
CANADA / JUDGMENT

R. v. Jones

2011 BCSC 1859

COURT

Supreme Court of British Columbia

DECIDED

22 November 2011

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2011 BCSC 1859 R. v. Jones

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Jones,

2011 BCSC 1859

Date: 20111122

Docket: X074228-2

Registry: New Westminster

Regina

v.

Cecil Henry Jones

Before: The Honourable Mr. Justice Bernard

Oral Ruling on Voir Dire

Counsel for the Crown:

C.A. McPherson

Counsel for the Accused:

H.M. Patey

Place and Date of Hearing:

New Westminster, B.C.

September 6-9, 2011

Place and Date of Judgment:

New Westminster, B.C.

November 22, 2011

[1] THE COURT:

A. THE APPLICATION

- [2] Cecil Henry Jones faces trial on an 11-count Indictment arising from evidence gathered in two police searches of his motor vehicle on March 29, 2010. In these searches firearms, firearms paraphernalia, and marihuana were discovered and seized.
- [3] At the trial's onset Mr. Jones applied to exclude, as evidence, all the items seized from his motor vehicle, on the basis of various breaches under the Canadian Charter of Rights and Freedoms (the Charter). Mr. Jones submits, inter alia, that the seizures arose from an arbitrary detention, the unlawful arrest of his passenger, Geoffrey Skea, the unlawful search of his car immediately following Mr. Skea's arrest, his own unlawful arrest based upon the results of said vehicle search, and the unlawful seizure and search of his car following his wrongful arrest.

B. EVIDENTIARY SYNOPSIS

- [4] At approximately 9:40 p.m. on March 29, 2010 the police pulled over Cecil Jones as he drove his car eastbound in the 22000-block Selkirk Avenue, Maple Ridge, British Columbia. Geoffrey Skea was the only other occupant of the car and he was seated in the front passenger seat.
- [5] Moments before the stop, the police had observed Mr. Jones' car parked in the back alley of the same block, near to the back gate of 22030 Selkirk Avenue, a residence the police believed was a drug house. When Constable Sprott drove his unmarked police car westbound in the alley and pulled up behind Mr. Jones' car, the headlights and taillights of Mr. Jones' car illuminated and Mr. Jones drove away at a normal speed. At 9:40 p.m. it was the dark of night and Constable Sprott agreed that Mr. Jones would have been only able to discern two headlights behind him. Constable Sprott followed Mr. Jones and when he turned onto Selkirk Avenue, Constable Sprott activated his emergency lights to stop Mr. Jones. Mr. Jones immediately complied.
- [6] Constable Sprott said he stopped the car because he "suspected drug activity". He said he had seen Mr. Jones' car at the front of 22030 Selkirk two days earlier and he knew that Mr. Jones had a criminal record for firearms offences. Constable Sprott said he and his partner, Constable Spencer, approached Mr. Jones' car to see if they could gather evidence to confirm their suspicions, such as the odour of drugs. Constable Spencer said that the car was stopped because he and Constable Sprott believed that a drug transaction had just occurred. When Constable Sprott approached the car, no evidence of the suspected drug activity was

gathered.

- [7] Constable Sprott recognized the driver as Cecil Jones and the lone passenger as Geoffrey Skea. He said that he knew Mr. Skea as someone who was very involved in the Maple Ridge drug culture and facing charges of shooting Contessa Reggio, a woman Constable Sprott believed was presently living with another woman named Brenda Tyhurst at 22030 Selkirk.
- [8] He returned to his police vehicle and learned, via CPIC, that Mr. Skea was bound by a court order prohibiting contact with both women. He also learned in a radio communication with Constable Vuong that Mr. Skea "possibly had a handgun in a 'man-purse'."
- [9] Constable Sprott decided to arrest Mr. Skea for breaching the "no contact" order and he requested police backup because of the firearms information. Prior to this arrest there was no attempt to contact Ms. Tyhurst or Ms. Reggio to ascertain: (a) if Mr. Skea had contacted either of the women that evening; (b) if they presently resided at 22030 Selkirk; and (c) if they were presently in the house, which was only steps away from the arrest scene.
- [10] After Constable Sprott arrested Mr. Skea, Constable Spencer began searching Mr. Jones' car via the front passenger door. He said the search was incidental to arrest, and for the purposes of ensuring officer and public safety, given the information from Constable Vuong and the history between Mr. Skea and Ms. Reggio. He began his search with the glove box, the front console compartment, and the area under the passenger seat. He found a magazine in a holster and a handgun under the seat. Upon finding these items he decided to search the entire interior of the car because in his experience "people who carry one gun often have more". In the centre console of the rear seat he found a handgun with a silencer.
- [11] Constable Daly was the back-up for the arrest of Mr. Skea. He asked Mr. Jones to step out of his car. Constable Daly said that Mr. Jones was neither under detention or arrest; however, he "patted down" Mr. Jones for reasons of officer safety and informed Mr. Jones that his car would be searched. Constable Daly agreed that Mr. Jones did nothing to indicate that he was a risk to officer safety, but it was his experience that "people around drug houses may have weapons".
- [12] Upon the firearms being found in the car, Mr. Jones was arrested for breaching a court order which prohibited him from possessing firearms.
- [13] Following their arrests, Mr. Jones and Mr. Skea were taken to the police detachment in police vehicles, and Mr. Jones' car was towed in. At the arrest scene, the police were unable to extricate the gun found under the front passenger seat. At the detachment the trunk of Mr. Jones' vehicle was searched and two duct-taped balls of marihuana, totalling 98 grams, were found.
- [14] The foregoing evidence is not contentious, and I accept it as forming the factual basis for the applications herein.

