

CANADA / JUDGMENT

R. v. Karaim

2022 BCSC 1849

COURT

Supreme Court of British Columbia

DECIDED

7 October 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1849 R. v. Karaim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Karaim,

2022 BCSC 1849

Date: 20221007

Docket: 42045

Registry: Courtenay

Rex

v.

Alina Marie Karaim and

Darren Michael Kinney

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment re: Voir Dire #1

Counsel for the Crown:

T. Ian McFadgen

Counsel for the Accused Karaim:

Bobak Movassaghi

Counsel for the Accused Kinney:

Michael Ritzker

Place and Dates of Hearing:

Courtenay, B.C.

August 16-22, 2022

Place and Date of Judgment:

Courtenay, B.C.

October 7, 2022

Table of Contents

I. Introduction.. 3

II. Factual background.. 4

III. Issues.. 11

1. Lawfulness of Arrest of Mr. Kinney. 11

2. Search of the Vehicle Incident to Arrest 15

3. Search of Ms. Karaim's Purse, and Passenger Area of the Vehicle. 17

4. Arbitrary Detention of Ms. Karaim.. 18

IV. Conclusion.. 23

I. Introduction

[1] Alina Karaim and Darren Kinney are charged with four counts of unlawful possession of a controlled substance for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. The four counts relate to, respectively, methamphetamine, cocaine, heroin/fentanyl, and GHB. Each defendant applies for exclusion of evidence pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms.

[2] A brief overview of the facts follows.

[3] The offences are all alleged to have taken place May 2, 2020 at Courtenay, B.C. At the time of the alleged offences, Mr. Kinney was driving a silver PT Cruiser. Ms. Karaim was a passenger in the vehicle. She was seated in the front passenger seat. Constable M. MacDonald of the Courtney RCMP initiated a traffic stop of the vehicle. Cst. MacDonald determined that Mr. Kinney was prohibited from driving, and he was arrested for driving while prohibited. A search of his person incidental to that arrest revealed a glass pipe with attached vinyl tubing in a pocket of his clothing.

[4] For the purposes of these reasons, I will refer to this apparatus as a "crack pipe", as suggested by counsel for Mr. Kinney.

- [5] Cst. MacDonald observed what he perceived to be burned drug residue in the crack pipe. Cst. MacDonald noted signs of impairment by drugs in Mr. Kinney's behaviour. He knew Mr. Kinney to be a drug user. He arrested Mr. Kinney for possession of a controlled substance. He searched the vehicle incidental to the arrest of Mr. Kinney for possession of a controlled substance. As part of the search of the vehicle, Ms. Karaim's purse was searched. No drugs were found in the purse. Ms. Karaim left the scene on foot. The officers searched the vehicle, and found the drugs forming the subject matter of the charges.
- [6] Mr. Kinney challenges the lawfulness of his warrantless arrest for drug possession and the lawfulness of the search of the vehicle incidental to that arrest. He asserts violations of his Charter rights under ss. 8 and 9. Ms. Karaim makes the same challenges.
- [7] Ms. Karaim also alleges that she was arbitrarily detained, and that the search of her purse was unlawful. She alleges breaches of her Charter rights under ss. 8 and 9. She alleges that her rights under ss. 10(a) and (b) of the Charter were violated, in that she was not informed promptly of the reasons for her detention and was not provided with an opportunity to retain and instruct counsel without delay and to be informed of that right.
- [8] The defendants did not testify on the voir dire. I heard evidence from the three police officers involved, Cst. M. MacDonald, Cst. E. Blouin, and Sergeant J. Swann. For convenience I will refer to Sgt. Swann as Corporal Swann, her rank at the material time.

II. Factual background

- [9] Cst. MacDonald had been an RCMP officer for approximately 12 years as of the alleged offence date of May 2, 2020. He had been an auxiliary RCMP officer for four years prior to that. He has been posted to the Comox Valley RCMP detachment since 2014. From 2014 to 2017 he was part of the Crime Reduction Unit. Prior to that he was on general duties. From 2017 to 2021 he worked with the Comox Valley Street Crimes Unit, a plain clothes unit responsible for larger investigations and drug investigations, including drug trafficking.
- [10] On May 2, 2020 he was working as part of the Comox Valley RCMP Street Crimes Unit. On that occasion he was working as part of a surveillance team on an unrelated matter. He was in plain clothes, driving an unmarked police vehicle. He was part of a team of four persons involved in the surveillance, which focused on activities taking place at the Travelodge hotel in Courtenay.
- [11] He was alone in his vehicle, which was parked near 26th Street, in a parking lot of a shopping plaza, at about 2 p.m. He was observing vehicles coming and going from the Travelodge, when he observed a silver PT Cruiser enter the parking lot. The vehicle drew his attention. He began taking photos because he recognized the passenger, Ms. Karaim. He observed her drop something from the window of the vehicle. The vehicle stopped, she got out, picked up the item, and re-entered the vehicle. He was familiar with Ms. Karaim because he had interacted with her approximately six times previously. He knew she was subject to court conditions related to drug trafficking matters. He did not recognize the

driver. The vehicle exited the parking lot onto 26th Street. It was only in the parking lot for a few minutes. Cst. MacDonald was unable to identify the item that was dropped and retrieved. Cst. MacDonald remained engaged with his surveillance duties.

