wasn't going to be driving this to Creston; I knew that it was going to be the driver. So my interest was in this person that I believed to be the driver. So I told the [surveillance team] "go with that box, wherever it goes". So they went back to Blake Street. They sat there until they were relieved by the CFSEU surveillance team.

[97] Accordingly, Sgt. Spearn did not agree with or adopt the suggestion put to him that surveillance showed both Mr. Higgins and Mr. Veloso coming out of the apartment building with the box. This is consistent with the conclusion that his earlier statement was a misstatement.

[98] But leaving aside what appears to be a misstatement on Sgt. Spearn's part at one point in his testimony (given his evidence on the point generally), I now turn to the substance of the defence submission, which focuses on Sgt. Spearn's allegedly mistaken understanding that both Mr. Higgins and Mr. Veloso were observed leaving the Madison Avenue location together with a large box. Mr. Veloso's submission on this point is as follows:

He concluded from the emails that 100,000 or more pills of ecstasy were in the box. He further surmised that it was "definitely not Higgins" who was going to drive the Ecstasy to Creston. From this theory he further hypothesized that Veloso must have put the box into his car, and that it was Veloso who was going to drive the ecstasy to Creston. Coupled with Sgt. Spearn's virtual certainty that ecstasy was in the box, the physical connection in his mind to Higgins as the box left Madison Ave. must have confirmed his theory.

[Emphasis added.]

[99] In effect, Mr. Veloso argues that the connection between Mr. Higgins, Mr. Veloso and the cardboard box was not as Sgt. Spearn thought it was. At the risk of repetition, however, I note again that the connection between the two men and the box was established 90 minutes prior to Mr. Veloso's pickup of the cardboard box when Mr. Higgins and Mr. Veloso were seen entering and then leaving the Madison Avenue apartment building together, and emails intercepted during this time indicated that this was for the purpose of introducing the courier to Stretch so that Mr. Higgins did not have to be there for the actual delivery.

[100] So even if Sgt. Spearn was under the misapprehension asserted by the Mr. Veloso, which I find he has not established, I conclude that it did not undermine the objective basis for Sgt. Spearn's subjective belief in any material way.

The Whereabouts of the Box after Madison Avenue

- [101] Mr. Veloso argued that although tracing the box and monitoring its whereabouts ought to have been of the utmost importance to the police, Sgt. Spearn failed to test his conclusion about what was about to happen with the box against the surveillance officers' actual observations or lack of observations about the box.
- [102] Specifically, the defence emphasized three points: (1) after the Dodge Caravan left the Madison Avenue location the surveillance team lost contact with it for a time; (2) the surveillance team did not see the box in the Dodge Caravan when they looked inside it while it was parked at Blake Street; and (3) the surveillance team did not notice any activity suggesting a transfer of a large volume of ecstasy to the Buick.
- [103] The defence argued that all of this ought to have caused Sgt. Spearn to question whether the ecstasy was in fact located in the Buick and to reconsider his decision to arrest the vehicle's occupants and search the vehicle.
- [104] The Crown submitted that the defence argument essentially puts Sgt. Spearn to the ultimate proof of possession, which is not the proper focus of a reasonable and probable grounds analysis. Instead, the Crown emphasizes, the proper focus is on whether Sgt. Spearn's inferences were reasonably held.
- [105] The Crown also noted that the defence did not cross-examine Sgt. Spearn on the assertions now being made. Accordingly, Sgt. Spearn had no opportunity to respond to the points raised or to point to other information he knew at the time which answered the matter.
- [106] I have reviewed my notes of the defence cross-examination of Sgt. Spearn. They reveal that during this cross-examination defence counsel put to him certain observations summarized in a synopsis that formed part of the minutes of a meeting of the investigation team on August 21. These were as follows:

UM1 then drove to Madison Avenue and picked up a large heavy box, and drove to the area of Harold Street and School Avenue, VCB [visual continuity broken], [the Dodge Caravan] was reacquired shortly thereafter and drove to [unit number and address on] Blake Street where UF2 was seen unloading items from the vehicle. The large heavy box was not in [the Dodge Caravan] when it was parked on the roadway.