C. DISCUSSION

i. Overview

- [15] The evidence Mr. Jones seeks to exclude was gathered in two searches: (a) the search of the interior of his car at the arrest scene; and (b) the search of the trunk of his car at the police detachment. Both searches were non-consensual and warrantless. The police justification for the search of the car's interior was that it was an incident of the arrest of Mr. Jones' passenger. The police justification for the search of Mr. Jones' trunk is less clear.
- [16] The essence of the defence application is that police conduct on the night in question constituted a pattern of disregard for Mr. Jones' Charter-protected rights which should, when viewed as a whole, result in the exclusion of the evidence pursuant to s. 24(2) of the Charter. The defence says the pattern began with the arbitrary detention of Mr. Jones and Mr. Skea, followed by Mr. Skea's unlawful arrest, the unlawful search of the interior of Mr. Jones' car at the scene, the unlawful arrest of Mr. Jones arising from the fruits of the unlawful search, and the unlawful seizure and subsequent search of Mr. Jones' car at the police detachment.

ii. Was Mr. Jones arbitrarily detained?

- [17] Mr. Jones' vehicle was stopped by the police shortly after it drove off from a stationary position near to the rear gate of 22030 Selkirk, a known drug house. The car was observed for only a matter of seconds before it departed. No one was observed entering or exiting the car in this short period. When the unmarked police vehicle approached the car from the rear, the car's headlights came on and it drove away in a normal manner. There is no suggestion that the driver would have been aware that the police were behind him as he drove away. It was dark and the only identifying characteristics of the police car were two burning headlights.
- [18] At the time the police made their observations of Mr. Jones' car, the police had not received a recent report or complaint of criminal activity in relation to the address in question.
- [19] Constable Sprott was the driver of the unmarked police car. He said he stopped the car because he suspected the occupants were involved in a drug deal. He said his suspicion was based upon: (a) his observation of the car parked with its headlights off at the rear gate of 22030 Selkirk; (b) his knowledge that 22030 Selkirk Avenue was a drug house; (c) his knowledge that the rear gate was used by purchasers of drugs; (d) his observations of the same car two days earlier at the front of 22030 Selkirk; (e) his knowledge that Cecil Jones was the registered owner and had a criminal record for firearms offences; and (f) his experience as a police officer.
- [20] Constable Sprott said he stopped Mr. Jones' car to see if his suspicion might be confirmed by approaching the car and speaking to the occupants. He said he did not believe he had grounds to detain or arrest the occupants at the time he stopped the vehicle. When Constable Sprott approached the car and spoke to Mr. Jones he did not gather any evidence confirming his suspicion; however, he learned that Mr. Skea was the passenger and when he

discovered that he was bound by a no-contact order, Mr. Skea was arrested for breaching the order. Mr. Jones' car was searched as an incident of that arrest.

