

CANADA / JUDGMENT

R. v. Hollaus

2020 BCSC 1165

COURT

Supreme Court of British Columbia

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2020 BCSC 1165 U.S.A. v. Hollaus

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE EXTRADITION ACT, S.C. 1999, c.18, AS AMENDED

Citation:

U.S.A. v. Hollaus,

2020 BCSC 1165

Date: 20200807

Docket: 27435

Registry: Vancouver

Between:

The Attorney General of Canada on behalf of the United States of America

Requesting State

And:

Wayne Steven Hollaus

Person Sought

Corrected Judgment: The front page of the judgment was corrected on October 29, 2020.

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment on Voir Dire No. 1

Counsel for the Attorney General of Canada on behalf of the Requesting State:

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Michael Klein, Q.C.

Place and Dates of Hearing:

Vancouver, B.C.

June 8, 2020

July 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 7, 2020

I. INTRODUCTION

- [1] These are the Reasons on a voir dire in an extradition proceeding. The United States of America (the "Requesting State") seeks the extradition of Wayne Steven Hollaus, (the "Person Sought"), for prosecution for the corresponding Canadian offence of conspiracy to traffic in Schedule I controlled substances. Mr. Hollaus alleges infringements of his rights pursuant to the Canadian Charter of Rights and Freedoms in the gathering of Canadian evidence.
- [2] On October 24, 2014, members of the Vancouver Police Department (the "VPD") assisted an ongoing American Homeland Security investigation by conducting an undercover controlled delivery of a suitcase containing fake cocaine in Vancouver. The Canadian undercover officer arranged for the cocaine to be picked up by calling a phone number provided by Homeland Security for David Oliynyk and the applicant, Mr. Hollaus. Following the undercover officer's instructions, Mr. Oliynyk retrieved the suitcase of fake cocaine from the undercover officer's vehicle, parked in Vancouver, and placed it in the flatbed of a pickup truck driven by Mr. Hollaus. In a pre-determined operational plan, the VPD used a traffic stop ruse in order to retrieve the suitcase and arrest Mr. Hollaus and Mr. Oliynyk for possession of a controlled substance for the purpose of trafficking without exposing the ongoing American investigation.
- [3] Mr. Hollaus alleges infringements of his ss. 8, 9, 10(a) and 10(b) Charter rights and seeks the exclusion of any evidence derived from the stop pursuant to s. 24(2) of the Charter, particularly the identification evidence. He says that it was impossible for the VPD to have grounds to stop or arrest him for the offence of possession of a controlled substance for the purpose of trafficking because the officers knew that the suitcase contained fake cocaine. Further, he argues the VPD acted without jurisdiction because they were acting as agents for Homeland Security, and investigating an American offence.

- [4] The Attorney General on behalf of the Requesting State submits that Mr. Hollaus' s. 8 and 9 Charter rights were not infringed. Attempted possession of a controlled substance for the purpose of trafficking is a criminal offence. The VPD members had grounds to arrest Mr. Hollaus for attempted possession of cocaine for the purpose of trafficking as soon as he and Mr. Oliynyk were observed driving away with the suitcase of fake cocaine. Any searches were incidental to arrest. The Requesting State concedes a minor four-minute breach of Mr. Hollaus' ss. 10(a) and 10(b) Charter rights, but takes the position that the admission of the evidence would not bring the administration of justice into disrepute.
- [5] The onus is on the Requesting State to establish that Canadian gathered evidence is admissible in an extradition hearing.

II. THE CHARTER APPLICATION

- [6] In his Amended Charter application, Mr. Hollaus seeks the following orders:

That the Applicant's right to be free from an arbitrary arrest or detention as protected by s. 9 of the Canadian Charter of Rights and Freedoms was violated.

That the real purpose of the Applicant's arrest or detention was to determine his identity and therefore was actually a search disguised as a traffic stop and was warrantless and therefore prima facie unreasonable and conducted without reasonable grounds and therefore contrary to s. 8 of the Charter.

That because the Applicant was never advised of the actual basis for his arrest, his right to be informed of the reason for his arrest or detention was denied thereby violating his rights as protected by s. 10(a) of the Charter.

By never being advised of the actual basis for his arrest, the Applicant could not obtain legal advice and therefore, his right to counsel as protected by s. 10 of the Charter has been infringed or denied.

That the evidence derived from the stop should be excluded from the proceedings pursuant to s. 24(2) of the Charter as to do otherwise would bring the administration of justice into disrepute.

- [7] The onus to prove Charter infringements is on the applicant.

