
CANADA / JUDGMENT

R. v. Russell

2009 BCSC 1939

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1939 R. v. Russell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Russell,

2009 BCSC 1939

Date: 20090918

Docket: 54994

Registry: Chilliwack

Regina

v.

Dennis James Russell

Before: The Honourable Mr. Justice N. Brown

Oral Reasons for Judgment

Counsel for the Crown:

R. Mansoori-Dara

Counsel for Defence:

S. Paterson

Place and Date of Trial/Hearing:

Chilliwack, B.C.

September 14 - 18, 2009

Place and Date of Judgment:

Chilliwack, B.C.

September 18, 2009

- [1] The indictments charge the accused with Count 1 that, on or about the 14th day of January at or near the City of Chilliwack in the Province of British Columbia, he did unlawfully have in his possession a controlled substance: methamphetamine, for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19, ("CDSA") and a second count that, on or about the 14th day of January, 2009 at or near the City of Chilliwack in the Province of British Columbia, he did unlawfully have in his possession a controlled substance: marihuana, in an amount not exceeding 30 grams contrary to s. 4(1) of the CDSA.
- [2] At the outset of the trial, the accused applied to exclude the physical evidence of methamphetamine (crystal meth) and marihuana found by RCMP officers as a result of their searches following their arrest of the accused and his passenger, Crystal Elisa Wilde. The application was based on the grounds that the arrest and search violated the accused's s. 8 and 9 Charter rights. I ordered a voir dire. The crown led this evidence.

Constable Mufford

- [3] Constable Mufford testified. He has served with the RCMP for about four years, two of those on general duty enforcing criminal code and controlled substances act offences and street crime generally, including dealing with prolific offenders, breaches of curfews, preparation of search warrants and drug enforcement. He has been involved in many motor vehicle stops that have yielded various substances, including crack, cocaine, and marihuana. He has been involved in more than 30 grow operation investigations and has been the search warrant affiant in 15 of those. He testified he had a great deal of experience dealing with drug users in the course of his duties and is very familiar with the smell of fresh marihuana.
- [4] On January 15, 2009 at about 9:40 a.m., Cst. Mufford was on patrol with his partner, Cst. Hughes. They were in an unmarked but fully equipped Grand Am police car. Cst. Mufford was driving the car with Cst. Hughes in the passenger seat. While patrolling in downtown Chilliwack, Cst. Mufford saw a 2009 Sebring. First noticing that the outside of the car was dirty, although the windows were clean, he saw the accused driving southbound in the opposite direction. He managed to catch a fleeting glimpse of a female passenger as the Sebring headed in the opposite direction. He noticed that the driver was not wearing his seatbelt, so he turned his vehicle around and followed the Sebring to deal with the Motor Vehicle Act infraction.

- [5] After following the Sebring for about two kilometres, he and Cst. Hughes pulled up behind it and confirmed the driver was not wearing his seatbelt. After stopping at an intersection controlled by traffic lights, Cst. Mufford noticed the driver, the accused Mr. Russell, had looked to his side rear view mirror, and noticed Cst. Mufford. He then put his seat belt on. Upon the change of lights to green, Cst. Mufford activated his lights and followed the Sebring until it turned right onto College Street, the next available right turn.
- [6] Cst. Mufford approached the driver's side, Constable Hughes the passenger side. Constable Mufford advised dispatch they had pulled the Sebring over. Dispatch informed him the Sebring was a Budget Rental Vehicle. The accused rolled down his window. Cst. Mufford found him polite and cooperative. He produced his BC driver's license when requested. Dispatch then ran licensing information. It was not clear whether Cst. Mufford communicated with dispatch while standing by the window or whether Cst. Mufford had to return to his vehicle to place the call. Either way, when beside the driver's door and conversing with the accused, Cst. Mufford testified he smelled the odour of fresh marihuana, which he had experienced before on many occasions. He said he could not easily mistake the odour for anything else. He testified the odour was a fresh out of the bag smell, not burnt. He had many opportunities in his duties to smell both fresh and burned marihuana and could distinguish the difference.
- [7] Dispatch advised Cst. Mufford the accused was on a recognizance. It had a term requiring he not be in a vehicle without the owner of the vehicle present. I heard no evidence regarding any other terms of the recognizance.
- [8] As for his belief at the time, Cst. Mufford testified he believed the accused had marihuana, either on his person or in his immediate vicinity. He was unable to form a belief about the amount involved, but said the amount was large enough to smell it.
- [9] Incidental to the accused's arrest, Cst. Mufford searched the accused's person and found an envelope bulging with \$3,400 cash inside the accused's inside jacket pocket and an additional \$460 CDN and \$46 US on Mr. Russell. The \$3,400 found in the envelope consisted of
1. 10 - \$100 bills;
 2. 9 - \$50 bills; and
 3. 97 - \$20 bills.
- [10] Constable Mufford then searched the accused's car. Readily visible to him was a black pouch located in the space between the centre console and the right side of the driver's seat. Inspection of the black pouch revealed 30 Ziploc bags, containing what later analysis revealed to be crystal meth. Constable Mufford said he did not have to search between the console and driver's seat for the black pouch; it was readily retrievable.

