

CANADA / JUDGMENT

R. v. Jaramillo

2025 BCCA 77

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 77 R. v. Jaramillo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Jaramillo,

2025 BCCA 77

Date: 20250312

Docket: CA50366

Between:

Rex

Appellant

And

Preston Hale Jaramillo

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 36 on March 18, 2025.

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Grauer

The Honourable Justice Winteringham

On appeal from: An order of the Provincial Court of British Columbia, dated December 23, 2024 (sentence) (R. v. Jaramillo, Campbell River Docket 44067-1).

Counsel for the Appellant:

S.E. Elliott, K.C.

Counsel for the Respondent:

S.J. Runyon

Place and Date of Hearing:

Vancouver, British Columbia

March 6, 2025

Place and Date of Judgment:

Vancouver, British Columbia

March 12, 2025

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Justice Winteringham

Summary:

The Crown appeals a sentence imposed for two counts of possession of a loaded handgun, and one count of possession in contravention of a firearms prohibition. The judge determined that a global sentence of four years (48 months) was fit, and that the respondent was entitled to 25 months' credit for time served. The judge also found that the manner in which a police service dog was deployed in executing the respondent's arrest breached the respondent's s. 7 Charter right to security of the person, notwithstanding that there had been no contact between the dog and the respondent, and no injury. Having found the breach, the judge deducted 11 months from the sentence pursuant to s. 24(1) of the Charter. The judge further ordered that the portion of the sentence he attributed to one of the counts be served as a conditional sentence order.

Held, Appeal allowed. As the judge had determined that a penitentiary term was a fit sentence, a CSO was not available in the circumstances. In addition, the judge erred in law in applying the test for s. 7 Charter breach; no breach was established and no deduction should have been made.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

- [1] The respondent pleaded guilty to two counts of possessing a loaded handgun (count 1: a Webley Mk IV .38 revolver; count 2: a Harrison & Richardson .38 revolver), and one count of possessing them in contravention of a firearms prohibition (count 5). The Crown seeks to appeal the sentence imposed.
- [2] Before the guilty pleas, the respondent applied to exclude the evidence of the two loaded handguns, alleging that his s. 7 and s. 8 Charter rights had been breached.
- [3] In his voir dire ruling (unreported, 29 May 2023, Campbell River File No. 44067), the judge found no breach of the respondent's s. 8 Charter rights, a finding that is not challenged. The judge did, however, find that the respondent's s. 7 right to security of the person had been infringed because of "the manner in which the arrest was executed, specifically the deployment of a police service dog ("PSD")." (Campbell River File No. 44067, Ruling on s. 24(2) Charter application, 25 September 2023, at para 2).
- [4] Notwithstanding his finding of a s. 7 breach, the judge declined to exclude the evidence of the handguns, finding, instead, that the circumstances of the case made it appropriate to address the breach of the respondent's rights in considering sentence.
- [5] In written reasons for sentence (unreported, 23 December 2024, Campbell River File No. 44067), the judge imposed a global sentence of 4 years. The judge then reduced this 48-month sentence by 11 months to remedy the breach of the respondent's s. 7 Charter right to security of the person.
- [6] This resulted in a 37-month sentence, to which was credited 25 months for time served. The judge observed that this left 12 "new" months in jail, which he ordered to be served as 4 months in jail followed by an 8-month conditional sentence order (CSO) comprising 4 months of house arrest and 4 months under curfew. This sentence was to be followed by a 2-year term of probation.
- [7] At para 107 of his reasons for sentence (unreported, 23 December 2024, Campbell River File No. 44067, the judge attributed the sentence as follows:

Count 1

25 months in jail, with credit for time served of 25 months jail, leaving no new jail.

Count 5

4 months in jail consecutive to the time-served jail sentence at Count 1.

Count 2

8 months CSO consecutive to the 4 months jail at Count 5.

[Emphasis original.]

- [8] The Crown contends that the judge erred in principle:

1. by imposing a CSO in circumstances where it was not available, resulting in an illegal sentence; and
 2. by finding, and deducting time for, a breach of the respondent's s. 7 Charter rights pursuant to s. 24(1) when the respondent's security of the person was not engaged, the judge failed to apply the proper analytical framework for abuse of process, and the result was the improper creation of new common law.
- [9] For the reasons that follow, I would grant leave to appeal, and I would allow the appeal by setting aside the conditional sentence order and restoring the 11 months deducted on the basis of the Charter breach.

