

CANADA / JUDGMENT

R. v. Hill

2021 BCSC 199

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 199 R. v. Hill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hill,

2021 BCSC 199

Date: 20210209

Docket: 88060

Registry: Kelowna

Regina

v.

Rebecka Lynn Hill and Derek Wolfe Leeming

Corrected Reasons: The cover page of the Ruling

was corrected on February 12, 2021

Before: The Honourable Associate Chief Justice H. Holmes

Ruling on Charter Voir Dire

Counsel for the Crown:

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J. Dosanjh

Place and Dates of Trial:

Kelowna, B.C.

August 31-September 4, 2020

Place and Date of Judgment:

Kelowna, B.C.

February 9, 2021

INTRODUCTION

- [1] Ms. Hill and Mr. Leeming seek the exclusion of evidence found in a police search of the parked vehicle in which they were seated at Kelowna City Park. Large amounts of drugs (fentanyl/carfentanyl, cocaine, and methamphetamine) were found, as well as about \$2,000 in cash and some drug paraphernalia, most of this in one of three carry-bags or purses in the front passenger footwell. Ms. Hill was in the front passenger seat, and Mr. Leeming the driver's seat.
- [2] Ms. Hill and Mr. Leeming allege breaches of their Charter rights not to be subject to unreasonable search (s. 8) and not to be arbitrarily detained (s. 9). Ms. Hill also alleges a minor breach of her rights under s. 10(b) (by not giving her immediate access to counsel) as part of what she contends was a pattern of Charter breaches that makes each breach more serious. Both applicants ask that the items found in the search be excluded from the evidence in the trial under s. 24(2) of the Charter.
- [3] The Crown at first took the position that each applicant lacked standing to bring the applications, but later accepted that Mr. Leeming may have met the threshold to do so. The Crown submits that, in any event, neither applicant met their burden of establishing the breaches they allege, and that, even if they had, the evidence should not be excluded.
- [4] After hearing submissions on the issue of standing, I directed that the voir dire concerning the alleged Charter breaches proceed, and said I would give my decision and reasons on standing later. Then, as the voir dire proceeded, and with the agreement of all counsel, I gave my conclusions, with reasons to follow, that some of the alleged breaches had been proven, and, following further submissions, that the application to exclude the evidence under s. 24(2) should be denied.
- [5] These are the reasons for those various conclusions.
- [6] I will begin by giving somewhat more detail about the factual context from which the applications arise. These facts are uncontested unless I indicate otherwise.

THE RELEVANT FACTS

- [7] On October 10, 2017, in the afternoon, RCMP Cst. Graeme Greig was parked in his unmarked police vehicle at Kelowna City Park, with Cst. Brent Edwards as his passenger, when he saw a woman he thought was Ms. Hill, for whom Cst. Greig believed a warrant was outstanding. The woman walked toward a parked Ford Fusion vehicle, and got in through the front passenger door. Cst. Greig asked Cst. Edwards to check Ms. Hill's warrant status, and the online query confirmed that at least one warrant was outstanding from Victoria in relation to charges of possession of a controlled substance, driving while prohibited, and/or driving while disqualified.
- [8] The police officers were too far away from the Fusion to make out its licence plate number, and so drove in a loop around the parking lot to take note of it.
- [9] While they did so, or around that time, Mr. Leeming walked to the Fusion and got in to sit in the driver's seat.
- [10] From his online queries based on the licence plate, Cst. Edwards learned that the registered owner of the Fusion was an elderly man - much older than Mr. Leeming, who is a young man - whose address was in Surrey, BC, and that the vehicle was subject to an expired inspection order. Cst. Greig testified that, on receiving this information, he determined that the vehicle had to be removed from the road. The timing, sincerity, and consequences of that conclusion were disputed in the voir dire, and I will address them later.
- [11] Approximately ten minutes after the officers had first seen Ms. Hill get into the Fusion, Cst. Greig drove toward it, with the police vehicle's lights now activated, and parked in a position designed to prevent the Fusion leaving. He and Cst. Edwards put on their police vests and approached the Fusion's occupants. Cst. Greig approached the driver's side, and Cst. Edwards the passenger side.
- [12] Cst. Greig looked inside the Fusion, across to the passenger, to verify that the woman he thought he recognized was, in fact, Ms. Hill, and then immediately told her that she was under arrest on the outstanding warrant. Cst. Edwards then took charge of Ms. Hill, because he was nearest to her; he handcuffed her, and gave her the standard police and Charter warnings.
- [13] While Cst. Edwards did so, Cst. Greig dealt with Mr. Leeming on the driver's side. Mr. Leeming was unable to produce identification papers, but he supplied a key word that enabled Cst. Greig to confirm through online licencing records from the police vehicle that Mr. Leeming was who he said he was, and that he was licenced to drive. After so confirming, Cst. Greig told Mr. Leeming that the Fusion would be towed because of the expired inspection order.