- [12] The PT Cruiser returned to the parking lot about 45 minutes later at approximately 3:06 p.m. The other matter was concluding, so Cst. MacDonald repositioned his vehicle. The PT Cruiser seemed to have the same occupants as before, a driver, and Ms. Karaim. He saw the vehicle drive to the north end of the shopping plaza, and park in a space near a Lordco parts store and a White Spot restaurant. Cst. MacDonald was approximately 75 meters away.
- [13] He observed a person approach the vehicle on foot from an area behind the White Spot restaurant, and briefly interact in some manner with the passenger of the PT Cruiser, Ms. Karaim. He was unable to observe whether there was an exchange. After that, his view of the PT Cruiser was partially obscured by the arrival of a black SUV. The driver of that vehicle also approached the passenger side of the PT Cruiser, but again Cst. MacDonald was unable to observe any interactions that may have taken place. The person returned to the SUV and the SUV departed.
- [14] Cst. MacDonald ran a query on the licence plate of the PT Cruiser which showed that it was registered to a 77-year-old female who had no driver's licence.
- [15] In Cst. MacDonald's view, the activities of the PT Cruiser and its occupants were suspicious. The surveillance task had been completed. He radioed Cpl. J. Swann, who had also been involved in the surveillance, to request assistance and surveillance of the PT Cruiser. As Cpl. Swann arrived, the PT Cruiser departed the parking lot onto 26th Street.
- [16] Cst. MacDonald noted the driver of the PT Cruiser looked to be a male in his mid-40s of average build.
- [17] Cst. MacDonald decided to stop the PT Cruiser to identify the driver. The vehicle proceeded from 26th Street on to Fitzgerald Avenue, proceeding northbound. Cst. MacDonald activated his lights and siren. The vehicle slowed but did not immediately stop. After 10 or 15 seconds the vehicle stopped. Cst. MacDonald parked behind it, on the side of Fitzgerald Avenue.
- [18] He advised Cpl. Swann by radio that he was stopping the vehicle. Cpl. Swann attended as backup.
- [19] The vehicle stop took place at about 3:25 p.m.
- [20] The legality of the traffic stop is not challenged.
- [21] Cpl. Swann arrived at the scene about a minute after Cst. MacDonald stopped the PT Cruiser.
- [22] Cst. MacDonald approached the driver's side of the vehicle. He requested the driver's licence. Cpl. Swann was on the sidewalk next to the passenger side door where Ms. Karaim was seated in the vehicle. Cst. MacDonald told her to watch Ms. Karaim.

- [23] Cst. MacDonald made observations that led him to conclude that the driver could be under the influence of drugs. The driver was "slumped" in the seat. He fumbled with his wallet and its contents. The driver, later identified as Mr. Kinney, handed Cst. MacDonald various credit or debit cards, rather than his driver's licence, which Cst. MacDonald could see was still in the wallet. Cst. MacDonald directed Mr. Kinney's attention to the driver's licence that the could see in the wallet. Mr. Kinney was slow to react to Cst. MacDonald's questions. Cst. MacDonald noted that the pupils of his eyes were "pin point" (that is, smaller than expected based upon ambient light levels). The driver's licence identified the driver as Darren Kinney. Cst. MacDonald had dealt with him a few times previously at Mr. Kinney's residence in Royston. He was known to Cst. MacDonald as a drug user, but he had no knowledge of Mr. Kinney being involved in trafficking of drugs.
- [24] Cst. MacDonald formed the view that Mr. Kinney could be impaired by a drug. Via radio he requested the attendance of a drug impairment expert. Cst. A. Blouin responded. She had been involved as a member of the surveillance team.
- [25] During this time Ms. Karaim remained in the passenger seat of the vehicle. Cst. MacDonald observed her unplug her telephone, wrap the cord around the telephone, and put it in her purse, a large bag open at the top, located near her feet on the passenger side floor of the vehicle.
- [26] Cst. MacDonald queried Mr. Kinney's driver's license. He learned that Mr. Kinney was prohibited from driving. He informed Mr. Kinney that he was prohibited from driving, and requested that he exit the vehicle. He informed him he was under arrest for driving while prohibited. Mr. Kinney was placed in handcuffs.
- [27] Incidental to that arrest Cst. MacDonald searched Mr. Kinney's person and found the crack pipe in a "right front" pocket of his clothing. In his testimony he did not specify in which garment the crack pipe was found.
- [28] Cst. MacDonald testified that he searched Mr. Kinney's person in order to check for weapons, needles, or anything that might harm himself or a police officer. He stated that in his experience people who use drugs often have such items on their person. He also searched for drugs, also based upon his experience that drug users often have drugs on their person.
- [29] He was familiar with the glass and vinyl tube apparatus, the crack pipe, as an apparatus which is used by drug users to consume drugs.
- [30] For purposes of this voir dire, counsel for Mr. Kinney admits that what Mr. Kinney was found to have could be described as a "crack pipe" and that he was arrested with the crack pipe in his possession. Ms. Karaim does not admit this, but I have no difficulty making this finding of fact.