Circumstances of the offence

- [10] On December 22, 2022, a warrant issued for the arrest of the respondent on a charge of aggravated assault allegedly committed on December 9, 2022.
- [11] On January 7, 2023, the police received a tip that the respondent was at a public storage facility in Campbell River. In response, all the on-duty members of the Campbell River detachment attended to execute the warrant. These were Sergeant Rutherford, the uniform division commander, and Constables MacDonald, Weihs, Dewar and England. Sergeant Rutherford's duties include overseeing general duty operations and police dog services. Constable England attended with the PSD, Norco. Constable England was Norco's handler.
- [12] At the facility, Constables MacDonald and England went inside to effect the arrest, while Sergeant Rutherford remained outside. Constables Weihs and Dewar also went into the facility. I will describe the circumstances of the arrest more fully when I discuss the Charter breach issue.
- [13] Following the arrest, after Constables MacDonald and England had left, Sergeant Rutherford went in to see if Constable Weihs needed any assistance with anything at the site of the storage locker. They were about to close the storage locker when Sergeant Rutherford noticed an unzipped sling bag on a trolley near the locker door. According to Constable Weihs, the respondent had asked them to move the trolley into his locker.
- [14] Looking into the sling bag, Sergeant Rutherford saw the handle of a gun. She then told Constable Weihs to search the bag, leading to the discovery of two loaded revolvers; hence counts 1 and 2. At the time, the respondent was prohibited from possessing a firearm; hence count 5.

Proceedings at sentence

- [15] As noted, after the rulings on his Charter application, the respondent pleaded guilty to the three counts. He had spent a considerable time in pre-sentence custody, and had attended a 90-day residential addiction treatment program in Courtney under electronic monitoring. After that, he lived in the community, although still under house arrest on electronic

monitoring, until he was arrested for breach of the release order. He was sentenced to 45 days in jail for that breach, and remained in custody thereafter. The judge concluded that the respondent was entitled to total enhanced credit for time served of 25 months, and that is not challenged.

- [16] The Crown sought a global sentence of 5-6 years in custody less time served, leaving an effective sentence of 3-4 years "new time". The Crown also sought ancillary orders consisting of a s. 109 weapons prohibition for life, together with a forfeiture order in relation to the seized handguns and ammunition.
- [17] The respondent conceded that the ancillary orders should be made, but submitted that he should receive a disposition of time served (25 months) together with a period of probation with conditions focused on his rehabilitation.

Determination of a fit sentence

- [18] The judge first determined the appropriate sentence without regard to the Charter breach. In doing so, he considered the gravity of the circumstances of the offence, the circumstances of the offender including his personal background, criminal record and rehabilitative prospects, the appropriate sentencing range, and the objectives and principles of sentencing.
- [19] With respect to personal background, the judge found that the circumstances of the respondent's childhood, "his exposure to violence, addiction, poverty and neglect, the loss of his stable caregivers, and spending his adolescence in Ministry care," reduced his moral culpability (at para 37).
- [20] Turning to aggravating circumstances, the judge noted the respondent's criminal record. It was extensive, including, more recently, trafficking in controlled substances and breaches of release orders. The last convictions for violence (assault with a weapon and assault) related to an offence date of March 22, 2015. Conditional sentences were imposed. He had a weapons offence conviction in 2021.
- [21] Turning next to mitigation, the judge gave the respondent's guilty plea significant credit and noted that the sentencing hearing benefited from insight into the circumstances and impacts of the Charter violation that was alleged. The judge further accepted that the respondent's expression of regret included remorse, and that the respondent took responsibility for the harm he had caused (at paras 43-48).
- [22] In the judge's view, the respondent's prospects for rehabilitation were "quite positive" and "more than a wishful thinking", and his release plan was solid (at paras 49-50).
- [23] With respect to the risk of reoffending, the judge quoted at para 51 from the psychiatric report which assessed the respondent as "presenting a moderate risk for future violence, and a moderate-high risk for non-violent offending", while noting that he appeared to be "approaching a period of stability in terms of his drug use and offending". On a positive note,

the psychiatric report observed that the respondent presented with "some strengths which may mitigate risk for future reoffending." In the judge's view, the respondent's risk profile was so closely connected to the stability of his recovery from addiction that "a period of close monitoring in the community post release is favored [sic]" (at para 52).

[24] After reviewing the relevant authorities, the judge concluded that but for any Charter remedy, the global range for the offence was 30 months to 6 years, with the midpoint of 4 years 3 months (at para 65). He reasoned at para 66 that, given the personal and mitigating circumstances,

with particular regard to the reduced moral culpability arising from the circumstances of his childhood, and the positive steps taken towards his rehabilitation, Mr. Jaramillo would, but for his criminal record be in the lower range.

[25] He then concluded:

[67] Given his criminal record, I place the fit and appropriate sentence here near the middle range, and would, but for the charter remedy sentence Mr. Jaramillo to a global sentence of 4 years (48 months) in jail, less credit for time served.

[26] The judge then proceeded to give effect to his earlier rulings on the Charter remedy, yielding the disposition set out in paras 5-8 above.

Fitness of the sentence

[27] The Crown notes that the judge's global four-year sentence, reduced for pre-sentence custody, permitted the imposition of a two-year probationary term to promote rehabilitation. The Crown says that this assessment was lenient given the gravity of the offence. Nevertheless, the Crown notes that the leniency reflects the judge's findings of reduced moral culpability and positive steps taken towards rehabilitation.

