

CANADA / JUDGMENT

R. v. Lundy

2023 BCCA 133

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 133 R. v. Lundy

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lundy,

2023 BCCA 133

Date: 20230317

Docket: CA47938

Between:

Rex

Respondent

And

Keith Christopher Lundy

Appellant

Before:

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Grauer

The Honourable Justice Marchand

On appeal from: An order of the Provincial Court of British Columbia, dated
May 18, 2021 (conviction) (R. v. Lundy, Prince George Docket 72296-1).

Oral Reasons for Judgment

Counsel for the Appellant

(appeared via videoconference on March 17, 2023):

J.C. LeBlond

Counsel for the Respondent:

M. Loda

Place and Date of Hearing:

Vancouver, British Columbia

March 13, 2023

Place and Date of Judgment:

Vancouver, British Columbia

March 17, 2023

Summary:

The appellant was convicted of possession for the purpose of trafficking. He appeals his conviction on the basis that the judge erred by declining to exclude evidence she found to have been gathered in breach of his ss. 8 and 9 Charter rights. Held: Appeal dismissed. The judge did not err in declining to exclude evidence because the appellant's Charter rights were not infringed.

MARCHAND J.A.:

Introduction

- [1] On May 18, 2021, the appellant, Keith Christopher Lundy, was convicted in Provincial Court of two counts of possession for the purpose of trafficking in heroin, fentanyl and carfentanil and two counts of possession for the purpose of trafficking in cocaine. On November 3, 2021, the trial judge sentenced Mr. Lundy to two five-year and two two-year concurrent jail sentences, less time served. The judge also made a number of ancillary orders.
- [2] Mr. Lundy appeals his convictions on the basis that the trial judge erred by not excluding evidence she found to have been gathered by the police in breach of his ss. 8 and 9 Charter rights.
- [3] The Crown submits that Mr. Lundy's appeal should be dismissed for two reasons. First, the Crown submits the judge erred in finding the police breached Mr. Lundy's Charter rights. In the alternative, the Crown submits the judge did not err in declining to exclude the evidence gathered as a result of the breaches.

Background

- [4] As the grounds for the arrest and search of Mr. Lundy are at issue, I consider it necessary to review the background in some detail.
- [5] Sgt. Chad Chamberlain is an experienced member of the RCMP. Acting on information from a confidential informant that "Keith Lundy sells drugs", Sgt. Chamberlain and members of his team surveilled Mr. Lundy between February 7 and 14, 2019 in Prince George. Sgt. Chamberlain did not communicate with the informant's handler and did not know when the information from the informant was received.
- [6] On February 7, the team observed Mr. Lundy at a residence on Montgomery Crescent. The judge found that Mr. Lundy lived in that residence with his spouse, Tanisha McKay, and a man named Andrew Setter. Mr. Setter was known to Sgt. Chamberlain as a drug trafficker and heavy drug user.
- [7] On February 8, the team observed Mr. Lundy travel with Ms. McKay in her Nissan Pathfinder from a gas station to a residence on Freimuller Avenue where Brook Lacey appeared to live or spend a lot of time. Mr. Lundy and Ms. McKay stayed there for several minutes before returning to their Montgomery address. Mr. Lacey was known to Sgt. Chamberlain as a drug trafficker.
- [8] On February 9, Mr. Lundy (who did not have a valid driver's licence) drove Ms. McKay in his Dodge Caliber from the Montgomery address to a convenience store. He then drove back towards the Montgomery address weaving through side streets. Sgt. Chamberlain believed that Mr. Lundy was employing countersurveillance measures known as "heat checks". Mr. Lundy then drove to and entered the Freimuller residence where he remained for 45 to 50 minutes.
- [9] Mr. Lacey subsequently drove Mr. Lundy to a house on Brigade Street in Mr. Lacey's mother's Hyundai Tucson. Mr. Lundy knocked on the door and went inside for "a matter of seconds" before returning to the Tucson. Sgt. Chamberlain was not familiar with the house on Brigade Street but Ms. McKay's Pathfinder was registered to that address. Sgt. Chamberlain testified that the short-duration stop was consistent with the sale of drugs and he believed the stop to be a drug transaction.
- [10] Mr. Lacey next drove Mr. Lundy to the downtown area. It was minus 25 outside. Mr. Lundy got out of the Tucson, lit a cigarette and walked a few blocks to a hostel known to Sgt. Chamberlain to be a high traffic area for drug use and drug trafficking. A few moments after Mr. Lundy entered the hostel, Mr. Setter left the hostel and walked to a gas station frequented by drug users. Sgt. Chamberlain suspected that Mr. Setter was at the hostel to get "reloaded" with drugs to sell by Mr. Lundy.

