
CANADA / JUDGMENT

R. v. Lerch

2020 BCSC 441

COURT

Supreme Court of British Columbia

DECIDED

11 February 2020

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2020 BCSC 441 R. v. Lerch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lerch,

2020 BCSC 441

Date: 20200211

Docket: 22181-3

Registry: Rossland

Regina

v.

Scott Allen Lerch

Amanda Marie Moosewaypayo

Before: The Honourable Mr. Justice Skolrood

Oral Reasons for Judgment

Re Voir Dire #1

Counsel for the Crown:

I. Ferbey

Counsel for the Accused, Scott A. Lerch:

M.A. Patterson

Place and Date of Trial/Hearing:

Rossland, B.C.

February 3-7 and 10, 2020

Place and Date of Judgment:

Rossland, B.C.

February 11, 2020

Introduction

- [1] THE COURT: This is my ruling on the Voir Dire #1.
- [2] The accused, Scott Allen Lerch, stands charged with 10 counts of drug and firearms-related offences, including possession of Fentanyl and Methamphetamine for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and possession of a prohibited firearm contrary to s. 91(1) of the Criminal Code, R.S.C. 1985, c. C-46. At the commencement of the trial, the Crown directed that a stay be entered on one of the charges, leaving nine outstanding.
- [3] Mr. Lerch has pleaded not guilty to all of the charges.
- [4] Amanda Moosewaypayo was also charged; however, she pled guilty to one of the charges.
- [5] The charges stem from a search of the residence occupied by Mr. Lerch, located at 190 Coleman Street in Trail, BC ("190 Coleman"), that occurred on August 9, 2018, pursuant to a search warrant. That search led to the seizure of drugs and various items.
- [6] Mr. Lerch challenges the validity of his arrest and of a strip search that was conducted of him. He submits that his arrest was in breach of s. 9 of the Canadian Charter of Rights and Freedoms [Charter] and that the search was done in violation of s. 8. He also takes the position that he was denied access to counsel in violation of his rights under s. 10(b) of the Charter.
- [7] A voir dire was held to consider Mr. Lerch's Charter challenges, as well as the voluntariness of two statements made by Mr. Lerch that the Crown wishes to rely on.

Background

- [8] The search of 190 Coleman and the arrest of Mr. Lerch were carried out by members of the Trail detachment of the RCMP. The lead investigator was Constable Tyler Peters. Constable Peters is a member of the Crime Reduction Unit that handles larger investigations.
- [9] In July and August 2018, the RCMP received three different reports about suspicious activities involving 190 Coleman. Specifically, reports of unusual comings and goings from the residence and drug paraphernalia in the street close to the residence, although in cross-examination Constable Peters acknowledged that the drug paraphernalia was found closer to 270 Coleman, a few houses down the street. Each of the reports or complaints was lodged

in the police PRIME system, which is essentially a depository of information concerning police activity. Constable Peters reviewed the different reports and, in his view, the complaints recorded were consistent with drug trafficking. Constable Peters acknowledged that he did not do any follow-up with the complainants and knew nothing about them.