- [11] After the arrival of a third officer, Constable Mufford advised the accused he was being charged with being in breach of his recognizance and possession of crystal meth for the purposes of trafficking. Constable Mufford read an approved printout of the s. 10(a) and (b) Charter warnings to Mr. Russell, who stated he understood the warning and that he wished to speak to a lawyer. He was then taken to Chilliwack CPO and Cst. Mufford, from that point forward, had no further direct dealings with him.
- [12] Constable Mufford took photographs, including one showing the position of the pouch between the console and the driver's seat. Before photographing it, he placed it in the same position he had seen it when he first found it. This photograph shows the pouch was inserted between the console and right seat, and was readily visible.
- [13] On cross examination, Cst. Mufford agreed the only marihuana discovered as a result of his own searches of the accused and the car and of Cst. Hughes's search of the passenger, Ms. Wilde, consisted of less than one gram of marihuana in a baggie found in a makeup bag belonging to her. Ms. Wilde had tucked it inside her waistband. Cst. Hughes spoke to her by the passenger side. Meanwhile, Cst. Mufford was dealing with the accused on the driver's side.
- [14] The only other marihuana found on either person, or in their obvious possession, was the slightly charred residue found in the bowl of a pipe that had been used to smoke marihuana. This pipe was wrapped inside a velvet maroon bag with a draw string closure, and was found inside Ms. Wilde's purse.
- [15] The officers found no other marihuana in the car after what Cst. Hughes described as a "fairly thorough" search of it by the officers.
- [16] On cross examination, Cst. Mufford testified that his belief Mr. Russell had fresh marihuana on his possession or in the vicinity was based on the smell of fresh marihuana. He acknowledged the only potential sources found as a result of the search were the 1/4 gram of marihuana found in the baggie in the makeup bag and the slightly charred residue in the pipe found in the velvet bag inside Ms. Wilde's purse. When asked on cross examination how any odours of fresh marihuana could have found their way into the air in the car, Cst. Mufford surmised Ms. Wilde could have opened the baggie with the marihuana at an earlier time and that the odour from this still lingered. He testified he had experienced smelling marihuana from smaller amounts than the 1/4 gram found in the baggie in this case.
- [17] Questioned further, Cst. Mufford suggested another possibility was that the accused and his passenger had thrown out fresh marihuana; but he acknowledged, during the two kilometres he followed the accused's vehicle, he saw nothing to indicate the accused or Ms. Wilde threw anything out of the vehicle. He explained as well that users will sometimes ingest marihuana to avoid detection. But he saw nothing when following the Sebring to confirm this had occurred. Neither did he see either party leaning forward to pour remnants down the car ventilation system, something he has seen in other cases. Cst. Mufford felt a reasonable explanation would lie in Ms. Wilde opening up the baggy earlier and then

putting it inside her bag.

- [18] Acknowledging no smell emanated from the bagged marihuana at trial, Cst. Mufford attributed this to the fact the smell would have been absorbed into the ozone by that time. He said there was no chance he would have mistaken the smell of fresh marihuana for anything else.
- [19] Defence counsel also cross examined Cst. Mufford on the defence theory he had recognized Ms. Wilde from earlier dealings with her, about six months previous, in connection with her presence in a crack cocaine drug house. Defence counsel suggested that, based on his previous dealings with Ms Wilde and his recognizing her from those dealings, Cst. Mufford expected to encounter the smell of marihuana; so on a subconscious level, he did.
- [20] Constable Mufford denied recognizing Ms. Wilde at the time of the arrest, or making any connection at the time between the Sebring passenger and Ms. Wilde. He testified it was not until he returned to the detachment that he "clued in", as he put it, pointing out that on the earlier occasion, he did not have that much interaction with Ms Wilde. I accept Cst. Mufford's testimony he did not realize until later that the passenger in the Sebring was Ms Wilde. This was as a result of his limited involvement with Ms. Wilde six months earlier.
- [21] Constable Mufford also denied knowing the accused, Mr. Russell was a drug dealer at the time of the arrest.