III. FACTS

- [8] The facts are largely not in dispute. Three witnesses testified on the voir dire: Det/Cst. Munro, Cst. Lennox, and Cst. Dodds, all of whom are officers with the VPD.
- [9] On October 16, 2014, Special Agent Maldonado of Homeland Security Investigations contacted Det/Cst. Munro to request the VPD's assistance with the controlled delivery of a suitcase of fake cocaine. The underlying Homeland Security investigation was targeting Mr. Oliynyk and his known associates, including Mr. Hollaus, for their involvement in a cross-border drug smuggling operation between Canada and the United States.

- [10] In the course of their investigation, Homeland Security had intercepted a shipment of approximately 26 kilograms of cocaine they allege Mr. Oliynyk and Mr. Hollaus had directed be picked up in California and smuggled into Canada. Homeland Security requested the VPD's help to facilitate the delivery of 26 kilograms of fake cocaine, with which they had replaced the intercepted drugs, to its intended recipients in Canada. The VPD named its operation "Tuxedo 25".
- [11] Early on October 24, 2014, Det/Cst. Munro conducted a briefing on operation Tuxedo 25. Cst. Dodds and Cst. Lennox, members of the Gang Crime Unit ("GCU"), were present at the briefing. According to the operational plan, an undercover VPD officer would place a suitcase containing the fake cocaine in the trunk of a car, call a number provided by Homeland Security, inform the person who answered the phone that the cocaine was ready for pick up, and provide instructions for the pick up. A VPD surveillance team was to observe the drug transaction, record it and relay their observations over the radio to the operation team that would include VPD GCU members standing by to arrest the individuals who picked up the suitcase of cocaine. Cst. Dodds and Cst. Lennox were two of the GCU members standing by.
- [12] Det/Cst. Munro instructed the GCU members that once they received confirmation that the cocaine had been picked up and the targets were driving away, they were to stop the vehicle to arrest its occupants and retrieve the fake cocaine. In order to protect the ongoing Homeland Security investigation the GCU members were to rely on a ruse, by explaining that the reason for the arrest was possession for the purpose of trafficking. The GCU members were to tell the targets they received a 911 call from an unknown source reporting that they had seen an individual take a suitcase out of a one vehicle, place it in their vehicle and drive away.
- [13] In accordance with the operational plan for Tuxedo 25, on October 24, 2014, a VPD undercover operator (the "UCO") called a phone number provided by SA Maldonado to arrange for the delivery of the "cocaine". The phone number was one Mr. Oliynyk had used to arrange for the cocaine to be delivered to Vancouver. The UCO told Mr. Oliynyk that she had his "equipment" and arranged to meet him. The UCO had multiple phone conversations with Mr. Oliynyk and heard another male in the background during at least one call.
- [14] The VPD surveillance team observed Mr. Hollaus and Mr. Oliynyk arrive at the pre-determined pick-up location in a Chevy Silverado pickup truck. Mr. Hollaus was the driver and Mr. Oliynyk the passenger. Mr. Oliynyk got out of the pickup truck, retrieved the suitcase of fake cocaine from the undercover officer's vehicle, and placed the suitcase in the flatbed of the truck driven by Mr. Hollaus. The two of them then drove away in the pickup truck. If the suitcase had not been picked up, the plan would have been terminated at this point.
- [15] In accordance with the operational plan, the GCU members then stopped the Chevy Silverado shortly after they were advised over the radio that the occupants of the vehicle had picked up the suitcase of fake cocaine. The traffic stop took place at approximately 12:19

p.m.