- [10] The RCMP launched an investigation and, as part of that investigation, learned that Mr. Lerch and Ms. Moosewaypayo resided at 190 Coleman.
- [11] The RCMP conducted three days of surveillance of 190 Coleman on August 7, 8, and 9, 2018, which Constable Peters described in some detail. I do not intend to review all of his evidence about the surveillance, but will summarize the key points. Constable Peters attended each day and was accompanied at different times by other officers, including Constables Zilkie and Gallon, and Acting Corporal Plotnikoff.
- [12] Typically, each day one member of the team was positioned with a view of the front gate to 190 Coleman, and another member was positioned at the entrance to the street which is a dead-end street. 190 Coleman is situated below the level of the street. Entrance is gained by passing through a gate at street level, then descending down some stairs. Accordingly, the officer positioned to watch the residence could see the gate and the top portion only of the house. Constable Peters was positioned in view of the gate to 190 Coleman on August 7, and then was positioned at or near the entrance to Coleman Street on August 8 and 9. Constable Gallon had the position with the view of 190 Coleman gate on August 8 and 9.
- [13] Over the course of the three days, the surveillance team observed numerous people coming and going from 190 Coleman. Many, if not most, of the visits were of a short duration which, in Constable Peters' experience, is consistent with drug trafficking activity. In addition, some of the visitors who could be identified were known drug users.
- [14] Both Constable Peters and Gallon confirmed that over the course of the three days of surveillance, they had no confirmed sightings of Mr. Lerch, and no confirmation that he was present at 190 Coleman. Further, while there was information indicating that Mr. Lerch and Ms. Moosewaypayo lived at 190 Coleman, the officers did not know if anyone else lived there as well. For example, they did not know if Mr. Clydesdale or Mr. Skinner, who were at the home on August 9 when the search warrant was executed, also resided at 190 Coleman.
- [15] During the course of surveillance on August 9, the officers observed a blue Honda drive onto Coleman Street and park in front of 190 Coleman. A male passenger got out and entered through the gate. Fifteen minutes later, the Honda departed.
- [16] The police decided to follow the vehicle with Acting Corporal Plotnikoff in one car and Constables Peters and Zilkie in another. The blue Honda came to a stop in front of a residence and the officers approached it. Constable Peters said he approached the passenger side and observed a shirtless male holding a lottery ticket and a small bag with a rock-like substance in his lap, which Constable Peters believed to be a controlled substance.

- [17] The male, who was identified as a Mr. Parr, got out of the car and was arrested by Constable Peters. According to Constable Peters, Mr. Parr asked if the officers were "coming from Scott's". In addition, Constable Zilkie dealt with the female driver, who said that she had driven Mr. Parr to 190 Coleman numerous times to purchase drugs.
- [18] Later in the day on August 9, 2018, Constable Peters prepared an information to obtain and submitted it to the Justice Centre in Burnaby in support of an application for a search warrant of 190 Coleman. The search warrant was approved at approximately 17:28 p.m. At approximately 18:28 p.m., officers arrived at 190 Coleman to execute the warrant.
- [19] The officers, including Constable Peters, entered through the gate and descended the stairs. Three males were observed sitting on patio furniture adjacent to the house. One of them was Mr. Lerch. The other two males, Mr. Clydesdale and Mr. Skinner, were initially arrested on scene but were then released. Mr. Lerch was taken into custody and transported to the Trail RCMP detachment.
- [20] According to Constable Peters, he gave Mr. Lerch a Charter warning at 18:24 p.m. He read the warning verbatim from a Charter card he had with him. The warning included the statement that Mr. Lerch had the right to consult counsel without delay. Mr. Lerch said that he understood. He also said something to the effect of, "Yah, I have a lawyer. I will call my lawyer."
- [21] Acting Corporal Plotnikoff attended at 190 Coleman on August 9 as part of the team executing the search warrant. He said that as he proceeded down the stairs towards the residence, he saw three men on the adjacent patio. He said that he advised all three that the police were there to execute a search warrant, and that they were all under arrest. He said that he gave them a verbal Charter warning, in the sense that he did not read a formal warning from the standard issue card. According to Acting Corporal Plotnikoff, this occurred at 18:17 p.m., which was seven minutes before Constable Peters provided Mr. Lerch with a formal Charter warning.
- [22] Acting Corporal Plotnikoff said that he did not see Constable Peters formally warn Mr. Lerch or advise him of his right to counsel, because once Constable Peters assumed custody of Mr. Lerch, Acting Corporal Plotnikoff escorted Mr. Skinner back up to the road where he was released.
- [23] According to Constable Peters, after giving Mr. Lerch the formal Charter warning, he arranged for Constables Gallon and Zilkie to transport Mr. Lerch to the Trail RCMP detachment.
- [24] Constable Peters said that he was not involved in any follow-up with Mr. Lerch with respect to Mr. Lerch contacting a lawyer at the time. He does not recall instructing the transporting officers, Gallon and Zilkie, to make sure that Mr. Lerch could call his lawyer, but he said it was understood that transporting officers will follow through on access to counsel.