- [14] When Cst. Greig had first looked inside the Fusion to identify Ms. Hill, he noticed three large carry-bags in the front passenger footwell: a white Louis Vuitton-style bag, a brown Louis Vuitton-style bag, and a satchel-style bag that the officers described as having a camouflage or "camo" design. It was the contents of the camouflage bag, revealed as I will describe shortly, that led the police officers to then arrest both Ms. Hill and Mr. Leeming for possession for the purposes of trafficking.
- [15] As first seen by the officers, the bags in the footwell were all in close proximity to Ms. Hill. Cst. Greig described the bags as being close to the seat, and thus under Ms. Hill's legs, while Cst. Edwards described them as being at or toward her feet. Either way, the bags were close to or touching Ms. Hill. These were relatively large bags, and the footwell was not huge. Both officers testified that the white Louis Vuitton bag was open, while the other two bags were either closed or placed in such a way that the contents were not visible to them.
- [16] Cst. Edwards testified that he asked Ms. Hill whether the bags were hers, because he needed to know whether the bags should go with her to the police detachment. Ms. Hill responded that the white Louis Vuitton bag was hers, but the other bags were not.
- [17] Cst. Greig asked Mr. Leeming whether he owned the bags. Mr. Leeming's answer is not in evidence, but, for the purposes of the voir dire, it was common ground that he made no claim to the bags.
- [18] Cst. Greig testified that he decided that all three bags should be removed from the Fusion and searched. Both the sincerity and the lawfulness of the reasons he gave for this decision are challenged, as I will discuss later.
- [19] All three bags were removed from the Fusion, and were searched in what Cst. Greig described as a "cursory" manner. Nothing of interest or concern was found in the white Louis Vuitton bag that Ms. Hill had claimed as hers. However, in the camouflage satchel there was what appeared to be a substantial amount of controlled substances, packaged as if for sale, along with a large amount of cash, and what appeared to be a score sheet. Nothing of note was found in the brown Louis Vuitton bag, but a later and more thorough search of that bag at the police detachment revealed a small amount of additional drug paraphernalia.
- [20] Cst. Greig arrested Ms. Hill and Mr. Leeming after he found the drugs and cash, for possession of a controlled substance for the purpose of trafficking. Mr. Leeming was handcuffed. Both accused were advised of their Charter rights. Ms. Hill said she would like to contact a lawyer, and she gave a specific name. Mr. Leeming did not wish to consult a lawyer at that time. Both Ms. Hill and Mr. Leeming were taken by police van to the police detachment not long afterwards.
- [21] In a search of the Fusion after the arrests for possession for the purpose of trafficking, Csts. Greig and Edwards found some further items consistent with drug trafficking. There was no evidence that any of those items - or, indeed, the items found in the bags - would have been visible to Ms. Hill or Mr. Leeming when they entered or were seated in the Fusion.

THE ISSUES

[22] The evidence and the parties' submissions give rise to the following issues:

1. whether, for each of Ms. Hill and Mr. Leeming, they had a reasonable expectation of privacy in the brown and camouflage bags so as to have standing to raise the s. 8 Charter breaches they allege
2. whether the searches of those bags and the vehicle violated Ms. Hill's and Mr. Leeming's rights under s. 8 of the Charter
3. whether Mr. Leeming continued to be detained after the police had verified his identity, and, if he did, whether that extension of his earlier detention was arbitrary, in violation of s. 9 of the Charter
4. whether Ms. Hill's second arrest (for possession for the purpose of trafficking, after the drugs and cash were found) violated her right to be free from arbitrary detention, in violation of s. 9 of the Charter, because that arrest was not supported by reasonable and probable grounds to believe that she was committing that offence
5. whether the police breached Ms. Hill's rights under s. 10(b) of the Charter on her initial arrest on the outstanding warrants by failing to give her an opportunity at that time to consult counsel, and
6. if any of the alleged Charter breaches are established, whether evidence obtained from the search of the bags and the vehicle should be excluded under s. 24(2) of the Charter.