[28] In these circumstances, the Crown does not challenge the fitness of the global four-year sentence, but submits that if it is restored on appeal (less credit for pre-sentence custody), it should be apportioned in the following manner to reflect the condemnation of firearms offences expressed by this Court in cases such as *R v Endean*, 2017 BCCA 125 at para 31, and *R v Kachuol*, 2017 BCCA 292 at para 25, while giving effect to the judge's findings that were generous to the respondent and maintaining the two years of probation on the terms crafted by the judge:

Counts 1 and 2: 3.5 years (42 months) each, to run concurrently, less credit of 25 months;

Count 5: 6 months consecutive to Count 1 and 2, followed by two years of probation.

The conditional sentence issue

The parties' positions

- [29] The Crown contends that whether or not the judge's sentence should properly have been reduced to take into account the impact of the Charter breach, it was not open to the judge to impose a CSO as part of that sentence. In the Crown's submission, once the judge found that a global sentence of 4 years was a fit sentence for these interrelated offences, the respondent fell into a category of offenders that is excluded from the conditional sentencing regime. This is because a sentence of less than two years must be imposed before conditional sentence can be authorized (Code s. 742.1; *R v Fice*, 2005 SCC 32 at para 4), and, at least for related offences arising out of the same events, this rule applies to global sentences before deduction for pre-trial custody (*Fice*; *R v Johnston*, 2023 ONCA 808 at paras 6-7).
- [30] The respondent argues that the sentence was legal. He notes that the judge imposed a 25-month sentence on count 1 to which was credited the 25 months of pre-sentence custody. The judge then imposed a 4-month sentence on count 5, and an eight-month conditional sentence order on count 2. No pre-sentence custody was considered in relation to either counts 5 or 2.
- [31] It follows, the respondent asserts, that the "erroneous route" followed in *Johnston* was not pursued by the judge here because the CSO was attached to count 2 without any reduction for pre-sentence custody. All of the pre-sentence custody had been credited to count 1. In the respondent's submission, while there are no reported authorities supporting this approach, nothing in the legislation or *Fice* expressly forbids it.
- [32] In my view, the respondent's argument is inconsistent with the law and must fail; the Crown's position is correct.

Analysis

- [33] By s. 742.1 of the Code:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under s. 742.3, if

- (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2;

- [34] The Supreme Court of Canada first applied a purposive interpretation of the section in *R v Proulx*, 2000 SCC 5:

46 This provision lists four criteria that a court must consider before deciding to impose a conditional sentence:

- (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
- (2) the court must impose a term of imprisonment of less than two years;
- (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
- (4) conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

47 In my view, the first three criteria are prerequisites to any conditional sentence. These prerequisites answer the question of whether or not a conditional sentence is possible in the circumstances. Once they are met, the next question is whether a conditional sentence is appropriate. This decision turns upon a consideration of the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. I will discuss each of these elements in turn.

- (1) The Offender Must be Convicted of an Offence That Is Not Punishable by a Minimum Term of Imprisonment

48 This prerequisite is straightforward. The offence for which the offender was convicted must not be punishable by a minimum term of imprisonment. Offences with a minimum term of imprisonment are the only statutory exclusions from the conditional sentencing regime.

- (2) The Court Must Impose a Term of Imprisonment of Less than Two Years

49 Parliament intended that a conditional sentence be considered only for those offenders who would have otherwise received a sentence of imprisonment of less than two years. There is some controversy as to whether this means that the judge must actually impose a term of imprisonment of a fixed duration before considering the possibility of a conditional sentence.

49 Far from addressing purely methodological concerns, this question carries implications as to the role of ss. 718 to 718.2 in the determination of the appropriate sentence, the duration of the sentence, its venue and other modalities.

[Emphasis added.]

- [35] The Court went on to answer the question of whether the judge must first impose a term of imprisonment of fixed duration before considering the possibility of a conditional sentence:

55 These problems can be addressed by a purposive interpretation of s. 742.1(a). For the reasons discussed above, the requirement that the court "imposes a sentence of imprisonment of less than two years" could not have been intended to impose on judges a rigid two-step process. Rather, it was included to identify the type of offenders who could be entitled to a conditional sentence. At one end of the range, Parliament denied the possibility of a conditional sentence for offenders who should receive a penitentiary term. At the other end, Parliament intended to ensure that offenders who were entitled to a more lenient community measure -- such as a suspended sentence with probation -- did not receive a conditional sentence, a harsher sanction

in this legislative scheme.

[Emphasis added.]

[36] The majority of the Court followed this approach in *Fice*. There, the offender had pleaded guilty to five offences: aggravated assault, fraud, personation, forgery and breach of recognizance. The sentencing judge considered the offender's pre-sentence custody to be equivalent of almost 3 years of incarceration and concluded that she should serve an additional 14 months in the community on certain conditions. In setting this sentence aside, Justice Bastarache for the majority said this after referring to *Proulx*:

2 Thus, it can be stated that the object of the requirement in s. 742.1(a) is to exclude categories of offenders from the conditional sentencing regime on the basis of the range of sentence that would apply to them. In particular, offenders for whom probation or a penitentiary sentence would be considered appropriate are barred from receiving a conditional sentence.

