
CANADA / JUDGMENT

R. v. Lopez

2016 BCSC 1359

COURT

Supreme Court of British Columbia

DECIDED

29 June 2016

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2016 BCSC 1359 R. v. Lopez

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lopez,

2016 BCSC 1359

Date: 20160629

Docket: 26909

Registry: Vancouver

Regina

v.

Tyler Lopez

Before: The Honourable Madam Justice Gray

Oral Ruling on Voir Dire

Counsel for the Crown:

H.D. Pineo

Counsel for the Accused:

S. Wright

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 7 - 10, 2016

Place and Date of Judgment:

Vancouver, B.C.

June 29, 2016

- [1] THE COURT: This is my ruling on a voir dire. Mr. Lopez has been charged with trafficking methamphetamine and with possession of methamphetamine for the purposes of trafficking. Because it was the term used by witnesses on the voir dire, I will refer to methamphetamine as "crystal meth" in these reasons on the voir dire.
- [2] Mr. Lopez alleges that the police breached his rights under ss. 7 and 10 of the Charter of Rights. He seeks a stay of the charges against him, or alternatively the exclusion of certain evidence.
- [3] Mr. Lopez's nose was broken during the course of his arrest. Mr. Lopez was pushed, first onto a desk and later onto the floor. Constable Baird testified that he punched Mr. Lopez's rear torso four to five times. Constable Li testified that he punched Mr. Lopez once in the face on Mr. Lopez's right cheek.
- [4] Mr. Lopez alleges that the police used excessive force in connection with the arrest and that is the basis of his argument that his rights under s. 7 of the Charter were breached.
- [5] Mr. Lopez requested a lawyer at the time of his arrest around 3:55 p.m. (15:55 hours), but he did not have contact with a lawyer until almost four hours later at about 7:46 p.m. (19:46 hours). That delay is the basis of Mr. Lopez's argument that there was a breach of his rights under s. 10 of the Charter.
- [6] There were three witnesses on the voir dire, being Constables Kine, Baird, and Li. The evidence also included written admissions.
- [7] I will first summarize the applicable law regarding the use of force by police officers.
- [8] Section 7 of the Charter provides that:

Everyone has the right to life and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

- [9] The alleged use of excessive force by a police officer in the exercise of the police power of the state can engage s. 7 if the interference with the person's physical or psychological integrity rises to the level of a threat to the person's life or security of the person as contemplated under s. 7: see *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, and *R. v. Nasogaluak*, 2010 SCC 6 at paragraph 38.
- [10] The leading case concerning the use of excessive force by the police is *Nasogaluak* which quotes s. 25 of the Criminal Code of Canada. Paragraphs 32 to 35 of *Nasogaluak* are as follows:

- [32] The Crown emphasized the issue of excessive force in its submissions to this Court, arguing strenuously that the police officers had not abused their authority or inflicted unnecessary injuries on Mr. Nasogaluak. But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.
- [33] The legal constraints on a police officer's use of force are deeply rooted in our common law tradition and are enshrined in the Criminal Code. This case engages s. 25 of the Code, the relevant portions of which are reproduced below:
25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
- (b) as a peace officer or public officer,
- is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
- (3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.
- (4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if
- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
- (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
- (c) the person to be arrested takes flight to avoid arrest;
- (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
- (e) the flight cannot be prevented by reasonable means in a less violent manner.

- [34] Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.
- [35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

[11] I would summarize those paragraphs as follows:

- a) the police do not have an unlimited power to inflict harm on a person in the course of their duties;
 - b) police are limited to using the degree of force which is proportionate, necessary, and reasonable;
 - c) there are special limitations on the use of force that is intended to cause death or grievous bodily harm or is likely to do so;
 - d) the use of force is to be judged on a subjective/objective basis, having regard to the circumstances as they existed at the time the force was used; and
 - e) police actions should not be judged against the standard of perfection and police should not be expected to measure the force used with exactitude, but instead police actions should be judged with recognition that the police engage in dangerous and demanding work and often have to react quickly to emergencies.
- [12] In this case, the force used was not intended to cause death or grievous bodily harm and was not likely to do so. As a result, the court must consider whether the police officers in question used only as much force as they subjectively believed was necessary in the circumstances and whether their subjective belief was objectively reasonable.