- [11] Mr. Lundy stayed at the hostel for 21 minutes. Relative to at least one previous time he had surveilled the hostel, Sgt. Chamberlain noted an "uptick" in the flow of drug traffickers and heavy drug users in and out of the building.
- [12] Mr. Lacey then returned to the area, parking some distance from the hostel, which Sgt. Chamberlain found suspicious. Mr. Lundy left the hostel on foot. Sgt. Chamberlain believed he was picked up by Mr. Lacey, though he did not observe that. Fifteen minutes later, the team observed the Tucson outside a pet store and Mr. Lundy inside the store. The team subsequently followed the Tucson back to the Freimuller residence. Both Mr. Lacey and Mr. Lundy went inside. Six minutes later, Mr. Lundy exited and drove his Caliber back to the Montgomery address.
- [13] Later, Mr. Lundy and a female drove in his Caliber to the home of Daniel Prediger on Riverview Drive. Sgt. Chamberlain described Mr. Prediger as "a significant figure in the local drug trade" who "operates at a higher-level." The team did not observe anyone exit the Caliber and Sgt. Chamberlain did not know how long Mr. Lundy was at the residence.
- [14] On February 12, Sgt. Chamberlain located Mr. Lundy driving in his Caliber. He followed Mr. Lundy to the Freimuller residence. Mr. Lundy went inside for 25 to 30 minutes. Mr. Lacey then drove Mr. Lundy downtown in the Tucson. Mr. Lundy again got out on a very cold day, lit a cigarette and walked to the hostel where he stayed for 22 minutes. He next walked to St. Vincent De Paul's while talking or texting on his phone. Sgt. Chamberlain agreed in cross-examination that St. Vincent's was "frequented by less-privileged people, homeless folks [and] transient folks."
- [15] Mr. Lundy spoke to drug users and others at St. Vincent's then walked while talking on his phone to meet Ms. McKay in her Pathfinder. He opened the front passenger door and leaned in briefly. He closed the door and Ms. McKay drove away. Mr. Lundy then walked to a gas station. Sgt. Chamberlain testified that, in his experience, drug traffickers do not keep all their drugs or cash in one spot. He therefore believed that Mr. Lundy arranged to meet Ms. McKay to either give her money he had collected from drug sales or to reload with more drugs to sell.
- [16] Mr. Lundy next walked to the area of the needle exchange. He interacted with people on the street corner, primarily drug users and drug sellers. A team member saw Mr. Lundy talking in a group of people then drop something on the ground before walking away. Sgt. Chamberlain described this as consistent with drug trafficking without what the judge described as "the tell-tale hand-to-hand interaction." No one observed anyone pick up the item or hand anything to Mr. Lundy in exchange. Sgt. Chamberlain noted that drug purchasers do not always pay at the time of the sale.

- [17] Mr. Lundy subsequently went to a pawn shop before walking to the hostel where he remained inside for about 45 minutes. Mr. Lundy then took a cab first to the pawn shop and then to Mr. Lacey's residence on Freimuller. Mr. Lundy went inside the residence briefly before returning to his home on Montgomery in his Caliber.
- [18] At some point, the team observed a female arrive at the Montgomery residence by car, enter for about 30 seconds and then depart. Sgt. Chamberlain testified that this was consistent with buying drugs. There was no evidence regarding who was present at the Montgomery residence at the time.
- [19] On February 13, the team observed Mr. Lundy and Ms. McKay come and go from the Montgomery residence and get into a heated argument.
- [20] On February 14, the team observed Ms. McKay drive Mr. Lundy from the Montgomery residence to the Freimuller residence in her Pathfinder. After dropping Mr. Lundy off, Ms. McKay returned briefly to the Montgomery residence before driving back to the Freimuller residence, where she went inside for 20 to 30 minutes. The Tucson was not at the Freimuller residence, so Sgt. Chamberlain assumed Mr. Lacey was not there.
- [21] Just before 2:00 p.m., Ms. McKay drove Mr. Lundy downtown in her Pathfinder. While they were stopped at a red light, Sgt. Chamberlain gave the direction to arrest both Mr. Lundy and Ms. McKay for possession for the purpose of trafficking. Sgt. Chamberlain testified that his belief that Mr. Lundy was in possession of drugs for the purpose of trafficking was based on the totality of the evidence and his observations, including:
- The information from the confidential informant;
 - Mr. Lundy's criminal record which included "a history of drug trafficking";
 - Mr. Lundy's associations with known drug traffickers;
 - Mr. Lundy attending at the Freimuller residence in one vehicle then driving downtown in another, which Sgt. Chamberlain believed to show that Mr. Lundy was reloading with drugs as well as attempting to thwart surveillance;
 - Mr. Lundy's apparent "heat checks";
 - The "clandestine" drops of Mr. Lundy a couple of blocks away from the hostel;
 - Mr. Setter leaving the hostel shortly after Mr. Lundy's arrival and then departing to a high drug use area, which Sgt. Chamberlain believed showed that Mr. Setter had been reloaded with drugs to sell;
 - The increased traffic in and out of the hostel after Mr. Lundy arrived;
 - Mr. Lacey picking up Mr. Lundy about a block from the hostel and then taking him back to the Freimuller residence where Sgt. Chamberlain believed drugs were stored;