- [107] Although Sgt. Spearn agreed that he knew this information prior to giving the arrest instruction, as the Crown notes, defence counsel did not challenge Sgt. Spearn about his belief about what was about to happen in light of these surveillance observations. In other words, he was not asked whether any of these observations or the loss of contact with the Dodge Caravan gave him pause or otherwise undermined his conclusion that any vehicle Mr. Veloso was driving eastbound was going to have around 100,000 ecstasy pills in it.
- [108] The only other cross-examination on this point was as follows:

Q: When you learned about the box at the Madison Avenue address, and noted down its dimensions and apparent weight, in your mind you believed the box contained ecstasy?

A: Yes.

Q: You instructed the surveillance team to stay and surveil wherever the box was going to go?

A: Yes.

Q: Did you take any steps to confirm that what was in the box was ecstasy on August 20th?

A: I didn't need to jeopardise the investigation by doing that. I had hundreds of intercepts that told me that that box was going to have ecstasy in it and where it was going, who was going to take it, how it was going to get to Creston and where it was going in Creston. There was no need to jeopardise the investigation by verifying – I knew that box had ecstasy in it.

[109] This excerpt demonstrates that the Crown is correct that defence counsel did not directly confront Sgt. Spearn with the three points (summarized earlier) she later argued on the voir dire. I agree with the Crown's submission that this undermines the defence submission considerably. Sgt. Spearn may or may not have had an answer to these points but he ought to have been given the opportunity to answer or respond to them if they were going to be advanced by Mr. Veloso in submissions.

[110] I turn to the substance of Mr. Veloso's argument which, to repeat, makes three points: (1) the surveillance team lost contact with the Dodge Caravan for a time; (2) the box was not seen in the Dodge Caravan when it was parked at the Blake Street location; and (3) the surveillance officers did not report any activity consistent with the transfer of the ecstasy from the Dodge Caravan to the Buick. As I understand the defence argument, these observations (or non-observations) tend to show that the ecstasy may not have ever made it to Blake Street. I am obviously hampered in my analysis of these points without Sgt. Spearn's response to them, but I would note that the loss of contact with the Dodge Caravan appears to have been relatively brief, and the evidence suggests that there was a delay between the arrival of the Dodge Caravan at Blake Street and the arrival of surveillance officers at the same location. Sgt. Proctor, for example, testified that on arrival at the Blake Street location he saw the Dodge Caravan parked near the target address. He saw a female unloading something from it. He did not see Mr. Veloso. This suggests that the delay in the arrival of the surveillance team was such that Mr. Veloso had already left the Dodge Caravan and gone somewhere, during which time Mr. Veloso could have moved the box elsewhere, including to the Buick.

[111] I also bear in mind that the intercepted emails indicated that the courier was going to be transporting the ecstasy to Creston and would be leaving in the morning of August 21 in order to be in the Creston area around 6 p.m. Sgt. Spearn testified that "whatever vehicle Veloso left in and was driving east on Highway 1 and east on Highway 3 with, that's the vehicle that I believed would contain 100-105,000 MDMA pills". The emails and surveillance identified Mr. Veloso as the courier, indicated he had picked up the ecstasy, and showed that

Mr. Veloso subsequently left the Blake Street address in the morning of August 21 and drove eastbound on both Highway 1 and Highway 3. All of these things were known to Sgt. Spearn prior to Mr. Veloso's arrest in Princeton. As noted earlier in my discussion of general principles, the objective strength of the police grounds can include information or knowledge that comes to their attention after they have formed their subjective belief but before the arrest is actually carried out. The departure of Mr. Veloso at the right time and his travel east on both Highway 1 and Highway 3 both fall into that category of information.