Constable Hughes

- [22] Constable Hughes has been a member of the RCMP for four years, working on the integrated homicide team in Surrey, on general duty, on the property section and is now in the homicide division. He testified he has been involved in hundreds of drug investigations, ranging from grow ops to vehicle stops and drug house raids, involving all aspects of drug investigation, though mostly from the street to residential grow operation level of investigation.
- [23] On January 14, 2009, Cst. Hughes was attached to the property division, working in plain clothes with Cst. Mufford. Constable Mufford pointed the Sebring out to him. Cst. Hughes later also noticed the driver was not wearing his seat belt. He did not recognize either occupant of the Sebring.
- [24] After stopping the Sebring, Cst. Hughes went to the passenger side of the Sebring. The window was open. He noticed the fresh smell of marihuana from a distance of about one to two feet away. He then engaged Ms. Wilde. He testified she appeared to be trying to hide something in a waistband. From his observations of her behaviour, he was concerned about both his own safety and the possibility of a concealed weapon, as well as the presence of marihuana. He described the smell of fresh marihuana as obvious. He was unable to form any belief about the quantities involved. He had smelled fresh marihuana many times before and could distinguish between the smell of burnt versus fresh marihuana and could also

distinguish between fresh and growing marihuana, which he described as "skunky".

- [25] Constable Hughes testified he formed the belief Ms. Wilde had drugs in her possession or in the car. What she had been doing with her waistband made him nervous, so he took the pouch from her and searched it. In the make-up bag, Cst. Hughes found the 1/4 gram baggie of marihuana, described earlier. He also found a plastic kinder egg in the middle of the passenger side doormat stuffed full of various small Ziploc-style baggies with different colors and designs on the front. Corporal Bosnell, an expert on the packaging, pricing, method of distribution and value of control substances and other matters relating to drug trafficking, including crystal meth, testified these were similar to the baggies containing crystal meth found in the leather pouch located between the driver's seat and middle console.
- [26] Returning to Cst. Hughes' search, he found \$350 cash in Ms. Wilde's purse: 17 - \$20 bills, and 1 - \$10 bill, two "high times" pipe screens, and the velvet bag that held the glass pipe filled with slightly charred marihuana. In the glove compartment of the Sebring, he found two small baggies containing approximately 1 to 1 1/4 grams of crystal meth, as determined upon later analysis. Constable Hughes also found two cell phones, a Sony Ericson walkman on Ms. Wilde's lap and a Blackberry flip phone inside her purse. Other items found are set out in the Exhibit Flow Chart Table, annexed as Exhibit "B" in the voir dire.
- [27] Constable Hughes described the search of the vehicle as "fairly thorough", but not extreme. He said the interior of the car and the trunk were searched.
- [28] Like Cst. Mufford, Cst. Hughes did not see anything thrown out either window of the vehicle before Mr. Russell and Ms. Wilde were stopped. He agreed the amount of marihuana was minimal and insufficient to indicate trafficking.
- [29] In cross-examination, Constable Hughes denied that what he smelled was the smell of a new car, body odour or anything other than the smell of fresh marihuana. He said that within one to two feet of the vehicle he could smell the odour, which he described as a distinct smell, not "skunky".
- [30] Constable Hughes said he has "thought to this day that there should have been more on her person than was found". He said with the passenger shoving the makeup pouch into her waistband, he expected they would have found more than they did.

Constable Abrahamson

- [31] Constable Abrahamson testified. She is a member of the RCMP serving in Chilliwack for two and one-third years. She is a general duty officer. She has spent 12 months in drug investigation. She was on duty and in full uniform on January 14, 2009. Her first involvement that day was around 10:00 a.m., when she performed a search of Ms. Wilde. She described it as a thorough search that located a small baggie in her right front pocket of what she believed to be crystal meth confirmed upon later analysis. She did not notice the smell of

marihuana on Ms. Wilde's person.