- Mr. Lundy's brief meeting with Ms. McKay on February 12, which Sgt. Chamberlain believed was either to handover cash or reload with drugs; and
- Mr. Lundy and Ms. McKay driving downtown together on February 14 after spending time together at the Freimuller residence.

- [22] When Sgt. Chamberlain gave the direction to arrest Mr. Lundy and Ms. McKay, one police vehicle activated its lights and siren, pulled out and stopped in front of the Pathfinder. Two other police vehicles boxed in the Pathfinder. One officer got out of his vehicle and took his service revolver out of its holster and held it in the "low ready" position (meaning pointed down). The officer walked to the front of the Pathfinder, yelled for Mr. Lundy and Ms. McKay to put their hands up and that they were under arrest for trafficking. He opened the driver's door and asked Ms. McKay to get out. Observing no weapons or threat, he put away his firearm, handcuffed Ms. McKay and led her away.
- [23] Sgt. Chamberlain arrived 10 to 15 seconds after the "takedown" had concluded. He did not draw his service revolver. He opened the passenger door and walked with Mr. Lundy to the sidewalk where he handcuffed and searched Mr. Lundy. Sgt. Chamberlain found drugs on Mr. Lundy that he believed had been pre-packaged for street-level sales and a key that, in a subsequently authorized search of the Freimuller residence, was found to open a safe containing drugs, cash, a digital scale and paraphernalia associated with drug use and drug trafficking.

Analysis

Did the police breach Mr. Lundy's Charter rights?

- [24] The Crown defends the judge's ruling to admit the evidence at issue on the basis that the police did not breach Mr. Lundy's s. 8 Charter right to be secure against unreasonable search or seizure or his s. 9 Charter right not to be arbitrarily detained or imprisoned. The outcome turns on whether the police arrested Mr. Lundy lawfully.
- [25] The scope of police powers to arrest in the circumstances of this case are not in issue. The principles were comprehensively summarized by Justice Jamal for the majority in the recent decision of the Supreme Court of Canada in *R. v. Beaver*, 2022 SCC 54:
- [71] The police have statutory authority to arrest a person without a warrant under s. 495 of the Criminal Code, R.S.C. 1985, c. C-46. The applicable part of s. 495 in this appeal, s. 495(1)(a), allows a peace officer to arrest a person without a warrant if, on reasonable grounds, they believe the person has committed or is about to commit an indictable offence.
- [72] The essential legal principles governing a warrantless arrest are settled:
1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint.

2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence. Subjective grounds for arrest are often established through the police officer's testimony. This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal.
3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer.
4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism". Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting] officer", deference is not necessarily owed to their view of the circumstances because of their training or experience. The arresting officer's grounds for arrest must be more than a "hunc[h] or intuition".
5. In evaluating the objective grounds to arrest, courts must recognize that, "[o]ften, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete". Courts must also remember that "[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a 'scientific or metaphysical exercise', but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience'".
6. "Reasonable and probable grounds" is a higher standard than "reasonable suspicion". Reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime. At the same time, police do not require a prima facie case for conviction before making an arrest. Nor do the police need to establish that the offence was committed on a balance of probabilities. Instead, the reasonable and probable grounds standard requires "a reasonable belief that an individual is connected to the offence". A reasonable belief exists when "there is an objective basis for the belief which is based on compelling and credible information". The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest.
7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest.
8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds.

