

CANADA / JUDGMENT

R. v. Lavender

2010 BCSC 1413

COURT

Supreme Court of British Columbia

DECIDED

6 October 2010

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

2010 BCSC 1413 R. v. Lavender IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Lavender, 2010 BCSC 1413 Date: 20101006 Docket: X072816 Registry: New Westminster Between: Regina And Brandon Lavender Before: The Honourable Mr. Justice N. Brown Reasons for Judgment on Voir Dire Counsel for Crown: K. Boland Counsel for Accused: P. Janzen Place and Date of Hearing: New Westminster, B.C. September 8 - 10, 2010 Place and Date of Judgment: New Westminster, B.C. October 6, 2010 I. Application

- [1] The defendant challenges validity of a warrant that authorized Constable Alex Bojic's obtaining of a bodily substance from the defendant. The s. 487.05 Criminal Code warrant authorized the police to obtain a bodily substance from the defendant to allow a DNA analysis intended to establish whether it matched blood samples found at a dwelling place where a robbery and other offences allegedly committed by the defendant and another suspect had occurred. The defendant says Cst. Bojic, the affiant of the Information to Obtain a Warrant failed to make full and frank disclosure, rendering the taking of the defendant's bodily substance warrantless, and constituted a violation of his s. 8 Charter right to be secure against unreasonable search and seizure.
- [2] During the voir dire, the defendant also applied to cross-examine Constable Bojic as affiant of the ITOW (Information to Obtain a Warrant). This ruling deals with that application as well as validity of the warrant and its admissibility.
- [3] There are three basic questions. The first is whether the defendant has shown a reasonable likelihood that a cross-examination of Constable Bojic will assist in my determining whether Cst. Bojic made a full and frank disclosure. The second, and pivotal, question is whether the issuing judge's warrant had any factual basis, as amplified by the cross-examination of the affiant, if such cross-examination is permitted. Finally, the curative provisions of s. 24 of the Charter must be considered, assuming the defendant's s. 8 Charter rights were breached. II. BACKGROUND

- [4] The defendant is charged with four counts: breaking and entering a dwelling place and committing robbery therein, contrary to s. 348(1)(b); confining, without lawful authority, Darrell Huyton and Lantz Huyton, contrary to s. 279(2); uttering a threat to Lantz Huyton to cause death or bodily harm to him, contrary to s. 264.1(1)(a) and assault causing bodily harm to Darrell Huyton, contrary to s. 267(b).
- [5] The alleged offences occurred June 2, 2008, at the Huyton residence, where the three principle witnesses lived. In response to calls, the police attended. Resident Lantz Huyton told police he awoke in his bed to find suspect 1 holding a knife to his throat. Suspect 1 and another suspect with him went on to grab objects from his bedroom, among them his Xbox.
- [6] Meanwhile, Darrell Huyton, Lantz Huyton's father, was getting up in the early morning to get ready for work when he heard noise downstairs on the main floor of the residence. He went down to see who was there. He saw two suspects and ordered them to leave. One of them cut him with his knife. As this was happening, Lantz Huyton was in his room waiting for the suspects to exit so he could then call the police. He heard his father's voice, grabbed a 'bong,' and used it to hit one of the suspects in the head, bloodying it.
- [7] The suspects fled. Lantz Huyton and Darrell Huyton described different exit routes the suspects took as they fled the scene. Lantz Huyton told an interviewing officer one suspect jumped through the back window of his brother's bedroom. He said the other suspect fled through the front entrance. On the other hand, Darrell Huyton told an investigating officer both suspects had jumped out a rear bedroom window.
- [8] Investigating officers observed what looked like blood droplets on the wall below the aforementioned bedroom window. One of the officers, Corporal Rodatz, swabbed what proved to be a blood sample there.
- [9] Constable Bojic later conducted a photo line-up for Darrell Huyton. The defendant objects to Cst. Bojic's use of Darrell Huyton's identification of Mr. Lavender as one of the grounds for the warrant because, he says, Cst. Bojic failed to describe sufficiently the hesitancy and uncertainty Mr. Huyton exhibited whilst reviewing the photo packs--before his eventual identification of Mr. Lavender as a suspect, with "70% certainty." The defendant says quoting this statement of Darrell Huyton did not adequately convey to the judge hearing the application the tenuous nature of Mr. Huyton's identification of the defendant.
- [10] Most of the defendant's submissions focused on the significance counsel said Cst. Bojic should have placed on incongruent statements Lantz Huyton and his sister, Chantelle Huyton, gave relating to the Xbox mentioned earlier and its controllers, a plastic bag with fingerprints on it, and a shoe box. Investigating officer Cpl. Rodatz removed these for further investigation. The plastic bag proved later to contain the thumb print and palm print of Mr. Lavender. The Xbox did not reveal any identification evidence.