- [13] All three officers used some degree of force. As a result, it is necessary to consider what occurred from the perspective of each of the three officers, to assess what they subjectively believed, and whether that belief was objectively reasonable.
- [14] I will now describe the relevant events.
- [15] The use of force occurred during the arrest of the accused, Mr. Lopez, at the cargo office of the Vancouver Helijet terminal on August 4, 2014. The background is that Constables Baird and Kine went to the cargo office and met with a Helijet employee, Mr. Greuger, at about 1:40 p.m. Mr. Greuger told them the following:
- a) Mr. Greuger received a package at about 12:50 p.m. for shipment to Victoria, B.C.;
 - b) the package was a small backpack with a lock on the main compartment;
 - c) the shipper gave the name David Klein and asked Mr. Greuger to ship the bag on the 3:30 p.m. flight to Cameron Klein, with payment for the shipment to be made at the time of pickup;
 - d) when Mr. Greuger weighed the package, the shipper said that it was clothes;
 - e) Mr. Greuger was suspicious, because he thought the shipper was very nervous, the backpack had a lock on it, and the contents felt crunchy or brittle, not like clothing; and
 - f) Mr. Greuger described the shipper as being white or Hispanic with short dark hair, about five foot five inches in height, and wearing a tight V-neck T-shirt which was either white or light blue.
- [16] Mr. Greuger also showed Constables Kine and Baird the waybill for the shipment of the backpack, which had a name and telephone number for both shipper and receiver.
- [17] Constable Kine felt and squeezed the backpack and it felt to him like there was something plastic and something brittle in the bag, and that it was not clothing.
- [18] Constable Baird also touched the bag and thought there was a crunchy, granular substance inside which he suspected, from the way it felt, was either crystal meth or prescription pills.
- [19] Constable Kine searched the police databases and found an entry for a man in his twenties named Cameron Klein in Victoria and Saanich, and the entry was consistent with involvement with drugs and weapons. Constable Kine did not find any information about a David Klein that was remotely consistent with the description, not even a driver's licence, and so he suspected that the name David Klein was an alias.
- [20] Constable Baird arranged for a police dog to check the backpack. The police set up a lineup of four packages, including the backpack. The dog grabbed onto the backpack and began to thrash it around, which caused the zipper to pop open, but did not break the lock. This behaviour from the dog was an indication that the dog had detected drugs in the backpack.

- [21] Constable Kine looked inside the backpack and saw what looked like a few T-shirts and a large bag of what appeared to him to be crystal meth. Constable Kine thought it looked like around a kilogram of crystal meth.
- [22] Constable Baird also looked in the backpack and thought it looked like a large amount of crystal meth. Constable Baird resealed the zipper on the backpack.
- [23] Constables Baird and Kine considered making a controlled delivery of the package to Victoria, B.C., but did not pursue that.
- [24] Constables Baird and Kine decided to try to get the shipper to return and pick up the backpack, and if someone did so, to immediately arrest the person for possession of crystal meth and trafficking. Constable Kine came up with the ruse to tell the shipper that the backpack could not be shipped because there was new aviation legislation forbidding shipment of a locked bag unless the owner was on the flight and had a key.
- [25] Constable Baird testified that they were concerned about counter-surveillance and so did not want any police officers in the area in uniform. Constables Baird and Kine borrowed some Helijet uniforms and went to the police station.
- [26] At the police station, Constables Baird and Kine changed into the Helijet uniforms and took off their radios and Kevlar vests, although they retained their concealed weapons. They returned to the Helijet terminal in Constable Kine's personal car. Constable Baird considered that even a police ghost car would be easily detected by the criminal element.
- [27] Constable Kine testified that he was concerned that the individual would have a weapon on his person, because he would be picking up a substantial amount of crystal meth. Constable Kine testified that he believed that one of the considerations in using force while not in uniform was that the individual may think the person is not a police officer and will react violently rather than comply. He testified that he was also concerned about the officers' personal safety, because they were not wearing their Kevlar vests. He testified that Constable Baird expressed similar concerns.
- [28] Constable Baird suggested that they arrest the shipper using a hard takedown and Constable Kine agreed.
- [29] The planned "hard takedown" meant that the police officers would take the individual to the ground as soon as possible, so that he or she would not be able to access weapons, and that the police would announce that they were police only after having implemented the force of taking the individual to the ground. The hard takedown is in contrast to a typical arrest where an officer announces the arrest and assesses compliance before using any force.
- [30] Constables Kine and Baird arranged for the Helijet employees to leave the shipping office. They also arranged for backup, which included Constable Li.

