
CANADA / JUDGMENT

R. v. Johnstone

2020 BCSC 316

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 316 R. v. Johnstone

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Johnstone,

2020 BCSC 316

Date: 20200305

Docket: 65546-2

Registry: Chilliwack

Regina

v.

Dean Mark Johnstone

Before: The Honourable Mr. Justice Crabtree

Reasons for Ruling on Voir Dire No. 1

Counsel for the Crown:

S.J.K. Gill

Counsel for the Accused:

M.J. Swartz

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

June 11-13, 2019

October 24, 2019

Place and Date of Judgment:

Chilliwack, B.C.

March 5, 2020

INTRODUCTION

- [1] Mr. Johnson was charged with two counts of possession for the purpose of trafficking: one count in relation to crystal methamphetamine; and the other, in relation to heroin mixed with fentanyl.
- [2] At the commencement of the trial, a voir dire was declared to address issues raised pursuant to the Charter notice filed by Mr. Johnstone. Mr. Johnstone challenges the admissibility of the evidence (drugs) obtained in the vehicle parked on the roadside of Highway 1, near Hell's Gate, B.C. He alleges that his Charter rights were violated on the following basis:
- a) he was arbitrarily detained at the roadside;
 - b) he was subject to an unreasonable search following his arbitrary detention;
 - c) the arrest was unlawful;
 - d) the subsequent warrantless search of the vehicle was unreasonable; and,
 - e) he was not provided his s. 10 rights.
- [3] Mr. Johnstone seeks the exclusion of the evidence obtained pursuant to s. 24(2) of the Criminal Code.

CIRCUMSTANCES

- [4] Shortly before 12:18 p.m. on October 1, 2016, Constable Tumbas was operating a police vehicle westbound, when he observed a 2016 Chevy Malibu vehicle (the "Malibu") parked on the opposite side of Highway 1, in a pullout area, located between Boston Bar and Spuzzum, B.C. The constable activated his emergency lights, crossed the oncoming lane and pulled in behind the stationary vehicle. As matters unfolded, the constable discovered that Mr. Johnstone was bound by a recognizance requiring him to produce a copy when stopped by the police officer.
- [5] Highway 1 is a two-lane highway, the speed limit in the particular area is 90 km/h. The Malibu was parked in what was described as a pullout area which can accommodate two vehicles, parked side-by-side. The area where the vehicle was parked is remote; there were no homes in the vicinity and there is no cellular coverage. The constable's purpose in pulling in behind the Malibu was to determine whether any roadside assistance was required.

- [6] As the constable approached the scene, he observed the driver door open and a person, subsequently identified as Mr. Johnstone, was in the process of getting into the drivers seat of the Malibu.
- [7] The constable activated his emergency lights and crossed the highway to pull in behind the parked motor vehicle. While doing so, he observe Mr. Johnstone "popping out" of the vehicle and walking toward the constable's vehicle.
- [8] The constable relayed the Malibu's licence plate information to dispatch and learned that it was a rental vehicle. The constable walked towards the Malibu and entered into a brief conversation with Mr. Johnstone.
- [9] The constable learned Mr. Johnstone was travelling from Mission to Prince George, B.C. At the conclusion of the initial part of the conversation, the constable was satisfied that no assistance was required.
- [10] Based on the belief Mr. Johnstone was the driver, he requested Mr. Johnstone's driver's licence, insurance papers and the car rental papers (the documents).
- [11] In the course of locating the documents, Mr. Johnstone looked into the glove box. The constable commented that Mr. Johnstone "appeared to be making himself look larger to prevent me from looking inside", which the constable thought to be odd; although he did not explain what he meant by this, or how this was done.
- [12] Mr. Johnstone was described as compliant and cooperative. The documents were provided to the constable, who then walked back to his vehicle to conduct roadside inquiries relating to the documents. Mr. Johnstone's identity was subsequently confirmed. Through dispatch the constable learned that Mr. Johnstone was on a recognizance bound by conditions including: 1) that he was to produce the recognizance if stopped by a police officer; and 2) that he was not to consume or possess alcohol or drugs.
- [13] Based on the fact that Mr. Johnstone did not produce a copy of the recognizance to the officer, Mr. Johnstone was arrested for breach of recognizance at 12:33 p.m.
- [14] Constable Tumbas then searched Mr. Johnstone incidental to arrest, stating his reason for doing so was officer safety and to determine if he had a copy of the recognizance on his person. Nothing relevant to the purpose of the search was located on his person.
- [15] The constable proceeded to search the vehicle as incidental to arrest for the purpose of determining whether a copy of the recognizance or related documents could be found there.
- [16] The constable searched both the front and back passenger area and the trunk, looking for evidence. In the course of doing so, he located what he believed were two packages of illicit substances contained in a Tim Horton's cup. One package was subsequently analyzed as methamphetamine and the second, a mixture of fentanyl and heroin. Subsequently, a third package of methamphetamine was located in a jar in a Subway cup, in the centre console. Following this, he went back to the police vehicle and advised Mr. Johnstone that he was