- [73] The existence of reasonable and probable grounds for a warrantless arrest is based on the trial judge's factual findings reviewable only for palpable and overriding error. Whether the facts as found by the trial judge amount to reasonable and probable grounds is a question of law reviewable for correctness.
- [Cites and emphasis omitted.]
- [26] Although Beaver had not been decided when the judge made her voir dire ruling on whether the police breached Mr. Lundy's Charter rights, she correctly noted many of these principles. Of particular relevance to this appeal, the judge directed her mind to how she was to assess the evidence. She held:
- [10] It is the totality of the evidence that is there which must be considered, not the totality of what is not present [cite omitted]. Further, it is the cumulative effect of evidence that is taken into account when determining whether there are reasonable grounds to arrest someone. The evidence is not assessed on a piecemeal basis [cite omitted].
- [27] After conducting a careful and thorough review of the evidence, the judge reiterated her understanding that she had to take account of the cumulative effect of the evidence and not assess it on a piecemeal basis to determine whether there were reasonable grounds to arrest Mr. Lundy.
- [28] The judge then reviewed individual pieces of evidence and drew certain conclusions. For example, she accepted it was suspicious that Mr. Lundy associated with Messrs. Lacey, Setter and Prediger and attended at the hostel in a fashion that was indicative of drug trafficking. Based on Sgt. Chamberlain's testimony that Mr. Lundy "had a history of drug trafficking," she concluded that Mr. Lundy had a prior conviction for trafficking under the Controlled Drugs and Substances Act, S.C. 1996, c. 19. She further concluded that the evidence established a "brief pattern" of Mr. Lundy going to the Freimuller residence, then to the hostel, then back to the Freimuller residence before going home. However, the judge also noted that she heard no evidence of Mr. Lundy exchanging anything with drug users outside any of the "various drug hubs" nor of any increase in the attendance of drug users or traffickers on the second occasion he was observed going into the hostel.
- [29] The judge gave "no weight" to the information from the confidential informer, the suggestion that Mr. Lundy dropped drugs on the ground in the midst of a group of people at the needle exchange, some of his "short-duration stops" or his brief meeting with Ms. McKay on February 12. She did not know what to conclude from Mr. Lacey dropping Mr. Lundy off to walk to the hostel (given he was smoking) or of the suggestion that Mr. Lundy tried to thwart police detection by going downtown in the Tucson rather than his Caliber (given he had no driver's licence and this behaviour was not suggested to be a routine characteristic of drug trafficking). She did not accept that Mr. Lundy was performing "heat checks" (given he was not looking around, doubling back or otherwise driving unusually).
- [30] The judge next set out her findings regarding s. 9 of the Charter.

- [31] First, she found that Sgt. Chamberlain had subjectively reasonable grounds to believe that "Mr. Lundy was loading up at Freimuller then selling drugs downtown." This finding was not seriously contested by Mr. Lundy during the voir dire and is not at issue on appeal.
- [32] Second, while finding that the circumstances were suspicious, she was not satisfied that Sgt. Chamberlain's grounds to arrest Mr. Lundy were objectively reasonable. In her view, "it [came] down to what was observed on February 9 and 12." She then outlined Mr. Lundy's travels on February 9, 12 and 14 with no reference to the pieces of evidence of which she did not know what to make or to which she gave no weight. She stated her conclusion as follows:
- [89] When I consider all of Sergeant Chamberlain's observations and information in its totality and view them through the lens of the experience and training of that particular officer, who I acknowledge to be very experienced, I am not satisfied that a reasonable person placed in his position would be able to conclude that there are indeed objectively reasonable and probable grounds for the arrest.
- [33] The Crown does not dispute that the judge correctly outlined the approach she was required to take in assessing whether Sgt. Chamberlain had reasonable and probable grounds to arrest Mr. Lundy. The issue is whether she actually took the approach she had so carefully and correctly outlined. Very respectfully, even on a functional, contextual and generous reading of the judge's voir dire ruling, I have concluded she did not.
- [34] After correctly noting that she had to take account of the cumulative effect of the totality of the evidence, the judge fell into error by undertaking the type of piecemeal analysis she had just noted was inappropriate. A few examples will suffice to demonstrate the significance of the error.
- [35] I agree with the judge that on its own, the information from the confidential informant had little probative value. As noted by the judge, Sgt. Chamberlain "was not the handler and did not know the confidential informant's pedigree or reliability; when the information was received; when, where or how Mr. Lundy was supposed to have trafficked drugs; or what drugs he was alleged to be selling." However, in the context of Sgt. Chamberlain and his team's observations of suspicious conduct consistent with drug trafficking, concerns about the reliability of the information from the confidential informant decreased substantially.
- [36] I also agree with the judge that on their own, nothing much could be made of Mr. Lundy taking back streets or catching a ride with others when he did not have a driver's licence. However, in the context of Mr. Lundy driving his car to the home of a person associated with the drug trade, leaving it there, being driven downtown to areas associated with the drug trade, then retrieving his vehicle to return home, the manner and pattern of Mr. Lundy's driving took on real significance, particularly when viewed through the lens of an experienced officer like Sgt. Chamberlain.