- [11] The information to obtain a warrant includes statements from Cpl. Rodatz and Lantz Huyton, among others, but none from Chantelle Huyton. A. Corporal Rodatz information to obtain a warrant statement
- [12] In the ITOW, at page 11, Cst. Bojic included the following information to Cpl. Rodatz (relating to the Xbox, Xbox controller, cords, shoebox and plastic bag): ...
- v. The suspects dropped a white bag containing X-Box cords and a shoe box with an X-Box console and a controller inside; vi. These items dropped by the suspects were touched by the family and taken to the upstairs of the residence; vii. There were blood drops observed on the wall below the rear bedroom window (it was unknown if these were old); ...
 - m. At 08:45 hours, Corporal Andrea RODATZ seized the X-Box console, cords, controllers, and the white bag from the upstairs of the residence for further examination at the office; ...
 - o. At 14:15 hours, Corporal Andrea RODATZ conducted further forensic examination on the X-Box, cords, 2 controllers and white bag at the Coquitlam RCMP detachment.;
- [13] Regarding evidence found on the plastic bag, referred to at p. 12 of the ITOW, Cpl. Rodatz confirmed she had examined the white plastic bag recovered at the scene and had located one fingerprint and two palm prints. The fingerprint and the palm prints were sent away for analyses, which revealed the fingerprint on the bag was the right thumb print of the defendant, and one palm print was the defendant's. B. Lantz Huyton
- [14] The ITOW states that Lantz Huyton testified on his preliminary inquiry that in the rec room he came upon the plastic bag, containing the Xbox controllers, Xbox console and control wires the suspects attempted to steal. Lantz Huyton then picked up his bag and took it upstairs where it was later seized by the police. On preliminary inquiry, Lantz Huyton testified: Page 45 43 Q I'm just going to take you back to -- so you said 44 you -- you found your Xbox. Can you tell the 45 court more about that, how -- how you spotted it, 46 and describe where it was, and... 47 A I had walked in -- out through -- from the front Page 46 1 door. I walked in the front door, down the 2 hallway towards the bathroom, my brother's room, 3 and the rec room. Walked into the rec room, and 4 I'd seen the plastic bag sitting on top of the TV 5 And I remember thinking, "Is that my Xbox? Is 6 that my Xbox? Is that my jewellery? Is that my 7 phone?" And I walked over, and I opened up the 8 bag and looked inside, and it was my Xbox. 9 Q And so the first thing you saw was this bag? 10 A Mm-hmm. 11 Q Yes? 12 A Yes. 13 Q And what made you think to look inside the bag for 14 your Xbox and your jewellery? 15 A 'Cause I just had a feeling. 16 Q All right. And so you went -- you went over to 17 the bag, I take it, then? 18 A Mm-hmm. Yes. 19 Q And -- and what happened next? 20 A Opened up the bag, and then I seen my wire 21 controller and my wireless controller, and the 22 system, and the cords. And I kinda went to the 23 bottom of the bag to see if my jewellery or 24 anything else was in there, but which it was not. 25 Q So your wireless -- wireless controller was in the 26 bag, and what else was in the bag? 27 A A wire controller, one with a wire. 28 Q The one with the wire. 29 A And the system and the cords. 30 Q Ok. So the actual Xbox -- 31 A System. 32 Q -- game consul? 33 A With the cords. 34 Q