[23] I will address these issues in turn.

ANALYSIS

1. Do the Applicants Have Standing to Assert Violations of s. 8 of the Charter?

[24] As I said earlier, the Crown at first took the position that each applicant lacked standing to bring the applications, but later accepted that Mr. Leeming may have met the threshold to do so.

[25] Generally, in this context, an applicant will have standing if they had a reasonable expectation of privacy in the area searched. Whether the applicant had a reasonable expectation of privacy rests on the totality of the circumstances, taking into account a non-exhaustive list of factors outlined in *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45, including:

- i. presence at the time of the search
- ii. possession or control of the property or place searched
- iii. ownership of the property or place
- iv. historical use of the property or item

- v. the ability to regulate access, including the right to admit or exclude others from the place
- vi. the existence of a subjective expectation of privacy, and
- vii. the objective reasonableness of the expectation.

- [26] The grounding for standing to challenge a search may include the Crown's theory of the case for prosecution. The Supreme Court of Canada explained, in *R. v. Jones*, 2017 SCC 60 at paras. 32-33, that the Edwards requirement for standing should not effectively force an accused who wishes to challenge a search to admit involvement in the offence by establishing their personal nexus to the area searched. As a result, in applying the Edwards analysis, the court can take into account the Crown theory of the case as part of the factual matrix. As Justice Williams observed in *R. v. Flintroy*, 2018 BCSC 1521 at para. 22:
- [22] the Supreme Court of Canada [in *Jones*] brought some clarity to applications of this nature. While the applicant will still have the obligation of proving on a balance of probabilities that he had a reasonable expectation of privacy over the subject matter of the search, he may now rely on "any facts that the Crown has alleged or will allege in the prosecution against them."
- [27] This approach does not automatically give standing. The trial judge must still assess all the relevant factors, along with the facts inherent in the Crown's theory of the case, to determine whether in the totality of the circumstances the accused had a reasonable expectation of privacy in the place in question: *R. v. Labelle*, 2019 ONCA 557 at para. 31.
- [28] Ms. Hill and Mr. Leeming are therefore entitled to rely on the Crown's position in the prosecution that they were each in possession of the drugs and cash, and because (in the circumstances of this case) of the bags which held those things. Also, it is objectively reasonable for drivers and passengers to have an expectation of privacy in personal items, such as purses, they may be carrying with them in a motor vehicle.
- [29] On the totality of these and all the other relevant circumstances, Ms. Hill and Mr. Leeming each had a reasonable expectation of privacy in the bags and their contents. They have standing to challenge the searches.
2. Did the Searches of the Bags and the Vehicle Violate Ms. Hill's and Mr. Leeming's s. 8 Charter Rights?
- [30] Section 8 of the Charter protects individuals against unreasonable search and seizure. A search is considered reasonable if it is authorized by law, the law itself is reasonable, and the search was carried out in a reasonable manner: see *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 23. A warrantless search is treated as unreasonable unless the Crown shows that it was authorized by law.