- [25] Constable Peters did call Mr. Lerch's lawyer's office the following day, August 10, at 16:10 hours. The lawyer called back at 16:16 hours and Mr. Lerch was placed in a telephone room to speak to his lawyer. This was his first contact with counsel after his arrest.
- [26] After Mr. Lerch spoke to his lawyer on the phone, Constable Peters conducted a warned interview of him that was video and audio recorded.
- [27] Constable Lerch summarized the facts that he relied upon in forming his belief that Mr. Lerch was committing an offence or offences and that led to his decision to arrest Mr. Lerch:
- a) His review of the complaints received about suspicious activity at 190 Coleman;
 - b) The fact that the people believed to be residing in 190 Coleman were Mr. Lerch and Ms. Moosewaypayo;
 - c) The activity observed during the three days of surveillance which was consistent with drug trafficking;
 - d) The vehicles parked in front of 190 Coleman were registered to Ms. Moosewaypayo, who was understood to be Mr. Lerch's common-law spouse;
 - e) The fact that Mr. Lerch, as part of a bail condition in respect of other charges, had advised the RCMP that he was residing at 190 Coleman;
 - f) A controlled substance was found in the possession of the male passenger, Mr. Parr, in the blue Honda sedan which was seen leaving 190 Coleman;
 - g) Mr. Parr's statement or question upon arrest of "you guys coming from Scott's"; and
 - h) The information from the female driver that she had driven Mr. Parr to 190 Coleman several times to purchase drugs.
- [28] Returning to the issue of access to counsel, as noted, Constable Peters testified that he did not take steps to facilitate access, but expected the transporting officers would. Constable Gallon was one of the transporting officers. He drove the police car and Constable Zilkie sat in the back with Mr. Lerch. According to Constable Gallon, no one asked him to help Mr. Lerch contact counsel and he did nothing to facilitate that.
- [29] After taking Mr. Lerch to the detachment, Constables Gallon and Zilkie returned to 190 Coleman to assist in executing the search warrant. At some point, information was provided that Mr. Lerch's lawyer's phone number may be stored in a phone at the residence and officers were told to look for a phone with a skull on the cover. Constable Gallon said that during the course of the search, he found two phones with skulls on the cover.

- [30] Constable Gallon later returned to the detachment and at 22:24 hours, he went to the cell where Mr. Lerch was being held. He had the two skull-cased phones with him and he asked Mr. Lerch if he needed one of them to contact his lawyer. Mr. Lerch said no, he was sleeping and would talk to his lawyer tomorrow. Constable Gallon then gave Mr. Lerch a supplemental Charter warning.
- [31] Constable Zilkie was the other officer involved in transporting Mr. Lerch from 190 Coleman to the detachment. Constable Zilkie sat in the back of the car with Mr. Lerch but said there was minimal conversation. Mr. Lerch mentioned something about his lawyer, but Constable Zilkie does not recall if he asked Mr. Lerch what the lawyer's name was.
- [32] Constable Zilkie said his understanding was that the officer at the detachment, Constable Crockford, would take care of ensuring Mr. Lerch had access to counsel.
- [33] Constable Crockford also testified. He, in fact, did not do anything to facilitate Mr. Lerch's access to counsel. He said that was because he understood that Constable Gallon was dealing with the lawyer request for Mr. Lerch. In his police report, Constable Crockford wrote, "Scott spoke to Constable Gallon about his legal representation." Constable Crockford dealt with the lawyer request for Ms. Moosewaypayo by arranging for another officer to call her lawyer.
- [34] Constable Crockford is the officer who conducted a strip search of Mr. Lerch at the detachment. He said he did so based upon his experience with people in custody bringing drugs or dangerous items into the cells. It is a particular concern when a person has been arrested as part of a drug-related search warrant, because the person may have had little time to dispose of drugs, and so it is common to hide drugs on their person, for example in their underwear.
- [35] Having formed the opinion that a strip search was warranted, in keeping with policy, Constable Crockford sought permission from his superior, Corporal Reid. Permission was granted and Constable Crockford conducted the search. Nothing was found.
- [36] Against this background, I will consider each of the legal issues arising on the voir dire.

Arrest of Mr. Lerch

- [37] Dealing first with his arrest, Mr. Lerch submits that the police lacked reasonable grounds to arrest him. He invokes s. 9 of the Charter of Rights, which provides that "everyone has the right not to be arbitrarily detained or imprisoned".
- [38] The authority of a police officer to arrest someone without a warrant is found in s. 495 of the Criminal Code. Section 495(1) states:

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

[39] The leading authority on the principles governing the power to arrest without warrant is *R. v. Storrey*, [1990] 1 S.C.R. 241, where Justice Cory provided the following summary at 250:

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 case for conviction before making the arrest.