- [31] Constable Kine telephoned the number provided on the waybill for the shipper, David Klein, and heard a recording message that the telephone number did not work. Constable Kine then telephoned the number for the receiver, Cameron Klein. A woman answered and said Cameron was not available. Constable Kine told her that there was a bag to be shipped to Cameron Klein, but it could not be shipped because it was locked and there was new legislation forbidding the shipment. Ultimately, the woman said she would contact David Klein and have him collect the bag before 4:00 p.m. (16:00 hours).
- [32] The police officers then waited in the shipping office for someone to arrive. Constable Kine was sitting at a desk. Constable Baird was in an office to the east. Constable Li was out of sight in a third office. He had a view to the long driveway into the Helijet terminal, which was the only route for vehicles and pedestrians to come into the terminal.
- [33] The plan of Constables Baird and Kine was that once the individual took custody of the backpack, Constable Baird would initiate the arrest and Constable Kine would assist. Constables Baird and Kine did not tell Constable Li that they were planning a hard takedown.
- [34] After Constable Li had kept watch for about 20 minutes, he saw a male matching the description walking towards the shipping office, and he announced that information to the other officers.
- [35] Mr. Lopez came to the shipping office and told Constable Kine that he was there to collect his bag. Mr. Lopez was wearing a tight white T-shirt, basketball shorts, and runners. He was about five feet seven inches tall and had an average build. He roughly met the description provided by Mr. Greuger.
- [36] Constable Kine asked Mr. Lopez for his identification, but Mr. Lopez said he did not have any. Constable Kine said that he was expecting him and that it was okay. Constable Kine observed that Mr. Lopez appeared very nervous and was stuttering and shaking lightly.
- [37] Constable Kine picked up the backpack from a storage area behind the desk and asked Mr. Lopez if it was his, and he said that it was.
- [38] At this point, I will set out the evidence of what occurred from the perspective of each officer.
- [39] First, Constable Kine.
- [40] Constable Kine is six feet six inches tall and at the time of Mr. Lopez's arrest weighed about 200 pounds, and had been a police officer for about six years. Constable Kine was dressed in a Helijet uniform. He had a concealed firearm, but was not wearing a protective vest. He did not know anything about Mr. Lopez and did not notice anything about his appearance which suggested he was in possession of a weapon. Mr. Lopez was alone and the arrest was taking place in the Helijet terminal, which the police had become familiar with.