Corporal Bosnell

- [32] Corporal Bosnell testified. He is an expert qualified to give opinion on the packaging, pricing, distribution, and valuation of controlled substances and other matters in relation to drug trafficking, including crystal meth. Based on the evidence given regarding his training experience, he was well qualified to opine in those areas.
- [33] He explained crystal meth is a stimulant, similar to crack cocaine in the way it releases a rush of dopamine, giving a euphoric feeling. The use and trafficking of crystal meth has become very prevalent in the last 10 years. He said the form of crystal meth involved in this case would be smoked, which gives the quickest route to the brain, through the lungs, without the need of filtration of organs through oral ingestion or injection. Crystal meth has a chemical base, is not organic and is produced in a chemical lab. He said very small quantities, particularly in their purest form, can produce a strong effect. He said the use of crystal meth is very prevalent in BC and that it is readily available.
- [34] He opined: based on the quantity of crystal meth involved, which had a value of \$1,500 to \$2,600 depending on whether sold by the ounce or the 1/2 gram; and based on the carefully organized packaging based on colours that designated the varying weights of the bags, (for example the blue at 1 1/2 grams, green at 3 1/2 grams and so on); and based on the empty bags in a style similar to the bags found with crystal meth in them; and the presence of residue in some empty bags, consistent with dealer practices of recycling bags; and based also on the cash involved and the breakdown of it into its various amounts; and the presence of two cell phones; that the exhibits and circumstances were consistent with street-level drug trafficking.
- [35] He testified all the exhibits had to be considered as a whole. His opinion did not depend on any one exhibit standing alone.

Section 8 and 9 of the Charter

- [36] I found all of the officers who testified were forthright and reliable in their evidence. While defence counsel was critical of the reliability of aspects of the evidence of Cst. Mufford and Cst. Hughes, she did not seriously question the honesty of their subjective beliefs. I accept both Constable Mufford and Constable Hughes' description of the events. These reasons focus on the reasonableness of the grounds for detention and the search based on it.

Issues

- [37] The issues to be decided on the voir dire are:

1. Did Cst. Mufford have reasonable grounds for the arrest of Mr. Russell, particularly with respect to his belief that he had committed the offence of being in possession of marihuana or was apparently in possession of marihuana at the time of his detention?
2. Should the physical evidence of the crystal meth obtained be admitted or excluded pursuant to s. 24(2) of the Charter?

The Law Relating to Section 8 and 9 of the Charter

[38] F.E. Howard J. of the Provincial Court, gives a succinct summary of the relevant applicable principles in a similar case before her, in *R. v. Burgis*, 2009 BCPC 74. She stated at paras. 16 - 18:

[16] The legal principles relevant to these issues can be summarized as follows:

1. Section 8 of the Charter provides all citizens with a constitutional guarantee against an "unreasonable search and seizure".
 2. A warrantless search, as occurred in the present case, is *prima facie* unreasonable under s. 8 of the Charter, unless the crown establishes, on a balance of probabilities, that the search was authorized by a reasonable law and conducted in a reasonable manner.
 3. A search conducted incidental to arrest is authorized by law so long as the arrest itself is lawful.
 4. Section 495(1) of the Criminal Code authorizes a peace officer to arrest without warrant
 - (a) a person whom the officer, on reasonable grounds, believes has committed an indictable offence; or
 - (b) a person whom the officer finds apparently committing a criminal offence.
 5. If a warrantless arrest of an accused is not in accord with s. 495(1) (a) or (b) of the Code, then the arrest may be found to be contrary to s. 9 of the Charter, which section protects all citizens from arbitrary detention or imprisonment.
 - (i) Warrantless Arrest under Section 495(1) (a) of the Code
- [17] In *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), [1990] S.C.J. No. 12, the Supreme Court of Canada set out what is required to meet the standard of 'reasonable and probable grounds' under S. 495(1)(a) of the Code. At pp. 250-251, para. 16:
16. In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[18] In *R. v. To*, [1998] B.C.J. No. 1323 (at para. 11), the British Columbia Court of Appeal confirmed the need to consider the police officer's skill and knowledge when assessing the objective reasonableness of an arresting officer's belief that an offence has been committed.

11. ...As Professor LaFave has described it - "Objective grounds must be measured from the standpoint of the officer with his skills and knowledge rather from the standpoint of the average citizen." (LaFave W.R., *Search and Seizure, A Treatise on the Fourth Amendment*, 3rd ed. vol.2, p.38).

See also *R. v. Juan*, 2007 BCCA 351 (B.C.C.A.) at paras. 18 and 19: The objective reasonableness of the arresting officer's grounds must be assessed from the standpoint of the reasonable person "standing in the shoes of the police officer".

[39] I also agree with the conclusion of the learned Provincial Court Judge in *R. v. Roberge*, [1983] 1 S.C.R. 312, that the validity of an arrest under s. 495(1)(b) of the Code requires an assessment based on the same objective standard required for s. 495(1)(a): a reasonable person placed in the circumstances of the arresting officer and possessing the officer's unique skill and knowledge.