- [31] Cst. MacDonald testified that he has had considerable experience in dealing with drug users, and deals with them on a daily basis. He has often found crack pipes when dealing with drug users.
- [32] Cst. MacDonald explained that the pipe is heated with a lighter or torch. The drugs turn black or dark as a result, leaving residue in the crack pipe. He identified three darkened areas in the glass pipe and vinyl tubing which indicated what he described as drug residue. In his opinion, the residue shown indicates that the pipe had been used to inhale a drug, such as crack cocaine, methamphetamine, heroin or fentanyl.
- [33] Cst. MacDonald arrested Mr. Kinney for possession of a controlled substance. In his view, Mr. Kinney had committed an offence and he had authority to arrest him. The arrest took place at 3:35 p.m.
- [34] After arresting Mr. Kinney for drug possession, Cst. MacDonald performed a more thorough search of his person, including searching for small pockets that might contain drugs. No drugs were located on his person. He found his wallet and cell phone.
- [35] As noted, Cst. Blouin attended the scene in response to Cst. MacDonald's request for a drug recognition expert ("DRE"). Cst. Blouin had been a member of the Comox Valley RCMP for about five years prior to May 2, 2020. She had worked in general duties, and had been with the drug section for about one-and-a-half years prior to May 2020. At the time she was a certified DRE. She spoke with Cst. MacDonald who informed her that Mr. Kinney was the driver, that he was prohibited from driving, and that he suspected that he was impaired by drugs.
- [36] Cst. Blouin spoke with Mr. Kinney. She formed the view that she had reasonable grounds to suspect that Mr. Kinney was driving while impaired by drugs. She made a demand that he comply with a standardized field sobriety test ("SFST"). Cst. MacDonald escorted Mr. Kinney to Cst. Blouin's vehicle. Cst. Blouin transported Mr. Kinney to the detachment in her vehicle where she conducted the SFST. Mr. Kinney failed the SFST. Cst. Blouin formed the opinion that he was impaired by a drug. He was rearrested. Further tests ensued. A demand for a urine sample was made. There is no evidence as to the results of the urine test, or whether any charge of driving while impaired by drugs was made.
- [37] Cst. MacDonald attempted to contact the vehicle's owner. Mr. Kinney had said that he had borrowed the vehicle. Cst. MacDonald decided to impound the vehicle.
- [38] While he was still dealing with Mr. Kinney, Cst. MacDonald asked Ms. Karaim whether she was abiding by court ordered conditions. Cpl. Swann was present at the passenger side window of the vehicle at this time. Ms. Karaim said that she was on a curfew. Cpl. Swann subsequently verified this information.