3 In my view, this interpretation of s. 742.1(a) is determinative of the issue in the present case. Here, the respondent pleaded guilty to aggravated assault, fraud over \$5,000, personation, forgery and breach of recognizance. Defence counsel conceded that a penitentiary sentence was otherwise warranted but urged a conditional sentence be imposed because of the time spent in pre-sentence custody. The respondent had spent approximately 16 months in pre-sentence custody and six months in a circumstance of house arrest at the time of sentencing. Without addressing the Crown's argument that it was not open to him as a matter of law to impose a conditional sentence, the sentencing judge considered the respondent's pre-sentence custody to be the equivalent of almost three years of incarceration. He then concluded that the respondent should serve an additional 14 months in the community on certain conditions. The Court of Appeal dismissed the Crown's appeal: (2003), 65 O.R. (3d) 751.

4 As noted above, defence counsel conceded that a penitentiary sentence was otherwise appropriate. According to this Court's purposive interpretation of s. 742.1(a) in *Proulx*, the respondent therefore fell into a category of offenders that is excluded from the conditional sentencing regime. In my view, the sentencing judge erred in imposing such a sentence. A conditional sentence cannot become available to an offender who otherwise deserves a penitentiary term solely because of the time the offender spends in pre-sentence custody.

[Emphasis added.]

[37] The Court went on to discuss why it is inconsistent with the conditional sentencing regime to argue that pre-sentence custody should be taken into account in determining the availability of a conditional sentence. It concluded that time credited to an offender for time served before sentence "ought to be considered part of his or her total punishment rather than a mitigating factor that can affect the range of sentence and therefore the availability of a conditional sentence" (at para 21). The Court went on to observe:

22 Since the time spent in pre-sentence custody as part of the total punishment imposed, it is clear that it is not a mitigating factor that can affect the range of sentence and therefore the availability of a conditional sentence, as argued by the respondent. This makes sense because the appropriate range of sentence is related to the gravity of the offence or the moral blameworthiness of the offender, and these concepts do not change with the time spent in pre-sentence custody.

[Emphasis added.]

In our case, of course, the judge found that the appropriate range of sentence, given the gravity of the offences and the moral culpability of the offender, was four years.

[38] In between these two cases, and consistent with the both of them, the Court of Appeal for Ontario confirmed in *R. v. Ploumis*, (2000), 150 CCC (3d) 424, 2000 CanLII 17033, leave to appeal to SCC ref'd, 153 C.C.C. (3d) vi, that where blended sentences in the case of two or more offences yielded a fit overall sentence that called for and effectively resulted in a penitentiary term, a conditional sentence could not be granted (at para 13-22). That Court came to the same conclusion in *Johnston*, and confirmed that this cannot be circumvented by deducting credit for pre-trial custody.

[39] This Court has confirmed on numerous occasions that "[w]here an offender's aggregate sentence of imprisonment exceeds two years, a conditional sentence is not available": *R v Finlay*, 2016 BCCA 299 at para 31; see also *R v Chaffey*, 2012 BCCA 33 at para 5 and *R v Keyler*, 2014 BCCA 300 at para 2.

[40] In the present case, the judge clearly (and quite properly) concluded that a penitentiary term was appropriate, imposing a global sentence for these related offences of 4 years in the context of a range extending from 30 months to 6 years. In my respectful view, in those circumstances, a conditional sentence is not available--and it is not permissible to avoid this prohibition by apportioning the global sentence among the counts (25 months for the count 1 gun, but only 8 months for the count 2 gun), applying all the credit for pre-trial custody to offset the one that exceeded 2 years, and then converting the second sentence to a CSO. This is what the judge attempted here. In doing so, he erred in law.

[41] It is not necessary to determine whether a conditional sentence would have been available had the reduction for the Charter breach resulted in a sentence of less than 2 years. In this case, the global sentence after the s. 24(1) reduction (3 years 1 month) remained a penitentiary sentence.

[42] Accordingly, I would set aside the judge's order imposing a conditional sentence order of 8 months on Count 2.

[43] I now turn to consider whether the judge erred in finding a breach of the respondent's s. 7 Charter right to security of the person.

The Charter breach/state misconduct issue

Standard of review

- [44] The Crown submits that the judge erred in finding a s. 7 breach by failing to determine the proper legal test for assessing the alleged breach and failing to apply the proper legal test to the facts, for which the standard of review is correctness: *R v Dhillon*, 2023 BCCA 38 at para 93; *R v Sheppard*, 2009 SCC 35 at para 20.
- [45] The respondent submits that the appeal is not truly about errors of law but rather takes critical aim at the sentencing judge's factual findings that the deployment of the dog, on a subjective-objective analysis, was unnecessary and unreasonable.
- [46] As I analyse this appeal, I agree with the Crown that the principal issue is whether the judge applied the proper legal test to the facts, for which the standard of review is correctness. To the extent there may also arise questions concerning his findings of fact, these would attract the deferential standard of palpable and overriding error.