[40] A concise summary of the key principles is provided by Justice Chiasson of our Court of Appeal in *R. v. Spence*, 2011 BCCA 280 at para. 33:

1. An arresting officer's subjective belief in reasonable grounds to arrest must be justified objectively;
2. There must be more than mere suspicion, proof on a balance of probabilities is not required; reasonable probability or reasonable belief (credibility based probability) is sufficient;
3. The assessment is to be made looking at the circumstances through the eyes of a reasonable person with the same experience, training, knowledge and skills as the arresting officer;
4. To the extent an officer's belief is based on informer information, the credibility of the information will be considered in light of the reliability of the informant based on any past experience, the quality of the information and any corroborating or confirmatory evidence; weaknesses in one area may be compensated by strengths in other areas.

[41] One other guiding principle is that the standard of reasonableness must be assessed in light of the circumstances as a whole: see *R. v. Nolet*, 2010 SCC 24 at para. 48.

[42] I have summarized the various factors that Constable Peters says informed his decision to arrest Mr. Lerch and I will not repeat them. I agree with Mr. Lerch that certain of the factors relied on by Constable Peters, if viewed in isolation, would not rise above mere suspicion and would not form the basis for a reasonable belief. For example, during the surveillance on August 8 and 9, 2018, Constable Peters noted traffic turning onto Coleman Street. However, he did not necessarily tie that traffic to activity at 190 Coleman. Further, Constable Peters made certain leaps in his logic or thinking, such as assuming that Mr. Roy was acting as a drug courier for Mr. Lerch without any real factual foundation for that assumption.

- [43] However, as I have noted, the cases require that the circumstances be examined in their entirety and when I consider the cumulative effect of all of the facts relied upon by Constable Peters, I am satisfied that he had reasonable grounds to arrest Mr. Lerch. Specifically, I am satisfied that he formed the subjective belief that he had reasonable and probable grounds on which to base an arrest. I am further satisfied that the grounds were objectively justifiable, in the sense that a reasonable person placed in the position of Constable Peters would conclude that there were reasonable and probable grounds for the arrest.
- [44] Surveillance was conducted over the course of three days which revealed activity that, in Constable Peters' experience, was consistent with street-level drug trafficking at 190 Coleman. The observed activity was consistent with what had been reported in three different complaints to police. There was credible evidence to indicate that Mr. Lerch resided at 190 Coleman and no evidence to suggest that anyone else other than Ms. Moosewaypayo lived there. Information obtained from the occupants of the blue Honda also supported the belief.
- [45] I would note that, as Constable Peters himself acknowledged, the failure to make a note about his conversation with Mr. Parr, specifically Mr. Parr's statement that "you guys coming from Scott's" was an error on his part. However, the fact that Constable Peters did not record that in his notes does not mean it did not happen. I found Constable Peters to be a credible witness and I have no hesitation in accepting his evidence on this point.
- [46] In summary, I am satisfied that, on the totality of the information available to Constable Peters, he had reasonable and probable grounds to believe that Mr. Lerch had committed or was committing an indictable offence, namely possession of a controlled substance for the purpose of trafficking, and was therefore justified in arresting him.
- [47] I therefore find that Mr. Lerch's s. 9 rights were not infringed.

Strip Search

- [48] The second issue concerns the strip search of Mr. Lerch, which he contends constituted an unreasonable search in violation of s. 8 of the Charter.
- [49] A police officer has the power to conduct a warrantless search of a person if it is incidental to a lawful arrest: *R. v. Caslake*, [1998] 1 S.C.R. 51. In *Caslake*, the Supreme Court identified the three main purposes of search incidental to arrest being: ensuring the safety of the police and public; protection of evidence from destruction at the hands of the arrestee or others; and discovery of evidence which can be used at the arrestee's trial (at para. 19).
- [50] *R. v. Golden*, 2001 SCC 83, deals specifically with strip searches. At para. 98, Justices Iacobucci and Arbour for the majority said:

The fact that the police have reasonable and probable grounds to carry out an arrest does not confer upon them the automatic authority to carry out a strip search, even where the strip search meets the definition of being "incident to lawful arrest" as discussed above. Rather, additional grounds pertaining to the purpose of the strip search are required. In *Cloutier*, supra, this Court concluded that a common law search incident to arrest does not require additional grounds beyond the reasonable and probable grounds necessary to justify the lawfulness of the arrest itself: *Cloutier*, supra, at pp. 185-86. However, this conclusion was reached in the context of a "frisk" search, which involved a minimal invasion of the detainee's privacy and personal integrity. In contrast, a strip search is a much more intrusive search and, accordingly, a higher degree of justification is required in order to support the higher degree of interference with individual freedom and dignity. In order to meet the constitutional standard of reasonableness that will justify a strip search, the police must establish that they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest.

- [51] At para. 101, the Justices identified 11 different questions that will inform the analysis of whether a strip search has been conducted in a manner that is Charter compliant.
- [52] The Crown cites *R. v. Vixaysongkham*, 2007 BCSC 183, where Mr. Justice Tysoe, as he then was, considered the validity of a strip search conducted of the female accused while she was in custody at the Vancouver jail. The search revealed cocaine and heroin in her bra.
- [53] Justice Tysoe reviewed the principles emanating from *Golden* and the discussion and application of those principles by Judge Bruce of the BC Provincial Court, as she then was, in *R. v. Douglas*, 2003 BCPC 392. Justice Tysoe concluded that the search was not unreasonable. He said at paras. 33 to 34:
- [33] The threshold for a strip search is not as high as the standard of reasonable and probable grounds for the arrest of a person. I agree with the comment of Bruce, P.C.J., that a mere suspicion is not sufficient to justify a strip search in the sense that a hunch or a suspicion without any foundation is not adequate as a basis for conducting a strip search. If, however, a suspicion that the detainee has contraband on their body does have some foundation, then a strip search may be reasonable. As mentioned by Bruce, P.C.J., the nature or circumstances of the charge can lead the police or corrections officer to conclude that the detainee poses a safety risk.
- [34] In the present case, Corrections Officer Ducharme and her partner decided to conduct a strip search of Ms. Vixaysongkham on the basis of the nature of the drug charges against her and their possibly mistaken, but honestly held, belief that she was going to be placed in the general population of the Jail. Both of those reasons provided a legitimate basis for a strip search of Ms. Vixaysongkham. It is my opinion that, in the circumstances of this case, it was reasonable for a strip search of Ms. Vixaysongkham to be conducted by the corrections officers.

[54] Here, the Crown submits that Constable Crockford had reasonable grounds to conduct the strip search of Mr. Lerch. The Crown submits that he was an experienced officer who was aware of the charges against Mr. Lerch and he had a legitimate and reasonable concern, based on his experience, about the dangers presented by drugs smuggled into the cells.

[55] In response, Mr. Lerch submits that the strip search was done essentially as a matter of routine or regular practice, and that Constable Crockford lacked reasonable grounds. Mr. Lerch cites the following additional passage from Golden at para. 95:

The requirement that the strip search be for evidence related to the grounds for the arrest or for weapons reflects the twin rationales for the common law power of search incident to arrest. Strip searches cannot be carried out as a matter of routine police department policy applicable to all arrestees, whether they are arrested for impaired driving, public drunkenness, shoplifting or trafficking in narcotics. The fact that a strip search is conducted as a matter of routine policy and is carried out in a reasonable manner does not render the search reasonable within the meaning of s. 8 of the Charter. A strip search will always be unreasonable if it is carried out abusively or for the purpose of humiliating or punishing the arrestee. Yet a "routine" strip search carried out in good faith and without violence will also violate s. 8 where there is no compelling reason for performing a strip search in the circumstances of the arrest.

[56] Constable Crockford was clear in his evidence that the principal reason for the strip search was the fact that Mr. Lerch was arrested on CDSA charges and he said that it is his standard practice to seek approval for a strip search in such cases.

[57] Constable Crockford also spoke about particular concerns emerging in recent years around the drug fentanyl. However, he acknowledged that he did not know what specific drugs Mr. Lerch had been arrested for or what was being searched for.