- [21] The Crown concedes that Mr. Jones was detained by Constable Sprott and, thus, the police were obliged to inform him of his s. 10(b) Charter rights, and failed to do so. The Crown does not, however, concede that the detention was arbitrary. In regard to detention, it is settled law that if a person is legally required to comply with a police demand or direction which interferes with his or her liberty, or if that person might reasonably conclude, in the circumstances, that he or she was obliged to comply, then detention for the purposes of s. 10(b) of the Charter has been established (see *R. v. Suberu*, 2009 SCC 33 at para. 4). In the case at bar it is not in issue that Mr. Jones was not given his s. 10(b) Charter right until he was arrested following the search of the interior of his car pursuant to the arrest of Mr. Skea. The Crown's position in relation to the s. 10(b) breach is that it is of no consequence because there is no nexus between the search of Mr. Jones' car and the breach, i.e., the search was a lawful incident of Mr. Skea's arrest.
- [22] In relation to whether the detention of Mr. Jones was arbitrary, the essence of the defence position is that there was neither a subjective belief, nor an objectively reasonable basis to believe, that the occupants of the car had committed, or were committing, a drug-related crime. The defence says the true motive of the police in stopping Mr. Jones was to find some justification to search his car; however, even if the police were not so motivated the defence submits that their suspicions fell well short of "a constellation of objectively discernible facts" implicating Mr. Jones to a recent illicit drug deal (see *R. v. Simpson* (1993), 12 O.R. (3d) 202 and *R. v. Mann*, 2004 SCC 52 at para. 27).
- [23] In *Mann*, *supra*, Iacobucci J. delivering the majority judgment said:
- [20] A detention for investigative purposes is, like any other detention, subject to Charter scrutiny. Section 9 of the Charter, for example, provides that everyone has the right "not to be arbitrarily detained". It is well recognized that a lawful detention is not "arbitrary" within the meaning of that provision. Consequently, an investigative detention that is carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the Charter.
- ...
- [34] The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must

further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.

- [35] Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.
- [24] The foregoing passages recognize a limited common law power afforded to the police to detain a person in the exercise of their common law duty to investigate crime. Iacobucci J. refers to the need for a clear nexus between the person to be detained and a recent or ongoing criminal offence. This necessarily implies that the detention is related to the investigation of a crime the police have reason to believe has been, or is being, committed.
- [25] In the case at bar, the primary defence position is not that there was an insufficient nexus between the crime and Mr. Jones, but rather that on any objective assessment of the information known to the police at the time they detained Mr. Jones, there was no reasonable basis to believe that a crime had been, or was being, committed. No crime had been reported, and no crime had been, or was being, witnessed by the police on the night in question; accordingly, there was no common law power afforded to the police to detain anyone, including Mr. Jones, for investigative purposes.
- [26] The Crown submits that a detention is not arbitrary if the police reasonably suspected that the occupants of the car were engaged in criminal activity. The police evidence is that the criminal activity they suspected was that the occupant(s) of the car had just engaged in an illicit drug deal of some sort.
- [27] On the night in question, Constable Sprott and Constable Spencer were with the Street Enforcement Unit of the Greater Vancouver Drug Section. They were on patrol in an unmarked police vehicle. A significant aspect of their duty was to be watchful of suspicious behaviour that may be criminal. When they observed Mr. Jones' car, I am satisfied that they had reason to be suspicious of it. The car was parked in darkness near to the rear gate of 22030 Selkirk with two persons in it. As the police vehicle approached from the rear, the car's lights came on and it drove off. The police had reliable information that 22030 Selkirk was a house where illegal drugs were sold, and that the back alley gate was one access point used by purchasers of drugs.

- [28] In addition to the foregoing, however, it must be borne in mind: (a) that when the police observed Mr. Jones' car they were not investigating the report of a crime related to 22030 Selkirk; (b) that they observed Mr. Jones' car only very briefly before it departed; (c) that they did not see anyone outside the car or any activity, suspicious or otherwise, inside the car; and (d) that they were not identifiable as police officers when they approached from behind.
- [29] On the question of whether the totality of the circumstances gave rise to a reasonable suspicion that the vehicle's occupants had just engaged in some sort of illegal drug transaction, it is noteworthy that Constable Sprott testified that he did not believe his suspicions were sufficient to either arrest or detain Mr. Jones; nonetheless he did the latter. I agree with Constable Sprott. The circumstances were suspicious, but they were merely suspicious. Without something more, it was neither reasonable to suspect that an illegal drug transaction had just occurred nor that the occupants were parties to it. Knowing that Mr. Jones was the registered owner of the car, that his car had been seen near the house two days earlier, and that Mr. Jones had a firearms record added nothing. For these reasons I conclude the detention infringed Mr. Jones' s. 9 Charter right not to be arbitrarily detained.
- iii. Was the arrest of Mr. Skea without reasonable grounds?
- [30] The relevance of this issue to the defence is that legal justification upon which the police relied to conduct a warrantless search of the interior of Mr. Jones' car was the common law power to search the immediate surroundings of Mr. Skea as an incident of his arrest. The defence submits that the arrest was unlawful because the police lacked reasonable and probable grounds to arrest Mr. Skea for the breach of a no-contact order.
- [31] It is not in issue that Mr. Skea was, at the time, bound by a court order prohibiting "contact" with Contessa Reggio and Brenda Tyhurst, or that Constable Sprott (the arresting officer) learned of this order prior to the arrest, or that Constable Sprott believed that Reggio and Tyhurst resided at 22030 Selkirk Avenue, or that Mr. Skea was a passenger in a car which was parked for an indeterminate period in the alley behind 22030 Selkirk and stopped by the police as it travelled westbound in the 22000-block of Selkirk.
- [32] Constable Sprott testified that he believed Mr. Skea's presence in the alley was a breach of the "no contact" order. He added that he believed that Mr. Skea had either breached, or was about to breach, the order. Constable Sprott's partner, Constable Spencer, testified, similarly, that he believed that there were grounds to arrest Mr. Skea for breach of the order, notwithstanding the absence of a "no go" order (i.e., one which prohibited Mr. Skea from attending to, or within a specific radius of, 22030 Selkirk).