Overview

- [47] This issue arises out of the role played in the respondent's arrest by Norco, the detachment's PSD. As noted above, all on-duty officers attended at the storage facility to assist with the arrest, including Constable England, Norco's handler. Sergeant Rutherford, as uniform division commander, also oversaw police dog services.
- [48] During the arrest, Norco remained on leash under Constable England's control. He barked and behaved in a manner the respondent considered highly threatening. He did not bite the respondent or otherwise touch him. The respondent maintained that the threat posed by Norco deprived him of his "security of the person" and constituted excessive force.
- [49] The judge agreed. He introduced the issue this way (voir dire ruling), observing that, while no one was bitten or physically injured, it does not follow that the deployment of the dog was "well-reasoned":
- [31] Mr. Jaramillo has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- [32] There is no issue raised with grounds for arrest. The police were executing an arrest warrant.
- [33] Instead, it is the manner in which the arrest was effected that is questioned, specifically whether the RCMP deployment of a police service dog (PSD) in arresting Mr. Jaramillo was reasonable.
- [34] The PSD did not bite Mr. Jaramillo, and no one was physically injured in the execution of the arrest warrant. It is however a logical fallacy to then conclude that the deployment of the PSD was well reasoned.

- [35] A careful review of this record reveals a degree of institutional nonchalance concerning the use of a Police Service Dog in effecting an arrest.
- [36] Despite the fact that there was an opportunity to make a considered, or reasoned decision about when and whether to involve a PSD in the execution of this search warrant this did not occur.
- [37] Instead, the record reveals a certain presumptive use of the PSD whenever Cst. England responds to a call.

[Emphasis by underlining original; emphasis in italics added.]

- [50] After reviewing the evidence, the judge recognized at para 100 that this was an unusual case, considering the use of force "in the context of a police dog handler and police service dog, when, there was no physical contact between the accused and the dog handler, or the dog." Nevertheless, he concluded as follows:

- [102] The fact of this case are perhaps too easily summarized as the execution of an arrest warrant on charges of aggravated assault involving an accused with a history of violence, guns and drug trafficking with no force used other than the application of handcuffs.
- [103] However, every arrest, however peaceful, even in circumstances of a consent surrender, engages and individuals s. 7 charter rights. Section 7 rights are engaged when the manner in which an arrest is effected is not reasonable.
- [105] The lawfulness of an arrest pursuant to a valid arrest warrant depends upon the reasonableness of the manner of execution chosen by the police.¹ This approach is necessary to ensure the personal safety of the accused, the officers and the public which may be nearby.
- [106] I find that because there was no formal or informal risk assessment supporting the use of a police service dog, the actions of the police here, created a real risk of harm to Mr. Jaramillo.
- [107] With the barking dog, in very close proximity to Mr. Jaramillo, he was unable to hear the commands being given. And that moment's hesitation between going to his knees and going to his stomach - which Cst. England himself perceived as a threat cue-- Mr. Jaramillo was then put at risk, that his own efforts to be safely detained and arrested, were even momentarily perceived (mistakenly) to signal safety threatening danger to the arresting officers.
- [108] I find that this, in the particular circumstances when there was no process in the period that was available to the detachment, to reflect on whether a police service dog should be used, and specific to the circumstances here, amounts to a breach of Mr. Jaramillo's s. 7 rights.

[Emphasis added.]

- [51] In footnote 1, the judge indicated that he was adopting language used by Madam Justice Bruce in *R v Cao*, 2008 BCSC 139, which he quoted as follows:
- [25] The lawfulness of an entry to a residence pursuant to a valid search warrant depends upon the reasonableness of the manner of entry chosen by the police. Where there are no exigent circumstances justifying a dynamic entry, as in the circumstances of this case, the police are required to knock, announce their presence and their lawful purpose for entry, and allow a reasonable amount of time for a response by any occupants. This so called "knock and announce" rule is not a mere formality. This rule is necessary to ensure the personal safety of anyone inside the residence at the time of entry as well as the police. When the police batter down a door to secure entry to a residence unannounced with firearms drawn and ready to be discharged, it creates a high degree of risk to both the occupants and the police. This risk is substantially reduced when the occupants have time to prepare themselves for the entry rather than responding instinctively to an unknown and possibly dangerous intruder.

[Emphasis added by the judge.]