- [31] Cst. Greig testified that he searched the bags on two bases: first, incidentally to Ms. Hill's initial arrest; and second, to remove and safeguard any high value or unsafe items in the bags before the Fusion was removed by a private towing company. The Crown relies on these bases as providing authorization in law for the search. However, I conclude that the evidence in the voir dire is not sufficient to support that result.
- [32] A search properly incidental to a lawful arrest is authorized by the common law, and will thus comply with s. 8 of the Charter, if: (1) the arrest was lawful; (2) the search is truly incidental to the arrest, in the sense that it is for a valid law enforcement purpose related to the reason for the arrest; and (3) the search is conducted reasonably (see *R. v. Fearon*, 2014 SCC 77 at para. 27). The three main law enforcement purposes recognized as bases for this type of search are to ensure the safety of the police and the public, to protect evidence from destruction, and to discover evidence that may be used in the trial of the arrested person: *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 19.
- [33] For a lawful search incidental to arrest, the officer must be able to explain why they conducted the search, with reference to the recognized purposes set out above or some other valid purpose related to the arrest: *Caslake* at para. 25. On the evidence in the voir dire, the Crown has not met its burden.
- [34] Cst. Greig did not need to search Ms. Hill in order to identify her. He knew Ms. Hill from previous dealings, and, as he came to agree in cross-examination, did not need her identification documents in order to be sure that he was arresting the right person. Indeed, Cst. Greig never did search the white bag, which was the only bag Ms. Hill claimed as hers, although that bag would most logically have contained any identification documents, and he was unsure whether or not Cst. Edwards searched that bag and relayed information to him.
- [35] Cst. Greig cannot have been searching the bags for weapons that might be used at the time. Ms. Hill was under arrest and in handcuffs. Also, as noted above, Cst. Greig did not search the white bag, and was unsure whether or not Cst. Edwards did so.
- [36] Finally, Cst. Greig was not searching for evidence associated with the reason for the arrest. The arrest was made because of an outstanding warrant or warrants about which Cst. Greig had little information. He knew that the warrant(s) related to charges of possession of a controlled substance and driving while disqualified or prohibited, but he did not know whether the warrant(s) had been issued in direct response to those charges or, rather, because Ms. Hill had failed to attend court (in respect of those charges) as required. A comment Ms. Hill made to him at the time of the arrest suggested that the latter reason was the likely one. On the evidence in the voir dire, Cst. Greig had no reason to think that evidence related to the basis for the warrant might be found in the bags.
- [37] Cst. Greig offered no other reason for searching the bags incidentally to Ms. Hill's arrest.
- [38] For the reasons given above, the search of the bags is not shown to have been properly incidental to Ms. Hill's arrest and therefore authorized by law for that reason.

- [39] The other basis Cst. Greig offered for searching the bags was to remove any high value or unsafe items from the unclaimed bags before they were taken away to the tow yard. Cst. Greig testified that because the Fusion was subject to an inspection order, it would be towed away by a private towing company, and the standard practice was to first remove and, if appropriate, safeguard valuable or unsafe items. The Crown submits that for this reason, the cursory search of the bags was a reasonable or necessary step in the process of ensuring that the unsafe vehicle was removed from the road.
- [40] However, the legal basis for these steps was not made clear in the evidence or in submissions.
- [41] Both Cst. Greig and Cst. Edwards testified that the Motor Vehicle Act or the associated regulations gave them legal authority to have the Fusion removed from the road because of the expired or unfulfilled inspection order. I have no doubt that they were each sincere in that belief. However, neither officer could identify or describe the particular provision giving this authority, and, after some research and inquiry, Crown counsel candidly acknowledged that no such statutory or regulatory authority appears to exist.
- [42] The Crown relies instead on the principles set out by the English Court of Criminal Appeal in *R. v. Waterfield*, [1963] 3 W.L.R. 946, as providing common law authority for police conduct that is "reasonably necessary" in the circumstances. The Crown contends that it was reasonably necessary in the circumstances for the police officers to have the Fusion towed, and, as a consequence, to search the bags for high value or other items that could not safely be left in it.
- [43] The authority recognized in *Waterfield* rests on a two-step inquiry. First, the court must determine whether the conduct of the police falls within the general scope of their statutory or common law duties. (Common law duties include keeping the peace, preventing crime, and protecting life and property.) Second, the court must determine whether the conduct involves a justifiable use of police power associated with that duty. Police conduct is justifiable if it is "reasonably necessary": *R. v. Reeves*, 2018 SCC 56 at para. 78.
- [44] I accept that removal of a vehicle for the reason Cst. Greig and Cst. Edwards described may, generally, fall within the scope of their common law duty as police officers to protect life and property and to ensure the safety of the roadways. This issue is unnecessary to discuss in detail in this case, because the main difficulty for the Crown relates to the next, second step of the *Waterfield* inquiry. However, I refer to the Ontario Court of Appeal's discussion in *R. v. Waugh*, 2010 ONCA 100 at paras. 27-8 of police duties in this context, as well as to the subsequent discussion of that court in *R. v. Harflett*, 2016 ONCA 248 of whether a duty to tow a vehicle may also justify an inventory search of the vehicle's contents.
- [45] The *Waterfield* authority cannot apply in this case because the evidence is not sufficient to satisfy the second step of the inquiry, namely to show that towing the Fusion was reasonably necessary in the circumstances.