- [33] The defence submits that Mr. Skea's mere presence in the passenger seat of a car which had only been observed parked for a few seconds behind the house at 22030 Selkirk is insufficient to meet the standard of reasonable and probable grounds to arrest Mr. Skea for breaching a no contact order; in particular, the defence says that the grounds fail to meet the objective standard.
- [34] The defence says the police had no information that Mr. Skea had contacted either of the women and no indication that he was about to do so. In relation to the former, the defence notes that the police did not know if either of the two women were in the house at 22030 Selkirk at the time, and did not speak, or attempt to speak, to either of the women to determine if Mr. Skea had contacted or had attempted to contact either of them. In relation to the latter, the defence notes that the car Mr. Skea occupied as a passenger was moving away from the rear of the address and that the police stopped it before it reached the front of the address.
- [35] The Crown's position is that the objective standard for arrest has been met; that it was reasonable for an experienced police officer to infer from his knowledge of matters related to 22030 Selkirk and his observations of Mr. Jones' car in which Mr. Skea was a passenger, that Mr. Skea had either just been in the house at 22030 Selkirk or was about to go into the house and that he had, thus, contacted Reggio and/or Tyhurst, or was about to do so.
- [36] In *R. v. Storrey*, [1990] S.C.J. No. 12 (S.C.C.), Cory J. delivering the judgment of the Court said the following about the standard of reasonable and probable grounds for arrest:
- [14] Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.
- [15] The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

- [16] There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.
- [17] In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.
- [37] Applying the foregoing to the case at bar, the narrow question raised is whether a reasonable person standing in the shoes of Constable Sprott would have concluded it was reasonable and probable that Mr. Skea had just breached, or was about to breach, his no contact order.
- [38] Having due regard for all the circumstances, including the knowledge and experience of the police, I am unable to conclude that the arrest in question was objectively justifiable. At the time the police arrested Mr. Skea they knew:
- (a) that a "no contact" order was distinctly different from a "non-attendance" order;
 - (b) that although Mr. Skea was prohibited from contacting Reggio and Tyhurst, he was under no restrictions regarding attendance and, thus, not prohibited from attendance to, for example, the 22000-block of Selkirk Avenue;
 - (c) that there was no evidence that Mr. Skea knew that Tyhurst and Reggio lived at 22030 Selkirk;