under arrest for possession for the purpose of trafficking and advised of his rights pursuant to s. 10(b) of the Charter at 12:40 p.m. The constable returned to the vehicle, at which point he searched the trunk. Nothing of significance was located there. He returned to the police vehicle at 12:44 p.m. and informed Mr. Johnstone he was under arrest for breach of recognizance and possession for the purpose of trafficking. He informed Mr. Johnstone of his s.10 (b) rights reading from the police issued card.

DISCUSSION

Was the defendant arbitrarily detained at the roadside?

- [17] Upon observing a vehicle pulled over alongside Highway 1, the constable activated his emergency lights, crossed the highway and pulled in behind the vehicle. The purpose of the stop was to make inquiries to determine whether roadside assistance was required. The constable engaged Mr. Johnstone for that purpose, believing he was the driver. The constable was satisfied that no assistance was required. At that point, instead of leaving the scene, he demanded Mr. Johnstone produce the documents. He did not explain the purpose or the basis for the demand.
- [18] Mr. Johnstone submits that, at this point, he was arbitrarily detained in that he was not free to leave and the constable had no legal basis for continuing to detain him.
- [19] At trial, the constable agreed Mr. Johnstone was detained until the documents were produced and he was able to conduct a search of police and motor vehicle databases using the information obtained from the documents, particularly his driver's licence.
- [20] The officer also testified Mr. Johnstone was detained only in the event he was going to drive away in the vehicle. In the event Mr. Johnstone was going to walk away from the scene, he agreed the person was free to leave. This choice was never put to Mr. Johnstone by the officer.
- [21] I find that Mr. Johnstone was detained at that moment.
- [22] The Crown argues that a police officer has the authority to randomly stop a motorist to enforce traffic or vehicle safety laws. In the course of the stop, the officer has the authority to request the driver's documents.
- [23] The defendant does not contest the constable's ability to perform highway checks to determine if assistance is required of a motor vehicle parked on the side of the highway. However, once the process is complete, he argues that Mr. Johnstone should have been permitted to leave. He argues that what followed was not a random stop, as that term has been judicially interpreted. Consequently, it is submitted the officer had no authority to continue the stop and request the documents.
- [24] Did the officer have the basis to detain Mr. Johnstone and demand the documentation?