- [112] Accordingly, I am satisfied that there was a reasonable basis for Sgt. Spearn to believe that the ecstasy was in the Buick being driven by Mr. Veloso on August 21 and that the matters raised by the defence do not materially undermine the objective basis of Sgt. Spearn's subjective belief.

C. Objective Basis for Belief – General

- [113] Although I have now addressed the various points raised by Mr. Veloso on the "objective basis" issue, given that the Crown bears the burden of demonstrating that the police had reasonable and probable grounds to arrest, I must still assess whether the Crown has met that burden.
- [114] I have already reviewed the key information known to police, and to Sgt. Spearn in particular, earlier in these reasons and so I will not summarize them again here. That evidence satisfies me that the Crown has demonstrated Sgt. Spearn's subjective belief was reasonably held or, to put it another way, that his subjective belief had an objectively reasonable basis.

D. Search Incidental to Arrest – Principles

- [115] As noted earlier, the defence argues that Sgt. Spearn's grounds for arrest "effectively disappeared" when Cpl. Wilcott failed to find a box of ecstasy in the trunk, and so the search ought to have ended at that point.
- [116] Before addressing this argument I will set out some of the principles applicable to the common law power of search incidental to arrest.
- [117] A frequent starting point for the discussion of this issue is *R. v. Caslake*, [1998] 1 S.C.R. 51 [Caslake], a case involving a warrantless search of a vehicle. The accused in that case was arrested for possession of narcotics following the discovery of nine pounds of marihuana near where his car had been stopped. His car was towed to a garage close to the RCMP detachment. Approximately six hours after the arrest a police officer searched the vehicle and found two small packages of cocaine. The stated reason for the search was an RCMP policy that required officers to inventory the condition and contents of a vehicle in order to safeguard any valuables as well as the vehicle itself. The accused was charged and convicted of possession of marihuana for the purposes of trafficking and possession of cocaine. He appealed his conviction for possession of cocaine on the grounds that the search of his

vehicle was not reasonable under s. 8 of the Charter.

[118] Chief Justice Lamer, writing for the majority of the court, said:

[13] In this case, the Crown is relying on the common law power of search incident to arrest to provide the legal authority for the search. In Cloutier [Cloutier v. Langlois, [1990] 1 S.C.R. 158] my colleague L'Heureux-Dubé J. (for a unanimous Court) discussed this power in detail. She held that it is an exception to the ordinary requirements for a reasonable search (articulated in Hunter [Hunter v. Southam Inc., [1984] 2 S.C.R. 145]) in that it requires neither a warrant nor independent reasonable and probable grounds. Rather, the right to search arises from the fact of the arrest. This is justifiable because the arrest itself requires reasonable and probable grounds (under s. 494 of the Code) or an arrest warrant (under s. 495). However, since the legality of the search is derived from the legality of arrest, if the arrest is later found to be invalid, the search will be also.

[Emphasis added.]

[119] The Chief Justice also referred (at para. 14) to L'Heureux-Dubé J.'s comments in Cloutier v. Langlois (referred to in the quote above), where she recognized three limits on the police's power to search incident to arrest: (1) the power to search does not mean there is a duty to search, and so the police must exercise some discretion in determining whether a search is necessary; (2) the search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused; and (3) the search must not be conducted in an abusive fashion. Lamer C.J. concluded that if these conditions are met, and if the arrest itself is lawful, the search will be "authorized by law" and consistent with s. 8 of the Charter.

[120] In discussing the scope of a search incidental to arrest, Lamer C.J. said:

[15] Since search incident to arrest is a common-law power, there are no readily ascertainable limits on its scope. It is therefore the courts' responsibility to set boundaries which allow the state to pursue its legitimate interests, while vigorously protecting individuals' right to privacy. The scope of search incident to arrest can refer to many different aspects of the search. It can refer to the items seized during the search. In Stillman [R. v. Stillman, [1997] 1 S.C.R. 607] Cory J. for a majority of this Court held, at para. 42, that bodily samples could not be taken as incident to arrest, as a search so invasive is an "affront to human dignity". It can also refer to the place to be searched. The appellant argues that the power of search incident to arrest does not extend to automobiles. I would reject this position. Automobiles are legitimately the objects of search incident to arrest, as they attract no heightened expectation of privacy that would justify an exemption from the usual common law principles referred to above.