- (d) that there was no evidence that Tyhurst and Reggio were at 22030 Selkirk at the time;
 - (e) that there was no evidence that Mr. Skea had exited Mr. Jones' car while it was in the alley of the 22000-block of Selkirk;
 - (f) that they had stopped Mr. Jones before his car reached the front of 22030 Selkirk and thus they did not know if he intended to stop there;
 - (g) that the car, the presence and movements of which they considered suspicious, was not in the care and control of Mr. Skea; and
 - (h) that they had an obvious and likely determinative investigative step available to them, i.e. attendance to 22030 Selkirk to speak to Tyhurst and/or Reggio which they chose not to take.
- [39] The prerequisite of reasonable grounds for arrest is not an onerous standard; however, it requires something beyond mere suspicion or an honest belief which is not objectively justifiable. It has been said that the "reasonable grounds" standard for arrest is met when credibly-based probability replaces suspicion (see *R. v. Grunwald*, [1991] B.C.J. No. 235 (B.C.C.A.)).
- [40] Mr. Skea's presence in the car parked at the rear of an address linked to Reggio and Tyhurst was undoubtedly suspicious when viewed in light of the no-contact order. It was reason for further investigation. Without something more, however, it did not meet the standard of credibly-based probability; accordingly, I conclude that the arrest of Mr. Skea was unlawful.
- [41] The relevance of the lawfulness of the arrest of Mr. Skea is that it was the legal basis upon which the police conducted a warrantless search of the interior of Mr. Jones' car. It is well-settled that the law recognizes a limited right to search an arrestee and his immediate surroundings as an incident to a lawful arrest. Such a search arises from the legitimate need of law enforcement authorities to gain control of things or information in such circumstances. It is limited to valid police objectives such as discovery of items which may: (a) pose a threat to the police or public safety; or (b) facilitate the arrestee's escape; or (c) provide evidence of the offence for which the arrestee was arrested (see *R. v. Caslake*, [1998] S.C.J. No. 3, paras. 13 to 25).
- [42] A search, which has as its legal justification the common law power of search incident to arrest, will be unlawful if the arrest itself is unlawful. In *Caslake*, supra, Lamer C.J. speaking for the majority said:
- [13] In this case, the Crown is relying on the common law power of search incident to arrest to provide the legal authority for the search. In *Cloutier*, supra, my colleague L'Heureux-Dubé J. (for a unanimous Court) discussed this power in detail. She held that it is an exception to the ordinary requirements for a reasonable search (articulated in *Hunter*, supra) in that it requires neither a warrant nor independent reasonable and probable grounds. Rather, the right to search arises from the fact of the arrest. This is justifiable because the arrest itself requires reasonable and probable grounds (under s. 494 of the Code) or an arrest warrant

(under s. 495). However, since the legality of the search is derived from the legality of arrest, if the arrest is later found to be invalid, the search will be also. As Cory J. stated in *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 27, "[n]o search, no matter how reasonable, may be upheld under this common law power [of search incident to arrest] where the arrest which gave rise to it was arbitrary or otherwise unlawful."

[43] In the case at bar, the arrest of Mr. Skea was unlawful; accordingly, the search of the interior of Mr. Jones' car was also unlawful. A search which is not authorized by law is unreasonable (see *R. v. Caslake*, *supra*, para. 12); accordingly, I conclude that Mr. Jones' s. 8 Charter right to be secure against unreasonable search or seizure was infringed.

iv. If Mr. Skea's arrest was not unlawful, then would the search of Mr. Jones' car have been a proper incident of the arrest?

[44] The Court is asked to consider this hypothetical question because the defence position is that the search was unlawful and a part of a pattern of police disregard for the rights of Mr. Jones and Mr. Skea, and that such is relevant to the s. 24(2) Charter remedy sought.

[45] Constable Sprott testified that upon Mr. Skea's arrest for breaching his no-contact order, Mr. Skea was handcuffed and placed into a police vehicle to be transported to the RCMP detachment. Mr. Skea was cooperative with the police. Constable Spencer also said that Mr. Skea was "extraordinarily" well known to the police and that he had a weapons history. He said that when Mr. Skea was arrested there was no expectation that he would be released at the scene.

[46] Constable Spencer testified that he and Constable Sprott decided to search Mr. Jones' vehicle after Mr. Skea's arrest. Mr. Jones was asked to step out of the car while the search was being conducted, and he was given a cursory pat-down search by Constable Daly.

[47] Constable Spencer said the purpose of the search of Mr. Jones' vehicle was for officer and public safety and his bases for concern were threefold: (a) Mr. Skea's no contact order arose from a charge that Mr. Skea had shot Contessa Reggio; (b) Mr. Skea was a passenger in a car which had just been seen parked in the dark outside Ms. Reggio's residence; and (c) Constable Vuong had informed him that Mr. Skea may be carrying a gun in a man-purse. Constable Spencer knew the source of the information from Constable Vuong was a police informant; however, he knew nothing of the reliability of the informant or the age of the information.

[48] Constable Spencer began with a search of the passenger area which had been occupied by Mr. Skea; however, upon finding a firearm and a magazine under the passenger seat, Constable Spencer searched the entire interior of the car because it was his police experience that persons who carry guns often carry more than one.