[40] The validity of Cst. Mufford's arrest in this case must stand or fall on the question of whether the odour of fresh marihuana coming from the accused's vehicle was sufficient to support a finding there were reasonable grounds for Cst. Mufford's belief the accused had committed the offence of unlawful possession of marihuana, or was apparently in possession of it.

[41] A search incidental to arrest may include a search of the vehicle the accused was arrested in (see *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, *R. v. Caslake*, [1998] 1 S.C.R. 51).

[42] In my view, Cst. Hughes' search of Ms. Wilde's makeup bag was justifiable in the circumstances. In *R. v. Thibodeau*, 2007 BCCA 489, the Court of Appeal found a constable who had demanded to see a passenger's hand and their fanny-pack because of an initial concern for his personal safety, was not then restrained, having seen the passenger's hands, from a search of the pack. Therefore, the discovery of the marihuana in Ms. Wilde's possession was most likely inevitable.

[43] The testimony of the officers does not reveal what communication occurred between them regarding their respective observations, or whether Cst. Mufford was aware of Cst. Hughes' search and discovery of the marihuana in Ms. Wilde's possession. There is no evidence either officer was directing the other; neither do the circumstances suggest there was one common operating mind between the two officers. Therefore, in the circumstances of this case, a finding of reasonable grounds for the arrest of the accused must rest on Cst. Mufford's dealings with the accused alone - although Cst. Hughes' smell of the odour of fresh marihuana remains pertinent evidence.

[44] Under s. 495(1) of the Code, an officer can arrest an individual "who, on reasonable grounds, he believes has committed or is about to commit an indictable offence" (s. 495(1)(a)) or "whom he finds committing a criminal offence" (s. 495(1)(b)). The question here, as it was in

R. v. Webster, 2008 BCCA 458, and a number of other cases referred by counsel, is whether Cst. Mufford had reasonable grounds to believe, based along on the odour of fresh marihuana, the accused had committed, or was committing a crime. It is difficult to reconcile the cases, but the weight of appellate authority in this Province supports the possibility of such a finding (see R. v. Dubois, 2004 BCCA 589).

- [45] Whether a smell of fresh marihuana will justify the arrest and search depends on the circumstances of each case. In R. v. Sewell, 2003 SKCA 52, the Saskatchewan Court of Appeal dealt with a case of an officer who made an arrest after smelling raw marihuana coming from the accused's car. The court concluded the sense of smell is just as capable of imparting knowledge as other senses. The court stated at para. 36:
- [36] ... it is fair and reasonable to infer from the officer's testimony - testimony that was not disputed - that he had knowledge of the presence of marihuana in the vehicle, as a result of his smelling the marihuana in question, without having seen it.
- [46] In this case, Cst. Mufford formed his belief of the accused's possession of marihuana based on the smell of fresh marihuana emanating from the car. He based the arrest and search incident arrest on this belief. As noted, Cst. Hughes also smelled fresh marihuana when he was speaking to Ms. Wilde on the opposite side of the car. Therefore, both officers, who had much experience dealing with fresh marihuana, testified they had smelled it. They testified they were able to distinguish between the smells of burned, fresh and growing marihuana. Their senses of smell in this area would likely be much keener than average. Cst. Hughes corroborates Cst. Mufford's testimony and, in my view, Cst. Mufford's observation, through his sense of smell, is sufficient in the circumstances of this case to satisfy both sections 495(1)(a) and (b) of the Code.
- [47] It is true the only amounts found in Ms. Wilde's possession were in a baggie inside her makeup bag; .22 of a gram to be exact. However, Cst. Mufford said he had smelled the odour of fresh marihuana based on smaller amounts than that. The sensory impressions of both officers may have been based on odours lingering from a point in time at which Ms. Wilde had opened her bag for some reason, or from the presence in the vehicle earlier of fresh marihuana. In the circumstances of this case, that is more than plausible.
- [48] The small amount of marihuana found in this case offers some basis for testing the honesty of the subjective belief of both officers, but I found both to be credible, forthright witnesses. The fact remains that their testimony with respect to the reasonableness of their grounds for arrest could be accepted even if no marihuana were to be found after a search--although this would give a stronger basis for testing the credibility of their subjective beliefs. As Judge Howard said in Burgis at paragraph 39:
- [39] I appreciate that Cst. Rettie may have been wrong. There may have been no marihuana in the car or on the occupants of the car. The smell of marihuana may have come from marihuana that had been in the car, but was removed at some earlier point in time. Again, this possibility, even though a reasonable one, does not detract from the reasonableness of

the constable's conclusion that marihuana was present in the vehicle, especially when one takes into consideration the fact that the odour made by the constable was strong and fresh. Under s. 495(1) (b) of the Code, the officer's belief that marihuana was apparently present in the vehicle must be a reasonable one in the circumstances; it may not be the only reasonable conclusion possible.