- [16] Both Cst. Dodds and Cst. Lennox testified that they believed they had grounds to arrest Mr. Hollaus for the offence of possession of a controlled substance for the purpose of trafficking as soon as they were informed he and Mr. Oliynyk had picked up the suitcase of fake cocaine. Both officers were also aware of the need to keep the vehicle stop low key in order not to jeopardise the ongoing Homeland Security investigation.
- [17] Cst. Lennox initially stopped the vehicle and was the first member to deal with Mr. Hollaus. In a variation of the plan, Cst. Lennox testified that he used the fact that the Chevy Silverado was missing a validation tag on its back license plate as a means to get Mr. Hollaus safely out of the vehicle and towards the back of the pickup, and to ensure that the vehicle could not flee. Once out of the vehicle, Mr. Hollaus and Mr. Oliynyk were both handcuffed and told that they were being detained in relation to a suspicious vehicle check.
- [18] As Cst. Lennox dealt with Mr. Hollaus, Cst. Dodds searched the flatbed of the Chevy Silverado and retrieved the suitcase of fake cocaine. After "discovering" the suitcase of fake cocaine, Cst. Dodds arrested Mr. Hollaus for possession of a controlled substance for the purpose of trafficking.
- [19] The arrest of Mr. Hollaus occurred at approximately 12:23 p.m. Upon arrest, Cst. Dodds informed Mr. Hollaus of his rights pursuant to ss. 10(a) and (b) of the Charter and gave him the official warning. Cst. Dodds identified Mr. Hollaus by comparing his likeness to the photograph on a B.C. driver's license inside the wallet he found on Mr. Hollaus' person during a search of Mr. Hollaus' person incidental to arrest. Cst. Dodds confirmed Mr. Hollaus' identity by having Mr. Hollaus confirm the address on the license.
- [20] Mr. Oliynyk and Mr. Hollaus were taken to the city jail and interviewed in accordance with VPD policy. Det/Cst. Munro testified that the information obtained in the interviews would be passed on to Homeland Security or used by the VPD in the future, but there was no testimony on the voir dire regarding the substance of the interviews. It is understood that voice identification evidence from the interview with the applicant may be relevant in the committal hearing.

IV. ISSUES

[21] The issues to be addressed by the court are:

- Was there an offence in Canada?
- Did the VPD officers have jurisdiction to arrest Mr. Hollaus?
- Did the VPD officers have reasonable and probable grounds to effect an arrest pursuant to s. 495 of the Criminal Code?
- What is the relevance of the ruse traffic stop to the s. 8 and 9 Charter rights of the applicant?

- Was the search before the formal arrest an unreasonable search?
- What is the relevance of the ruse traffic stop to the Applicant's s. 10 Charter rights?

V. THE LAW

A. The Admissibility of Canadian-Gathered Evidence

- [22] Pursuant to s. 32 of the Extradition Act, evidence summarized in the record of the case ("ROC") in accordance with s. 33 of the Act is presumptively admissible. However, where that evidence includes Canadian-gathered evidence, s. 32(2) of the Act requires that the extradition judge ensure that it complies in substance with the Canadian rules of evidence. Where the Canadian-gathered evidence would be admissible in a Canadian court that evidence can be relied upon by the extradition judge. The onus is on the Requesting State to prove compliance: *USA v. Anekwu*, 2009 SCC 41 at paras. 21 and 23.
- [23] The extradition judge's scrutiny of Canadian-gathered evidence includes a consideration of whether that evidence was obtained in breach of the Charter and, if such a breach occurred, whether the evidence should be excluded by way of s. 24(2) of the Charter: *R. v. Fraser*, 2017 BCCA 136 at para. 1.
- [24] Where the ROC contains sufficient information to enable the extradition judge to ascertain whether the Canadian-gathered evidence meets the Canadian rules of evidence, no further evidence is required. However, where compliance with Canadian law cannot be determined from the record of the case alone further information, including viva voce testimony, may be required in order to determine the admissibility of the evidence under s. 32(2): *Fraser* at para. 59.

B. Reasonable Grounds to Affect a Lawful Warrantless Arrest

- [25] Pursuant to s. 9 of the Charter, everyone has the right not to be arbitrarily detained. Detention is arbitrary if (1) it is not authorized by law, and (2) the law itself is arbitrary.
- [26] A warrantless arrest is not arbitrary where the arresting officer complies with s. 495 of the Criminal Code. Subsection 495(1)(a) of the Criminal Code authorizes a peace officer to arrest without a warrant 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. Possession of a controlled substance for the purpose of trafficking is an indictable offence under s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (the "CDSA"). Pursuant to s. 24 of the Criminal Code, s. 5(2) of the CDSA includes an attempt to commit the offence.
- [27] Reasonable and probable grounds have both a subjective and an objective component. The arresting officer must subjectively have reasonable and probable grounds on which to base the arrest and those grounds must also be justifiable from an objective point of view: *R. v McWhirter*, 2018 BCSC 358 at paras. 24 and 28.

- [28] To fulfill the subjective requirement, the officer must hold an honest belief that the person committed an offence and subjectively believe that there are reasonable grounds to make the arrest.
- [29] For the objective component, the officer's belief must be objectively reasonable in the circumstances known to the officer at the time of arrest. The objective inquiry asks whether a reasonable person, standing in the shoes of the officer, would be able to conclude that reasonable and probable grounds existed to make the arrest.