- [25] The police are entitled to enforce laws relating to the operation of a motor vehicle on public highways. The authority for the police to stop a vehicle was set out by Riley J. in *R. v. Woody*, 2018 BCSC 2275 at para. 34:
- [34] If the officer's basis for stopping the vehicle relates to enforcement of traffic or vehicle safety laws, then the resulting detention may be authorized or justified by the Motor Vehicle Act, R.S.B.C. 1996 c. 319. To be more precise, there are two different bases on which a vehicle stop related to enforcement of traffic or vehicle safety laws will be authorized under the Motor Vehicle Act. On the one hand, where the vehicle stop is based on an observed traffic infraction or violation of the Motor Vehicle Act or its regulations, then the resulting "detention" is authorized under the Act and therefore does not infringe s. 9 of the Charter: *R. v. Kaddoura*, 2009 BCCA 113 at para. 12-13. On the other hand, where the vehicle stop is a random stop to enforce traffic or vehicle safety laws, the detention of the driver is arbitrary under s. 9 of the Charter, but justified as a reasonable limit under s. 1 of the Charter so long as the actions of the police fit within the pressing and substantial objective of promoting traffic safety: *R. v. Nolet*, 2010 SCC 24 at para. 22.
- [26] An officer may require the driver of a motor vehicle to come to a stop. When directed to do so, the driver is obliged to immediately come to a safe stop. Section 73 of the Motor Vehicle Act, R.S.B.C. 1996 c. 319 [MVA] provides:
- 73 (1) A peace officer may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as a peace officer, must immediately come to a safe stop.
- (2) When requested by a peace officer, the driver of a motor vehicle or the person in charge of a motor vehicle on a highway must state correctly his or her name and address and the name and address of the owner of the motor vehicle.
- (3) A person who contravenes subsection (1) or (2) commits an offence and is liable to a fine of not less than \$100 and not more than \$2 000 or to imprisonment for not less than 7 days and not more than 6 months, or to both.
- [27] A police officer may pull over a motor vehicle without grounds, provided it is related to traffic safety and regulation: *R. v. Strilec*, 2010 BCCA 198. In *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 [Ladouceur], the Court held that random stops of vehicles are permissible for a broad range of purposes, including "to check for sobriety, for licences, insurance and the mechanical fitness of cars" (at para. 30). The Court held that no "cause" or articulable grounds is required to exercise the authority to stop a vehicle under the relevant motor vehicle legislative provisions. In such circumstances, while the stop is arbitrary contrary to s. 9 of the Charter, it is a justified limit under s. 1 of the Charter.
- [28] In the case at bar when the officer came upon the scene, he observed Mr. Johnstone getting into the vehicle and then, in his words, "popping out". While I accept he was coming from the driver seat area, there is no evidence that he was observed sitting in the driver's seat. No

observations were made of the defendant driving and no evidence was provided as to how long the vehicle had been parked at this location. In addition, there was no evidence as to where the keys were located. There was no evidence that the vehicle's engine was running or that the vehicle lights were on.

- [29] During the course of the interaction with Mr. Johnstone, the officer assumed he was the driver. As was noted above, s. 73(1) provides a peace officer with the authority to stop a vehicle and to make inquiries of the driver.
- [30] The terms "driving" or "driver" are not defined in the interpretation section of the MVA. Section 215 of the MVA defines driver to include a person who is in care and control of a motor vehicle. However, this provision is limited in its applicability to Part 4 of the MVA.
- [31] In *R. v. Steeden*, [1995] B.C.J. No. 1413 (C.A.) [Steeden], the Court considered the meaning of driving in relation to s. 149 of the MVA, the provision prohibiting careless driving. The Court held that the meaning of "driving" in relation to a motor vehicle, combines the elements of movement and the exertion of control. As an example of movement and the exertion of control, the Court in Steeden cited earlier jurisprudence to explain that somebody sitting in the driver's seat of a vehicle being towed would not be driving because that person had nothing to do with the propulsion. At para. 13, Wood J.A. stated:
- [13] It is my view, that when it is intended to describe conduct in relation to a motor vehicle, the ordinary meaning which attaches to the verb "drive" in the English language is one that combines the elements of movement and control; movement of the vehicle and control of that movement by the person said to be driving.
- [32] As there was no observable movement of the vehicle. Mr Johnstone does not meet the definition of a driver in this circumstance and s. 73 (1) does not become engaged.
- [33] While s. 73(1) of the MVA provides justification for stopping a vehicle for the limited specified purposes related to traffic safety and regulation, do the provisions of s. 73(2) and s. 33 of the MVA authorize the detention of Mr. Johnstone?
- [34] Section s. 73(2) requires a person who is in charge of a motor vehicle to provide their name and address when requested to do so by a police officer. I do not read s. 73(2) as providing a separate basis for the police to detain the "person in charge" if they are not engaged in the operation of the motor vehicle. If it did, the provision would enable a police officer to detain any person in charge of a motor vehicle parked on a highway or in a public place. In my view, the justifiable infringement of the s. 9 Charter right articulated in *Ladouceur*, *Nolet*, and *Strilec* does not extend the infringement of a person's s. 9 rights to this extent.
- [35] Section 33(1) of the MVA sets out the requirement that a driver or operator of a motor vehicle must have in their possession a driver's licence, registration and insurance documents, and produce them on demand of a peace officer.
- [36] Section 33(1) of the MVA states:

33 (1) Every person, except

(a) a person driving or operating a motor vehicle exempted under section 2(5) or section 8 or 10,
or

(b) a person driving or operating a motor vehicle of a fire department of a municipality,

must have his or her driver's licence and driver's certificate and a motor vehicle liability insurance card or financial responsibility card, issued for the motor vehicle he or she is driving or operating, in his or her possession at all times while driving or operating that motor vehicle on a highway, and must produce the licence, certificate and card for inspection on demand of a peace officer.