- [49] Cst. Mufford testified the smell was noticeable. He did not say it was strong. However, the circumstances here must be weighed and considered based on the unique experiences of both Cst. Mufford and Cst. Hughes in drug enforcement and detentions involving marihuana - not those of the average person.
- [50] I find Cst. Mufford had reasonable grounds for the arrest of the accused and the subsequent search incident to that arrest. Accordingly, I reject the application to exclude the physical evidence of the drugs discovered and testimony connected to it. I have carefully weighed and considered the skilfully presented submissions of defence counsel, but they do not sufficiently persuade me to justify their exclusion from the evidence.

Section 24(2)

- [51] In the event I have erred in my ruling on the accused's s. 8 and 9 Charter applications for the exclusion of the crystal meth found in his vehicle after his arrest, I turn now to the question of whether the evidence of the drugs found in the vehicle should be admitted or excluded pursuant to s. 24(2) of the Charter.
- [52] Section 24(2) provides:
- (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.
- [53] The Supreme Court of Canada recently clarified the test to be applied on s. 24(2) determinations in *R. v. Grant*, 2009 SCC 32 [Grant].
- [54] The court explains that the purpose of s. 24(2) is to maintain the good repute of the administration of justice, which includes not only legal processes and investigations, charging and trials, but also the maintenance of the rule of law and upholding of the Charter of Rights and Freedoms in the justice system (Grant at para. 67).
- [55] Grant emphasizes that the view is a long-term one, not to be based on an immediate reaction to an individual case. The governing question is whether the overall repute of the justice system, viewed in the long term, will be negatively affected by admission of evidence.

- [56] The inquiry is an objective one. It asks whether "a reasonable person, informed of all the relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute." (Grant at para. 68). This engages those avenues of inquiry rooted in the public interest engaged by s. 24(2), viewed in a long term forward-looking perspective (Grant at para 71).
- [57] The Supreme Court further explains that the court must balance the effect that admitting the evidence will have on society's confidence of the justice system, taking into consideration:
1. The seriousness of the Charter-infringing state conduct, where admission may send the message that the justice system condones it;
 2. The impact of the breach and the Charter-protected interests of the accused, where admission may send the message that individual rights count for little;
 3. Society's interest in the adjudication of the case on the merits.

Seriousness of the Conduct

- [58] The court explains that the more serious or deliberate the police conduct, the greater the need of the courts to disassociate itself from the fruits of that unlawful conduct. Good faith on the part of the police would reduce the need of the court to disassociate itself, but does not excuse what the court characterized as wilful blindness or negligence, neither of which is equivalent to good faith. Further, Grant explains that, where there is evidence that the impugned misconduct was part of the pattern of abuse, this supports a finding of exclusion.
- [59] In this case, there has been no claim the officers did not subjectively believe that they had reasonable grounds for the arrest of both the accused and Ms. Wilde. The original detention relating to the traffic violation was fully justified. The fact the amounts of marihuana recovered were much smaller than expected has not, on the evidence here, called into question the officer's subjective belief that they smelled fresh marihuana. The defence did not question the professional integrity of either officer, but argued that Cst. Mufford had an expectation of finding drugs based on alleged recognition of Ms. Wilde's from her involvement in a drug house six months earlier.
- [60] Cst. Mufford's search of the accused was brief and produced \$3,500 cash stuffed into an envelope inside the accused's inside jacket pocket. The Crown submitted this raised a question of a potentially concealed weapon but, in my view, the pertinent issue here is that possession of such a large amount of cash in the denominations found, in conjunction with the smell of marihuana, should be considered in assessing the seriousness of the police conduct relating to the search incidental to arrest.

- [61] As for the search itself, the crystal meth found in the pouch in the space between the console and the driver's seat did not violate the accused's body, only the space in the car. The crystal meth in question did not emanate from the accused's person or as a result of a statement from him, and therefore it was not conscriptive evidence.

