
CANADA / JUDGMENT

R. v. Lerch

2020 BCSC 442

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Supreme Court of British Columbia

DECIDED

14 February 2020

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2020 BCSC 442 R. v. Lerch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lerch,

2020 BCSC 442

Date: 20200214

Docket: 22181-3

Registry: Rossland

Regina

v.

Scott Allen Lerch

Amanda Marie Moosewaypayo

Before: The Honourable Mr. Justice Skolrood

Oral Ruling on Voir Dire

Re s. 24(2) Charter Application

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, 10,11, and 13, 2020

Place and Date of Judgment:

Rossland, B.C.

February 14, 2020

Introduction

- [1] THE COURT: On February 11, 2020, following four days of evidence on this voir dire, I found that Mr. Lerch's rights under ss. 8 and 10(b) of the Charter were breached. Specifically, I found that a strip search conducted of Mr. Lerch after his arrest was unreasonable and that he was not provided access to counsel within a reasonable time.
- [2] I also found that the police had reasonable and probable grounds to arrest Mr. Lerch, such that there was no violation of his s. 9 Charter rights, and that two statements made by Mr. Lerch were voluntary.
- [3] A further hearing was then held to determine the appropriate remedy for the Charter breaches, specifically whether evidence obtained by the police should be excluded pursuant to s. 24(2) of the Charter.

Background

- [4] The background is described in some detail in my Reasons on Part 1 of the voir dire, and I do not propose to repeat the facts in detail here. Essentially, a search was conducted at 190 Coleman Street in Trail, BC ("190 Coleman"), on August 9, 2018, pursuant to a search warrant. That search resulted in various items being seized, which in turn led to the charges against Mr. Lerch.
- [5] Additional facts relevant to the s. 24(2) analysis have been provided by counsel in the form of admissions agreed to by counsel for Mr. Lerch. Those admissions, made solely for the purposes of this voir dire, detail the evidence found by the police on the execution of the search warrant. That evidence includes a significant amount of drugs, notably fentanyl, methamphetamine, and heroin, cash, drug paraphernalia, a stun gun, and a .22-calibre rifle and ammunition.
- [6] I note that none of the evidence obtained by the police and that forms the basis for the charges against Mr. Lerch was obtained as a direct result of the Charter breaches. The strip search did not reveal any evidence or other illicit items concealed on Mr. Lerch and police did not attempt to interview him, prior to affording him access to counsel. The evidence obtained at 190 Coleman was obtained through the execution of a valid search warrant.

Legal Framework

[7] Section 24 of the Charter provides:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[8] The leading authority on the application of s. 24(2) is *R. v. Grant*, 2009 SCC 32, where Justice Charron for a majority of the Supreme Court of Canada described the fundamental objective of the section in these terms at paras. 68 to 70:

[68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

[70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

[9] The Supreme Court of Canada in *Grant* identified three lines of inquiry to be considered when determining whether evidence should be excluded pursuant to s. 24(2), at para. 71:

- a) The seriousness of the Charter-infringing state conduct;
- b) The impact on the Charter-protected interests of the Accused; and
- c) Society's interest in an adjudication on the merits.

- [10] Ultimately, the s. 24(2) analysis involves a balancing of these factors. A helpful discussion of the balancing process was provided by Justice Doherty of the Ontario Court of Appeal in *R. v. McGuffie*, 2016 ONCA 365, at paras. 62 to 63:
- [62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the Charter-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case.
- [63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence.
- [11] *McGuffie* was cited with approval by Madam Justice Watchuk in *R. v. Robertson*, 2017 BCSC 965 at para. 41.

Discussion

- [12] Before considering the *Grant* factors, there is a threshold issue to address. Under s. 24(2), the court must first be satisfied that the evidence sought to be excluded was obtained in a manner that infringed or denied the accused's rights as guaranteed under the Charter.
- [13] It is well established that there must be a nexus between the Charter breach and the obtaining of the evidence; however, it need not be causal. In *R. v. Pino*, 2016 ONCA 389, Justice Laskin identified a number of considerations that may inform the "obtained in a manner" analysis at para. 72:

Based on the case law, the following considerations should guide a court's approach to the "obtained in a manner" requirement in s. 24(2):

- The approach should be generous, consistent with the purpose of s. 24(2)
- The court should consider the entire "chain of events" between the accused and the police
- The requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct
- The connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections.
- But the connection cannot be either too tenuous or too remote.

[14] Here, the Crown quite fairly concedes that there is a sufficient nexus between the Charter breaches that I have found and the evidence obtained through execution of the search warrant at 190 Coleman. Specifically, there is both a temporal and contextual connection sufficient to render the search and the treatment of Mr. Lerch while in custody part of the same chain of events. The Crown submits that the connection is not as strong vis-à-vis Mr. Lerch's statements to police, which I will return to.