And were those the same items that had been taken 35 from your -- from your room? 35 A Correct, yeah. Page 95 31 Q Do you ever -- do you remember the Xbox being in a 32 box? 33 A After the situation. 34 Q In the -- what? 35 A After coming home from the hospital. 36 Q Yes. 37 A It's hours, hours after, and coming upstairs and 38 looking, it was in a box. 39 Q It was in a box? 40 A Yes. It was, like, a shoebox. 41 Q A shoebox? 42 A Yeah. 43 Q And where was the shoebox located? 44 A Still in front of the TV, where I'd left the 360 45 in the bag. 46 Q Do you know how it got out of the bag and into the 47 box? Page 96 1 A My sister had told me one of the police officers 2 had moved it. 3 Q Well, okay. My friend asked me to clarify. I 4 understand that when you came home, the Xbox was 5 in a box. 6 A Correct. 7 Q Okay. That box, which contained the Xbox, was in 8 the same place where you had placed the bag? 9 A Correct. 10 Q Okay. Where was the bag when you came back? 11 A With the box, I believe. In the box, with the 360 12 still in it. It looked like it'd just been placed 13 into the box. C. Chantelle Huyton

- [15] At the April 8, 2009, preliminary inquiry Chantelle Huyton testified: Page 102 26 Q Now, at some point, I understand, your -- your dad 27 and your brother went to hospital for a while? 28 A Yeah. I was gonna go with them, but I stayed with 29 my mom, and I did a statement. 30 Q Now -- so you -- at some point they went -- they 31 went away, and you stayed there with your mom. 32 Did you -- did you have a look around the house at 33 all, that morning? 34 A Yeah, I did. 35 Q Can you tell the court anything sort of 36 significant you saw, some stuff that was different 37 from the night before? 38 A There was the rec room. I believe, in the rec 39 room, the box with the Xbox in it, the box lid 40 was -- it's, like, a shoebox. The box lid was 41 open, and the Xbox was in there. When I walked 42 into my brother's, room there was blood on the 43 wall from one of the guys. And I believe the 44 window was open a crack. Page 103 6 Q Now, when you looked around the house, do you 7 remember if this was before or after your brother 8 and your dad went to hospital? 9 A It was -- it was after that they went to the 10 hospital. 11 Q So after you looked around? 12 A Yeah. And at that point, the police were there, 13 and -- and they, like -- I couldn't, like, stay 14 down there and look around, because they were, 15 like, taking, like, evidence and stuff, so... 16 Q So did the police give you instructions about what 17 you should do, when they arrived? 18 A I -- just, like, stay upstairs and keep my mom 19 calm, 'cause she was really shaken (sic) up, 20 so... 21 Q Did you -- you said, when you first of all looked 22 around the house, you saw the Xbox downstairs. 23 Did you see it again later that day, at all? 24 A Yeah, the police moved it to upstairs when they 25 were taking, like, evidence and stuff. 26 Q Now, did you see them move it? 27 A Yeah. It was a girl, actually, that moved it, and 28 she moved it upstairs while she was talking to my 29 mom. And then Constable Mayner (phonetic), I 30 believe, was upstairs talking to my mom. They put 31 it down on the ground upstairs, the living room, 32 before they took it. Page 106 12 Q Okay. You went into the rec room. There was 13 nothing really unusual about the rec room? 14 A Not that I can remember, no. 15 Q Okay. You saw an Xbox in a shoebox? 16 A Yes. 17 Q Okay. Was it just, like, sticking out of the 18 shoebox? 19 A It was just sitting in there. The -- like, the 20 cover for the shoebox was just lying open. 21 Q Okay. And you could tell it was an Xbox because 22 you could see it. It was plain as day,

correct? 23 A Yes. 24 Q It wasn't wrapped in anything, or anything like 25 that? 26 A No. III. Reasonable grounds statement in ITOW

[16] Cst. Bojic states the following as reasonable grounds:

42. Based on the evidence presented, I believe that the police investigation has shown that there are reasonable and probable grounds to believe that Brandon LAVENDER was involved in the home invasion at 11-2719 St. Michael Street in Port Coquitlam on June 2nd, 2009. The police investigation has shown:

- a. That a fingerprint located at the home invasion scene from a plastic bag that contained items that the suspects were attempting to steal belonged to Brandon LAVENDER;
- b. That a palm print located at the home invasion scene from a plastic bag that contained items that the suspects were attempting to steal belonged to Brandon LAVENDER;
- c. That Brandon LAVENDER denied the following:
 - i. being at 2719 St. Michael Street Port Coquitlam or even knowing the address; ii. denied knowing the HUYTON family; iii. denied ever sending the HUYTON family anything; iv. he said he hadn't been in Port Coquitlam for 5-6 years;
- d. That victim Darrell HUYTON identified Brandon LAVENDER from a photo line up with 70 percent certainty as being involved in the home invasion;
- e. That victim Darrell HUYTON identified Brandon LAVENDER in the court house and in the court room (during the Preliminary Inquiry) as the person involved in the home invasion;
- f. Darrell HUYTON identified Brandon LAVENDER as the suspect who was bleeding from being hit in the head by his son (Lantz HUYTON) with a glass bong;
- g. That blood samples were taken from the wall and a sheet from the crime scene;
- h. These blood samples are believed to belong to the suspect as all other possible sources of the blood have been ruled out IV. Ruling on Right to Cross-examination of Cst. Bojic A. The Law

[17] In deciding whether to allow cross-examination, the court must strictly focus on the question whether there is a basis upon which the authorizing judge could grant the order: R. v. Lising, 2005 SCC 66; 259 D.L.R. (4th) 441 (para 40). If the proposed cross-examination is not likely to assist in determining this question, it should not be permitted. A reasonable likelihood that it will assist the court to determine a material issue is all that must be shown (para 40). In the words of Charron J:

[69] Although the likely effect of the proposed cross-examination must be assessed in light of the affidavit as a whole, I also agree with Finch C.J.A. that the threshold test for determining whether cross-examination should be allowed is separate and distinct from the ultimate question of whether the authorization is valid. Hence, in determining whether the threshold test has been met, the trial judge cannot decide the question simply on the basis that other

parts of the affidavit would support the authorization. The focus, rather, must be on the likely effect of the proposed cross-examination and on whether there is a reasonable likelihood that it will undermine the basis of the authorization. If the test is met, it is only at the conclusion of the voir dire that the trial judge will determine whether, on the basis of the amplified record, there still remains a basis for the authorization.

- [18] See also *R. v. Cook*, [2008] O.J. No. 4764 (Super. Ct) where the court included these overarching principles at para. 28
- (4) ... leave to cross-examination should be given only where "necessary" to enable an accused to make full answer in defence: *R. v. Garofoli*, [1996] C.C.C. (3d) 161 SCC at para. 88.
 - (5) there is an onus, albeit not an onerous one... on an accused seeking cross-examination "to show" a basis... for cross-examination before leave will be granted for an evidentiary hearing with cross-examination.
 - (6) the leave question, involving an exercise of discretion by a trial judge... considers whether the applicant has established "a reasonable likelihood" that cross-examination of the applicant will elicit testimony of probative value to an issue under consideration, for example, a challenge to the accuracy of an affidavit insofar as accuracy or omissions impact on the existence of reasonable grounds for issuance of the search order... B. Ruling on leave to Cross-examine
- [19] I granted counsel for the defendant leave to cross-examine Cst. Bojic. I was satisfied there was a reasonable likelihood that the proposed cross-examination would undermine the basis of the authorization, particularly with respect to the foundational importance of the inculpatory prints on the plastic bag, the affiant's failure to disclose Chantelle Huyton's statements in the ITOW, and inconsistent evidence surrounding the continuity of the plastic bag. While I had considerable doubt cross-examination would provide information that would allow me to conclude that, even with the amplified information, the authorizing judge would have had no basis for issuing the warrant; on balance I concluded the likelihood was sufficient to authorize counsel to cross-examine. V. Constable Bojic's evidence on cross-examination
- [20] Constable Bojic has served for 9 ½ years as a member of the RCMP, and for 2 ½ years has served in the Coquitlam detachment robbery section. He was not involved in the original investigation and so was asked to conduct the photo line-up for Darrell Huyton. The officer originally in charge of the investigation had already reported to the Crown, but he was transferred to another detachment. Cst. Bojic was then designated to take over the file and complete the ITOW. He also conducted the Sophonow photo line-up since he had not been involved in the original investigation (Manitoba, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) (Commissioner Peter Cory)).