- [41] Constable Kine handed Mr. Lopez the backpack and, while he was doing so, Constable Kine could see Constable Baird approaching Mr. Lopez from behind Mr. Lopez.
- [42] Constable Kine saw Constable Baird push Mr. Lopez, who fell forward face down onto the desk rather than onto the floor. Constable Baird started yelling police commands, like, "Police, you are under arrest," and Constable Kine echoed the commands.
- [43] Constable Kine wrapped his right arm around Mr. Lopez's neck and upper body, squeezing it. Constable Kine testified that his goal was to ensure that he could control Mr. Lopez's body. Constable Kine testified that Mr. Lopez was screaming and flailing and moving quite a bit, but Constable Kine thought it was from fear and extreme adrenaline, rather than from trying to fight. Constable Kine testified that he had control of Mr. Lopez's body, but Mr. Lopez's right arm was completely free.
- [44] Constable Kine testified that he did not want Mr. Lopez to be able to push himself off the desk with his hands, so he picked Mr. Lopez up from the desk and spun around 270 degrees with Mr. Lopez, and then pushed him onto the floor, with Constable Kine on top of him and Mr. Lopez flat on the floor. Mr. Lopez was quickly handcuffed.
- [45] Constable Kine rolled Mr. Lopez over and he was bleeding badly from the nostrils, although Constable Kine could not see a cut. Mr. Lopez was also complaining about his neck. There was blood on the carpet where Mr. Lopez had been taken down.
- [46] Constable Kine estimated that about 20 seconds elapsed between the time he handed the bag to Mr. Lopez and the time Mr. Lopez was handcuffed.
- [47] Next, the events from the perspective of Constable Baird.
- [48] Constable Baird is five feet 10 inches tall and weighs about 170 pounds. He had been a police officer for seven or eight years at the time of Mr. Lopez's arrest. He had previously worked as a front line customs officer and inspector at the Vancouver International Airport. He had training in surveillance, including surveillance of higher-level drug dealers and arrests by police officers when not in uniform. He considered that a kilogram was a large amount of drugs. He testified that the risk of violence can increase when an officer is not in uniform.
- [49] Constable Baird's evidence was that after he pushed Mr. Lopez onto the desk, Mr. Lopez braced himself, actively resisting and pushing his hands against the table to try to put counter pressure, as Constable Baird was trying to get Mr. Lopez to the floor. Constable Baird tried to push Mr. Lopez to the floor.
- [50] Constable Baird testified that he delivered four to five punches to Mr. Lopez's rear torso on his right side as a technique to distract Mr. Lopez, to stop him from applying the counter pressure, and to force him to comply with the officer's effort to bring him to the floor. Constable Baird testified that he stopped punching Mr. Lopez as soon as Mr. Lopez stopped pushing himself from the table and went to the floor. Constable Baird estimated that it took 10 to 15 seconds from the time he first made contact with Mr. Lopez until Mr. Lopez was on

the floor.

- [51] Next, the events from the perspective of Constable Li.
- [52] Constable Li is about five feet 10 inches tall and 165 pounds in weight. Constable Li's evidence was at the time in question he was in plainclothes, but apart from his uniform, he had all of his police gear, including his bulletproof vest.
- [53] Constable Li testified that Constables Kine and Baird told him there was a suspicious package believed to contain one kilogram of crystal meth, and he was given a description of the male expected to return and pick up the backpack.
- [54] The other officers asked Constable Kine to go to the Helijet terminal, watch the roadway, and advise them if he saw someone matching the description approaching the terminal. He was told that the goal was to have the male come into the shipping office area and, once he had done so, Constable Li was to come out and to assist in the arrest.
- [55] Constable Li's evidence was that he was not told that Constables Baird and Kine were planning a hard takedown. Constable Li testified that he thought Mr. Lopez had a weapon, based primarily on the amount of drugs involved.
- [56] Constable Li testified that he heard the words he was told would be his cue, being, "[c]ome on to the back". He testified that he then heard a scuffle almost immediately and heard Constable Kine yelling "Vancouver Police" multiple times. He testified that he ran quickly to the scene and arrived in three to five seconds.
- [57] Constable Li testified that he assumed that a violent struggle was occurring between Mr. Lopez and the officers. He testified that no one called for his help.
- [58] Constable Li testified that he saw Constable Kine holding Mr. Lopez in a headlock on the right side of his body and Mr. Lopez was struggling violently, pushing and pulling to try to free himself, and at the same time he observed Constable Baird trying to control Mr. Lopez's right arm. Constable Li did not see Mr. Lopez trying to strike the officers, but he was concerned that there was a chance they would be injured in the struggle.
- [59] Constable Li testified that he thought Mr. Lopez was trying to escape the arrest, and because of the large amount of drugs thought to be involved, and without having had prior dealings with Mr. Lopez, he concluded that Mr. Lopez had to be taken into custody quickly, in case he was armed and would injure the officers.
- [60] Constable Li testified that based on his experience in arresting drug dealers, they may have weapons, including a pocket knife or bear spray, which can be hidden in a waistband, and he believed that Mr. Lopez was armed. Constable Li believed that Constables Kine and Baird were not wearing protective vests and were therefore at risk of injury from a firearm or a knife. Constable Li testified that he believed he should use physical force to take Mr. Lopez into custody quickly.