- [46] To determine if police conduct, such as a search, is "reasonably necessary", three factors must be weighed to "balance the police duty against the liberty interest in question": *R. v. MacDonald*, 2014 SCC 3 at para. 37. These factors are: (1) the importance of the performance of the duty to the public good; (2) the necessity of the interference with the individual's liberty or property for the performance of the duty; and (3) the extent of the interference: *MacDonald* at para. 37; *Reeves* at para. 78.
- [47] The problem for the Crown is that the evidence in this case contains conflicts about the timing of the decision to tow the vehicle, and the reasons for doing so, which impair the reliability of the key evidence on which the Crown relies. I will explain.
- [48] Cst. Greig maintained that he decided to have the Fusion towed before he and Cst. Edwards approached it and dealt with Ms. Hill and Mr. Leeming. He testified that, in approaching the Fusion, he intended not only to arrest Ms. Hill on the outstanding warrants (after verifying that the woman in the passenger seat was, in fact, Ms. Hill), but also to have the Fusion towed because of the expired and unfulfilled inspection order, which inherently indicated that a safety issue remained unaddressed.
- [49] However, I find that it is equally possible that, as the defence contends, Cst. Greig did not decide that the Fusion should be towed until after he had arrived at the Fusion, looked inside and seen the bags, and told Ms. Hill she was under arrest on the outstanding warrants. The defence submits Cst. Greig's decision to have the Fusion towed was motivated by his interest in searching the bags.
- [50] Cst. Edwards had a clear memory of the sequence of events, and had notes of the times of some of the main events. He was confident that there was no discussion about towing the vehicle until after Ms. Hill had been arrested on the outstanding warrant, which, as I have indicated, was after Cst. Greig had looked into the vehicle and noticed the bags. On the evidence about how the two officers worked together, I find that, had Cst. Greig decided early on to tow the Fusion, before the officers approached it to deal with the occupants, he would likely have said so to Cst. Edwards, and Cst. Edwards would have noted or remembered this. Both officers testified that they worked side by side through the entire sequence of events, chatting back and forth informally and keeping each other apprised of any developments.
- [51] I note also that, when Cst. Greig was cross-examined about why he asked Mr. Leeming whether he owned any of the bags, he testified that he did so because he simply wanted to know: he explained that it is uncommon to find three purses (his word) in the front footwell of a vehicle. I found it telling that Cst. Greig did not respond that he needed to know whether any of the bags that Mr. Leeming might claim should be released to him, rather than sent with the Fusion. If Cst. Greig had known from the start that the vehicle would be towed, he would have been concerned early on to assess which items would be going with it, and which not.

- [52] In assessing whether the evidence establishes that it was reasonably necessary to tow the Fusion, and therefore to conduct a cursory search of the bags, I take into account also that there was little to explain why other obvious steps or measures were not taken. Neither officer took any steps to ask Mr. Leeming or Ms. Hill about the accuracy of the online record, or the status of any necessary repairs, or safe alternatives to having the Fusion towed to a private tow yard. Mr. Leeming was polite and cooperative, and there was no indication that Ms. Hill was any different. The Fusion was parked in a safe place, and was causing no evident inconvenience or disruption to users of the roads or the parking lot.
- [53] For all the reasons I have given, the evidence in the voir dire does not establish that to tow the vehicle was reasonably necessary, such that cursory searches of the bags left in it were a necessary step.
- [54] The search was not authorized by the Waterfield principles, or, as I have discussed, on any other legal basis. The search of the bags was therefore unreasonable, and it violated Ms. Hill's and Mr. Leeming's rights under s. 8 of the Charter.
3. Was Mr. Leeming arbitrarily detained in violation of s. 9 of the Charter?
- [55] The Crown accepts that Mr. Leeming may well have viewed himself as detained when the police car pulled up, lights flashing, behind the vehicle he was in, and parked in a position that did not allow that vehicle to leave. It is also common ground that, until drugs were found in the bags, there was no basis on which to arrest Mr. Leeming, or to detain him further, once his identity had been verified. The issues are whether Mr. Leeming nonetheless continued to be under detention after the police had verified his identity, and, if he was, whether that extension of his initial detention was arbitrary.
- [56] Section 9 of the Charter provides that everyone has the right "not to be arbitrarily detained". Detention in this context means a "suspension of [an] individual's liberty interest by a significant physical or psychological restraint". The latter may be established where the individual has a legal obligation to comply with a restrictive request or demand, or where a reasonable person would conclude (because of the police conduct) that they had no choice but to comply. See *R. v. Grant*, 2009 SCC 32 at para. 44. The burden is on an accused to show that, in the circumstances, they were effectively deprived of the liberty of choice: *R. v. Suberu*, 2009 SCC 33 at para. 28.
- [57] The Crown contends that Mr. Leeming was free to leave the scene once Cst. Greig was satisfied of his identity, and that Mr. Leeming could not reasonably have considered himself detained at that point. The Crown submits that there were no indicia of detention: for example, Csts. Greig and Edwards did not handcuff Mr. Leeming or physically take control of him, and they did not give him any directions.
- [58] It is true that Cst. Greig at no time told Mr. Leeming that he was detained, but equally Cst. Greig never told Mr. Leeming that he was free to leave. Mr. Leeming had not been free to leave at first, because Cst. Greig wanted to confirm his identity and to make sure that he was