[15] I will now address each of the Grant factors in turn

Seriousness of the Charter Infringing State Conduct

[16] While, as indicated, I do not intent to review the background facts, it is useful to briefly refer to the conduct that gave rise to the finding of a breach of ss. 8 and 10(b).

[17] The strip search was conducted by Constable Crockford at the RCMP detachment in Trail. In my earlier reasons, I said this about the search:

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.

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.

[18] With respect to the s. 10(b) breach, the essential facts are that Mr. Lerch was given a formal Charter warning by Constable Peters at 18:24 hours on August 9, 2018. He was then turned over to Constables Gallon and Zilkie for transport to the detachment. Constable Peters did nothing to facilitate access to counsel, but assumed that the transporting officers would do so. Those officers in turn assumed that Constable Crockford, the duty officer at the detachment, would take care of contacting counsel. For his part, Constable Crockford assumed that Constable Gallon had done so. At 22:24 hours on August 9, Constable Gallon attended the cell where Mr. Lerch was being held and asked if he wanted to use one of two cellphones found at 190 Coleman to call his lawyer. Mr. Lerch replied that he was sleeping and would talk to his lawyer the next day.

[19] The following day, no attempts were made to contact Mr. Lerch's lawyer until 16:10 hours and contact was made at 16:16 hours, approximately 22 hours after Mr. Lerch was arrested. No compelling reasons were provided for this delay.

[20] In my Reasons finding a breach of s. 10(b), I said:

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.

- [21] In considering the seriousness of the state conduct, it is useful to first assess the two breaches separately. With respect to the strip search, it is well established that a strip search is highly invasive, and that in order to justify such a search, a police officer requires reasonable and probable grounds over and above the grounds for an arrest (*R. v. Gordon*, 2001 SCC 83 at para. 98). Here, I found that no such grounds existed and that the officer did not engage in a fact-specific inquiry about Mr. Lerch, but rather conducted the search as a matter of routine or practice.
- [22] The Crown submits that there are mitigating or ameliorating factors that diminish the seriousness of the s. 8 breach, including the fact that Constable Crockford was acting in good faith, believed he had grounds to conduct the strip search, and the search was conducted quickly, privately, and with no physical contact.
- [23] I agree in the circumstances that the strip search was not at the far end of the seriousness spectrum, but the fact remains that an unjustified strip search constitutes a serious breach of an accused's s. 8 rights.
- [24] In terms of the denial of access to counsel, this case can be distinguished from, for example, *R. v. Rover*, 2018 ONCA 745, where the court found that the accused was denied immediate access to counsel pending a search warrant application as a matter of police practice. While the trial judge characterized the Charter breach as serious, the judge nonetheless admitted the evidence obtained through the search warrant. The Ontario Court of Appeal allowed the appeal and quashed the conviction. Speaking for the court, Justice Doherty said at paras. 40 and 42:
- [40] Although the trial judge recognized that the police misconduct was serious, he understated its seriousness by failing to connect it to a police practice that routinely denied detainees access to counsel in situations in which the police were intending to apply for search warrants. Constitutional breaches that are the direct result of systemic or institutional police practices must render the police conduct more serious for the purposes of the s. 24(2) analysis. A police practice that is inconsistent with the demands of the Charter produces repeated and ongoing constitutional violations that must, in the long run, negatively impact the due administration of justice. This is so even if many of the breaches are never exposed in a criminal court
- [42] The Charter-infringing state conduct in this case must be viewed as very serious. A police practice that routinely holds detained individuals incommunicado while the police go about obtaining and executing a search warrant must, over time, bring the administration of justice into disrepute.
- [25] Similarly, in *R. v. Wong and Truong*, 2017 BCSC 1643, Justice Kent characterized the police's denial of timely access to counsel as willful and flagrant in that, as in *Rover*, there was a premeditated strategy to deny access to counsel pending execution of a search warrant. In *Wong*, the delay in permitting access to counsel was about six hours; it was similar in *Rover*.