[58] Indeed, Constable Crockford had minimal knowledge about Mr. Lerch, about the charges, or about any of the surrounding circumstances. Neither of Constables Zilkie or Gallon, who transported Mr. Lerch to the detachment, raised any concerns about his behaviour or the likelihood or even possibility of him concealing drugs or weapons, nor did Constable Crockford have any discussions with Constable Peters, who was the lead investigator.

[59] The requirement that an officer have reasonable and probable grounds to carry out a strip search mandates a fact-specific inquiry based on the particular circumstances of the individual in custody. Here there was no such inquiry. Rather, the strip search was conducted by Constable Crockford in accordance with his standard practice or routine.

[60] While there is nothing to suggest that Constable Crockford was acting in anything but good faith, that is not sufficient to render the search reasonable.

[61] In my view, Constable Crockford lacked reasonable and probable grounds to conduct a strip search, and the search therefore constituted a violation of Mr. Lerch's rights under s. 8 of the Charter.

Access to Counsel

[62] I now turn to the access to counsel issue.

[63] Section 10(b) of the Charter provides:

Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right;

[64] In *R. v. Suberu*, 2009 SCC 33, the Supreme Court of Canada described the s. 10(b) right in these terms at para. 38:

Once engaged, s. 10(b) imposes both informational and implementational duties on the police. The informational duty requires that the detainee be informed of the right to retain and instruct counsel without delay. The implementational obligation imposed on the police under s. 10(b), requires the police to provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach a lawyer, or the detainee has unequivocally waived the right to do so.

[65] The Crown cites *R. v. Duerksen*, 2018 BCCA 46, where the Court of Appeal considered the 10(b) right. There, Chief Justice Bauman took issue with a statement of the Alberta Court of Appeal in *R. v. Luong*, 2000 ABCA 301, where that court set out a number of guiding principles, including the following, at para. 12, which was number 7 in its list of 11 principles:

A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.

[66] It was the second part of that paragraph that Chief Justice Bauman disagreed with. In his view, the burden is on the detained person at all times to establish the police failed to provide him with a reasonable opportunity to consult counsel. It is only where a detainee establishes that there was a delay in affording an opportunity to access counsel that the Crown has the burden of proving that the delay was reasonable: see *R. v. Taylor*, 2014 SCC 50 at para. 24.

[67] Here I agree with the Crown that there was no delay on the part of the police with respect to the informational component of the s. 10(b) right. While Mr. Lerch argues there was a gap, in the sense that Acting Corporal Plotnikoff purported to arrest all three of the men on the patio at 18:17 p.m., and gave them only a general Charter warning from memory, Mr. Lerch was not formally warned and read his Charter rights until Constable Peters did so seven minutes later. I find that this delay, if it can be characterized as such, is inconsequential and explained by the fact that Constable Peters and the other officers first had to secure the property for security reasons.

- [68] With respect to the implementational aspect of the s. 10(b) right, the procedures employed by the police were, in my view, significantly flawed.
- [69] Constable Peters acknowledged that upon arrest, and having been read his rights, Mr. Lerch said, "Yah, I have a lawyer. I will call my lawyer." However, Constable Peters did nothing to facilitate contact with Mr. Lerch's lawyer. Instead, he handed Mr. Lerch over to Constables Zilkie and Gallon and assumed that, as the transporting officers, they would take care of facilitating access to counsel. There is no evidence, however, that he instructed them to do so.
- [70] In fact, they did not do so. Instead, Constable Zilkie testified that he assumed Constable Crockford, as the duty officer at the detachment, would take care of ensuring Mr. Lerch's access to counsel. Again, however, there is no evidence that either Constable Zilkie or Constable Gallon discussed this with Constable Crockford. For his part, Constable Crockford assumed or believed that Constable Gallon was or had arranged for Mr. Lerch to contact his counsel. The basis for that belief, which was clearly mistaken, was not explained.
- [71] Frankly, the evidence of all of these officers revealed, at best, a significant failure of communication and, at worst, a cavalier attitude towards ensuring that Mr. Lerch could exercise his constitutional right to access counsel.
- [72] The Crown relies on the fact that Constable Gallon attended the cells at 22:24 with two cellphones and asked Mr. Lerch if he wanted to use one of them to contact his lawyer. The Crown submits that the four hour gap in time from when Mr. Lerch was arrested was reasonable in the circumstances, and that Mr. Lerch, when he said to Constable Gallon that he was sleeping and would talk to his lawyer the next day, failed to diligently exercise his right.
- [73] The evidence about the cellphones raises more questions than answers. Constable Peters said that all of the officers conducting the search were aware that they should be looking for a cellphone with a skull on the cover, because it may contain the phone number of Mr. Lerch's lawyer. There was no explanation of where that information came from.
- [74] Nor was there any explanation of the apparent conflict in the evidence between that of Constable Gallon, who said that he found two cellphones with skull covers, one at 19:34 and one at 19:37, and the evidence of Acting Corporal Plotnikoff, who was the exhibits officer, who recorded two phones seized at 20:31 and 20:45. There was also no explanation as to why, if it was known or believed that at least one of the phones was necessary to permit Mr. Lerch to contact his lawyer, he was not provided with the phones until well after 10:00 p.m.
- [75] I do not accept that Mr. Lerch's response, when he was presented with the phones late at night, constitutes a lack of diligence on his part. There was little to be gained in speaking to counsel at that time, even assuming counsel was available. Moreover, Mr. Lerch said that he would speak to his lawyer the next day.