- [39] Cst. MacDonald decided to search the vehicle. In his view, he had arrested Mr. Kinney for possession of drugs. Mr. Kinney had been seated in the vehicle. He was entitled to search the vehicle incidental to the arrest, in order to search for further evidence in relation to the drug possession offence.
- [40] In order to return the vehicle to the owner, the police would need to ensure there were no drugs in the vehicle, and that a proper inventory of its contents was carried out. However this was not the reason for the vehicle search.
- [41] Constable MacDonald was informed by Cpl. Swann that she had observed drug paraphernalia in the vehicle, consisting of small plastic baggies in the backseat.
- [42] After Mr. Kinney was taken away by Cst. Blouin, Cst. MacDonald returned to the vehicle, intending to search the vehicle incidental to his arrest of Mr. Kinney for drug possession. He obtained a camera and began taking pictures of the interior of the vehicle. He noted drug paraphernalia such as a small "dime" baggy in the right rear passenger seat area, ripped open, with apparent drug residue, a white powder, in it.
- [43] Cst. MacDonald began searching the vehicle within a few minutes of Mr. Kinney's departure with Cst. Blouin.
- [44] Cpl. Swann advised Ms. Karaim that she would need to exit the vehicle in order for it to be searched. Ms. Karaim complied. When Cst. MacDonald began searching the vehicle, Ms. Karaim had exited the vehicle and was speaking with Cpl. Swann on the sidewalk.
- [45] Ms. Karaim's large bag or purse was located on the right front passenger seat floor area. Some of the contents were plainly visible, such as a wallet, notebooks, and Ms. Karaim's cell phone. Cst. MacDonald believed that the bag would have been accessible to Mr. Kinney when Cst. MacDonald initiated the traffic stop.
- [46] Cst. MacDonald searched the glove box of the vehicle. \$110 in cash was found, as well as a used glass "drug pipe".
- [47] Cst. MacDonald searched Ms. Karaim's purse, for the presence of drugs. Cpl. Swann may also have been involved in the search of the purse.
- [48] No drugs were found in the purse. There was a large amount of cash in the purse, amounting to about \$4,000. Cst. MacDonald or Cpl. Swann asked about the money. Ms. Karaim said that it was her Covid-19 federal government CERB (Canada Emergency Response Benefit) payment or payments. The officers also noted a small empty dime-sized baggy with a marijuana leaf printed on it. Ms. Karaim said that the baggy was used to hold a piercing.

- [49] After searching the purse, Cst. MacDonald asked Cpl. Swann whether Ms. Karaim was in breach of her conditions, and whether she could be allowed to leave. Cpl. Swann advised him that she was not in breach of conditions. Cpl. Swann advised Cst. MacDonald that Ms. Karaim was free to go. Cst. MacDonald gave Ms. Karaim her purse and told her that she was free to leave. She left on foot.
- [50] Cst. MacDonald thought that Cpl. Swann took the lead in searching the purse. Cpl. Swann thought Cst. MacDonald did so. This detail does not matter. The purse was searched, by one or the other of the police officers, or by both of them together.
- [51] Cst. MacDonald testified that Ms. Karaim was calm and pleasant to deal with throughout. In dealing with her, his tone was calm and casual. In examination in chief, Cpl. Swann testified that Ms. Karaim was polite, and cooperative. However she became upset when she learned that Mr. Kinney was driving while prohibited. When she became agitated Cpl. Swann told her to "just sit tight" and "we will sort this out". On cross-examination, she testified that in testifying to this she was in error and did not believe that she told Ms. Karaim to "sit tight". Rather, she had said something to the effect of "relax", "calm down", or some such statement.
- [52] After Ms. Karaim departed, the officers continued with the search of the vehicle, at the scene.
- [53] A drawer under the front passenger seat of the PT Cruiser contained a grey zippered pouch. Inside the pouch the police found a digital scale, as well as various quantities of cocaine, methamphetamine, and fentanyl/heroin. A water bottle located in a cup holder in the centre console of the vehicle contained GHB.

III. Issues

1. Lawfulness of Arrest of Mr. Kinney

- [54] I adopt the summary of legal principles governing lawfulness of the warrantless arrest set out in the decision of Justice Fitzpatrick in *R. v. Janzen*, 2019 BCSC 256 [Janzen], as follows:
- [73] The second issue turns on whether Cst. Smit had reasonable grounds to arrest Ms. Janzen for possession. The grounds for the arrest only arose from Cst. Birtwistle and, therefore, the matter must be assessed from his point of view: *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166-67; *R. v. Le*, 2006 BCCA 463 at para. 25.
- [74] The defence alleges that no reasonable grounds existed for Ms. Janzen's arrest, resulting in a breach of her s. 9 Charter rights.
- [75] Authority to effect a warrantless arrest is found in the Criminal Code:
- 495(1) A peace officer may arrest without warrant
- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

[76] The burden of demonstrating that the police had reasonable and probable grounds to arrest is on the Crown: *R. v. Storrey*, [1990] 1 S.C.R. 241. The requirement is both that the arresting officer subjectively had such grounds for arrest and that such grounds are objectively reasonable. The Court stated at 250-251:

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. [Citations omitted]

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.

[77] The objective reasonableness of the arresting officer's grounds must be assessed from the standpoint of the reasonable person "standing in the shoes of the officer". The reasonable person is thus presumed to have the knowledge and experience of the officer or officers in question including if the matter involves the drug trade and the expertise of the officers in that field: *R. v. Juan*, 2007 BCCA 351 at paras. 19, 27; *R. v. Luong*, 2010 BCCA 158 at para. 24. See also *R. v. Messina*, 2013 BCCA 499 at paras. 20-24, where our Court of Appeal stated, at para. 24, that "an officer's reasons for arrest [must] be assessed from the vantage point of a prudent, reasonable and cautious police officer, similarly experienced as the arresting officer".