- [26] In the case at bar, the denial of timely access to counsel was not the result of police policy or practice, but rather a constellation of factors that I again characterized as, at best, a gap in communication and, at worst, a cavalier attitude toward Mr. Lerch's rights.
- [27] Mr. Lerch cites a number of cases in which evidence has been excluded based on a denial of access to counsel of a far shorter duration than occurred here. Wong and Rover are examples of such cases, although, as I have noted, the facts of those cases are somewhat different.
- [28] In *R. v. Noel*, 2019 ONCA 860, no attempt was made to contact duty counsel on behalf of the accused until three hours after his arrest. In allowing an appeal from the trial judge's decision not to exclude evidence obtained on execution of a search warrant, the Ontario Court of Appeal said at paras 23 to 26:
- [23] The right to consult counsel without delay exists because those who are arrested or detained are apt to require immediate legal advice that they cannot access without help, because of their detention
- [24] For example, an arrest and the search of one's home can raise urgent legal issues about the lawfulness of the arrest and the obligation to submit, as well as the validity of the search warrant and the scope of authority that the search warrant gives to the police. Such information could be useful in preventing an unjustified search, before it happens
- [25] Detention also raises questions of immediate importance relating to the detainee's rights during detention, including the right against self-incrimination
- [26] Beyond this, the right to counsel is also important in providing "reassurance" and advice, on such questions as how long the detention is apt to last, and what can or should be done to regain liberty
- [29] The court went on to cite Justice Doherty in *Rover* at para. 45:

The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

- [30] Mr. Lerch submits the delay in this case in permitting Mr. Lerch access to counsel was excessive and beyond anything the courts have countenanced. That delay is compounded by the absence of any explanation. For example, there was no evidence of exigent circumstances or operational requirements that might have justified some degree of delay. Mr. Lerch notes that the investigation conducted by the police and the obtaining and execution of the search warrant was a highly-planned operation, yet that planning apparently did not include any plan for ensuring Mr. Lerch's timely access to counsel.

- [31] Counsel for the Crown fairly acknowledges that access to counsel was not properly facilitated by the police. However, the Crown takes issue with Mr. Lerch's characterization that the police officers were operating as though they were in a "Charter-free zone" or that there was a pattern of abuse. The officers obtained a valid search warrant and executed a valid arrest on reasonable grounds of Mr. Lerch. As I found, there was no delay in the informational component of s. 10, and that Mr. Lerch was advised of his rights in a timely way. Moreover, police did not attempt to interview Mr. Lerch until he had spoken with counsel.
- [32] As I have noted, this case differs from Wong and Rover in that the denial of access to counsel was not premeditated, and I would not characterize the breach as wilful as flagrant, as did Justice Kent in Wong. However, I do accept that there was a significant disregard for Mr. Lerch's rights. While the seriousness of a breach is not measured solely by the length of delay in granting access to counsel, the length of the delay here is both extensive and unexplained.
- [33] Further, when the significance of the denial of Mr. Lerch's right to counsel is considered alongside the unjustified strip search and corresponding breach of his s. 8 rights, I am compelled to find that the Charter-infringing state conduct falls towards the more serious end of the spectrum.

Impact on the Accused's Interests

- [34] Turning to the impact on the accused's interests, the courts have again regularly held that a strip search is highly invasive. The Crown cites the same factors again as to why this particular search was at the lower end of the seriousness spectrum. However, it is worth noting the comments of Justice Iacobucci and Arbour in Golden at para. 96 that:
- 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.
- [35] In terms of the impact of the breach of the s. 10(b) right, Justice Kent in Wong cited Justice Laskin in Pino on the issue of the impact of a breach on an accused's interests. Justice Laskin said at paras. 104 to 105:
- [104] This factor focuses on the extent to which a Charter breach undermines the interests protected by the right infringed. The trial judge found that the s. 8 breach only had a "moderate" impact on Ms. Pino's interests, largely and correctly because s. 8 protects a person's privacy interests and Ms. Pino's privacy interests were not affected by the manner of her arrest.
- [105] But the s. 10(b) breaches have a much greater impact on Ms. Pino's interests. These breaches were neither technical nor fleeting. Being forced to sit alone in a jail cell for over five hours after her arrest without access to counsel undermined the very interests s. 10(b) seeks to protect: correct information about the right to counsel and the immediate ability to

consult with a lawyer. Ms. Pino was vulnerable and she needed counsel, not just for legal advice, but as a lifeline to the outside world. This second Grant factor also favours exclusion.

[36] In Noel, the trial judge found that there was no evidence to establish an adverse impact on the accused from the denial of his right to counsel, as he had not testified to any such impact. The Court of Appeal rejected that view, stating at para. 22:

With respect, this passage reflects a misunderstanding of the relevant Charter protected interest. That interest is the right is to consult counsel without delay. The loss of this right is in no way neutralized because the right to consult counsel is delayed, as opposed to denied. Nor is the impact of delayed access to counsel neutralized where an accused fails to demonstrate that the delay caused them to be unable to have a late but meaningful conversation with counsel. It would be inconsistent with solicitor-client privilege to expect a detainee to lead evidence about the quality of their solicitor-client conversation. More importantly, this inquiry misses the mark.

[37] The Court went on to make the observations at paras. 23 to 26 that I quoted previously.

[38] The Court of Appeal's observation in Pino answered one of the Crown's submissions here that we do not have any evidence from Mr. Lerch about the impact on him of the delayed access to counsel.