[37] Can s. 33(1) of the MVA be read to require a person found "operating a motor vehicle" to produce the specified documents as part of a random stop?

[38] In Steeden, Wood J.A. went on to discuss the term "operate" (in para. 15) stating:

[15] ... While it is not always easy to visualize a circumstance in which the alternative "operate" would describe an activity distinct from driving, as for example with respect to the speed limit provisions found in s. 151, one must nevertheless accept that the Legislature's choice of language was deliberate and that the use of different words was intended to convey different meanings.

[39] In Steeden, the term "operating" was not specifically defined but was held to include a broader form of activity than driving. As noted previously, the vehicle was parked when the officer came on the scene and it was not known how the long vehicle had been parked in the highway pullout area. The vehicle engine was not running and there was no indication the vehicle lights were on. There was no evidence where the keys were located. In short, the Malibu was parked on the side of the road.

[40] In my view, for the reasons that follow, a justifiable detention pursuant to a random stop does not include a stationary vehicle parked at the side of the highway.

[41] The random stop of a motorist is a violation of s. 9 of the Charter. The decisions of Ladouceur, Nolet, and Strilec stand for the proposition that while the stop was an arbitrary detention contrary to s. 9, the infringement was saved by s. 1 of the Charter, on the basis of a pressing and substantial concern related to the operation of motor vehicle on highways. In finding such a pressing and substantial concern, the Court stated at paras. 42, 47, 49-50:

[42] There cannot be any serious doubt that the legislation in question deals with a pressing and substantial concern. The statistics paint a depressing picture of the killing and maiming that results from the operation of motor vehicles on the streets and highways of the nation. The evidence filed vividly demonstrates the validity of the pressing and substantial nature of the concern.

...

[47] ... The majority reasons of United States Supreme Court in *Delaware v. Prouse*, 440 U.S. 648 (1979), finding random stops unconstitutional, were specifically rejected in *Hufsky* [*Hufsky v. The Queen*, [1988] 1 S.C.R. 621]. However, the position on this issue was well put by Rehnquist J. (as he then was) in his dissenting reasons, at p. 666:

The State's primary interest ... is in traffic safety, not in apprehending unlicensed motorists for the sake of apprehending unlicensed motorists. The whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed. The [majority of the United States Supreme] Court would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away.

...

[49] In *Hufsky*, ... at p. 636 Le Dain J. wrote these compelling words upon a consideration of this same evidence that was put forward to justify random spot checks:

[It] reinforces the impression of the gravity of the problem of motor vehicle accidents in terms of the resulting deaths, personal injury and property damage, and the overriding importance of the effective enforcement of the motor vehicle laws and regulations in the interest of highway safety. The charts or tables prepared by the respondent from the statistical data in the government reports stress the following points: the relative importance of licence suspension and the effective enforcement of it; the relatively higher proportion of unlicensed and uninsured drivers, by comparison with the proportion of licensed and insured drivers, involved in motor vehicle accidents resulting in death or personal injury; and the relative importance of the motor vehicle offences, including driving without a licence or while under licence suspension or without insurance ...

[50] In my view these remarks are equally applicable to the random routine checks under consideration in this case. I am satisfied that the legislation at issue (s. 189a(1) of the Highway Traffic Act) and the random stops carried out pursuant to its provisions are designed to deal with and meet a very real "pressing and substantial concern". It now must be seen whether the means chosen is proportional or appropriate to those pressing concerns. The legislative provision that provided a police officer the right to stop motor vehicles and briefly detain a driver without a reason or grounds if related to traffic safety and regulation, was justified on the basis that it focused on the reduction of the carnage occurring on the highways. In my view it did not justify the detention of an individual who while connected to the vehicle not driving the vehicle at the relevant time.

[42] The pressing and substantial concern was directed towards drivers of vehicles on the nation's highways. I do not read the authorities to justify the detention of individuals in relation to parked vehicles on the highways. In the circumstances of this case, as there is no evidence that Mr. Johnstone was driving the vehicle, I find when he was detained by the constable to obtain the documents, the detention was arbitrary and contrary to s. 9 of the Charter.