[78] The standard of proof required to establish reasonable grounds is "reasonable probability" rather than proof beyond a reasonable doubt or a *prima facie* case: *Debot* at 1166. Similarly, Justice Frankel noted in *R. v. Jir*, 2010 BCCA 497:

27. As has been stated many times, the "reasonable grounds" standard is not only less than that required for conviction, but is also less than the civil standard of proof.

More recently, in *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, the Court stated (at para. 114):

the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities [citations omitted].

Further, as Mr. Justice Hill noted in *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 at 367 (Ont. Ct. (G.D.)):

The appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted.

- [79] It is well established that the standard of reasonableness must be met not on a "piece meal basis" (Luong at para. 17) but in the "totality of the circumstances" (Jir at para. 28).
- [55] The meaning of "reasonable grounds" was reviewed again in *R. v. Glendinning*, 2019 BCCA 365, at paras. 4-7. In brief "reasonable grounds" is equivalent to "reasonable and probable grounds", the phrase previously used in the predecessor legislation. These phrases connote "credibly based probability". The objective grounds do not rise to the level of a prima facie case for conviction. The standard is less than that of the civil standard of balance of probabilities. The standard is something more than mere suspicion.
- [56] In this case, Cst. MacDonald arrested Mr. Kinney upon finding the so-called crack pipe in the "right front" pocket of his clothing. As noted, whether this garment was Mr. Kinney's trousers or some other garment was not made clear on the evidence, and that detail does not much matter. It was on his person.
- [57] According to Cst. MacDonald, he saw "residue" of drug use in the crack pipe, at three locations. In his view, the "residue" that he viewed equates to an illegal controlled substance itself.
- [58] The defence argues that the Crown has not established that the presence of "residue" objectively viewed establishes possession of a prohibited drug. The defence argues that even if Cst. MacDonald viewed signs of impairment, the evidence still does not provide a reasonable basis for him to conclude, objectively, that Mr. Kinney was or had been in possession of prohibited substances.
- [59] In *Janzen*, Fitzpatrick J. reviews a number of authorities involving sighting of crack or meth pipes in the context of establishing reasonable grounds for arrest: paras. 85 through 99.
- [60] I accept that the possession of a crack pipe, in itself, is insufficient to ground an arrest for possession of drugs. I accept the comments of Justice Griffin in *R. v. Lee*, 2009 BCSC 616 [Lee], quoted in *Janzen*, (para. 99) as follows:

At most, possession of a crack pipe might indicate reasonable grounds to suspect that whoever owns the crack pipe had in the past used drugs or might want to use drugs in the future.

- [61] In *Janzen*, the Crown argued that the police officer, Cst. Birtwistle had an objectively sound reason for believing that the meth pipe could contain drugs beyond trace residue, based on his recent training. Fitzpatrick J. held that this was merely a suspicion, and insufficient to establish the legal test of reasonable grounds.

- [62] Likewise, here, I am unable to place weight on Cst. MacDonald's assertion that the "residue" he saw is equivalent to possession of prohibited drugs. I accept that subjectively he believed this to be so. The Crown did not establish facts which would objectively confirm this subjective belief on the part of Cst. MacDonald.
- [63] However, in my view, there were reasonable grounds for Cst. MacDonald to believe that Mr. Kinney had been in possession of drugs. The crack pipe was obviously used, and Cst. MacDonald's considerable experience reasonably led him to conclude that the crack pipe had been used for consumption of illegal drugs.
- [64] Mr. Kinney argues that Cst. MacDonald should have considered the possibility that the crack pipe had not been used for consumption of illegal substances, possession of which would be contrary to s. 4 of the CDSA. Mr. Kinney argues that Cst. MacDonald should have considered whether the crack pipe had been used for consumption of cannabis, which is no longer illegal.
- [65] However Cst. MacDonald testified that he had no knowledge of that type of pipe being used to consume cannabis, despite dealing with cannabis users on a daily basis. In my view it was reasonable for Cst. MacDonald to believe that the crack pipe was associated with use of illegal controlled drugs, rather than cannabis.
- [66] What distinguishes this case from Janzen and Lee is that Cst. MacDonald had reasonable grounds to conclude that Mr. Kinney was impaired by illegal drugs. The grounds for his belief in impairment are objectively reasonable. Cst. Blouin, a certified drug expert, came to the same conclusions. It does not matter that Mr. Kinney was, apparently, never charged with the offence of driving while impaired by drugs.
- [67] Mr. Kinney was known by Cst. MacDonald to be a drug user. Cst. MacDonald testified that in his experience, an impaired person will often have drugs in their possession. There is no question in this case that Mr. Kinney was in possession of the crack pipe at the same time as he was driving the motor vehicle while apparently impaired by drugs. Cst. MacDonald was also influenced by what he perceived to be a notable delay in Mr. Kinney stopping and pulling over the vehicle in response to Cst. MacDonald's activation of lights and siren. To Cst. MacDonald, this suggested the possibility that something was taking place in the vehicle during the delay, such as hiding of drugs.
- [68] In my view, this constellation of factors led Cst. MacDonald to reasonably believe, on reasonable grounds, that Mr. Kinney was or had been in possession of unlawful substances in contravention of s. 4 of the CDSA. Thus, the arrest of Mr. Kinney for drug possession was lawful.