licenced to drive. Once those things were done, Cst. Greig gave no indication to Mr. Leeming that his status had changed. Rather, Cst. Greig continued in conduct that, I find, appeared to continue an investigation with Mr. Leeming still as a potential focus: he asked Mr. Leeming questions about whether the bags belonged to him, and he then removed the bags from the vehicle and searched them. A reasonable person in Mr. Leeming's situation would not have assumed that they could walk away.

[59] But although Mr. Leeming may therefore have been arbitrarily detained at this point, the detention resulted largely because of the search of the bags. The unlawful search of the bags effectively subsumed any arbitrary detention of Mr. Leeming, which was in any event of extremely short duration until his arrest. The search of the bags was ultimately what kept Mr. Leeming in place and should be the focus of this application.

[60] Any breach of Mr. Leeming's right not to be arbitrarily detained was minimal.

4. Was Ms. Hill unlawfully arrested for PPT?

[61] Ms. Hill contends that her arrest for possession for the purpose of trafficking was unlawful, and in violation of her s. 9 Charter right, because the arrest was not supported by reasonable and probable grounds to believe that she was committing that offence.

[62] I cannot agree. Ms. Hill was one of only two people in the vehicle, and was in very close proximity to the two bags. The bags contained large amounts of drugs and cash. Moreover, Ms. Hill acknowledged ownership of the third bag that was with the other two.

[63] There were reasonable and probable grounds to believe that Ms. Hill was in possession of the drugs.

5. Were Ms. Hill's s. 10(b) Charter Rights Violated?

[64] In her notice of application, Ms. Hill contends that Cst. Greig failed to provide her with access to counsel on her initial arrest on the outstanding warrant, thus violating s. 10(b) of the Charter. The evidence in the voir dire indicated that it was, in fact, Cst. Edwards who gave Ms. Hill the police warning and Charter advice in respect of that first arrest. Cst. Edwards did so immediately after Cst. Greig first looked into the Fusion, verified that the woman was Ms. Hill, and told her that she was under arrest.

[65] It is common ground that Ms. Hill was not given an opportunity to consult counsel at that point, or until she reached the police detachment. There is no suggestion of any delay in giving Ms. Hill an opportunity to consult counsel once she arrived at the detachment.

[66] The evidence does not establish a breach of s. 10(b). Even if, after her initial arrest and Charter advice, Ms. Hill had expressed a wish to speak to counsel - and there is no evidence that she did - there is no basis on which to find that her right to do so was not implemented within an appropriate time. On the evidence, the police detachment was close to the scene of the arrest, and the officers expected Sgt. Willcox to arrive promptly to take Ms. Hill there, as he in fact did. Also, the evidence indicated that Ms. Hill would not have had privacy in

speaking to counsel at the scene in the park.

[67] I find no violation of Ms. Hill's s. 10(b) Charter rights.

6. Should the Evidence be Excluded under s. 24(2) of the Charter?

[68] Ms. Hill and Mr. Leeming rely on s. 24(2) of the Charter in asking that the evidence of the fruits of the search be excluded from the trial because of the Charter breach or breaches. Section 24(2) reads as follows:

24(2) Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, 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.

[69] The assessment under s. 24(2) is objective, and asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence in issue would bring the administration of justice into disrepute: Grant at para. 68. Three lines of inquiry are engaged, relating to:

- the seriousness of the Charter-infringing state conduct
- the impact of the breach on the Charter-protected interests of the accused, and
- society's interest in the adjudication of the case on its merits.