- [43] At the point Mr. Johnstone was detained at the roadside, s. 10(a) of the Charter was invoked and the defendant should have been advised of his s. 10 Charter right but was not. I find his s.10 Charter right was infringed at that point. This issue will be addressed more fully later in these reasons.
- [44] The defendant also submits that the documents obtained from him were the product of a warrantless search and should be excluded.

SEARCH

- [45] A warrantless search and seizure is, generally speaking, presumptively unreasonable. Did it violate the defendant's s. 8 rights? In order to prove the search was reasonable, the Crown must establish the following: that the search was authorized by law, that the law itself was reasonable, and the search was carried out in a reasonable fashion. See *R. v. Collins*, [1987] 1 S.C.R.265.
- [46] It is argued that the search was authorized by law. In *R. v. Hufsky*, [1988] 1 S.C.R. 621, Mr. Hufsky, the driver, was stopped in a random spot check by the police, during which he produced his driver's licence and insurance card. It was argued that requiring the production of the documents constituted a search within the meaning of s. 8 and that it was an unreasonable search because there were no criteria or guidelines for determining when a driver should be required to produce such documents for inspection. It was held that the demand by the police officer, made pursuant to the legislative provisions did not constitute a search, as it did not constitute an intrusion on a reasonable expectation of privacy. At para. 23, Le Dain J. commented that:
- [23] ... There is no such intrusion where a person is required to produce a licence or permit or other documentary evidence of a status or compliance with some legal requirement that is a lawful condition of the exercise of a right or privilege.
- [47] In *Hufsky*, the defendant was the driver of the vehicle. The operative feature which justifies the interference of the right not to be arbitrarily detained and the further intrusion to request the production of the documents is the fact that he was the driver.
- [48] In the case at bar, Mr. Johnstone is not the driver; and therefore, the request for the documentation is not justified. To hold otherwise would lead to the result that a police officer could detain and demand motor vehicle documents of any individual who exhibited some connection with, or control over, a vehicle without any grounds to do so. As noted earlier, the random stop regime does not extend that far.
- [49] I find the request for the documents of Mr. Johnstone to be an unreasonable search, in breach of his s. 8 rights.

- [50] Based on the information obtained from the documents, it was discovered Mr. Johnstone was bound by a recognizance. Based on his failure to produce a copy when stopped by the police officer, the officer arrested him. The defendant submits that without the information obtained, the officer lacked the necessary legal basis to arrest him.
- [51] While the constable did not articulate the basis for the arrest, presumably it was on the basis that he found Mr. Johnstone committing the offence of breach of recognizance [s. 495(1)(a)]. In the circumstance, the Crown is required to establish that the facts as they appeared to the officer, viewed objectively, support the reasonable belief that the person was in breach of the order. Mr. Johnstone was arrested based on information received from a search of his driver's licence.
- [52] The defendant submits that the state should not be permitted to rely on information obtained in violation of his s. 8 right flowing from the arbitrary detention.
- [53] In support of this proposition, the defendant relies on *R. v. Pelucco*, 2013 BCSC 588. In *Pelucco*, the court addressed whether evidence obtained in violation of the defendant's s. 8 rights should be excluded when determining whether the arrest of the defendant was lawful. The court held that evidence obtained in violation of the accused's Charter rights cannot be considered in determining whether the police had reasonable and probable grounds to arrest the accused.
- [54] The Crown relies on *R. v. Flintroy*, 2019 BCSC 35 [Flintroy] in support of the proposition that information obtained by unauthorized means can be relied upon to form the basis for the officer's grounds for arrest. In *Flintroy*, Williams J., following a detailed consideration of *Pelucco* and other related authorities, concluded that evidence obtained in violation of a defendant's s. 8 right is admissible to provide the evidentiary basis for formulating the grounds for an arrest.
- [55] One caveat to the foregoing proposition is outlined at paras. 47 to 49 of *Flintroy*, where Williams J. states:
- [47] A potentially relevant and important consideration that may be made within the *Storrey* analysis framework that helps achieve proper balance on an ongoing basis is this: Should an arresting officer believe, or should have reasonably believed, that the grounds for arrest they seek to rely on are unconstitutionally obtained, these grounds for arrest will not meet the reasonable and probable grounds standard. As the Crown submits, a reasonable person would not rely on conduct known to be the result of abusive or unlawful conduct. *Ipsa facto*, it would be unreasonable for an arresting officer to rely on known abusive or unlawful conduct to form the grounds for a warrantless arrest. As the *Storrey* analysis requires objective justification for the reasonable and probable grounds relied on for the arrest, reliance on grounds known to be based in unlawfulness or a Charter breach makes these grounds to arrest objectively unreasonable, invalid and unlawful. Should insufficient grounds for arrest remain after these grounds are removed from the overall analysis, then the arrest is invalid and hence unlawful.