[16] Scope can also refer to temporal limits on the power of search

[17] In my view, all of the limits on search incident to arrest are derived from the justification for the common law power itself: searches which derive their legal authority from the fact of arrest must be truly incidental to the arrest in question. The authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy. This means, simply put, that the search is only justifiable if the purpose of the search is related to the purpose of the arrest.

[Emphasis added.]

[121] The Chief Justice then discussed the three main purposes of a search incident to arrest:

[19] As L'Heureux-Dubé J. stated in *Cloutier*, the three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial. The restriction that the search must be "truly incidental" to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why. There are both subjective and objective aspects to this issue. In my view, the police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one.

[20] To be clear, this is not a standard of reasonable and probable grounds, the normal threshold that must be surpassed before a search can be conducted. Here, the only requirement is that there be some reasonable basis for doing what the police officer did. To give an example, a reasonable and probable grounds standard would require a police officer to demonstrate a reasonable belief that an arrested person was armed with a particular weapon before searching the person. By contrast, under the standard that applies here, the police would be entitled to search an arrested person for a weapon if under the circumstances it seemed reasonable to check whether the person might be armed. Obviously, there is a significant difference in the two standards. The police have considerable leeway in the circumstances of an arrest which they do not have in other situations. At the same time, in keeping with the criteria in *Cloutier*, there must be a "valid objective" served by the search. An objective cannot be valid if it is not reasonable to pursue it in the circumstances of the arrest.

[22] Requiring that the search be truly incidental to the arrest means that if the justification for the search is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested.

[Emphasis in original.]

[122] The Chief Justice summarized the principles as follows:

- [25] In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier*, *supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.
- [123] Ultimately in *Caslake*, Lamer C.J. held that the Crown failed to prove that the warrantless search that resulted in the discovery of the cocaine was, on a balance of probabilities, reasonable. When the police officer searched the appellant's vehicle six hours after his arrest, he did not do so for the purpose of finding evidence which could be used at the appellant's trial on the charge of possessing marihuana for the purposes of trafficking. Rather, the "sole reason for the search was to comply with an RCMP policy requiring that the contents of an impounded car be inventoried" (at para. 26). Lamer C.J. found this to be an improper purpose.
- [124] In *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851 [Nolet], a commercial tractor-trailer vehicle with a driver and two passengers in it was stopped for a random check conducted pursuant to a provincial transportation statute. Certain observations by the police officer indicated there were two regulatory offences and a non-compliant logbook. To further investigate these regulatory offences, the officer searched a duffle bag in the driver's sleeping compartment where he found \$115,000 in cash bundled in small denominations, which was suggestive of drug trafficking. All three occupants were placed under arrest for possession of the proceeds of crime. A later search of the trailer revealed a hidden compartment containing 392 pounds of marihuana. The initial detention of the vehicle and the subsequent searches were challenged by the accuseds as being violations of the Charter.
- [125] For present purposes, the relevant search in *Nolet* is the search of the trailer that was carried out after the arrest of the accuseds. On that issue the court said:
- [49] A search is properly incidental where the police attempt to "achieve some valid purpose connected to the arrest" including "ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial": *Caslake*, at para. 19 (emphasis added); *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at paras. 74-75. The appellants were under arrest for possession of the proceeds of crime. It was clearly "incidental" to this arrest to search the vehicle in which the cash was found for evidence of the criminal activity to which the money related: *R. v. Rao* (1984), 12 C.C.C. (3d) 97 (Ont. C.A.), and *Cloutier v. Langlois*, [1990] 1 S.C.R. 158. The officers' belief that this purpose would

be served by a search of the trailer (given their previous roadside observation of the discrepancy in the dimensions) was itself reasonable. The important consideration is the link between the location and purpose of the search and the grounds for the arrest.