- [49] The primary defence position is that there was no reasonable basis for the police to believe that a search of Mr. Jones' vehicle was required to protect the safety of the police or the public and that the police simply misused the arrest as the basis for conducting a vehicle search.
- [50] In support of this position the defence relies upon the evidence that Mr. Skea was cooperative; that he neither said nor did anything to suggest that he posed a danger to the police or to the public; that he was restrained by handcuffs and confined within a police vehicle; that there was no expectation that he would be released at the scene; that there were several police officers at the scene and virtually no possibility that Mr. Skea would escape. In short, once Mr. Skea was handcuffed and placed into a police vehicle, he had no means of accessing the car and, thus, anything in it could not pose a threat to the police or to the public.
- [51] As has been already observed, the common law power to conduct a search of an arrestee and his immediate surroundings arises out of a need for the police to gain control of things and information. It outweighs the individual's interest in privacy if it is limited to valid police objectives. These limits are no different for motor vehicles than they are for any other place. The discovery of items which may pose a threat to the police or to the public is a recognized valid police objective, and such was the stated purpose for the search in question. In this circumstance, the police officer must have held an honest belief that the safety of the police or the public would be served by the search and such a belief must be objectively reasonable. The standard is not high. There needs only to be some reasonable basis to pursue it given the circumstances of the arrest (see *Caslake*, *supra*, paras. 19, 20 and 23).
- [52] In *Caslake*, *supra*, Lamer C.J. provided the following apposite summary of the limits on the power to search as an incident of arrest:
- [25] In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier*, *supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

- [53] In *R. v. Bulmer*, 2005 SKCA 90 the court considered whether the police stated safety concerns justified a post-arrest search of Mr. Bulmer's motor vehicle as an incident of the arrest. Three officers were at the scene, Mr. Bulmer was cooperative during the arrest, and Mr. Bulmer was locked in the rear of the police cruiser at the time of the search. He posed no threat to the police. The court concluded that there was no foundation for the police to conduct a search for safety reasons in such circumstances.
- [54] Having regard to all the foregoing, I am unable to conclude that the search in question fell within the limits of the common law doctrine. There is an absence of a reasonable explanation for why the search of the interior of Mr. Jones' car was necessary to protect the police or the public. On the evidence presented, I am unable to discern any risk Mr. Skea posed to the public or the police once Mr. Skea was handcuffed, and secured in a police vehicle to be transported to the Detachment. As stated in *Caslake*, *supra*, the limits of the doctrine of search incidental to arrest must be respected. If the objective of the search is police and/or public safety then the police belief that such would be in jeopardy without a search must be objectively reasonable. The test to meet is not onerous, but I am satisfied that it has not been met here.
- v. Was the arrest of Mr. Jones without reasonable grounds?
- [55] As part of the alleged pattern of disregard for the rights of Mr. Jones, the defence submits that the police did not have reason to believe that Mr. Jones knew of the existence of the firearms discovered in the search of his car; thus, grounds in respect of an essential element of the offence of breaching the order prohibiting possession of firearms did not exist.
- [56] It is not contentious that Mr. Jones was the owner and operator of the car searched, and that he was driving it on the night in question. The two firearms found in Mr. Jones' car were neither in plain view nor within easy reach of the driver's seat. One was under the right side of the front passenger seat and could not be accessed without moving the seat; the other was in the closed centre console of the rear seats.
- [57] Constable Sprott testified that the only evidence he had that Mr. Jones knew about the firearms was their presence in the car.
- [58] The standard of reasonable and probable grounds to arrest is met when credibly-based probability replaces suspicion (see *R. v. Grunwald*, *supra*, and *R. v. Smellie*, [1994] B.C.J. No. 2850 at para. 16). The standard is met with something less than a *prima facie* case for conviction (see *R. v. Storrey*, *supra*). The arresting officer must take into account all information available and disregard only that which he or she reasonably believes is unreliable (see *Chartier v. Quebec (Attorney General)*, [1979] 2 S.C.R. 241).
- [59] I infer from the foregoing that a prerequisite to a lawful arrest for a crime is credibly-based probability that all aspects of the offence exist. Without such, there cannot be reasonable grounds to believe a person has committed a criminal offence. This does not mean, however, that there must be some direct evidence of each essential element and averment of

the offence in question before the standard for arrest is met, or that the police must deliberate on such matters. When it comes to the knowledge or intention of the suspect, such is often inferred from other evidence, and the question on review will simply be whether the inference was a reasonable one in all the circumstances, including those circumstances apparently inconsistent with guilty intention or guilty knowledge. If there is no credibly-based probability of guilty knowledge or guilty intention from the information available then there can be no reasonable grounds to believe a suspect has committed, or is committing, an offence.