C. Search Before Formal Arrest

- [30] A search will not be unreasonable under s. 8 of the Charter if it is authorized by law, the law itself is reasonable and the manner in which the search was carried out is reasonable. While warrantless searches are presumptively unreasonable, the common law power of search incident to arrest authorizes searches related to the reasons for the arrest, such as officer safety and the preservation and discovery of evidence: *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 19.
- [31] Where the police have reasonable and probable grounds to effect an arrest, a search incidental to arrest may occur prior to a formal arrest. A search incident to arrest may also occur without the police uttering the words "You are under arrest", such as in the circumstances of a de facto arrest. The fundamental question is whether the officer had reasonable grounds to arrest at the time that the search took place: *R v. Bielli*, 2016 ONSC 6866 at para. 72.

D. The Use of a Traffic Stop - Section 9

- [32] The use of a ruse traffic stop to conceal a broader ongoing investigation has been held to be a lawful policing technique in circumstances where the police have reasonable and probable grounds to arrest the target of the ruse. The lawful traffic stop ruse is a planned and intentional investigative trick where the police have formed reasonable and probable grounds to detain or arrest and have a legitimate police objective to disguise those grounds: *Bielli* at paras. 68-70. In this respect, a traffic stop ruse differs from a situation in which an officer relies on their powers under motor vehicle legislation to arbitrarily detain a motorist.
- [33] It has been recognized that the investigation of crime will at times require the police to deceive their targets. The traffic stop ruse is one technique. The lawfulness of the traffic stop ruse is determined by grounds to arrest or detain the target when the ruse is taking place, and the rational justification for the ruse: *R v. McWhirter*, 2017 BCSC 2314 at paras. 125-126 [McWhirter 2017].

- [34] The use of a traffic stop ruse to further a larger ongoing investigation has been upheld in the following cases. In *Bielli*, the court upheld the use of a traffic stop ruse to protect the confidentiality of a larger ongoing investigation where the police already possessed reasonable grounds to arrest.
- [35] In *R. v. Vuozzo*, 2013 ABCA 130, the Court found that the use of a traffic stop ruse in the context of an undercover scenario where the appellant was a passenger in a vehicle driven by an undercover officer did not breach the appellant's s. 9 Charter rights. The Court distinguished the traffic stop ruse from those cases involving police officers who stop motorists arbitrarily, noting that the police had ample rational reason to stop the vehicle as part of the ongoing investigation. In rejecting the appellant's argument that he had been arbitrarily detained during the ruse, the Court noted that the appellant's real objection was not the stop itself but the police play-acting and their intention to mislead. Commenting upon the police use of deception, the court stated (at para. 44) that such deception "is not a logical basis to convert a rational form of detention into an arbitrary detention, unless on the facts it can be said that what the police did 'bears no relation or is inconsistent with' the law which founds the state action."
- [36] In *McWhirter* 2017, the Court considered whether ss. 7, 8, 9, 10 or 11(a) of the Charter prohibited the use of a traffic stop ruse to further an ongoing drug investigation where the police had reasonable and probable grounds to arrest the accused. Relying on *Vuozzo* and *R. v. Sheck*, 2015 BCCA 471, the Court rejected the argument that the use of a traffic stop ruse to further an ongoing drug investigation was itself a breach of s. 9 of the Charter. The Court found that, regardless of the traffic stop ruse, the primary consideration was still whether the detaining officer had reasonable and probable grounds to arrest the accused.

E. Section 10(a) and (b) - Traffic Stop Ruse

- [37] Section 10(a) of the Charter enshrines the right of the individual to be informed promptly of the reasons for their arrest or detention. Section 10(b) requires that the individual be both advised of their right to counsel and given the opportunity to exercise that right without delay.
- [38] The requirement under s. 10(a) is that the police provide the detainee with sufficient information to fully appreciate the extent of their legal jeopardy. The right attaches immediately following detention to ensure that the detainee has the information necessary to properly exercise their right to counsel and right to silence.
- [39] While s. 10(a) is an informational requirement, s. 10(b) imposes two separate obligations on the police: the duty to inform the detainee of their right to counsel and a separate duty to facilitate access to counsel if requested. The two obligations under s. 10(b) do not arise simultaneously. The duty to inform a detained person of his right to counsel arises immediately upon arrest or detention, but the duty to facilitate access to counsel arises once the detainee requests to speak with counsel. If the detainee requests access to counsel, the

police are then obligated to facilitate access at the first reasonable opportunity: *R. v. Taylor*, 2014 SCC 50 at para. 24.