Analysis

The respondent's security of the person

- [52] With respect, the judge's statement at para 103 that "Section 7 rights are engaged when the manner in which an arrest is effected is not reasonable" is not an accurate statement of the law. The approach for assessing whether a party's s. 7 right was breached was set out by the Supreme Court of Canada in *R v Nasogaluak*, 2010 SCC 6. It requires a two-step analysis: (1) was there an excessive use of force that posed a real threat to the party's security of the person by substantially interfering with the party's physical and/or psychological integrity, (2) which was not in accordance with principles of fundamental justice? (*Nasogaluak* at para 38).
- [53] The proper test, then, requires a subjective-objective analysis of whether the force used by an officer in carrying out an arrest was excessive. As the Court said in *Nasogaluak* at paras 33-34 the analysis engages s. 25 of the Code, which, in essence, "provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances." That use of force is to be judged on a subjective-objective basis. The Court went on to observe:

35 Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

[54] The test also requires that the use of force in question posed a real threat that interfered with the person's physical or psychological integrity. In this case, as there was no physical harm (the dog did not bite or touch the respondent), it is the respondent's psychological integrity that is in issue.

[55] The bar is high. As the Court stated in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44:

57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (G. (J.), at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious.

[56] I consider that the judge erred in his analysis and his application of the law to the facts before him. I will look first at the question of excessive force and a real risk of harm, before turning to the judge's assessment of reasonableness.

Excessive force and risk of harm

[57] The judge stated in para 106 quoted above, he found that the actions of the police created a real risk of harm "because there was no formal or informal risk assessment supporting the use of a police service dog". Although the dog did not touch or bite the respondent, what seemed to concern the judge was that the dog behaved aggressively in its barking, frightening the respondent. In the judge's view, this created a real risk of harm because the respondent, although he complied, said that he was unable to hear the commands being given, giving rise to a moment's hesitation between going to his knees and going to his stomach.

[58] I can accept hypothetically that, if the respondent's ability to respond in compliance with the demands of the police had been hampered by panic and an inability to hear caused by the PSD, so that the response was non-compliant with serious consequences, then the manner in which the dog was deployed could possibly rise to the level of excessive force. But that is not what happened. The respondent complied.

[59] As it is, the only finding with which the judge supported his conclusion that a real risk of harm arose was based not on what Constable England did, but on the fact that his actions had not been subjected to any formal or informal risk assessment--other than, of course, Constable England's own use of discretion, which was consistent with Provincial policing policy. What was unreasonable, in short, was what the judge found to be "institutional nonchalance". The judge did not apply an excessive force framework, refer to s. 25 of the Code, or make a finding that excessive force was used.

[60] What is also missing is an analysis of whether there was a real threat to the respondent's security of the person that substantially interfered with the party's physical and/or psychological integrity. As no physical harm resulted, the focus must be on psychological harm ("serious state-imposed psychological stress").

[61] I turn to the respondent's evidence:

In that moment, like I'm scared. The dog's pulling on the leash, like going -- running forward on the slack, that it's catching the slacken lifting up on his hind legs, barking wildly, spitting everywhere. [The two police officers were] both yelling at me. Only the one has a gun pointed at me. The other one had his hand on his gun -- yelling about being shot or bit. It's common knowledge in Campbell River the -- about the cop in the green [Constable England], more times than not, once to engage people with the dog. A friend of mine was recently bit by the dog so we had a conversation about that.

Like I said, I know exactly who [Constable England] is and the dog. I know about -- it's common knowledge in Campbell River if you're involved in drug culture or what they would say criminal world -- that people know about this guy and about the shooting at Tim Hortons

You know, like I'm not wanting to -- saying the exact things I'm afraid of, being shot or bit by that dog.

A friend of mine, Ray, told me about being bit by the dog, described it was quite vicious, and I didn't want that happening to me, so yeah, I'm very scared of that.

[62] The judge found as a fact that, contrary to the respondent's subjective perception, the police officers did not draw their guns. Oddly, the judge found the respondent's perception to be reasonable even though it was wrong--but the proper concern is with real risk, not imagined risk. In any event, it is difficult to see what risk arose from the dog's noise when no guns were drawn and the dog remained under Constable England's control. On the respondent's evidence, he complied with the officers' demands because of the dog--thereby reducing the risk of harm.

[63] Moreover, I do not see how the respondent's reliance on common knowledge in the Campbell River criminal world and what his friend Ray told him can support a finding that state action, whether Constable England's exercise of discretion on this occasion to "display the dog", or institutional nonchalance, gave rise on this occasion to a real risk of harm or seriously interfered with the respondent's psychological integrity. As noted, that action

instead encouraged the respondent's compliance. It certainly fell well short of state-imposed harm that caused serious psychological prejudice, as discussed in *Blencoe*. But even if a risk of harm arose, the judge made no finding of excessive force, and, in my view, erred in principle in his analysis of what was reasonable.