- [61] Constable Li ran in and punched Mr. Lopez once in the face on his right cheek using a closed fist. Constable Li testified that he had his pepper spray and baton, but did not have the opportunity to deploy such an intermediate weapon.
- [62] Constable Li testified that his goal was not to hurt Mr. Lopez, but instead to create a distraction to gain an opportunity to take Mr. Lopez to the ground and place him in handcuffs. Constable Li testified that after the punch, he grabbed Mr. Lopez's shoulder and pushed him to the floor.
- [63] After Mr. Lopez was handcuffed and stood up, Constable Li noticed a big pool of blood directly in front of where Mr. Lopez's face had been and noticed that he was bleeding from the nose. Constable Li estimated that it was no more than 10 or 15 seconds from the time he came into the area until Mr. Lopez was on the floor.
- [64] I now return to the chronology of what occurred.
- [65] After the arrest of Mr. Lopez, Constable Li, who was the only officer there with a police radio, called an ambulance.
- [66] Constable Baird told Mr. Lopez that he was under arrest for drug offences and gave him a Charter warning at 1553 hours, being 3:53 p.m. Mr. Lopez said he understood and wanted to speak with a lawyer.
- [67] Constable Li testified that he also gave Mr. Lopez a Charter warning at about 1555 hours, being 3:55 p.m. Constable Li said he did this because he thought he was the only officer with a police-department issued device which enabled him to confirm that the person was Mr. Lopez and that Mr. Lopez was subject to a probation order not to possess drugs. Constable Li testified that he told Mr. Lopez he was under arrest for breach of probation, and that Mr. Lopez said that he wanted to contact a lawyer.
- [68] Constable Baird searched Mr. Lopez. In the pockets of Mr. Lopez's basketball shorts, Constable Baird found a BlackBerry cellphone, about \$1,700 in cash, cigarettes, a lighter, keys, and a wallet. About 500 grams of crystal meth and some T-shirts were seized from the backpack.
- [69] Constable Baird did not facilitate Mr. Lopez having access to counsel. He testified that there was no secure place for Mr. Lopez to access a telephone, with no way to ensure his privacy within the Helijet office. Constable Baird had a cellular telephone, but it had his personal information on it and he thought that Mr. Lopez would access counsel when he arrived at the Vancouver jail.
- [70] Mr. Lopez left the Helijet terminal by ambulance at around 16:35 hours, being 4:35 p.m. Constable Li rode with him in the ambulance to St. Paul's Hospital in Vancouver, B.C.
- [71] Constable Li did not make any attempts to facilitate Mr. Lopez contacting legal counsel, either at the Helijet terminal or in the ambulance or at the hospital. Constable Li testified that Mr. Lopez was talking to the other officers at the terminal and that there was not

adequate privacy in the ambulance or at the hospital for a private conversation with a lawyer. Constable Li did not inquire with hospital staff about whether a private phone was available, but he did not think one would be available. Constable Li did not have any conversations with Mr. Lopez, apart from the Charter warning and Mr. Lopez's answers.

- [72] A different officer, Constable Cheah, took custody of Mr. Lopez at 1650 hours, being 4:50 p.m. Constable Cheah waited in the triage area of the hospital and accompanied Mr. Lopez to his CT scan. Constable Cheah did not take any steps to facilitate Mr. Lopez having access to counsel while at St. Paul's Hospital and did not inquire about the availability of a private phone at the hospital.
- [73] Constable Cheah did not take steps to facilitate access to counsel because his primary concern was Mr. Lopez's medical care, and because he was concerned about privacy. Constable Cheah was concerned that Mr. Lopez would not have sufficient privacy to talk to legal counsel while he was in a public area near hospital clients and medical staff. Constable Cheah only had a personal cellphone and did not provide that to Mr. Lopez, both because of his concerns about the privacy of the environment and because he had personal information on his cellphone.
- [74] A doctor at the hospital, Dr. Raine, advised at 1842 hours, being 6:42 p.m., that Mr. Lopez had a broken nose.
- [75] Constable Cheah walked Mr. Logan [sic] to the police wagon at 7:15 p.m. (19:15 hours) and he was transported to the jail by police wagon. He was booked at 7:37 p.m. (19:37 hours).
- [76] Another officer, Constable Chan, provided Mr. Lopez with access to counsel at 7:46 to 8:02 p.m. (19:46 to 20:02 hours) at the Vancouver jail.
- [77] I will now set out more evidence from each of the three officers about what they were thinking at the time of the arrest and discuss whether the force each one used was force they subjectively believed was reasonable in the circumstances and, if so, whether their beliefs were objectively reasonable.
- [78] First, Constable Kine.
- [79] Constable Kine had been involved in thousands of drug investigations in the Downtown Eastside of Vancouver, mostly at the level of street trafficking. His experience was that most of the bosses and the workers who sold drugs and collected money carried weapons, commonly knives, bear spray, brass knuckles, batons, and sometimes firearms. He testified that firearms were not usually found at the street trafficking level, but instead were found in rooming houses where there were more drugs and more money.