- [48] Such an approach recognizes the precedent that reasonable and probable grounds for arrest is based on the arresting officer's beliefs, not any Charter breach per se, while preserving the overall legal principle that the police cannot benefit from their own misconduct.
- [49] A robust conception of what information the arresting officer ought reasonably to have alerted himself to in forming a reasonable belief, and holding an arresting officer's reasonable beliefs to a level of sophistication in line with their overall knowledge, training and experience, provides the requisite balance of Charter rights protections and a well-functioning warrantless arrest framework.
- [56] The question raised by Williams J. is whether the arresting officer in this circumstance should have alerted himself, or herself, to the manner in which the information was subsequently found to be unlawfully obtained? Cst. Tumbas assumed the individual at the roadside was driving the vehicle. There was no evidence as to how long the motor vehicle had been parked there. He did not turn his mind to whether the random stop, as authorized by the jurisprudence and the provisions of the MVA, enabled the officer to detain and demand the documents where there was no evidence of driving.
- [57] In the circumstances, the officer should have alerted himself to the basis for making such a demand. In failing to do so, when viewed objectively, a reasonable person would not have proceeded without making further inquiry.
- [58] Accordingly, the information obtained from dispatch should not be relied upon in assessing whether the police officer had the necessary basis or grounds to arrest Mr. Johnstone. Without that information, the officer lacked the grounds to arrest Mr. Johnson and I find the arrest to be unlawful.

SEARCH INCIDENTAL TO ARREST

- [59] In the event I am in error and the arrest is found to be lawful, the defendant submits that the search incidental to arrest cannot be justified.
- [60] As noted earlier in my reasons, a warrantless search and seizure is, generally speaking, presumptively unreasonable. However, the power of the police officer to conduct a search incidental to an arrest has been recognized as an exception to the general rule, provided that it is undertaken for a valid purpose and the search is reasonably based: *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Caslake*, [1998] 1 S.C.R. 51 [Caslake]; *R. v. Golden*, [2001] 3 S.C.R. 679. The primary purposes are:
- ensuring the safety of the police and the public;
 - preventing the destruction of evidence; and,
 - discovering evidence of the offence or offences for which the accused was arrested: *Caslake*.

- [61] A search incidental to arrest is not unlimited and the actual scope of the search is dependent on the circumstances. The right to search a vehicle and the scope of the search will depend on a number of factors, including: the basis for the arrest, the location of the motor vehicle in relation to the place of arrest, and other relevant factors, including that the purpose of the search must be connected to the arrest.
- [62] Caslake is the leading case relating to the powers to search the vehicle at a roadside incidental to arrest. The principles established in the Caslake have been conveniently summarized in *R. v. Majedi*, 2009 BCCA 276, at para. 19:
1. Officers undertaking a search incidental to arrest do not require reasonable and probable grounds; a lawful arrest provides that foundation and the right to search derives from it (paras. 13 and 17);
 2. The right to search does not arise out of a reduced expectation of privacy of the arrested person, but flows out of the need for the authorities to gain control of the situation and the need to obtain information (para. 17);
 3. A legally unauthorized search to make an inventory is not a valid search incidental to arrest (para. 30);
 4. The three main purposes of a search incidental to arrest are: one, to ensure the safety of the police and the public; two, to protect evidence; three, to discover evidence (para. 19);
 5. The categories of legitimate purposes are not closed: while the police have considerable leeway, a valid purpose is required that must be "truly incidental" to the arrest (paras. 10, 20 and 25);
 6. If the justification for the search is to find evidence, there must be a reasonable prospect the evidence will relate to the offence for which the person has been arrested (para. 22);
 7. The police undertaking a search incidental to arrest subjectively must have a valid purpose in mind, the reasonableness of which must be considered objectively.
- [63] In the event the purpose is to search for evidence, there must be a reasonable prospect of obtaining evidence of the offence for which the defendant has been arrested. The reasonable prospect standard provides that the officer must be able to explain why the search was conducted, the police officer must believe that the purpose will be served, and the purpose must be a reasonable one.
- [64] Was the search of the motor vehicle incidental to the lawful arrest of Mr. Johnstone?
- [65] Upon his arrest, Mr. Johnstone was secured and searched for officer safety and to determine whether he had a copy of the recognizance. Once the search was completed, he was placed in the back of the police vehicle.