VI. SUBMISSIONS OF THE PARTIES

A. The Applicant - Mr. Hollaus

- [40] Mr. Hollaus's application rests on the mismatch between the ostensible grounds for his arrest, and the true purpose of the investigation. He argues that the police lacked subjective grounds to arrest him because they never intended to arrest him for a Canadian offence. The sole reason for stopping him was to identify persons involved in a drug offence committed in the United States.
- [41] Even if the police had reasonable and probable grounds to arrest him, Mr. Hollaus argues their conduct should be assessed on the basis of what they actually did, rather than on what they could have done. The police here, he says acting as agents for Homeland Security, arrested him to further a U.S. investigation. To state otherwise, he suggests, is both artificial and inaccurate. The police never had the subjective belief that they were investigating the attempted possession of cocaine. Accordingly, Mr. Hollaus claims his arrest was groundless, and therefore illegal.
- [42] In addition, Mr. Hollaus submits that the VPD was acting without jurisdiction in furthering an American investigation without any intention of pursuing any Canadian offence. He relies on section 6(2) of the Criminal Code:

Offences outside Canada

- (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.
- [43] The applicant submits that as a corollary to s. 6(2), if no one can be convicted of an offence committed outside of Canada, there can be no lawful authority to investigate that offence. It is trite to say that before investigating anyone, the police have to have a legal basis for doing so and, if the police are going to exercise their powers of arrest and search, they must have lawful authority to do so.
- [44] In the applicant's submission, the entire operation was conducted without any lawful authority.

B. The Respondent - The Requesting State

- [45] In response, the Requesting State argues that the purpose of the investigation is irrelevant. It submits the police had reasonable and probable grounds to arrest Mr. Hollaus for attempted possession of cocaine for the purpose of trafficking at the time of the traffic stop. The search of the truck prior to Cst. Dodd's formal arrest of Mr. Hollaus was a valid search incidental to arrest.

- [46] The Requesting State submits that the VPD's observations of Mr. Oliynyk and Mr. Hollaus picking up the suitcase of fake cocaine gave rise to reasonable grounds to arrest for the offence of attempted possession of cocaine for the purpose of trafficking. The officers had reasonable and probable grounds to arrest at the time of the searches. Accordingly, Mr. Hollaus' ss. 8 and 9 Charter rights were not breached.
- [47] The Requesting State does concede that Mr. Hollaus' ss. 10(a) and (b) Charter rights were breached during the four minutes between the initial vehicle stop and the formal arrest.
- [48] According to the Requesting State, this breach ended as soon as Mr. Hollaus was advised he was under arrest for possession of a controlled substance for the purpose of trafficking and informed of his right to counsel. At that point, Mr. Hollaus would have been sufficiently aware of the jeopardy he faced.
- [49] The Requesting State submits that the VPD had no obligation to advise Mr. Hollaus of the nature and scope of the Homeland Security investigation. Rather, as the Court stated in Bielli (at para. 88), "[t]hey were entitled to continue with those aspects of the ruse to protect the integrity of the ongoing investigation."

VII. DISCUSSION

A. An Offence in Canada

- [50] The parties do not agree on whether this possession of fake or sham drugs constitutes an offence in Canada. I turn first to that issue.
- [51] There is no issue that the factual basis of the alleged attempt to possess cocaine for the purpose of trafficking occurred in Canada.
- [52] The Requesting State submits that this attempt was an offence contrary to s. 5(2) of the CDSA and s. 24 of the Criminal Code.
- [53] Attempted possession of a controlled substance for the purpose of trafficking is an offence under Canadian criminal law. The accused's intention is determinative of an attempt pursuant to s. 24. For the offence of attempted possession of a controlled substance for the purpose of trafficking, the focus is on what the accused intended with regard to the substance in their possession, and not the nature of the actual substance.
- [54] In this case, Mr. Hollaus' and Mr. Oliynyk's attempt to possess 26 kilograms of cocaine for the purpose of trafficking was impossible because the police had secretly replaced the 26 kilograms of cocaine with fake cocaine before it reached Mr. Hollaus and Mr. Oliynyk. However, as stated in *United States v. Dynar*, [1997] 2 S.C.R. 462 (at para. 67), s. 24 of the Criminal Code "draws no distinction between attempts to do something possible but by inadequate means, attempts to do the physically impossible, and attempts to do something that turns out to be impossible 'following completion'. All are varieties of attempts to do the 'factually impossible' and all are crimes." Only attempts to commit imaginary crimes fall outside the scope of this subsection. In other words, a factually impossible attempt is still an

offence pursuant to s. 24 of the Criminal Code. The fact that the police replaced the real cocaine with a benign substitute does not change the nature of the attempt of Mr. Hollaus and Mr. Oliynyk.