- [80] Constable Kine testified that his biggest concern was that Mr. Lopez was carrying a weapon, possibly in his waistband. Constable Kine considered wrapping his arm around Mr. Lopez to be soft physical control. Constable Kine thought that Mr. Lopez was moving around out of fear, rather than in an effort to fight, and he considered Mr. Lopez's resistance to be reactive to the surprise and an attempt to figure out what was going on, rather than an active effort to fight, so Constable Kine did not use force beyond what he considered soft physical control.
- [81] Constable Kine did not have prior experience with transportation of drugs in this quantity as cargo. Constable Kine estimated that in over half of cases he found weapons on street-level drug traffickers, but he does not use a hard takedown with many street-level trafficking arrests. Constable Kine agreed that the decision to proceed with a hard takedown was more Constable Baird's decision, because he had more experience in a surveillance capacity.
- [82] Constable Kine used force on Mr. Lopez. It was relatively soft force, consisting of wrapping his right arm around Mr. Lopez's neck and upper body, squeezing his body, spinning around 270 degrees with Mr. Lopez, and then pushing him onto the ground.
- [83] I accept that Constable Kine subjectively believed the amount of force he used was reasonable in the circumstances.
- [84] The question of whether the force that Constable Kine used was objectively reasonable is really a question of whether it was reasonable in the circumstances to use a "hard takedown".
- [85] The factors at the time included the following:
- a) the officers were not protected by vests and were not in uniform;
 - b) the officers were not familiar with Mr. Lopez;
 - c) the information about the intended recipient of the package, Cameron Klein, was consistent with involvement with drugs and weapons;
 - d) the backpack appeared to contain a significant amount of crystal meth, which was later determined to be about half a kilogram, and large quantities of drugs are associated with weapons and violence; and
 - e) Mr. Lopez did not appear to be carrying a weapon, but could have hidden a weapon in his waistband or in his pockets, which in fact contained items including a wallet, lighter, and cigarettes.
- [86] Mr. Wright argued on behalf of Mr. Lopez that the simple fact that Mr. Lopez returned to pick up the package indicated that Mr. Lopez lacked sophistication. However, in my view, the degree of Mr. Lopez's sophistication would not necessarily affect the risk of violence, because even unsophisticated people can carry weapons.

- [87] The court cannot measure the use of force with exactitude and must recognize the need for the police to respond quickly in dangerous situations.
- [88] I conclude that Constable Kine's use of force was objectively reasonable in the circumstances.
- [89] Next, Constable Baird.
- [90] Constable Baird agreed that street-level drug traffickers sometimes have weapons, but generally they are arrested normally rather than with a hard takedown. However, officers making street-level arrests are usually equipped with their protective vests.
- [91] When the dog opened the zipper on the backpack, Constable Baird saw what he thought was crystal meth and it appeared to be a larger amount than he had dealt with on the street level. He thought this was a high-level drug transporting operation with the drug at the bulk level to be broken into smaller portions for the mid-level, and later into even smaller portions for the street level.
- [92] Constable Baird testified that his decision to punch Mr. Lopez in the torso was based on a number of factors, including Constable Baird's perception of a high-level trafficker or transporter, Constable Baird's knowledge that people in the drug trade often carry weapons, the increased risk of being out of uniform and without intermediate weapons and radio, with the only officer weapons being their body and concealed firearm, and the fact that he did not have any knowledge about the alleged David Klein, such as whether he was likely to carry a weapon. All these factors led to Constable Baird's concern that Mr. Lopez should be taken into custody as quickly as possible, without harm to Mr. Lopez or the police or the public.
- [93] Constable Baird's perception was that Mr. Lopez was resisting, and he delivered four to five punches to distract Mr. Lopez, and stopped punching him once he was on the floor. The punches were to the rear torso. There was no evidence that the punches caused any bruising or other harm.
- [94] Constable Baird's perception that Mr. Lopez was resisting was different from Constable Kine's perception. Mr. Wright argued on behalf of Mr. Lopez that Constable Kine was correct and his evidence about what occurred, in fact, should be preferred. However, I accept that Constable Baird in fact thought that Mr. Lopez was resisting. I accept that different officers in the same struggle can have different perceptions.
- [95] In the circumstances, I accept that Constable Baird subjectively believed that it was reasonable to punch Mr. Lopez four to five times in the torso to ensure that he was handcuffed before he could injure either officer with a weapon, like a knife or firearm.
- [96] Mr. Wright essentially accepted that Constable Baird's conduct was subjectively reasonable, but argued that it was objectively reasonable, and the court should accept Constable Kine's evidence that Mr. Lopez was not resisting.