- [66] The officer proceeded to search the vehicle incidental to the arrest. His stated purpose was to locate evidence relating to the breach of recognizance.
- [67] The officer stated it was important to complete the entire investigation, to confirm that there were no documents pertaining to the offence in the vehicle. He also believed he needed to do his due diligence and search the vehicle for completeness of the investigation. He acknowledged in cross-examination that nothing further was required to complete the investigation, but believed he needed to show the thoroughness of the investigation and to "eliminate that another document existed that showed the recognizance was dated". The constable indicated he previously experienced a situation where a person was arrested based on dated information received from the database.
- [68] The constable was extensively cross-examined on this point. He did not offer this rationale at the preliminary inquiry and no note was made at the time of the investigation.
- [69] In conducting the search, not all areas of the motor vehicle were examined. The constable agreed he did not search those areas of the vehicle where paper work could be stored, such as the pockets or pouches on the interior doors or behind the front seats. He did not search the jacket located in the vehicle, or the glove compartment.
- [70] In these circumstances, I find the scope of the search was to locate a copy of the recognizance. A search incidental to arrest is based on there being an identifiable purpose, or reasons to undertake the search. To undertake a search based on due diligence, or completeness, runs the risk of impacting the privacy rights of an individual where there is no legal basis to do so.
- [71] A warrantless search is *prima facie* unreasonable. In the absence of a warrant, the Crown is required to establish that it was for a valid purpose and objectively reasonable in the circumstances. I am not satisfied that the search undertaken by Cst. Tumbas incidental to arrest was objectively reasonable; and I find the search of the vehicle unreasonable and a breach of Mr. Johnstone's s. 8 right.

SECTION 10 CHARTER RIGHT

- [72] The defendant argues that his s. 10(b) rights have been infringed in the course of the arrest and transport back to the Hope Detachment.
- [73] Section 10(b) of the Charter provides that:
10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right
- [74] In *R. v. Taylor*, 2014 SCC 50 [Taylor] at para. 23, the Court set out the three duties the police have upon the arrest or detention of an individual:

- (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
- (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[75] In *R. v. Suberu*, 2009 SCC 33 [Suberu], the Court highlighted the necessity for timely compliance with these obligations. At para. 42, McLachlin C.J. and Charron J., for the majority said this:

[42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention. [Emphasis added.]

[76] The first duty is informational, while the second and third are implementational duties. With regard to the second duty, in *Suberu*, the Court stated that facilitating access to counsel is to be done immediately, subject to concerns for officer or public safety. Delaying access to counsel may also be justified if the police have an identifiable reason to believe that evidence may disappear or be destroyed if access to counsel is facilitated: *R. v. Patterson*, 2006 BCCA 24 at paras. 40-41.

[77] Where there has been delay, the burden is upon the Crown to show that the delay was reasonable in the circumstances. Whether a delay in facilitating access to counsel is reasonable is a factual inquiry: *Taylor* at para. 24. The practicalities of the situation must be taken into account in analyzing the reasonableness of the delay: *R. v. Patrick*, 2017 BCCA 57 at para. 113.

Were the accused's s. 10 Charter rights violated?