- [21] He explained the information was not sworn until February 16, 2010; but preceding that, several drafts had been prepared and exchanged with Ms. Kenward, a Crown counsel, who had drawn various potential sources of information to Cst. Bojic's attention. She also had suggested some modifications in the drafts. He explained the considerable lapse of time relates mostly to delays stemming from waiting on Crown counsel's responding to drafts he had submitted. A. Frank and full disclosure
1. Xbox and plastic bag
- [22] Constable Bojic testified on cross-examination that he was aware of his duty to make full and frank disclosure. Materials available to him included police reports on the computer management system and CDs of witness statements. He also had copies of the preliminary inquiry transcripts; he read most parts of them and skimmed the rest. A Crown counsel directed his attention to certain areas she thought significant. Cst. Bojic was aware of the evidence of Chantelle Huyton on the preliminary inquiry and contradictions lying between her evidence and Lantz Huyton's evidence on whether they had seen the plastic bag in proximity to the Xbox, its controllers and a shoebox they and Cpl. Rodatz refer to. Constable Bojic acknowledged the three witnesses had not agreed on specifics; but testified he did not want to confuse the judge deciding the application with what he had seen as insignificant variations contained in Chantelle Huyton's evidence.
- [23] He acknowledged the importance of the plastic bag for identification in the case, since prints on it could connect the defendant to the robbery and he agreed it was important to link the inculpatory bag with the Xbox that Lantz Huyton said been taken from his room during the robbery.
- [24] He explained he did not refer to the preliminary inquiry cross-examination of Chantelle Huyton because he was focused on the plastic bag, not the Xbox. There were no prints on the Xbox, just on the plastic bag. He did not think Chantelle Huyton's 'perception' that when, after Darrell and Lantz Huyton had left for the hospital, she had seen the Xbox and shoebox on the rec room table but did not describe seeing a plastic bag was a significant matter. He thought the plastic bag with the defendant's fingerprints on it was what was important for the judge deciding the application to know about.
- [25] Constable Bojic also thought that Cpl. Rodatz was the most material witness for the search warrant application: she was aware the exhibits she took away for further investigation had been touched by members of the family. For Cst. Bojic, the fact Cpl. Rodatz had seized the bag, and the prints on it had tested positive for identifying the defendant, who was not supposed to be in the home at all, was of prime importance. In sum, Cst. Bojic wanted the report to flow properly. He concluded Chantelle Huyton's information added only confusion and that her perception viz-a-viz the Xbox and unmentioned bag would be impossible to sensibly situate on a logical timeline. He did not see this discrepancy as relevant, and for that reason only, he left it out of the ITOW.