- [55] From the evidence of his actions, I conclude there were grounds to believe Mr. Hollaus intended to be in possession of cocaine in an amount sufficient for the purpose of trafficking. While the suitcase did not contain the expected cocaine, the individuals picking up the suitcase believed that it did.

B. Jurisdiction

- [56] In my view, the finding that there were grounds to believe that the applicant, in Canada, was committing a Canadian offence is determinative of the applicant's jurisdictional argument. The applicant argues the VPD was acting without jurisdiction because they were investigating an American offence. He relies on s. 6(2) of the Criminal Code:

Offences outside Canada

- (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.
- [57] With respect, I do not agree. In this case, the VPD's jurisdiction was not rooted in the investigation of an offence committed in the United States as the applicant alleges. Mr. Hollaus was observed committing a Canadian offence. The fact that the VPD executed operation Tuxedo 25 in order to assist Homeland Security with its investigation of a trans-border drug smuggling operation does not make Tuxedo 25 an American investigation. Nor does it make the CDSA offence Mr. Hollaus and Mr. Oliynyk were observed committing an American offence. The operation occurred entirely in Canada. The undercover operator was in Canada. Mr. Oliynyk and Mr. Hollaus picked up the suitcase of fake cocaine in Canada. They committed an offence contrary to Canadian law in Canada. In these circumstances, I conclude that the VPD had jurisdiction to investigate that offence.

C. Sections 8 and 9

- [58] The existence of reasonable grounds to believe Mr. Hollaus committed a Canadian offence is the starting point to the discussion of his arguments that there were breaches of his s. 8 and 9 Charter rights.
- [59] Mr. Hollaus submits that Csts. Dodds and Lennox lacked subjective grounds to arrest him and search his vehicle because they knew the true purpose of the stop was to further an American investigation. Thus, he says, his detention was arbitrary.

- [60] In my view, the applicant's argument confuses the "grounds" for an arrest with the "purpose" of an investigation. A lawful detention requires that police have reasonable and probable grounds to believe someone has committed an offence before arresting them: *R. v. Storrey*, [1990] 1 S.C.R. 241. In addition, in that case a lawful arrest did not become unlawful simply because the police intended to continue the investigation after the arrest.
- [61] An arrest without warrant pursuant to s. 495 of the Criminal Code requires reasonable grounds - both objective and subjective grounds to arrest. In this case the evidence establishes that the officer had the requisite objective and subjective grounds to arrest.
- [62] The objective grounds arose when the VPD surveillance team observed Mr. Hollaus and Mr. Oliynyk pick up the suitcase, and then relayed that information to Csts. Dodds and Lennox who were in their police vehicle. The officers' subjective belief was that the occupants of the vehicle were arrestable for an offence contrary to the CDSA after retrieving the suitcase of fake cocaine. This was sufficient to establish reasonable and probable grounds for the arrest. The officers' beliefs as to the underlying purpose of the investigation have no bearing on this question.
- [63] I therefore find that the arresting officer, Cst. Dodds, had reasonable and probable grounds for the arrest of Mr. Hollaus. The arrest was a lawful arrest as authorised by s. 495 of the Criminal Code, and the detention was therefore not arbitrary.
- [64] The use of a ruse does not affect this analysis. As the traffic stop ruse cases cited above demonstrate, one question is whether the police had legal grounds to arrest the applicant. In this case, they undoubtedly did having observed Mr. Hollaus pick up the suitcase of fake drugs. They also had a rational justification for employing this subterfuge: to protect the integrity of the ongoing American cross-border investigation. Their failure to inform Mr. Hollaus of the entire reasons behind his arrest may bear on his s. 10(a) and (b) rights, as is discussed below, but it is not relevant at this stage of the analysis.
- [65] While the traffic stop ruse executed by GCU members differed from the ruse planned by Det/ Cst. Munro in terms of the explanation Mr. Hollaus was given for the stop, the objective of the ruse was the same: to further and protect the ongoing Homeland Security investigation. Given the valid policing objective of the traffic stop ruse, and the fact the police had reasonable grounds to arrest, the traffic stop ruse was a lawful policing technique at common law.
- [66] Accordingly, I find no breach of Mr. Hollaus' s. 9 Charter rights.
- [67] On this basis, I also find that Mr. Hollaus' s. 8 Charter rights were not breached. The VPD had reasonable and probable grounds to arrest Mr. Hollaus and Mr. Oliynyk. The search of the flatbed of the truck was a lawful search incident to arrest.