- [37] As a final example, I agree with the judge that on its own, nothing much could be made of Mr. Lundy being dropped off to walk outside on a cold day while smoking a cigarette. However, in the context of the totality of the evidence, there was a sound basis for Sgt. Chamberlain to conclude there was more to Mr. Lacey dropping off Mr. Lundy than simply giving Mr. Lundy time to have a smoke. In particular, it was consistent with allowing Mr. Lundy to arrive at the hostel in an inconspicuous fashion while separating himself from a person involved in supplying him with drugs.
- [38] The trial judge's factual findings regarding the events in question are, of course, entitled to deference. On the other hand, her conclusion as to whether the facts she found constituted reasonable grounds was a question of law subject to review on the standard of correctness: *R. v. Shepherd*, 2009 SCC 35 at para. 20; *R. v. Harms*, 2020 BCCA 242 at para. 25.
- [39] In my view, when properly analysed, the evidence established that Sgt. Chamberlain's subjective belief that there were grounds to arrest Mr. Lundy was objectively reasonable. As the Crown aptly put it in its factum:

In sum, Sgt. Chamberlain, an experienced investigator, received information that the appellant was trafficking drugs. The appellant had a criminal record for trafficking drugs. On February 9 and 12, the appellant drove his vehicle to the house of someone associated to the drug trade. From there and leaving the car he drove behind, he was driven downtown, to locations associated to the drug trade. When downtown, he visited locations of high drug activity. He interacted with people who [have substance use disorder]. He then returned to the house from which he had gone downtown, retrieved the vehicle he drove, and returned to his own house. On February 14, the day of the arrest, the same pattern was repeated with minor variation. On one occasion, he drove in a manner consistent with an intention to avoid surveillance. He also met with a local high-level drug figure.

- [40] While various individual pieces of evidence can be isolated and explained away, a clear enough picture to justify an arrest emerges from a reasonable consideration of the totality of the evidence.
- [41] In my view, the judge erred in concluding the police breached Mr. Lundy's s. 9 Charter right to be free of arbitrary detention. It follows that, in the circumstances of this case, the police search of Mr. Lundy incident to his lawful arrest did not breach his s. 8 Charter right to be secure against unreasonable search or seizure.
- [42] Although my finding that the police did not breach Mr. Lundy's Charter rights is adequate to dismiss his appeal, I will briefly address his arguments regarding the judge's decision not to exclude the evidence.

Did the judge err in declining to exclude evidence under s. 24(2) of the Charter?

- [43] Mr. Lundy sought an exclusion of the evidence the judge had concluded was obtained in breach of his ss. 8 and 9 rights under s. 24(2) of the Charter.

- [44] Section 24(2) provides that "[w]here 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."
- [45] In *Beaver*, Justice Jamal summarized the well-established approach to excluding evidence under s. 24(2):
- [116] Whether the administration of justice would be brought into disrepute by admitting [evidence gathered in breach of an accused's Charter rights] involves examining the impact its admission would have on public confidence in the administration of justice over the long term, based on a balancing of the three lines of inquiry described by this Court in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353: (1) the seriousness of the Charter-infringing state conduct; (2) the impact of the breach on the accused's Charter-protected interests; and (3) society's interest in the adjudication of the case on its merits [cites omitted].
- [117] Section 24(2) of the Charter is not an automatic exclusionary rule precluding the admission of all unconstitutionally obtained evidence. Such evidence will only be excluded when the accused establishes that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute (cites omitted). Balancing the relevant considerations under s. 24(2) is a qualitative determination that is not capable of mathematical precision [cites omitted].
- [46] In this case, the judge correctly outlined these and other principles pertinent to the task of considering whether to exclude the evidence at issue. She then made findings regarding the *Grant* factors.
- [47] Regarding the seriousness of the Charter-infringing state conduct, the judge considered that before Mr. Lundy was arrested, the police had conducted a surveillance operation on him over six days. She held that the police had a firmer foundation for arrest than had been the case in *R. v. Pope*, 2015 BCSC 2391, a case relied on by Mr. Lundy where evidence had been excluded under s. 24(2). Further, the judge found the officers had reasonable grounds to deem the anticipated arrest as a "high-risk takedown" based on Mr. Lundy's personal history as well as the officers' general awareness of the nexus between drug trafficking and weapons. In her view, the officers' actions were "reasonably based and moderate." The judge concluded that the breach of Mr. Lundy's s. 9 right to be free from arbitrary detention was serious but somewhat diminished by the existence of some, though in her view insufficient, grounds for arrest. She also concluded that the s. 8 breach was minor relative to other forms of search, such as strip searches.
- [48] Regarding the impact on Mr. Lundy's Charter-protected interests, the judge inferred that being arrested in a vehicle driven by his intimate partner and being in custody for a considerable time had had a significant adverse effect on Mr. Lundy and represented a significant deprivation of his liberty. On the other hand, the judge noted that there was some