2. Photo line-up identification

- [26] Constable Bojic was asked to conduct a photo line-up because he had not been involved in the original investigation and so had no idea who the suspects were. He was aware of the proper Sophonow protocol. Counsel raised no procedural concerns relating to Cst. Bojic's conducting of the photo line-up. Constable Bojic confirmed the photo line-up lasted about 33 minutes. He had a transcript of it, as well as his own personal knowledge to refer to. He agreed 30 minutes was longer than normal for a photo line-up identification, and that 70% was not a high level of certainty for identification.
- [27] He explained Mr. Huyton had quickly narrowed his identification of suspects down to two. He spent the remainder of his photo lineup time deciding between the two remaining suspects in the photo packs. Constable Bojic did not comment in the ITOW on this or related details, such as Mr. Huyton's various oral remarks preceding his statement that he was 70% sure of his identification. On cross-examination, Cst. Bojic said he could not comment on whether Mr. Huyton was struggling. He acknowledged Mr. Huyton was talking out loud and had made comments about such things as why the suspects were not smiling, which was "what he saw," and that the suspect had long hair. He said Darrell Huyton's comments were basically just a monologue and he saw no reason to mention them.
- [28] In short, Cst. Bojic believed his referring in the ITOW to Mr. Huyton's statement that he was 70% certain was sufficient disclosure. He saw no reason to amplify this statement. VI. POSITION OF THE PARTIES A. Summary of Positions generally
- [29] The defendant submits the DNA sample taken by police resulted from a warrantless search because the affiant, Cst. Bojic, failed to make full and frank disclosure on what counsel referred to as the three main pillars of the ITOW. The first alleged failure relates to Cst. Bojic's failure to mention witness statement discrepancies about the exit routes taken by the suspects when they fled that were known to him. Counsel says the information failed to point out the evidence about the exit routes was ambiguous and if one or both suspects had not exited the window where the blood sample was taken, this would weaken any connection between the defendant and any blood swab from the wall below the window. I found no merit in this submission.
- [30] The second alleged failure relates to insufficient detail in the ITOW that the defendant says would have revealed that identifying witness Darrell Huyton was actually more uncertain than the denoted 70% level of uncertainty mentioned in the ITOW. I am not persuaded by counsel's submission in this aspect of his application either. Amplifying the information with additional details such as the fact the photo line-up interview lasted thirty-three minutes; and that Mr. Huyton went through the photo packs six times after narrowing the suspects to two; and that he then had to review those further those before being able to identify the defendant with 70% certainty would still not, in my view, enable a reviewing judge to conclude that a judge issuing a warrant would have been wrong to do so. Further, a Provincial Court Judge would have been fully alive to the uncertainty inherent in an

identification based on 70% certainty. In addition, Mr. Huyton's photo line-up identification was enhanced by his identification of the defendant outside the courtroom before the preliminary inquiry began, which the issuing judge could also properly consider.

- [31] This leaves counsel's submissions about Cst. Bojic's failure to incorporate Chantelle Huyton's preliminary inquiry evidence in the ITOW, in some way, or to address inconsistencies between witness' evidence over the presence, or not, of the inculpatory print-imprinted plastic bag in proximity to the Xbox when they saw it. Counsel's submissions constitute what could be characterized as an allegedly serious exhibit continuity problem.
- [32] Defence counsel submits the plastic bag, with its inculpatory prints, is a crucial exhibit because Darrell Huyton said the suspects took it from his room and thus this is the only object, there being no prints on the Xbox, that would connect the defendant with the alleged offences. Therefore, counsel says, if information was available to Cst. Bojic indicating the plastic bag was not present with the Xbox, Xbox controllers or shoebox, this should have been brought to the attention of the judge considering the information. He submitted the inculpatory plastic bag must be closely tied to the Xbox in order to connect the defendant to the alleged offences.
- [33] After a brief consideration of law I will consider the defendant's challenge to this 'pillar' of the ITOW. B. Law
- [34] Police are duty bound to make full and frank disclosure and to avoid strategic omissions: *R. v. Araujo*, [2000] 2 S.C.R. 922 (para. 46-47). The reviewing judge does not substitute their view for that of the authorizing judge. If, based on the record before the authorizing judge, as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then they should not interfere: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1452, (as cited in *R. v. Hummell*, 2002 Y.K.C.A. 6 at para. 37). C. Xbox and plastic bag continuity arguments
- [35] The defendant says Cst. Bojic seriously failed in his duty to make full and frank disclosure of all relevant material and information. Counsel submitted he cannot make a strategic omission for any reason, including any concern he might have felt over confusing the judge with what he saw as Chantelle Huyton's irrelevant statements about the Xbox. He submitted this is especially so given that the plastic bag is a key exhibit. Any relevant information concerning the bag ought to have been included in the ITOW, whereas Cst. Bojic excluded it all together.
- [36] Defence counsel strongly argued against the prosecution's contention that at this stage, the fact the bag was found in the house at all is really all that matters. He argues the importance of the bag lies in its possible linking of the defendant to the Xbox and cables removed from Lantz Huyton's room, not its mere presence somewhere in the house.