2. Search of the Vehicle Incident to Arrest

[69] A leading authority is *R. v. Caslake*, [1998] 1 S.C.R. 51, 121 C.C.C. (3d) 97 [Caslake]. I summarized some of the principles drawn from *Caslake* in *R. v. Drynock*, 2019 BCSC 1133, at paras. 85 and 86, as follows:

[85] The following principles are drawn from *R. v. Caslake*, [1998] 1 S.C.R. 51, 121 C.C.C. (3d) 97 [Caslake]:

1. A warrantless search is *prima facie* unreasonable. Therefore, the Crown has the burden of showing that the search was, on the balance of probabilities, reasonable: at para. 11.
2. The arrest must be lawful: at para. 14.
3. The three main purposes of search incident to arrest are:
 - i. ensuring the safety of the police and public;
 - ii. the protection of evidence from destruction at the hands of the arrestee or others; and
 - iii. the discovery of evidence which can be used at the arrestee's trial: at para. 19.
4. The search must be "truly incidental" to the arrest. This means that the police must be attempting to achieve some valid purpose connected to the arrest. This will depend on what the police were looking for and why.
5. There are subjective and objective aspects to this issue:
 - i. The police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted;
 - ii. the search must actually be for purposes related to the arrest; and
 - iii. the police officer's belief that he or she has a legitimate reason to search must be reasonable in the circumstances: at paras. 19, 21.
6. The standard is not reasonable and probable grounds. The only requirement is that there be some reasonable basis for doing what the police officer did: at para. 20.

[86] A similar summary is found in the reasons of Chiasson J.A. in *R. v. Majedi*, 2009 BCCA 276, at para. 19.

[70] The principles were recently reviewed in *R. v. Stairs*, 2022 SCC 11, at paras. 35-37 as follows:

35. The common law standard for search incident to arrest is well established. As explained in *Fearon*, at paras. 21 and 27, it requires that (1) the individual searched has been lawfully arrested; (2) the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest; and (3) the search is conducted reasonably
36. Under the second step, valid law enforcement purposes for search incident to arrest include (a) police and public safety; (b) preventing the destruction of evidence; and (c) discovering evidence that may be used at trial (*Fearon*, at para. 75).

37. The police's law enforcement purpose must be subjectively connected to the arrest, and the officer's belief that the purpose will be served by the search must be objectively reasonable (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 19). To meet this standard, the police do not need reasonable and probable grounds for the search. Instead, they only require "some reasonable basis" to do what they did (*Caslake*, at para. 20). This is a much lower standard than reasonable and probable grounds.
- [71] As noted, Cst. MacDonald testified that he searched the vehicle for the purpose of looking for drugs associated to Mr. Kinney, following his arrest for drug possession.
- [72] I have no difficulty in concluding that Cst. MacDonald had "some reasonable basis" to search the vehicle, and that the vehicle search was for valid law enforcement purposes subjectively and objectively connected to the arrest.
- [73] Cst. MacDonald's stated reason for searching the vehicle was the pursuit of evidence that could be used at trial. The vehicle was searched for drugs. Mr. Kinney had been arrested for possession of drugs. He had been in control of the vehicle. There were ample grounds to believe that the vehicle could contain illicit drugs.
- [74] In *Caslake*, the court held that the police could have searched the car for the purpose of finding evidence which could be used at trial, on a charge of possessing marijuana for purposes of trafficking.
- [75] Ms. Karaim contends that the search of her purse was warrantless and unreasonable. Defence also contends that the search of the area of the car where Ms. Karaim was seated was unreasonable. Other than these points raised by Ms. Karaim, the defendants do not take issue with the manner or reasonableness of the search of the vehicle. There was, in fact, nothing about the manner in which the search of the vehicle was conducted that is unreasonable.
3. Search of Ms. Karaim's Purse, and Passenger Area of the Vehicle
- [76] The police officers contend that they did not detain Ms. Karaim. They do not contend that the search of the purse was incidental to an investigative detention.
- [77] I accept, however, that the search of the purse was ancillary to and formed a part of the search of the vehicle, which was incidental to the valid arrest of Mr. Kinney for drug possession. Its primary purpose was that, not an investigation of Ms. Karaim.
- [78] The purse, really a large bag, was open at the top when observed by Cst. MacDonald, and Cpl. Swann. The photographic evidence makes this quite clear, as well as Cst. MacDonald's testimony that he could observe a wallet and other contents without opening the bag or searching its contents. While there is some indication that the purse was associated to or belonged to Ms. Karaim, the fact remains that it was in the vehicle that was being driven by Mr. Kinney. There were grounds to believe that Mr. Kinney could have placed contents in the bag, either before the traffic stop, or even, during the slight delay in bringing the vehicle to a