- [51] In these circumstances, no distinct and separate demonstration of reasonable and probable grounds was required: *Caslake*, at para. 25; *R. v. Caprara* (2006), 144 C.R.R. (2d) 287 (Ont. C.A.); and *R. v. Chubak*, 2009 ABCA 8, 243 C.C.C. (3d) 202.
- [126] The trial judge found the arrest to be invalid, but added that, in any event, he would have found the search of the trailer to be unreasonable because there were no "exigent circumstances" requiring the search to be conducted without first obtaining a search warrant. The Supreme Court of Canada said:
- [52] However, the basis of the warrantless search was not "exigent circumstances" but connection or relatedness, i.e. to trigger the common law authority to search for evidence of the crime to which the arrest related: *Cloutier v. Langlois*, at p. 186. In my view, the seizure of the 392 pounds of marijuana was Charter compliant as it was discovered during a valid search for evidence incidental to a valid arrest.

E. Search Incidental to Arrest – Analysis

- [127] As already noted, Mr. Veloso submitted that when Cpl. Wilcott failed to find a large box containing ecstasy in the trunk of the Buick "the factual foundation for his reasonable and probable grounds was entirely destroyed". This submission is based on Cpl. Wilcott's testimony that: (1) he, too, had a subjective belief that there would be ecstasy in the vehicle; and (2) based on the information supplied to him, he expected the ecstasy to be in a large box in the trunk.
- [128] Although Mr. Veloso reviewed at length various issues associated with Cpl. Wilcott's subjective belief, I find it unnecessary to address these in light of the defence concession that, as per *Debot*, an arresting officer need not have reasonable and probable grounds if the arrest is being carried out at the direction of another officer – here, Sgt. Spearn – who has reasonable and probable grounds to arrest. As I have concluded that Sgt. Spearn had objectively reasonable grounds to arrest, and given that the arrest was carried out at Sgt. Spearn's direction, it is not necessary that I also analyse Cpl. Wilcott's subjective and objective grounds for arrest.
- [129] Accordingly, this leaves for analysis the argument that Cpl. Wilcott should have stopped his search at the point when he did not find what he thought he would find.
- [130] The Crown argued that *Caslake* provides a full answer to this submission. More particularly, the Crown said Sgt. Spearn did not testify as to a specific location of the drugs in the Buick, rather his evidence was that he believed the ecstasy was in the Buick. Further, although Cpl. Wilcott might have expected the ecstasy to be in a box in the trunk, he did not say that he believed this would be the case to the exclusion of any other location in the

vehicle. To the contrary, he said it was his intention to continue to search the vehicle until he found the drugs.

[131] In my view, Mr. Veloso's argument – that Cpl. Wilcott's "factual foundation for his reasonable and probable grounds was entirely destroyed" when he did not find an ecstasy-filled VCR box in the vehicle's trunk – confuses or conflates the concepts of the necessary grounds for arrest with the necessary connection that a search must have to the arrest.

[132] From the authorities reviewed earlier it is clear that once reasonable and probable grounds have been made out for an arrest "no distinct and separate demonstration of reasonable and probable grounds" is required for the related search: Nolet, at para. 51. In order for a related search to be lawful all that is required is that the search be for the purpose of achieving some valid purpose connected to the arrest.

[133] Here, the occupants of the Buick were arrested for possession of a controlled substance. The purpose of the search was to discover evidence – the ecstasy – that was expected to be in the vehicle. This was a valid purpose that was connected to the arrest of the occupants for possession of a controlled substance. That purpose was not lost merely because the drugs were located in a different location in the vehicle than the one police thought was the most likely.

[134] For these reasons I conclude that the search of the Buick was lawful.