Institutional nonchalance

- [64] As noted above, the judge stated in para 105 of his *voir dire* reasons that "[t]he lawfulness of an arrest pursuant to a valid arrest warrant depends upon the reasonableness of the manner of execution chosen by the police", relying on the excerpted quote from *Cao*.
- [65] *Cao* was not a s. 7 case. It was a s. 8 case, and the analysis is not the same. There, the police executed a valid warrant by battering down a door to secure entry into a residence, unannounced, with firearms drawn and ready to be discharged. This was contrary to an established procedural practice, or "rule" called "knock and announce", by which, in the absence of exigent circumstances (such as "a real threat of violent behaviour associated with the particular residence"), the police are required to knock and announce their presence, allowing a reasonable time for response. In *Cao*, there were no exigent circumstances to justify the disregard of the rule by the police. Their force was excessive.
- [66] In his *voir dire* reasons in the present case, the judge seems to begin his analysis with regard to the question of the reasonableness of the manner of execution of the warrant chosen by the police:
- [33] Instead, it is the manner in which the arrest was effected that is questioned, specifically whether the RCMP deployment of a police service dog (PSD) in arresting Mr. Jaramillo was reasonable.
- [67] But he then veered away from this approach, in effect imposing a "rule" on the police in this case similar to the "knock and announce" rule applied in *Cao*--notwithstanding that there was no such rule concerning the attendance of police dogs while effecting an arrest. On the evidence before the judge, the applicable British Columbia Provincial Policing Standards provided wide discretion to police handlers in the use of PSDs for arrest by "police dog bite or display", and indeed in her cross-examination of Constable England, counsel for the respondent observed: "And just so you know, I'm not suggesting to you that you haven't complied with your policy. What I'm -- trying to suggest is that your policy offers you a very wide degree of discretion as to when you can use these dogs. Okay? That's what I - there's no argument there."
- [68] Constable England confirmed that he was using Norco in this case to assist in arrest by "display". Norco remained on his leash under Constable England's control.

- [69] But the judge seems to conclude that this was not an appropriate exercise of discretion, and was therefore unreasonable, because of "institutional nonchalance", in the sense that there had been no attempt to assess in advance whether the use of a police dog would be appropriate in the execution of this or any other arrest warrant:
- [34] The PSD did not bite Mr. Jaramillo, and no one was physically injured in the execution of the arrest warrant. It is however a logical fallacy to then conclude that the deployment of the PSD was well reasoned.
- [35] A careful review of this record reveals a degree of institutional nonchalance concerning the use of a Police Service Dog in effecting an arrest.
- [36] Despite the fact that there was an opportunity to make a considered, or reasoned decision about when and whether to involve a PSD in the execution of this search warrant this did not occur.
- [37] Instead, the record reveals a certain presumptive use of the PSD whenever Cst. England responds to a call.
- [Emphasis original.]
- [70] While I accept that the evidence supported the judge's conclusion that there had been no advance institutional risk assessment of that sort, what was lacking was an evidentiary basis, let alone a legal basis, for concluding that it would be reasonable or practicable for such a procedure to be in place. The evidence of Sergeant Cornwell was emphatically to the contrary. And on what basis could it be concluded that a procedure such as the judge contemplated would have led to a different result?
- [71] What the police officers were responding to was not the issuance of a warrant; they were responding to a call that a person they had been trying to arrest, who had been alleged to have committed a crime of considerable violence, with a weapons history, was present at a storage facility. That required their immediate attendance at the facility, and that is when the decision had quickly to be made about whether to bring Norco along; what Constable England might have done in the past was irrelevant. In this regard I note that in two cases that considered his use of a PSD where the person being arrested was bitten, the court concluded that the Constable's actions were justified: *R v Sharkey*, 2022 BCPC 61, and *R v Roberts*, 2018 BCPC 358.
- [72] As it is, while the judge recognized that "it would not be feasible to assess each of the outstanding arrest warrants in the detachment for whether the deployment of a police service dog should be considered", he nevertheless found that what was missing was a "game plan to effect this arrest by deploying a police service dog" (s.24(2) ruling at para 22).

- [73] In my opinion, on the record before him, it was not open to the judge to concern himself with what he perceived to be institutional nonchalance in the lack of supervisory risk assessment in advance of the attendance to execute the warrant. There is no basis in the record for determining that this was an abuse of process, or offended principles of fundamental justice (the second step in the s. 7 analysis).
- [74] What the judge could properly consider, consistent with the court's approach in Sharkey and Roberts, was whether Constable England's decision to bring Norco into the building with him to assist in effecting the respondent's arrest was reasonable, necessary and proportionate--bearing in mind that there was no contact between Norco and the respondent, and that Norco's deployment appeared to be highly effective in securing a safe arrest notwithstanding the presence of two loaded handguns. In short, did Constable England use excessive force?
- [75] I have already pointed out the judge's problematic conclusion as to the risk of harm and the absence of a finding of excessive force. I turn now to Constable England's exercise of discretion in attending with the dog.

The test for proportionality and reasonableness

- [76] As noted above, this requires a subjective/objective analysis. For the reasons discussed above, the proper focus should have been on Constable England's decision to attend with the dog at the arrest as opposed to remaining in the background while others effected the arrest. Under cross-examination, Constable England explained:

Because of the high threat of the case. It's one of the highest threat individuals we've dealt with in Campbell River on -- on a basis. So having the police dog right there and able to help out members.