stop. The bag was large, open, and reachable by Mr. Kinney.

[79] It was reasonable for the police to search the entirety of the vehicle, including the passenger area where Ms. Karaim was seated, and her purse, as part of the search of the vehicle itself. There was no basis to exempt the search of the purse from the search of the vehicle. In my view, Cst. MacDonald's lawful authority to search the vehicle extended to a search of the purse, within the vehicle. *R. v. Le* 2013 BCCA 442 is somewhat analogous. There, the court held that a valid search warrant extended to the search of a purse within the premises.

4. Arbitrary Detention of Ms. Karaim

[80] Ms. Karaim alleges that she was arbitrarily detained in breach of s. 9 of the Charter, and, further, upon her detention, the police breached s. 10(a) and (b) of the Charter, in that she was not promptly informed of the reasons for her detention, and she was not provided an opportunity to retain and instruct counsel without delay and to be informed of that right.

[81] The Supreme Court of Canada summarized the principles relating to the meaning of "detention" under ss. 9 and 10 of the Charter in *R. v. Grant*, 2009 SCC 32, at para. 44, as follows:

44 In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether [page385] a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:

(a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

(b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[82] These principles were applied in the companion case of *R. v. Suberu*, 2009 SCC 33 [Suberu], at para. 25. The court added the following:

21. In *Grant*, we adopted a purposive approach to the definition of "detention" and held that a "detention" for the purposes of the Charter refers to a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the state. The recognition that detention can manifest in both physical and psychological form is consistent with our acceptance that police actions short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the Charter.
22. While a detention is clearly indicated by the existence of physical restraint or a legal obligation to comply with a police demand, a detention can also be grounded when police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police. As discussed more fully in *Grant*, this is an objective determination, made in light of the circumstances of an encounter as a whole.
23. However, this latter understanding of detention does not mean that every interaction with the police will amount to a detention for the purposes of the Charter, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. This Court's conclusion in *Mann* that there was an "investigative detention" does not mean that a detention is necessarily grounded the moment the police engage an individual for investigative purposes. Indeed, Iacobucci J., writing for the majority, explained as follows:

"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional [page475] rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so. [Emphasis added; at para. 19.]

24. As explained in *Grant*, the meaning of "detention" can only be determined by adopting a purposive approach that neither overshoots nor impoverishes the protection intended by the Charter right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interest in robust Charter rights. To simply assume that a detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the Charter.

[83] In *R. v. Reddy*, 2010 BCCA 11, the Court of Appeal reviewed these decisions, at paras. 47-67.