Impact of Charter Protected Interests of the Accused

- [62] This inquiry determines the extent to which the Charter protected rights of the accused's have been infringed by the police conduct. Again, the more serious the intrusion on Charter protected rights, the greater the risk the admission of the evidence would bring the administration of justice into disrepute (Grant at para. 77).
- [63] An unreasonable search that intrudes into an area where the person enjoys a high expectation of privacy or demeans their dignity is more serious than one that does not.
- [64] In this case, the accused enjoyed a high expectation of privacy in his car, but not to the same extent as in his home. He was in his vehicle in a public space, observable by any other persons, subject to some restrictions already in his activities, such as traffic laws and imposed civil duties to drive in a safe and responsible manner. In some circumstances, a driver may be responsible for the actions of passengers while in their car. As already mentioned, the initial detention of the accused was fully justified and not challenged by the defence in this case. The search of the accused was brief and the pouch containing crystal meth was readily visible and discoverable in the car.
- [65] Further, Cst. Mufford ensured Mr. Russell's Charter rights were safeguarded. He was properly Charter warned. The accused's dignity was respected. There was no suggestion Cst. Mufford treated Mr. Russell roughly or disrespectfully. There is no evidence of any other police misconduct.
- [66] As for the discovery of the marihuana, it was discovered by Cst. Hughes on the justifiable search of Ms. Wilde's make-up pouch because of Ms. Wilde's action. Cst. Hughes' concern for his personal safety as a result of Ms. Wilde's actions.

Society's Interest in the Adjudication on the Merits

- [67] This aspect of the inquiry is concerned is with the adjudication on the merits and the truth-seeking function of the criminal process. The question is whether that process would be better served by admission or exclusion of the evidence. On a s. 24(2) application, the court must consider not only the negative impact of admission, but also the impact of failing to admit the evidence (Grant at para 79). The court also explains, however, that the concern for truth-seeking is only one of the considerations under a s. 24(2) application (Grant at para. 80).

- [68] The application must also consider whether the breach itself undermines the reliability of the evidence, which would lend weight to the exclusion of the evidence. On the other hand, the Supreme Court of Canada noted the "exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute." (Grant at para. 81).
- [69] In this case, there is no question about the reliability of the evidence. The court notes that, generally speaking, physical evidence will not be related to the Charter breach, a consideration that tends to weigh in favour of its admission in. (Grant at para. 115).
- [70] The court further explains,
- [82] The fact that the evidence obtained in breach of the Charter may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": [authorities omitted]. The court must ask "whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial": [Authorities omitted.]
- [71] In this regard, the Supreme Court of Canada noted the effect of the exclusion of evidence on the Crown's case must also be considered: "[t]he exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution." (Grant at para 83). In this case, the exclusion of the evidence would effectively gut the prosecution's case.
- [72] The seriousness of the offence is also a consideration; however, the court in Grant explains that the expected immediate reaction of the public to the exclusion of reliable evidence cannot derail the focus on a long-term repute of the justice system (para 84).
- [73] In this case, there is no question that the offence of trafficking crystal meth is a serious one. Crystal meth is a highly addictive manufactured substance and, according to the evidence, is highly prevalent in British Columbia. Society has a very strong interest in the prevention of trafficking of this addictive substance. Further, regarding trial fairness, it remains open to the accused to argue that the crystal meth found in the pouch between the seat and console has not been proven to be in his possession beyond a reasonable doubt.
- [74] Having considered all of these circumstances, giving them due weight, and seeking a result that balances these three factors with an overall view to the long-term repute of the justice system, I find admission of the physical evidence and connected testimony obtained as a result of Cst. Mufford's search would not bring the administration of justice into disrepute. On the contrary, I find that excluding it would have the opposite effect.
- [75] Accordingly, I admit the evidence in question, including all of the exhibits contained in Exhibit "B", under s. 24(2) as well.

Was the accused in possession of the evidence?

[76] With respect to the charge of possession of cannabis, Count 3 in the original indictment, I acquit the accused as I am not satisfied beyond a reasonable doubt that he was in constructive possession of it.

[77] With respect to Count 1, possession of methamphetamine for the purposes of trafficking, I am satisfied, based on all the evidence of the circumstances at the time of the accused's arrest, that the accused was in possession of the crystal meth found in the pouch located between the seat and the console and that he was in possession of it for the purposes of trafficking.

[78] The definition of possession of s. 4(3) of the Criminal Code, R.S.C. 1985, c. C-46, ("Code") is incorporated in the CDSA by virtue of s. 2(1) in that statute. Section 4(3) of the Code provides:

Possession

(3) For the purposes of this Act,

(a) a person has any in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[79] Possession may be personal, constructive or joint. Over a number of years, the Supreme Court of Canada has defined possession as follows:

To constitute "possession" within the meaning of the criminal law it is my judgment that where, as here, there is manual handling of a thing, it must be co-existent with knowledge of what the thing is, and both these elements must be co-existent with some act of control (outside public duty). When these three elements exist together, I think it must be conceded that under sec. 4(1) (d) it does not then matter if the thing is retained for an innocent purpose." (Russ v. Hess (No.1) (1948), 94 C.C.C. 48 (BCCA), at para 6).