- [68] A search preceding formal arrest is permitted as a search incidental to arrest provided that the officer has reasonable and probable grounds to arrest. As discussed in Bielli at paras. 72 and 73, the sequence of reasonable grounds, search, and arrest or release is not determinative of whether a breach has occurred:
- [72] The case law has established principles that govern when reasonable and probable grounds to arrest will be considered to exist, when search incident to arrest is or will be permitted, and when accused persons may be arrested, or released, without formal arrest. As the following paragraphs will show, the application of these principles in the present circumstances supports the conclusion that Mr. Bielli was de facto under arrest during the roadside detention. There are no temporal safe harbours that establish where a person may or may not be searched incident to arrest, but the case law clearly establishes three circumstances where a search may be conducted:
- (1) a search incident to arrest may occur prior to the formal arrest, provided there are reasonable and probable grounds to arrest;
 - (2) search incident to a de facto arrest may occur without the formal words, "You are under arrest"; and
 - (3) after a search incident to arrest, the police may release the person without continuing the arrest; the authority for the prior search is not retroactively negated.
- [73] In *R. v. Debot*, Lamer J. adopted the judgment of Martin J.A. in the Court of Appeal for Ontario in confirming that the sequence of reasonable grounds, search, and arrest or release is not determinative:
- Martin J.A. also disagreed with the trial judge's conclusion that the search was not incidental to a valid arrest because the search preceded the arrest and because the officer stated, in effect, that he would not have arrested the accused had the search not produced a prohibited drug. Martin J.A. rejected the contention that this was a finding of fact made by the trial judge. In his view, what constitutes a search incident to arrest is a question of law. As long as the officer has probable cause to arrest the suspect, the fact that he or she postpones the decision until after the search is not fatal. This is so because the reasonable belief that the suspect has committed the offence of being in possession of a prohibited drug may turn out to be erroneous. Alternatively, the officer may still have reasonable grounds for making the arrest but conclude that there would be no chance of obtaining a conviction without the evidence. In these circumstances an arrest would be pointless.
- [69] In this case, I find that the search of the truck was a lawful search incidental to the arrest of Mr. Hollaus as the officer had reasonable and probable grounds at the time of the search and prior to the formal arrest.
- [70] There was therefore no breach of the applicant's s. 8 Charter right to be secure against an unreasonable search.

D. Sections 10(a) and (b)

- [71] The applicant also alleges breaches of his ss. 10(a) and (b) Charter rights. These sections enshrine the right on arrest or detention to be "informed promptly of the reasons therefor" and to be given an opportunity to retain and instruct counsel without delay. Unlike the criteria for arrest, which refer to reasonable and probable grounds for an arrest, s. 10 mandates that reasons be provided.
- [72] It is conceded that Mr. Hollaus was subject to a de facto arrest for attempted possession of cocaine for the purpose of trafficking for the four-minute period between the beginning of the vehicle stop (12:19 p.m.) and his formal arrest by Cst. Dodds (12:23 p.m.). During this four-minute period, Mr. Hollaus' ss. 10(a) and (b) Charter rights were breached since he was not informed of either the jeopardy he was facing or his right to counsel. The Requesting State argues this breach did not extend beyond that four-minute period. It says that breach ended once Cst. Dodds advised the applicant of those rights upon formally arresting him for possession of a controlled substance for the purpose of trafficking.
- [73] The resulting four-minute breach will be the subject of a s. 24(2) application.
- [74] The primary issue between the parties concerns whether Mr. Hollaus was given sufficient information about the reasons for his arrest after the discovery of the fake drugs. Mr. Hollaus argues that the failure of police to inform him of the true purpose for his arrest was a breach of his right to know the reasons for his arrest.
- [75] It is not disputed that the purpose of the stop was to further the American cross-border investigation. There was no intention at that time to hold and charge the applicant in Canada, but rather to release him and recover the fake drugs.
- [76] In my view, s. 10(a) and 10(b) together require that the accused be told both the reasons (here the grounds for arrest) for the detention, and the general purpose of the detention if necessary for the effective exercise of the right to counsel.
- [77] A recognition of the double nature of s. 10 rights is present in many early Charter cases. As explained by Iacobucci J. in *R. v. Borden*, [1994] 3 S.C.R. 145:

As this Court has previously stated, the rights in s. 10(a) and 10(b) of the Charter are linked. One of the primary purposes of requiring the police to inform a person of the reasons for his or her detention is so that person may make an informed choice whether to exercise the right to counsel, and if so, to obtain sound advice based on an understanding of the extent of his or her jeopardy: *R. v. Black*, [1989] 2 S.C.R. 138, at pp. 152-53; and *R. v. Smith*, [1991] 1 S.C.R. 714, at p. 728.