VI. Conclusion

[135] The arrest of Mr. Veloso on August 21, 2008 did not violate his s. 9 Charter right to be free from arbitrary detention or imprisonment because the police had reasonable and probable grounds for his arrest. Specifically, Sgt. Spearn, who made the decision to arrest and who directed others to carry it out, subjectively believed he had reasonable and probable grounds to arrest Mr. Veloso, and his belief was objectively reasonable in the circumstances.

[136] The search of Mr. Veloso's vehicle was lawful, and did not breach Mr. Veloso's s. 8 Charter right to be free from unreasonable search and seizure, because it was carried out for a valid purpose reasonably related to his arrest, namely to search for drugs, and specifically ecstasy, that the police believed were present somewhere in his vehicle.

"Blok J."

Schedule "A"

August 7, 2008

Emails 66 to 74: These show Higgins discussing with waldo@datalocking.net a proposal to obtain two kg. of cocaine over the border ("he will walk them across himself near Alberta") in exchange for 110,000 pills of ecstasy ("vits").

August 13, 2008

Emails 129 to 146: These indicate Higgins confirming with Brian Edwards ("Tiger") his interest in the "contract" and Edwards intending to send his courier in the coming days. Higgins then discusses with "Waldo", the ecstasy supplier, the delivery of 2 kg. of high-quality cocaine in exchange for 100,000 pills, indicating more cocaine could be delivered but he can only handle 100,000 pills weight-wise. Higgins suggests introducing the courier to Stretch (the person associated with the later Madison Avenue pickup address) so they can do regular exchanges.

August 14, 2008

Emails 156 to 159: These indicate Waldo asking Higgins when the cocaine will be sent "so I can get the vitamins in order". Higgins replies that they leave tomorrow and take two days "to get to the spot" (which Sgt. Spearn interpreted as the border crossing), then 10 hours to "your place". The expected arrival is late on the 18th.

Emails 164 to 168: In this exchange Edwards indicates to Higgins that Edwards expects the exchange to be "box for box", that is, both drug deliveries to be exchanged at the same time.

August 15, 2008

Emails 172 and 173: Edwards tells Higgins the cocaine is en route ("the birds have left"). Higgins confirms he will be there in person at the exchange.

August 16, 2008

Emails 177 to 180: Higgins asks Waldo if the courier is going to be able to do an immediate turnaround. Waldo replies that he had told his own supplier to have the pills ready on the 20th but will try to get them sooner.

Emails 186 to 193: Edwards learns he can now get a higher price for the cocaine in Canada ("just heard I can get 34 for chicks upstairs") so he tells Higgins he should be able to get more than 100,000 pills for the cocaine. He suggests 5,000 more.

August 17, 2008

Email 203: Higgins confirms to Waldo he will be meeting the courier the next day. He suggests the two of them meet beforehand.

Email 214: In an email between tehya@datalocking.net and Edwards, Tehya reveals the telephone number of "Randy". Using that number Spearn is able to determine the identity of "Randy" and the location of the Creston property Randy owns.

Emails 218 to 219, 227: Higgins confirms to Edwards that he will meet the courier at the Burnaby-Willingdon exit, which is later modified to Burnaby near the Boundary exit.

Emails 233 to 237: Edwards tells Higgins his "limo" (courier) will be "here" (Creston) at 6 a.m. "so will be in your hands by dinner tomorrow". Higgins says the pills are "almost all done" and will be vacuum-sealed so there is "less crush at the bottom" if they are subjected to running and bouncing.

August 18, 2008

Email 250: Edwards tells Higgins the courier will be there around 3 p.m. because he met the courier around 5:30 a.m. and it is a 9-hour drive.

Email 290: Waldo tells Higgins he will meet him at Stretch's.

Email 297: Edwards tells Tehya the courier is with "his wife or girlfriend and is driving a minivan".

Email 307: Higgins tells Waldo that the courier is coming from Creston.