- [84] The timing of the traffic stop is somewhat uncertain. Cst. MacDonald agreed that 3:25 p.m. would be fairly accurate. Ms. Karaim left, with her purse, at approximately 3:50 p.m. Therefore, she was "detained" in the sense of being "delayed" or "kept waiting" for a total of approximately 25 minutes.
- [85] Initially she was "detained" in the non-technical sense simply because she was a passenger in the vehicle that was stopped. A passenger in a vehicle that is stopped by police is not by that fact alone detained within the meaning of the Charter, and some preliminary questioning of the passenger, as a "bystander" is permitted, without a "detention" being found: *R. v. Mooiman and Zahar*, 2016 SKCA 43, at para. 21; *R. v. Fillery*, 2021 BCSC 1858, at paras. 56-57.
- [86] Much of the time that elapsed before Ms. Karaim departed was absorbed by Cst. MacDonald dealing with Mr. Kinney. That is, obtaining his driver's licence, determining that he was prohibited from driving, making the arrest for driving while prohibited, searching him, contacting Cst. Blouin, arresting him for possession of a controlled substance, and so on.
- [87] For most of this time, Ms. Karaim remained seated in the passenger side of the vehicle. However when Cst. MacDonald decided to search the vehicle, Ms. Karaim was obliged to exit the vehicle. She remained standing on the sidewalk or nearby while her purse was searched.
- [88] The officers maintained that Ms. Karaim was not under investigation at any time, and that she was free to leave at all times. However, they concede that she could not have left with her purse.
- [89] As noted, Cpl. Swann arrived very soon after the traffic stop was initiated. Cst. MacDonald asked her to watch the female passenger. Cpl. Swann remained on the sidewalk on Fitzgerald Street while Ms. Karaim remained in the vehicle. There was some conversation between them, through, I infer, an open window. The details are not in evidence.
- [90] Ms. Karaim was calm and polite, except that at some point Ms. Karaim became agitated when she learned that Mr. Kinney was driving while prohibited. I accept that the officers were calm in their tone, in dealing with both Mr. Kinney and Ms. Karaim. The defendants were both calm and cooperative with the police.
- [91] Cpl. Swann said something to Ms. Karaim to the effect of "just sit tight" or, perhaps, "stay calm" and "we'll sort this out." She denies directing Ms. Karaim to remain in place or to do anything else.
- [92] Cpl. Swann says that when Ms. Karaim got out of the vehicle, she told her she did not have to "hang around". Ms. Karaim said she wanted her purse. Cpl. Swann testified that she said that would be up to Cst. MacDonald.
- [93] In my view, Ms. Karaim was detained within the meaning of ss. 9 and 10 of the Charter when the police advised that she could not leave with her purse, until it was searched. Prior to that, the focus of the investigation was clearly on Mr. Kinney. Ms. Karaim was simply a

passenger in the vehicle and was held up for that reason. It is true that Cpl. Swann was told to keep an eye on her, but this was primarily for purposes of officer safety. Both Cst. MacDonald and Cpl. Swann had some minor incidental conversation with her about whether she was complying with her conditions. This does not mean that she was the focus of their investigation, which remained on Mr. Kinney. I would characterize this question as being simply general questioning, not crossing the line to detention.

- [94] However at a later stage Ms. Karaim was told to exit the vehicle by Cpl. Swann, and was informed that her purse would be searched. While Cpl. Swann maintained that Ms. Karaim was free to leave at this point, in my view Ms. Karaim would have reasonably believed that she was obliged to remain present while her purse was being searched. In my view the circumstances were such as to cause a reasonable person to conclude that she was not free to choose whether or not to cooperate with the police.
- [95] It is notable that some investigatory discussions took place during the search of the purse, concerning the reasons for the large amount of cash being in the purse, and about the small baggy. While I do not have evidence from Ms. Karaim regarding her background, Cst. MacDonald knew that she had a history as a drug dealer. I can infer that she had experience in dealing with police officers, and would have understood that she was in legal jeopardy at this time. Cst. MacDonald thought the large amount of cash was suspicious. This makes sense in view of the circumstances, and his awareness of Ms. Karaim's connection to drug trafficking. She gave an exculpatory answer to the police officer's questions about the cash in her purse, and about the baggy. The baggy was another suspicious item, in that it was drug paraphernalia. At this point, Ms. Karaim had become the "object of particularized suspicion": Grant, para. 49.
- [96] While Cpl. Swann's testimony about what she told Ms. Karaim was vague, I consider it likely that she said something that would have indicated to Ms. Karaim that she was obliged to wait, such as "just sit tight" or "we'll sort this out" or some other comment which could reasonably be seen as a direction.
- [97] The fact that she was later advised that she was "free to go" does not necessarily mean that she was detained prior to this, but in the circumstances of this case, the statement supports the view that she was detained prior to this. Ms. Karaim was told that she was free to go, only after her purse was searched, and after the police confirmed that she was not in breach of court ordered conditions (of probation or bail, I infer), and after the police did not find drugs in her purse.
- [98] The formal detention of Ms. Karaim lasted only a few minutes, while her purse was searched, and until she was advised that she was free to go.
- [99] As the officers did not believe they detained Ms. Karaim, in the technical sense, they made no effort to comply with s. 10(a) or (b) of the Charter. There was therefore, a breach of Ms. Karaim's Charter rights in this respect.

IV. Conclusion

[100] In summary, the applicants have not established breaches of the Charter in relation to the searches. Ms. Karaim has established that she was arbitrarily detained in breach of s. 9 and breaches of s. 10 (a) and (b) of the Charter.

[101] Counsel agreed that submissions regarding the application of s. 24(2) of the Charter should be deferred until after this ruling.

"Verhoeven J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/18/2022BCSC1849.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-karaim-2022>

Prepared on 28 October 2026 · Esheria