The police dog also provides a level of safety to police officers. For this instance, you know, just having him displayed I believe encouraged him, and according to his own words, he didn't want to be bit. So having the police dog there encouraged him to cooperate, and he was arrested without any incident, without police getting hurt, without public getting hurt, and without Mr. Jaramillo getting hurt.

- [77] Constable England testified that he also took into account a number of other factors:

- 1) that they were executing a warrant for aggravated assault;
- 2) the respondent had a criminal history that included crimes of violence and a weapons offence;
- 3) about a week before the arrest, Constable England attended a residence to try to execute the warrant and noted a very distinct bag outside the residence that resembled one the respondent was seen carrying in a video of the alleged aggravated assault. The bag contained a loaded sawed-off shotgun and a machete;

- 4) on an earlier occasion, the respondent had tried to flee police from the second story of a house, and claimed that he had a firearm; and
- 5) two years earlier, Constable England responded to a call where the respondent had been detained in a vehicle following a report of an incident with a firearm. His police dog located a modified .22 rifle along with some gloves in a nearby ditch.
- [78] With respect, the judge approached these factors piecemeal and treated them as though Constable England had to prove their connection to the respondent, rather than whether it was reasonable for the Constable to have been sufficiently concerned to involve the PSD. For instance (paras 55-62), the judge dismissed factor (3) on the ground that it was "circumstantial" or "suspicion-only". He similarly dismissed factor (5). He dismissed factor (4) on the ground that he would characterize it as an incident involving "potential fleeing" (at para 60), noting that Crown disclosure in relation to a different offender involved in the incident had not mentioned the firearm threat. That information was not, in fact, in evidence, but had been stated in a question from defence counsel not adopted by the witness. The judge could not properly rely on it.
- [79] With respect, what the judge failed to do is consider the totality of these circumstances in assessing whether a reasonable person standing in Constable England's shoes would consider it reasonable to bring the dog to the arrest. That was an error in principle: see, for instance, Sheppard at paras 21-23.
- [80] The judge did not doubt Constable England's credibility: voir dire reasons at para 118. Accepting his evidence on its face, whether or not one might describe it as "circumstantial", it is difficult to imagine how he would not reasonably be concerned about the potential for risk in arresting the respondent. The result was an arrest where no one was injured. A proper analysis of the totality of the relevant circumstances suggests both reasonableness and proportionality.
- [81] For the reasons set out above, I conclude that the judge erred in law and in principle in his assessment of whether the respondent's s. 7 right to security of the person had been breached by the manner of his arrest.
- [82] I should not, of course, be taken as suggesting that the deployment of a police dog during an arrest can never give rise to a s. 7 breach. A PSD is one of many tools available to the police, and if the police use such a tool during an arrest in a manner that, properly analysed, constitutes an excessive use of force that substantially interferes with a party's physical or psychological integrity and is not in accordance with principles of fundamental justice, then a s. 7 breach may be established.

State misconduct

[83] The respondent argues that, even if the judge did not carry out a proper s. 7 analysis, the result can be upheld on the basis of state misconduct that impacts the offender, referring to the following passage from Nasogaluak:

3 As we shall see, the sentencing regime provides some scope for sentencing judges to consider not only the actions of the offender, but also those of state actors. Where the state misconduct in question relates to the circumstances of the offence or the offender, the sentencing judge may properly take the relevant facts into account in crafting a fit sentence, without having to resort to s. 24(1) of the Charter. Indeed, state misconduct which does not amount to a Charter breach but which impacts the offender may also be a relevant factor in crafting a fit sentence.

[Emphasis added.]

[84] I do not accept the respondent's argument. It ignores the context of paras 2 and 4. What the Court is saying is that, quite apart from s. 24(1), both state misconduct that constitutes a Charter breach and state misconduct that does not amount to a Charter breach may be taken into account as relevant factors in crafting a fit sentence where they relate to the circumstances of the offence or the offender. That was not the approach taken by the judge in this case, nor, in my view, was such an approach open to the judge. The respondent describes the "state misconduct" as the failure to have any sort of oversight or analysis involved in the decision to deploy the PSD. But that was neither demonstrated to be misconduct, nor was it related to the respondent's degree of responsibility or the gravity of his offence. The more relevant proposition, that it was unreasonable and unnecessary to employ the PSD at the time cannot, as discussed above, withstand proper analysis in the circumstances of this particular case.

Disposition

[85] For all of these reasons, I would allow the appeal by (1) setting aside the order reducing the respondent's 48-month sentence by 11 months to remedy the alleged s. 7 breach, and (2) setting aside the order that a portion of the sentence be served as a conditional sentence order. I would substitute an order that the judge's global 48-month sentence be apportioned as follows:

Counts 1 and 2: 42 months each, concurrent, less credit of 25 months, for a total of 17 months;

Count 5: 6 months consecutive to counts 1 and 2;

followed by two years' probation on the terms imposed by the judge.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Winteringham"

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