...a constituent and essential element of possession under s. 3(4)(b) of the Criminal Code is a measure of control on the part of the person deemed to be in possession by that provision of the Criminal Code. (R. v. Terrence, [1983] 1 S.C.R. 357, para. 18).

[80] Constructive possession must extend beyond quiescent knowledge and disclose some measure of control of the goods (R. v. Smith, [1973] 10 C.C.C. (2d) 384).

- [81] The Court of Appeal in *R. v. Fisher*, 2005 BCCA 444, hearing an appeal on a case where the accused answered the door to an apartment, allowed the police to enter, whereupon they located on a kitchen counter a white powder later proved to be cocaine, and so arrested Fisher for possession, said this:
- [24] As is evident from my summary of the law, neither constructive possession nor joint possession requires proof of manual handling. To establish constructive possession, it was incumbent upon the Crown to prove beyond a reasonable doubt that the appellant knew of the presence of the cocaine and that he had some measure of control over its location. To establish joint possession, the Crown was required to show that [someone else] had possession of the cocaine with his knowledge and consent and that he had some measure of control over it.
- [82] The case at bar is based on circumstantial evidence. While an accused may be convicted solely on the basis of circumstantial evidence, the evidence must be consistent with the accused "having committed the act and inconsistent with any other rather conclusion." (*Hodge's Case* (1838), 2 Lewin 227 at 228, 168 E.R. 1136).
- [83] In this regard, the words of McEachern C.J.B.C. in *R. v. To* (1992), 16 B.C.A.C. 223, should be kept in mind:

It must be remembered that we are not expected to treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof, especially for inferences consistent with guilt, but it does not demand certainty.

Analysis of Possession

- [84] In this case, the crystal meth was located very near to the driver's person at the edge of his seat. He had in his possession \$3,500 in cash, held in an envelope in denominations consistent with drug trafficking, according to the accepted testimony of Cpl. Bosnell. This amount was in addition to cash in similar denominations he had in his wallet.
- [85] Defence counsel argues that much of the evidence is equivocal, pointing to the fact that, while the accused was the driver of the vehicle and designated as such in the rental agreement, Ms. Wilde was the designated renter, ostensibly exercising greater control of the space inside the vehicle. In my view, this in no way detracts from the fact that the accused as driver had control of the vehicle, the space immediately around him and the pouch containing crystal meth with a value of at least \$1,500 right beside him.
- [86] Other physical evidence, including the smoking pipes and residue from empty baggies, indicate that Ms. Wilde was a user. While it is true that Cpl. Bosnell testified that street-level traffickers are often also users, the evidence gives no indication that the accused himself was a user. He did not have any such paraphernalia in his possession. It is also true that Ms. Wilde had a relatively small amount of cash in her possession in denominations of 20's and

10's, similar to the denominations of the accused's envelope of money. But Cpl. Bosnell explained that these are convenient amounts for both buying and selling crystal meth as the baggies can usually be sold or purchased in these denominations, or multiples of that. Moreover, nothing approaching \$3,500 in such denominations were found on Ms. Wilde's person or in any objects such as purses and pouches that clearly belonged to her.

- [87] The exhibits found on and around Ms. Wilde, including two small baggies containing about 1 gram each of crystal meth, the baggie of crystal meth found on her person by Cst. Abrahamson, the pipe screens, leather bag and pipe with slightly charred to marihuana, all strongly suggest a user and their found locations strongly suggest that they belonged to her.
- [88] It is unbelievable that the possessor of crystal meth valued at \$1,500 at minimum, packaged specifically for trafficking, would keep them in any place other than close by. Given its location, the accused exercised far more than a measure of control over the contents of the pouch. Had the crystal meth actually belonged to Ms. Wilde, it is not believable that she would have kept the envelope or the pouch anywhere but in a location close to her person such as in her purse or in the glove compartment, given the quantities and values involved, particularly in the absence of any evidence indicating a relationship between Ms. Wilde and Mr. Russell, such as husband and wife, that would justify a contrary conclusion.
- [89] I find that the evidence relating to possession is consistent with the accused's guilt on the charge of possession of crystal meth for the purpose of trafficking and is inconsistent with any other rational conclusion. Based on all the evidence relating to possession and considering all the evidence, I find the accused guilty beyond a reasonable doubt of possession of methamphetamines (crystal meth) for the purposes of trafficking.

"N. Brown J."

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