- [78] There are four specific incidents requiring examination. The first is based on the finding that Mr. Johnstone was arbitrarily detained at the roadside at the point the constable demanded the documents. As a consequence of being detained, Mr. Johnstone was entitled, pursuant to s. 10(a), to be informed of the reasons for his detention. He was not provided the Charter warning at this stage of the investigation and I find his s. 10 Charter right was breached.
- [79] I will address the second and third incidents together. The constable placed Mr. Johnstone under arrest at 12:33 p.m., for breach of recognizance. The constable informed him of his right to counsel and the police warning from memory. He has no note of the responses. I find Mr. Johnstone requested to speak to his lawyer, but Mr. Johnstone was not informed how or when this would be accommodated. After placing Mr. Johnstone under arrest and providing his rights to counsel from memory, the constable searched the Malibu. During the search of the interior of the car, the packages of drugs were discovered. The constable returned to the police vehicle at 12:40 p.m. At this point, he advised Mr. Johnstone he was under arrest for the possession for the purpose of trafficking.
- [80] The constable again informed Mr. Johnstone of his rights to counsel by memory. Again, Mr. Johnstone indicated a desire to contact his lawyer. The constable then returned to the vehicle to complete the search of the trunk.
- [81] The concern raised in regard to the second and third incidents is that no steps were taken to implement Mr. Johnstone's right to counsel after he indicated he wanted to contact counsel. Both Mr. Johnstone and the constable had cell phones, although the officer testified they were located in an area where, in his experience, cellular coverage was not available.
- [82] In the case at bar, the constable promptly informed Mr. Johnstone of his rights to counsel when arrested for breach of recognizance and did so again, following the discovery of the drugs. In the circumstances, I find no fault in the officer not taking the additional steps to facilitate access at either moment in time. He was engaged in an investigation on his own without support, in a remote area in which, based on his experience, there was no cellular coverage. He interrupted the search of the motor vehicle to provide Mr. Johnstone his s.10 Charter rights as soon as possible. He then returned to complete the search.
- [83] The constable returned to the vehicle four minutes later (the fourth incident), at which point he informed the accused that he was being arrested for breach of a recognizance and for possession for the purpose. He informed him of his rights to counsel, reading from a standard issued card.
- [84] Mr. Johnstone advised he wished to speak to a lawyer. At that point, the officer confirmed there was no cell coverage. The officer and the accused remained at the scene, awaiting the arrival of the tow truck to transport the vehicle to safe storage, during which time Mr. Johnstone was held in the rear passenger area of the police vehicle.

- [85] Once the tow truck had removed the Malibu, the officer and the accused proceeded to the Hope detachment of the RCMP. The officer indicated that while the Boston Bar detachment was closer, the building had been decommissioned. As a result, it was necessary to transport the accused to the Hope detachment which had a functional secure lockup. En route to the detachment, the officer became aware there was cell coverage in the Fraser Canyon community of Spuzzum. At this point, the officer stopped the vehicle and an attempt was made to contact counsel but the call went to voice mail. No message could be left, as the voice message system was full.
- [86] Mr. Johnstone indicated that he would contact another lawyer once back at the detachment. As a result, they continued to the Hope detachment where arrangements were made for Mr. Johnstone to speak to counsel.
- [87] There was a delay in the implementation of the accused's rights following his arrest for PPT. The burden falls to the Crown to establish that the delay was reasonable in the circumstances. In the circumstances, I am not persuaded that waiting for the tow truck before leaving the scene gives rise to a breach of the implementation component of his s. 10 rights. No further evidence was collected after 12:44 p.m. Upon leaving the scene, en route to the detachment, the officer attempted to connect Mr. Johnstone by phone with counsel but was unsuccessful. At that point, rather than wait to further attempt to reach counsel, it was determined to proceed directly to the Hope detachment. Mr. Johnstone did not object to this when asked by the police officer.
- [88] I am satisfied that the Crown has established that the delay following the fourth incident was reasonable in the circumstances.

SUMMARY

[89] To summarize, Mr. Johnstone's Charter rights were violated as follows:

1. Mr. Johnstone was arbitrarily detained.
2. The officer's having obtained the documents was a warrantless search, unlawful and a breach of Mr. Johnstone's s. 8 right.
3. Mr. Johnstone was unlawfully arrested based on information received from dispatch, following which the officer undertook a warrantless search of the vehicle, which the Crown failed to establish was reasonable in circumstances. I find this to be a breach of Mr. Johnstone's s. 8 rights.
4. Mr. Johnstone was not immediately advised of his s. 10 Charter right to be informed of the reason for his detention.

[90] This concludes my ruling on voir dire no. 1.

"T.J. Crabtree J."

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