- [37] Crown counsel acknowledges discrepancies between the statements of Lantz Huyton and Chantelle Huyton. However, he submits they do not change the fundamental fact a plastic bag was found in the Huyton residence with the defendant's thumb and palm print on it and that this belies the defendant's denial, as noted in the information, he had ever been present there. Counsel submits that even if taken at its worst, that is, that the origin of the bag is unknown, the approving judge still would be left with information that a bag with the defendant's prints on it was found in the home. When combined with the identification of Darrell Huyton, this would be enough for a judge to grant a warrant.
- [38] Crown agrees it would have been preferable for Cst. Bojic to have at least noted the discrepancy. However, he points to Cst. Bojic's testimony that he did not, in effect, appreciate the possible importance of the discrepancies between Lantz and Chantelle Huyton's recollections. Counsel submits that the only real discrepancy relates to whether the Xbox was in the bag. He points out the bag could easily have been in the shoebox and simply had not been noted by Chantelle Huyton, whose attention would have been drawn to the Xbox itself. In sum, Crown counsel submits Cst. Bojic had no intention to mislead the approving judge. Moreover, he says, the information, fully amplified with descriptions of the discrepancies, would not have added information that could lead a reviewing judge to conclude that the judge had erred in granting the warrant. D. Ruling
- [39] I understand the reasoning that that led Cst. Bojic to omit reference in the ITOW to Chantelle Huyton's evidence. I am satisfied he had no intention to mislead. But, given his duty of full and frank disclosure, he should have drawn the approving judge's attention to the differences in witness' statements on the plastic bag. Of course, a detailed comparison was not necessary, but for full and frank disclosure, some mention of differences in the recollections of the only scene witnesses on the continuity of a key inculpatory exhibit should have been included in the ITOW.
- [40] Even so, I agree with the prosecution that even with fully amplified information on this aspect of the case, Cst. Bojic would still have established reasonable grounds. And as a reviewing judge I could not find there wasn't any basis for the decision of an approving judge, having regard to all relevant factors, including the nature of the designated offence and the circumstances of its commission: *R. v. Hummell* (supra).
- [41] It should be noted that the break and entry of a dwelling place is an included offence of s. 348(1)(b). The inculpatory prints on the plastic bag afford reasonable grounds for that offence.
- [42] Therefore, considering all, I conclude the taking of a DNA sample from the defendant was not warrantless, and the DNA sample obtained pursuant to it is not inadmissible on the grounds of it being an invalid warrant.
- [43] I turn next to the question whether, in the event I have erred in what I so far decided, s. 24 of the Charter applies. VII. SECTION 24 A. Law