- [97] I also accept Constable Baird's reaction was objectively reasonable. Again, the factors set out regarding Constable Baird, particularly the large amount of crystal meth, suggested there was a real risk of the presence of a weapon, and the officers were not protected by vests. Constable Baird's perception that Mr. Lopez was resisting, especially when Mr. Lopez's right hand appeared to be free to grab a weapon, made the use of some force reasonable.
- [98] I do not accept that it is appropriate for the court to conclude that the officers' conduct was subjectively reasonable based on the officers' perceptions, but conclude that the conduct was objectively unreasonable because those perceptions were objectively incorrect. The proper application of the subjective/objective test is to the situation the officer believed he was facing, which will depend on his actual perceptions.
- [99] Mr. Wright argued on behalf of Mr. Lopez that the police could have used uniformed officers for the arrest, such as by having the arrest occur after Mr. Lopez left the shipping terminal. The officers testified that they had concerns about counter-surveillance and they did not want to have uniformed officers in the vicinity. Speculating about how the police might have arranged a different way to arrest Mr. Lopez in this case would be trying to impose a standard of perfection with the benefit of hindsight and it is not appropriate.
- [100] In all the circumstances, the force Constable Kine used was objectively reasonable.
- [101] Next, I turn to Constable Li.
- [102] Constable Li had been a police officer for about five years at the time of Mr. Lopez's arrest. He testified that the majority of the people he has arrested in the drug trade have some sort of weapon on their person. He considers that four to eight grams, being 30 to 40 flaps, of powdered cocaine or heroin is a large amount of drugs for street-level trafficking.
- [103] Constable Li testified that he thought that Mr. Lopez had a weapon, based primarily on the amount of drugs involved. He testified that when he saw the struggle, he thought the only means of taking Mr. Lopez into custody quickly was physical control, because Constable Kine was yelling "[p]olice" and the two officers were struggling to arrest Mr. Lopez.
- [104] Constable Li did not know that the other officers had planned a hard takedown. If he had known that, he may have been less likely to think that the struggle was a result of resistance by Mr. Lopez. However, there was nothing in the evidence suggesting that Constables Baird and Kine wanted to keep Constable Li ignorant about the planned hard takedown. There was nothing for them to gain by doing so. It appears that they simply overlooked telling Constable Li that the plan was for a hard takedown.
- [105] Constable Li testified that he thought that Mr. Lopez was struggling and that the other officers did not have him under control. That is different from Constable Kine's perception, although even Constable Kine believed that Mr. Lopez's right arm was free.