See Grant at para. 71.

The seriousness of the Charter-infringing state conduct

[70] This line of inquiry requires the court to assess whether the admission of the evidence would send the message to the public that the courts "effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct": Grant at para. 72. State conduct resulting in Charter violations varies in seriousness. The more severe or deliberate the state conduct that led to the breach, the greater the need for the courts to dissociate themselves from it in order to preserve public confidence in and ensure state adherence to the rule of law: Grant at paras. 72-74.

[71] The Crown has not established that the search was authorized by law and, in particular, has not shown that towing the vehicle was reasonably necessary (according to the Waterfield principles) such that associated searches of the bags in it were as well. However, I accept that the officers had from the start a loose plan to deal with the vehicle, once they knew that it was subject to an expired inspection certificate. What is not clear, on the evidence in the voir dire, was that the loose plan conformed to the requirements for authorization according to the Waterfield principles.

- [72] In the somewhat unusual circumstances, I place the Charter-infringing conduct in the middle of the spectrum of seriousness.

The impact of the breach on the Charter-protected interests of the accused

- [73] This line of inquiry requires an examination of the Charter interest or interests protected, and the degree to which the violation affected those interests. As the Court explained in Grant, "[t]he more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute": at para. 76. An unreasonable search that demeans a person's dignity, or a search that intrudes into an area in which the person reasonably enjoys a high expectation of privacy, will be more serious than one that does not: Grant at paras. 76-78.
- [74] A search of a vehicle is usually considered less demeaning or intrusive than some other searches, such as a search of a person's home. The searches in issue in this case extended to bags within the vehicle. Personal bags may engage a higher expectation of privacy, particularly if they are of a type in which very personal items are likely to be carried.
- [75] The two bags for which the searches are in issue were purse-like, though large. However, with three bags of that same general type and size clustered together, and only two people in the Fusion, the likelihood was reduced that all three of the bags were used for personal items. As it turned out, the camouflage bag that yielded most of the drugs and the cash contained little, if anything, of a distinctly personal nature, and there is scant evidence that the other bag did either.
- [76] The search of the two bags was brief - Cst. Greig described it as cursory. But the search must nonetheless have been intended to be careful enough to reveal the types of high-value or unsafe items Cst. Greig said he was concerned to remove.
- [77] In my view - and this is based on the unproven assumption at the time of the voir dire that the bags were Ms. Hill's or Mr. Leeming's - the violation of their privacy rights was not trivial. But nor was it in the upper half of the spectrum of seriousness.

Society's interest in the adjudication of the case on its merits

- [78] This line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or its exclusion. The court must consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but also the impact of failing to admit the evidence: Grant at para. 79. The seriousness of the alleged offence may be a valid consideration, but it has the potential to cut both ways, because it is the long-term repute of the justice system that s. 24(2) protects, not short-term interests in convictions: Grant at para. 84.

- [79] The reliability of the evidence is an important factor in this line of inquiry, because to admit unreliable evidence serves neither the accused's interest in a fair trial, nor the public's interest in uncovering the truth: Grant at para. 81. Conversely, to exclude relevant and reliable evidence tends to undermine the truth-seeking function of the justice system: Grant at para. 81.
- [80] This evidence, being real evidence, was reliable in showing that a large amount of drugs and cash were in the car. The charges were serious and reflected conduct of grave concern to the public. Without the evidence in issue, the Crown would have no case in the trial. These factors weigh in favour of admission.

Balancing the assessments

- [81] The final step in determining whether the evidence should be admitted requires the balancing of the assessments flowing from the three lines of inquiry discussed above.
- [82] Where the first and second lines of inquiries make a strong case for exclusion, the third line of inquiry will rarely, if ever, tip the balance in favour of admission. Conversely, if the first two lines of inquiries reveal weaker support for the exclusion of the evidence, society's interest in the adjudication of the case on its merits will normally confirm that the administration of justice would not be brought into disrepute by admitting the evidence: R. v. Le, 2019 SCC 34 at para. 142.
- [83] This case comes very close to the line, but the balance favours the admission of the evidence.

CONCLUSION

- [84] Ms. Hill's and Mr. Leeming's applications are denied.

"The Honourable Associate Chief Justice Holmes"

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