- [78] To similar effect, McLachlin J. in *R. v. Evans*, [1991] 1 S.C.R. 869 stated:

The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 (Ont. C.A.), at p.

424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the Court in *R. v. Black*, [1989] 2 S.C.R. 138, at pp. 152-53, "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right. [emphasis added]

[79] The need to disclose the purpose of the investigation is explained in *R v. Sawatsky*, [1997] O.J. No. 3561 (Ont. CA) as follows:

29 Knowledge of the purpose of the detention is so important to the informed exercise of the right to counsel that the police are constitutionally required by s. 10(a) of the Charter to promptly inform a detained person of the reasons for her detention. Where there is more than one reason for a detention, they must all be disclosed: *R. v. Borden*, supra, at p. 419. In most cases, disclosure of the reason for detention will also reveal the subject matter about which the police wish to question or otherwise investigate the detained person. Compliance with s. 10(a) of the Charter will, in those cases, provide the necessary information as to both the reason for the detention and the subject matter of the investigation. In other cases, however, the reason for the detention will be different than the subject matter which the police intend to address in their contact with the detainee: *R. v. Young*, supra; *R. v. Chartrand* (1992), 74 C.C.C. (3d) 409 (Man. C.A.). In those cases, the police must inform the detained person of both the reasons for detention and the proposed subject matter of the interview so that the detainee may make an informed decision whether to seek the assistance of counsel: *R. v. Young*, supra at p. 297 [emphasis added]

[80] Crucially, these cases establish that the right to be informed of the reasons for a detention is an adjunct of the effective exercise of the right to counsel, and must be interpreted purposively in light of that right. It does not require the police to always divulge details of the purpose of a broader investigation. Rather, it requires that the accused be given sufficient information to make an informed decision about whether and how to exercise their right to counsel, and for their counsel to provide sound advice if they do so. In some circumstances, as here, the reasons given for a detention may be narrower than the entire purpose of the investigation, and that compliance with s. 10(a) will be sufficient for exercise of the s. 10(b) rights.

[81] Mr. Hollaus was informed of the reasons for his arrest as soon as he was told he was under arrest for the Canadian offence of possession for the purposes of trafficking. In my view, once he realized he was under arrest for that offence, he also had sufficient knowledge of the purpose of the arrest and the extent of his jeopardy to effectively exercise his right to counsel.

[82] Mr. Hollaus' alleged illegal activities on Canadian soil are part and parcel of the offence for which he was being investigated in the United States. In this regard, the offence for which he was ostensibly detained and the offence for which he was actually being investigated are different facets of the same course of criminal conduct. They are two sides of the same

transnational crime, divided only by the international border. In addition, I note that the ATP was issued later, on August 12, 2019, and there is no evidence that an extradition or a prosecution in the United States was commenced prior to that date, or at the time of the arrest of the applicant in 2014.

- [83] It is an intrinsic aspect of any cross-border drug trafficking operation that there are actions done in Canada as well as in the foreign state. In this case, one of those actions led to an arrest in Canada for an offence in Canada. That there were other aspects to the overall investigation is not determinative of the issue of the exercise of s. 10 rights where the information provided allowed the applicant to know that the action in Canada was the subject of an arrest in Canada.
- [84] In these circumstances, I find Mr. Hollaus' right to counsel was not infringed by the failure of the police to inform him of the entire purpose of the investigation. He was provided the reason; he faced potential criminal sanctions for his part in a transnational drug smuggling operation. At this point, the danger that the Canadian authorities might share this information with their American counterparts would have been sufficiently apparent, along with the risk that further investigation on both sides of the border might reveal more of the operation. In these circumstances, it is difficult to see how knowledge of the full extent of the investigation would have affected Mr. Hollaus' decision or ability to retain counsel, or compromised the soundness of any advice that counsel may have provided.
- [85] I conclude that Mr. Hollaus had sufficient information regarding the extent of his jeopardy to be able to effectively exercise his right to counsel. As such, I find any breach of his s. 10(a) and (b) rights ended upon his arrest following the discovery of the drugs that had been substituted for the intercepted 26 kilograms of cocaine.

VIII. Conclusion

- [86] As I have found that there was not a breach of Mr. Hollaus's s. 8 and s. 9 Charter rights, the application in that regard is dismissed.
- [87] There was a breach of the applicant's s. 10 Charter rights for the four-minute period after the traffic stop and before he was placed under arrest for the drug offence. The application is granted to that extent.
- [88] The voir dire will continue with the s. 24(2) submissions relating to that s. 10 Charter breach.
- "The Honourable Madam Justice Watchuk"

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