Emails 309 to 310: Edwards tells Higgins the courier is now "in yer area". He gives Higgins a coded telephone number to make direct contact with the courier, whose name is "Nano", and tells Higgins to identify himself to Nano as "frank juniour's bud".

Emails 321 to 322: Edwards follows up on his request for 105,000 pills instead of 100,000. Higgins says he'll check with the supplier.

Email 333: Waldo provides the buzzer number to Higgins for Stretch's apartment.

Emails 337, 339 and 341: At 5:11 p.m. Higgins tells Edwards he has met the courier and is going to meet him again at noon the following day. He tells Edwards that "the one you me and brow saw smelt good" but the other one smells like diesel. He tells Edwards he doesn't want a diesel smell in the future.

Emails 343 and following: Waldo tells Higgins the pills won't be ready until August 20 because "the guy had to fly to Calgary for a family emergency". Higgins tells Edwards there is a delay with the pills. There is an extended dialogue over this delay that continues into the next day.

August 19, 2008

Emails 369 to 381: Higgins tells Stark he is "on the coast" but will be in Vancouver "later tonight". He tells Stark he will be getting a 5:30 p.m. ferry. Waldo tells Higgins he is in Langley and Higgins replies that he is staying the night in that area. Higgins asks Stark ("Pedro") about hotels in the area and Stark recommends two hotels.

Emails 388 to 400: Waldo asks Higgins if he wants to take another 100,000 pills. Higgins passes that on to Edwards, who declines, saying he just wants his 105 and asks when they'll be ready. Later Higgins asks if Edwards will also take 100,000 for Higgins so he can sell them himself, and Edwards says no. Higgins says he just wants the border crossing but Edwards says it has to be done by backpack and 105,000 is a full load.

Emails 409 to 424: Higgins arranges to meet Stark at the Sandman Hotel on 200th. The last email in that dialogue is at 9:43 p.m.

August 20, 2008

Emails 425 to 446: Various emails between Higgins and Waldo as to when the pills will be ready, between the two Edwards ("Tiger" and "Tehya") complaining about the delay, and between Greg Gay ("Pitbull") and Brian Edwards as to when Gay will be getting the load. Specifically, Emails 426 and 434-437, between Higgins and Waldo, indicate the ecstasy supplier's plane arrives at 2 p.m., they will meet at Stretch's around 4 p.m., and Higgins will bring the driver there. Tiger phones the driver who said Higgins told him "not till 5 o'clock tonight", which from the context appears to be the expected pickup time.

Emails 451 to 486: In emails with Waldo, Higgins says he is meeting the courier at 4:30 p.m. "near Stretch's place". Higgins will introduce the courier to Stretch. Higgins' message to Stretch at 4:39 p.m. indicates Higgins is waiting with the courier; Stretch replies that he will be home in 15 minutes. Waldo's own courier/supplier is not there yet. Higgins tells Stretch he wants Stretch to meet his "buddy" (the courier) but then he will have to leave to get a ferry. Stretch invites them up at 5:03 p.m.

Emails 492 to 494: Higgins tells Waldo that "they have met" so he is now off to the ferry. He says he gave the courier money "to get a bite and wait for [Stretch] to call".

Emails 495 to 498: Higgins tells Edwards that he took the driver to the meeting point (Stretch's) and the driver is going to call Higgins soon. Edwards asks Higgins to call the driver and tell him to leave in the morning rather than drive through the night because he wants the driver there at 6 p.m. Higgins confirms he has called the driver and told him that.

[This is where Spearn said he concluded, in conjunction with surveillance observations, that the transport of ecstasy to the Creston area was happening the next day].

Emails 505 to 513: Higgins asks Stretch to confirm when "chillie" has been and gone. At 6:17 p.m. Stretch says "I think he's here now" and at 6:29 p.m. he tells Higgins "he's gone". Higgins then tells Edwards that his courier "has it safe and sound".

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