- [44] The focus of s. 24(2) of the Charter is societal, aimed at the broad impact of the admission of evidence on the long term repute of the justice system. In *R. v. Reddy*, [2010] B.C.J. No. 49 at para. 91, the British Columbia Court of Appeal succinctly summarized the *Grant* (*R. v. Grant*, 2009 SCC 32) factors that a judge should consider when deciding whether to omit or exclude evidence: (para. 91)
- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
 - (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little); and
 - (3) society's interest in the adjudication of the case on its merits.
- [45] Admitting evidence obtained by deliberate and egregious police conduct in disregard of the accused's rights may lead the public to conclude the court implicitly condones such conduct. However, admission of evidence obtained from a breach committed in good faith would have little adverse affect on the repute of the court process (*Grant* para. 108). But "ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith" (*Grant* para. 75).
- [46] Regarding the intrusiveness of the warrant, a DNA warrant is not as intrusive as a strip search warrant; *R. v. S.A.B.*, 2003 SCC 60 (at para. 55). The degree of intrusion, both physical and informational, is limited (para. 59). Further, while the degree of coercion remains high, there are a number of safeguards in place to prevent abuse of the DNA in the warrant provisions of the Criminal Code (para. 59).
- [47] In *S.A.B.*, the court also noted the high probative value of forensic DNA analysis, which is "capable of both identifying and eliminating suspects, a feature that seriously reduces the risk of wrongful convictions" [para. 61]. Further, cases involving bodily samples will usually favour admission because "evidence obtained from the accused's body is generally reliable, and the risk of error inherent in depriving the trier of fact of the evidence may well tip the balance in favour of admission [*Grant*, para. 110]. However, where intrusion is pronounced, the evidence may still be excluded; conversely, where the violation is less egregious, reliable evidence from the accused's body may be admitted. [*Grant*, para. 111].
- [48] The seriousness of the offence remains a consideration, but is a far less important factor now than previously [*Reddy*, *supra*, at para. 94]. B. Position of the Parties
- [49] Counsel for the defendant points out this is not the first information Cst. Bojic had sworn. He was an experienced officer. He had ample opportunity to review the preliminary inquiry transcripts. Further, he points out Cst. Bojic was not working in haste, as is sometimes the case; and when imperfections are anticipated. Counsel submitted it was troubling that Cst. Bojic and Crown counsel assisting him (not counsel at bar) had so much time to prepare the information, had worked through drafts, and yet had failed to recognize the importance of putting in any information from Chantelle Huyton. He said this places the case in a different

context than ITOW's that have been prepared quickly under pressure and given there had been extensive file reviews vetted by a superior officer, and also more than once by Crown counsel, it is not possible to say the admissions were accidental.

- [50] Crown submits Cst. Bojic acted in good faith at all times and that this case is quite distinguishable from those such as *R. v. Lising*, [2005] S.C.C. 66 where the warrant was rife with problems. In this case, the constable simply missed the significance of Chantelle Huyton's information - based on his belief the discrepancies were not relevant, given the overall circumstances of the case. He submits nothing contained in the report was misleading or misstated. Only an act of omission was involved and inclusion of the omitted information would not have made any difference to the final result. C. Findings
- [51] I have already commented on Cst. Bojic's failure to include reference to Chantelle Huyton's statement and the facts relating to their inconsistency with Darrell Huyton's statements. It is obviously not usually necessary to note every inconsistency between witnesses. But given the importance of the plastic bag, the nature of the offences alleged and the surrounding circumstances, some information about the discrepancies should have been included, even though they would not have changed the result. Constable Bojic's duty to make full and frank disclosure should have outweighed his concerns about confusing the approving judge. However, and as noted, I am satisfied Cst. Bojic was acting in good faith. The reasons he gave for his not including the information were not farfetched or illogical. I found no basis for saying he intended a strategic admission or intended to mislead the approving judge. Neither is this a case of wilful ignorance of the law. Constable Bojic misapprehended the significance of Chantelle Huyton's information, significant because any reference to the inculpatory plastic bag and its proximity to the Xbox could connect or disconnect a suspect from their presence during the robbery. But as noted earlier, I would not be able to conclude the approving judge had no basis for granting the warrant, even with fully amplified information. I find Cst. Bojic's conduct is more aptly characterized as an error in judgment than anything approaching a serious abuse of state power and I find he had acted mistakenly but in good faith.
- [52] Given public awareness of the reliability of DNA evidence, and the presence of the defendant's thumb and palm print on the bag, in my view, the reputation of the administration of the court process would be damaged more by exclusion of the DNA evidence than by its inclusion. It is true, as counsel for the defendant submits, that exclusion would not gut the prosecution, but the strength of that consideration is somewhat weakened by the reliability of DNA evidence, and its capacity to establish innocence as well as guilt.
- [53] I am satisfied, having regard to the Grant factors, the reputation of the justice system would not be harmed by admission of the evidence and breach of the defendant's rights under s. 8 of the Charter should not prevent admission into evidence of the DNA sample obtained pursuant to the warrant.
- [54] The defendant's application is therefore dismissed "N. Brown, 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/10/14/2010BCSC1413.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-lavender-2010>

Prepared on 26 October 2026 · Esheria