[60] In the case at bar, I am satisfied that when Constable Sprott arrested Mr. Jones he acted upon information which went beyond mere suspicion about Mr. Jones' knowledge of one or more of the firearms. The information established a credibly-based probability of knowledge, particularly in respect of the firearm in the rear console. The information included: (a) that Mr. Jones was the owner and operator of the car; (b) that there were no back-seat passengers; and (c) that there was no other information tending to link this firearm to someone other than the owner of the vehicle. In my view such evidence is, at the arrest stage, sufficient to satisfy the knowledge aspect of the offence. As the Court stated in *Storrey*, *supra*, a *prima facie* case for conviction is not required.

[61] For all the foregoing reasons I am unable to conclude that Constable Sprott was without reasonable and probable grounds to arrest Mr. Jones for breaching his firearms prohibition order, albeit with grounds largely gathered from the unlawful search of the interior of Mr. Jones' car.

vi. Was the search of the trunk of Mr. Jones' vehicle authorized by law?

[62] The search of the trunk of Mr. Jones' car was conducted after Mr. Jones was taken into police custody and after the car had been towed to the police detachment. Constable Sprott said Mr. Jones' car was towed to the detachment because the police were having difficulty removing the firearm located under the passenger seat.

[63] After the car was towed to the detachment Constable Spencer searched its trunk. He was not, at the time, acting pursuant to a search warrant, and neither he nor any other witness testified as to the legal justification for the warrantless search.

[64] It is well settled that agents of the state must be able to justify entry onto, and confiscation of, property of a person, by showing that they acted under legal authority pursuant to a statute or common law. In *Caslake*, *supra*, Lamer C.J. speaking for the majority said:

[12] In order to be reasonable, searches and seizures must be authorized by law. The reason for this requirement is clear: under both the Charter and the common law, agents of the state can only enter onto or confiscate someone's property when the law specifically permits them to do so. Otherwise, they are constrained by the same rules regarding trespass and theft as everyone else. There are three ways in which a search can fail to meet this requirement. First, the state authority conducting the search must be able to point to a

specific statute or common law rule that authorizes the search. If they cannot do so, the search cannot be said to be authorized by law. Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides. For example, s. 487 of the Criminal Code, R.S.C., 1985, c. C-46, authorizes searches, but only with a warrant issued by a justice on the basis of a sworn information setting out reasonable and probable grounds. A failure to meet one of these requirements will result in a search which has not been authorized by law. Third, and in the same vein, the scope of the search is limited to the area and to those items for which the law has granted the authority to search. To the extent that a search exceeds these limits, it is not authorized by law.

[65] In the case at bar there has been a complete failure of the state authority to justify the search in question by pointing to a specific statute or common law rule that authorized the search. As Lamer C.J. stated, if the state cannot do so, then the search cannot be said to be authorized by law.

[66] An unlawful search is an unreasonable search; accordingly, I must conclude that the search of Mr. Jones' car trunk infringed his s. 8 Charter right.

vii. Should the items seized in the vehicle searches be excluded as trial evidence?

[67] The police breached Mr. Jones' rights under ss. 8, 9 and 10(b) of the Charter in the course of their dealings with him in the evening of March 29, 2010. Mr. Jones was arbitrarily detained and he was not given his right to counsel upon that detention. Mr. Jones' passenger was arrested without reasonable and probable grounds, and the interior of Mr. Jones' car was searched pursuant to that wrongful arrest. The police justification for the search, i.e., that it was incidental to the arrest, was invalid. Mr. Jones was arrested on the basis of evidence gathered in the unlawful search of the interior of his car. Mr. Jones' car was impounded and the trunk of Mr. Jones' car was searched without authorization in law.

[68] I conclude that the police conduct showed repeated disregard for the rights of Mr. Jones (and Mr. Skea) on the night in question. I am not satisfied that the police engaged in a pattern of deliberate breaches; however, it is evident that the police were, at the very least, repeatedly reckless regarding Mr. Jones' constitutionally protected rights. At the time Mr. Jones was detained and his car was searched, the law in relation to such matters was well settled; there were no conflicting precedents creating uncertainty in the law. Police powers of detention and search are matters which are fundamental to policing, and it is expected that the police will know the law and exercise their powers in conformity with it: see *R. v. Reddy*, 2010 BCCA 11.

[69] In *R. v. Grant*, [2009] 2 S.C.R. 353 the Supreme Court of Canada reformulated the approach to be taken in determining whether evidence obtained in breach of a Charter right should be excluded. The court must now assess and balance the effect of admitting the evidence on society's confidence in the justice system, having regard to:

(a) the seriousness of the Charter-infringing conduct;

- (b) the impact of the breach on the Charter-protected interests of the accused; and
- (c) society's interest in the adjudication of the case on its merits.