basis for Mr. Lundy's arrest and subsequent detention which could diminish the impact on his Charter-protected interests. She further noted that Mr. Lundy had not been conscripted into providing evidence.

[49] Finally, regarding society's interest in the adjudication of the case on its merits, the judge first referenced the Supreme Court of Canada decision in *R. v. Le*, 2019 SCC 34. She held:

[32] In *R. v. Le*, 2019 SCC 34, the Supreme Court of Canada noted at paragraph 158 and 159 that while disrepute to the administration of justice might arise from the exclusion of relevant and reliable evidence, so too might it result from what could be perceived as "judicial condonation of unacceptable conduct by investigatory agencies." Courts must be careful to dissociate themselves from the violation of Charter breaches.

[50] The judge then noted that Mr. Lundy was alleged to have trafficked in cocaine and heroin tainted with fentanyl and carfentanil. She noted that fentanyl and carfentanil are both highly addictive and dangerous opiates, which was reflected in the serious potential consequences of the alleged offences, namely that Mr. Lundy was liable to a lengthy term of imprisonment up to imprisonment for life. The judge also noted that the effect of excluding the evidence would be that the charges would not be adjudicated on their merits.

[51] Ultimately, the judge was not satisfied on the balance of probabilities that the admission of the evidence would bring the administration of justice into disrepute. In arriving at this finding, the judge considered:

1. While the evidence was found as a result of what she had found to be an unlawful search, it was real evidence that was both relevant and reliable;
2. The charges were serious and society had a "high degree of interest in the trafficking of opiates such as fentanyl and carfentanil";
3. The arresting officer's actions were not capricious or without foundation, which diminished the impact on Mr. Lundy's Charter-protected interests. This was not a case "where a senior officer flagrantly disregarded fundamental Charter rights"; and
4. The manner of arrest did not give rise to further Charter breaches.

[52] On her balancing of the Grant factors, the judge declined to exclude the evidence.

[53] On appeal, a trial judge's findings of fact in applying s. 24(2) attract deference, but not the judge's application of the law to the facts: *R. v. Grant*, 2009 SCC 32 at para. 129; *Beaver* at para. 118.

[54] In this case, Mr. Lundy submits that the judge erred by minimizing the seriousness of the conduct she found to be Charter-infringing. I do not agree.

[55] In *Grant*, the majority held that Charter-infringing conduct by the state ranges in seriousness:

- [74] State conduct resulting in Charter violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.
- [56] Here, Mr. Lundy has not identified any palpable and overriding errors in the judge's findings of fact. She did not find that Sgt. Chamberlain acted in wilful or reckless disregard of Mr. Lundy's Charter rights. Rather, she found he subjectively believed he had grounds to arrest Mr. Lundy and had some objective basis to support his subjective belief. Further, her findings regarding Mr. Lundy's arrest supported her conclusion that the police acted moderately in a potentially very dangerous situation.
- [57] Far from erring, in my view, the judge sensibly balanced the Grant factors and correctly declined to exclude the evidence gathered by the police incident to Mr. Lundy's arrest and in the subsequent authorized search of the Freimuller residence.
- [58] Accordingly, even if I had concluded that Sgt. Chamberlain did not have reasonable and probable grounds to arrest Mr. Lundy, I would have dismissed the appeal.

Disposition

- [59] For all of these reasons, I would dismiss the appeal.
- [60] HUNTER J.A.: I agree.
- [61] GRAUER J.A.: I agree.
- [62] HUNTER J.A.: The appeal is dismissed.

"The Honourable Justice Marchand"

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