[39] I would add to these observations that s. 10(b) is a foundational right under the Charter, in that it is often only through counsel that an accused person both learns of and exercises other important Charter-protected rights.

[40] I acknowledge that the police here did not attempt to interview Mr. Lerch or to elicit incriminating evidence from him until after he had spoken to counsel. However, when one considers the values intended to be protected by s. 10(b) as described by the courts in cases like Pino and Noel, the negative impact on those values from a denial of the right to counsel is magnified in this case by the sheer length of time that Mr. Lerch was left in the cells without any contact with counsel.

[41] In my view, again keeping in mind the cumulative impact of both the unwarranted strip search and lengthy denial of access to counsel, the impact upon Mr. Lerch's interests was serious.

Society's Interest in an Adjudication on the Merits.

[42] The third factor is society's interest in an adjudication on the merits. The Court in Grant described the third factor as follows at para. 79:

Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": R. v. Askov, [1990] 2 S.C.R. 1199 at

pp 1219-20 Thus the Court suggested in Collins that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the reputé of the administration of justice, but the impact of failing to admit the evidence.

[Emphasis in original.]

[43] The court went on to note that the seriousness of the alleged offence may cut both ways at para. 84:

[84] Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term reputé of the justice system that is s. 24(2)'s focus. As pointed out in Burlingham, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in Collins, "[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term reputé of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[44] In the case at bar, there is no question that the charges are serious. It is not possible to overstate the devastating impact drugs, particularly drugs like fentanyl, have had and are continuing to have on communities throughout this province and the country, whether they be small towns like Trail or large cities like Vancouver. Society has a strong interest in seeing traffickers of those drugs prosecuted to the full extent of the law.

[45] Further, the type of evidence in issue here, obtained through execution of a valid search warrant, is reliable evidence and is clearly central to the Crown's case.

[46] At the same time, as the Supreme Court has emphasized, the s. 24(2) analysis mandates a perspective that looks beyond the demands of a particular case and takes a long-term view of the reputation of the administration of justice.

[47] In balancing the Grant factors, I refer again to the decision of Doherty J.A. in McGuffie that I previously cited. A similar view was expressed in R. v. Paterson, 2017 SCC 15 at para. 56:

It is therefore important not to allow the third Grant 2009 factor of society's interest in adjudicating a case on its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant's Charter right. In this case, I find that the importance of ensuring that such conduct is not condoned by the court favours exclusion. As Doherty J.A. also said in McGuffie, at para. 83, "[t]he court can only adequately disassociate the justice system from the police misconduct and reinforce the community's commitment to individual rights protected by the Charter by excluding the evidence. This unpalatable result is the direct product of the manner in which the police chose to

conduct themselves."

[48] This case is similar to *R. v. Caron*, 2011 BCCA 56, in the sense that it is, as Justice Frankel put there, "close to the line" given that what is in issue is highly relevant evidence central to the Crown's ability to prosecute serious offences.

[49] However, taking account of all of the evidence and the relevant factors, I have come to the conclusion that the breaches of Mr. Lerch's Charter rights, particularly the extended, unexplained, and unjustified denial of his right to counsel, combined with the unwarranted strip search, demand exclusion of the evidence obtained by way of the execution of the search warrant at 190 Coleman.

[50] Quoting again from Justice Doherty in *Rover* at para. 49:

this is one of those cases in which the long-term reputé of the administration of justice requires the sacrifice of the short-term benefit of an adjudication on the merits of this case. The seriousness of the police misconduct points very strongly toward exclusion. The negative impact of the breach on the appellant's constitutionally-protected rights also points, although less strongly, to exclusion. The two together make a strong case for exclusion. Society's interests in an adjudication on the merits does not tip the balance in favour of admissibility

[51] I come to a different conclusion with respect to Mr. Lerch's statements to the police, although not much may turn on this given my ruling on the evidence obtained through the search warrant.

[52] I previously found that the statements were made voluntarily after Mr. Lerch was advised of his rights, including his right to remain silent, and after he had consulted counsel. Further, unlike other cases in which statements are in issue, Mr. Lerch was lawfully under arrest at the time he gave his statements.

[53] In my view, there is nothing in the circumstances surrounding the statements that would warrant their exclusion.

Conclusion

[54] In summary, I hold that the evidence obtained on the execution of the search warrant at 190 Coleman Street, Trail, BC, on August 9, 2018, is excluded pursuant to s. 24(2) of the Charter. Mr. Lerch's statements, however, to Constable Peters on August 10 and later that day to Acting Corporal Plotnikoff are admissible.

[55] I thank counsel for their very thorough and helpful submissions. Those are my reasons.

"Skolrood J."

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Prepared on 26 October 2026 · Esheria