[76] When the next day arrived, Mr. Lerch was, in fact, not given an opportunity to contact counsel until after 4:00 p.m. in the afternoon. Again, no explanation was provided for this delay, other than Constable Peters saying that he was occupied in preparing his report to Crown counsel.

[77] In *Taylor*, the Supreme Court of Canada underscored the point that arresting officers are under a constitutional obligation to facilitate access to counsel at the first reasonable available opportunity. In my respectful view, the officers here failed to meet that constitutional obligation. They similarly failed to show that the significant delay in permitting Mr. Lerch access to counsel was reasonable.

[78] In the circumstances, I find that Mr. Lerch's s. 10(b) right was infringed.

Voluntariness of Statements

[79] Finally, the Crown seeks a finding that two statements made by Mr. Lerch were voluntary. The two statements in issue are his recorded interview with Constable Peters on August 10 and his conversation with Acting Corporal Plotnikoff later that night when he provided the PIN number to the door to 190 Coleman so that the officers could arrange for care of the dogs at the house.

[80] *R. v. Oickle*, 2000 SCC 38, is the leading authority dealing with the principles governing the voluntariness analysis. A very helpful summary of the principles emanating from *Oickle* was provided by Mr. Justice Williams in *R. v. Sundman*, 2018 BCSC 2037.

[81] In *R. v. Perkins*, 2018 BCSC 396, Mr. Justice Ehrcke distilled the *Oickle* analysis down to four key factors the court must consider when assessing voluntariness (at para. 14):

- a) the presence of threats or promises;
- b) police oppression;
- c) whether the accused had an operating mind; and
- d) police trickery of a kind that would shock the community.

[82] I agree with the Crown that the voluntariness of the statements in issue was not challenged in any meaningful way in cross-examination, nor did counsel for Mr. Lerch make any submissions disputing voluntariness.

[83] The statements were made only after Mr. Lerch had been advised of his Charter rights and had spoken to counsel. Further, there was no evidence of threats, promises, police oppression, or trickery that would have overridden Mr. Lerch's operating mind.

[84] In the circumstances, I am satisfied that Mr. Lerch's statements were made voluntarily and are therefore admissible at trial.

Conclusion

[85] In summary, I make the following findings:

- a) Constable Peters had reasonable and probable grounds to arrest Mr. Lerch and Mr. Lerch's rights under s. 9 of the Charter were not infringed;
- b) The strip search of Mr. Lerch was unreasonable and a breach of his rights under s. 8 of the Charter;
- c) Mr. Lerch's right to retain and instruct counsel without delay under s. 10(b) of the Charter was breached; and
- d) Mr. Lerch's statements in his interview with Constable Peters and to Acting Corporal Plotnikoff providing the PIN to the front door lock at 190 Coleman were made voluntarily and are therefore admissible at trial.

[86] Those are my reasons.

"Skolrood J."

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Prepared on 24 October 2026 · Esheria