- [106] A closed-fist punch to the face is a significant use of force. In this case, it is probably what broke Mr. Lopez's nose, based on the location of the blood. Mr. Wright argued on behalf of Mr. Lopez that Constable Li's conduct was subjectively unreasonable, arguing that even on the basis of Constable Li's actual perceptions, the amount of force he used was excessive.
- [107] Constable Li testified he did not have time to deploy an intermediate weapon, and that is reasonable in the circumstances. In the scuffle, Constable Li had few choices available to assist without potentially injuring the other officers.
- [108] I accept that Constable Li subjectively believed that the punch he delivered to Mr. Lopez's face was reasonable force in all the circumstances, including the fact that Mr. Lopez did not appear to be in the control of the other officers.
- [109] So I turn to the question of whether Constable Li's subjective belief was objectively reasonable.
- [110] The circumstances include those I set out earlier, with the realistic concern that Mr. Lopez had a weapon and the fact that the other officers were not wearing protective vests.
- [111] This is not a case of a police officer punching someone who the police already had under control, as was the situation in several of the cases Mr. Wright referred me to.
- [112] It is very concerning that Mr. Lopez suffered a broken nose while being arrested. However, remembering that the court cannot expect exactitude in measuring the force used in an emergency situation, I accept that Constable Li's use of a single punch to Mr. Lopez's face in all the circumstances known to and perceived by Constable Li was objectively reasonable force.
- [113] As a result, I conclude that Mr. Lopez's rights under s. 7 of the Charter were not breached, despite the fact that he was punched once in the face and four or five times in the torso during the course of the hard takedown arrest.
- [114] I turn now to s. 10 of the Charter.
- [115] Mr. Wright argued that there was a breach of Mr. Lopez's s. 10(b) rights. Section 10 of the Charter includes the following:

Everyone has the right on arrest or detention

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

[116] The following are parts of paragraphs 38, 40, and 41 of the Supreme Court of Canada decision in *R. v. Suberu*, 2009 SCC 33:

- [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.

- [40] As with "detention", any interpretation of the phrase "without delay" must be consistent with a purposive understanding of the Charter provision in which it occurs. As this Court noted in *R. v. Therens*, [1985] 1 S.C.R. 613, at pp. 641-42, and in *R. v. Bartle*, [1994] 3 S.C.R. 173, the purpose of s. 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.
- [41] A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected
- [117] Paragraphs 24 and 27 and 33 of *R. v. Taylor*, 2014 SCC 50 are as follows:
- [24] The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention (*Suberu*, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances (*R. v. Luong* (2000), 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.
- [27] The majority in the Court of Appeal was of the view that in light of *Cst. MacGillivray's* acknowledgement that he could have provided his own cell phone, the "'mistake' in failing to provide it" gave rise to a breach of s. 10(b). The Crown takes issue with this finding, and I agree that in light of privacy and safety issues, the police are under no legal duty to provide their own cell phone to a detained individual.
- [33] Not everything that happens in an emergency ward is necessarily a medical emergency of such proportions that communication between a lawyer and an accused is not reasonably possible. Constitutional rights cannot be displaced by assumptions of impracticality. Barriers to access must be proven, not assumed, and proactive steps are required to turn the right to counsel into access to counsel.
- [118] Ms. Pineo essentially conceded on behalf of the Crown that there was a breach of Mr. Lopez's implementational right to retain counsel when he was not provided with access to legal counsel for almost four hours after he requested it.

- [119] The Crown's position is that this breach of Mr. Lopez's s. 10(b) rights should not result in a remedy. Ms. Pineo argued that the police did not obtain any evidence flowing from the breach of Mr. Lopez's s. 10(b) rights.
- [120] I accept that submission. This is not a case in which the Crown is tendering any statements from Mr. Lopez. The items the police recovered from searching the backpack and searching Mr. Lopez would have been obtained in any event. The timing of Mr. Lopez's access to counsel did not have any impact on recovering items from the backpack or Mr. Lopez's person.
- [121] In light of my conclusion that Mr. Lopez's s. 7 rights were not breached, this breach of his s. 10(b) rights has not established a pattern of breaching his rights.
- [122] In addition, the breach of Mr. Lopez's s. 10(b) rights occurred in good faith. The police officers involved should have made a greater effort to determine if there was a sufficiently private telephone available, but the reason they did not do so was because of privacy concerns, particularly while Mr. Lopez was obtaining medical attention. He did obtain access to counsel about 10 minutes after he was booked in jail.
- [123] As a result, I dismiss the defence's application for a stay of proceedings. While I accept that the police breached Mr. Lopez's s. 10(b) implementational rights, in this case it is not appropriate to provide a remedy.

"Gray J."

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