[70] In Reddy, supra, Frankel J.A. summarized the considerations in relation to the three factors as follows:

[92] With respect to the first factor -- seriousness of the breach -- the greater the level of state misconduct, the greater will be the need of the courts to disassociate themselves from that conduct. Wilful or reckless disregard for Charter rights will, therefore, tend to support exclusion: paras. 71-74. Further, as the Chief Justice and Charron J. noted (at para. 75):

"Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: [citations omitted].

[93] As for the second factor -- impact of the breach on the accused -- it was observed that "[t]he impact of a Charter breach may range from fleeting and technical to profoundly intrusive". The more serious the impact is on the rights of the accused, the more likely it will be that exclusion is warranted: paras. 76, 77.

[94] The last factor -- society's interest in a decision on the merits -- involves the question of "whether the truth seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": para. 79. The reliability of the evidence is an important consideration, as is the importance of the evidence to the truth-seeking function of the trial. Although "seriousness of the offence" remains a consideration, it has far less importance than under the Collins/Stillman framework, because s. 24(2) focuses on the long-term implication for the repute of the administration of justice, and not the public's short-term desire for a conviction: para. 84.

[71] Reddy, supra, has similarities to the case at bar, and the results are instructive. In Reddy, the accused sought the exclusion of two loaded firearms found in an unlawful search of his vehicle which followed his arbitrary detention. In the police encounter with Mr. Reddy, the police breached Mr. Reddy's rights under ss. 8, 9, and 10(b) of the Charter. At trial the firearms were not excluded and Mr. Reddy was found guilty of concealing the firearms and carrying them carelessly. On appeal, Mr. Reddy was acquitted of all charges on the basis that the firearms ought to have been excluded as evidence under a Grant analysis.

[72] In Reddy, supra, the majority concluded that the repute of the administration of justice would, in the long term, be adversely affected by admitting the handguns into evidence. In reaching this conclusion, Frankel J.A., speaking for the majority, found:

(i) that the breach was at the serious end of the breach spectrum because, at the time of Mr. Reddy's detention, the law had been settled for 11 months in relation to detention and search; therefore, the police officer ought to have known that he did not have the power to (a) detain someone for investigation on a bare suspicion that the person might be in breach of a condition of a probation order; and (b) to conduct a search incidental to an investigative detention that is unconnected to any safety concerns;

(ii) that Mr. Reddy could reasonably expect that he would not, in the absence of lawful authority, be directed to get out of the vehicle in which he was sitting, and have his jacket searched. In support of this, Frankel J.A. referred to the Supreme Court of Canada decision in *R. v. Harrison*, 2009 SCC 34, in which a large quantity of cocaine was seized during an unlawful search of Mr. Harrison's motor vehicle following an unlawful detention. The exclusion of the evidence was upheld on appeal. McLachlin C.J. acknowledged that the detention was brief and the expectation of privacy was relatively low; however, she said that a person in Mr. Harrison's position has every expectation of being left alone and, therefore, the breaches were a significant, although not egregious intrusion on Mr. Harrison's Charter-protected interests; and

(iii) that the evidence was highly reliable and critical to the prosecution of serious offences; that the public has an interest in the successful prosecution of persons who carry loaded handguns; that the dangers of such conduct cannot be overstated; and that the public expects those engaged in law enforcement to respect the rights and freedoms we all enjoy by acting within the limits of their lawful authority.

[73] Frankel J.A. concluded that the police failure to act in accordance with well established limits on police powers set by the Supreme Court of Canada tipped the scales in favour of exclusion of the evidence and the entering of an acquittal. In so doing, he quoted from *Harrison*, supra: "the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining Charter standards."

[74] Given the remarkable similarities between Reddy, supra, and the case at bar, I am satisfied that the results should be the same. I conclude that the breaches of Mr. Jones' rights were at the serious end of the spectrum and that despite the seriousness of the offences, the dangerousness of some of the items found, and the effect exclusion will have on the prosecution's case, the importance of maintaining Charter standards tips the scales in favour of exclusion.

D. CONCLUSION

[75] The defence application is allowed. The items seized in the search of Mr. Jones' car are excluded as evidence at trial, pursuant to s. 24(2) of the Charter.

"The Honourable Mr. Justice Bernard"

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Prepared on 26 October 2026 · Esheria