

CANADA / JUDGMENT

R. v. Schirmer

2020 BCSC 209

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 209 R. v. Schirmer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schirmer,

2020 BCSC 209

Date: 20200218

Docket: 174439

Registry: Victoria

Regina

v.

Horst Schirmer

Before: The Honourable Madam Justice Murray

Reasons for Judgment on Voir Dire #2

Re: Breaches of s. 7, 8 and 9,

Canadian Charter of Rights and Freedoms

Counsel for the Crown:

O.L. Bick

Counsel for the Defence:

R.S. Horne

Place and Date of Hearing:

Victoria, B.C.

February 13-15, March 6-7, 2019, and January 20-24, 2020

Place and Date of Judgment:

Victoria, B.C.

February 18, 2020

Introduction

- [1] Mr. Schirmer is facing a seven count Indictment relating to possession of illicit substances and possession for the purpose of trafficking (PPT) in same.
- [2] This ruling deals with a number of Charter challenges brought by Mr. Schirmer in which he claimed the following breaches of his rights and sought exclusion of evidence:
 - 1) Section 7 by being arrested with excessive force;
 - 2) Section 8 because his bag was searched without a search warrant; and
 - 3) Section 9 by being wrongfully detained for PPT.
- [3] On January 24, 2020 I ruled that Mr. Schirmer's Charter rights had not been breached and dismissed his applications. At that time I advised that reasons would follow. These are those reasons.
- [4] The three Charter challenges were heard together in a blended voir dire (voir dire #2). Voluntariness of statements made by Mr. Schirmer to police and a s. 10(b) Charter challenge were also dealt with in this voir dire.
- [5] The voir dire commenced on February 13, 2019. Evidence was heard from February 13-15, 2019 and continued March 6, 2019. Submissions on the voir dire were made by former counsel for Mr. Schirmer on March 6 and 7. The Crown commenced submissions March 7, 2019. On March 8, 2019, when the Crown was to continue, court was advised that Mr. Schirmer had discharged his former counsel. There followed a series of adjournments to allow Mr. Schirmer time to obtain new counsel. In December 2019 Mr. Schirmer brought a mistrial application based on ineffective representation of counsel (voir dire #3). That application was heard the week of January 13, 2020. On January 17, 2020, in a decision indexed at 2020 BCSC 81, I dismissed Mr. Schirmer's application for a mistrial but granted him leave to re-open the evidentiary portion of this voir dire to recall witnesses and granted him leave to bring this s. 10(b) Charter challenge. That ruling is indexed at 2020 BCSC 81.
- [6] In accordance with that ruling on January 20, 2020, Mr. Schirmer filed a s. 10(b) Charter Notice and the voir dire continued. Two police officers, Csts. McGregor and Pistone, both of whom testified in February 2019, were recalled and questioned with respect to the s. 10(b) issue. Mr. Schirmer, who testified in March 2019, was recalled as well.

- [7] On January 21, 2020 counsel made submissions on the voluntariness of the statements made to police. On January 22, 2020, in a ruling indexed as 2020 BCSC 94, I found the statements to be voluntary.
- [8] On January 22, 2020 counsel made submissions on the s. 10(b) challenge. In that application Mr. Schirmer sought to have the same statements I had ruled voluntary excluded on the basis that he was not afforded access to counsel within a reasonable time. On January 23, 2020 I found that Mr. Schirmer's s. 10(b) rights had not been breached and dismissed his application. That ruling is indexed at 2020 BCSC 100. The statements in issue on the voluntariness and s. 10(b) voir dire are relied on by the Crown in the s. 7 voir dire in which Mr. Schirmer alleges that the police used excessive force when they arrested him. They are not to be used for any other purpose.
- [9] I will now outline the facts relevant to this application. In doing so I will borrow from my previous rulings.
- [10] In this judgment I will refer to Mr. Schirmer both by name and as the accused.

Background

- [11] On August 2, 2017 Victoria Police (VPD) were conducting surveillance on Mr. Schirmer using a tracking device, the warrant for which was the subject matter of a separate Charter challenge in voir dire #1.
- [12] The goal of the surveillance was to apprehend Mr. Schirmer on two outstanding warrants.
- [13] Surveillance commenced on a residence in Cobble Hill and continued on a white Dodge Caravan with Alberta licence plates ("the van") as it travelled from the residence, south over the Malahat toward Victoria.
- [14] I heard from many members of the surveillance team. The most compelling evidence was given by Cst. Brendan Robinson who was familiar with Mr. Schirmer. Constable Robinson was seated in the driver's side rear seat of an unmarked surveillance vehicle being driven by Sgt. Iain Campbell. They were following the van as it travelled south on Highway 1 towards Victoria. In Mill Bay Sgt. Campbell pulled up along side the van so the surveillance vehicle's driver's side was beside the passenger side of the van. At that point Cst. Robinson got a clear view of Mr. Schirmer seated in the front passenger seat van. I accept Cst. Robinson's evidence on that point. It is also corroborated by other evidence that I will get to shortly.
- [15] VPD called the West Shore RCMP and asked them to assist by stopping the van when it entered Langford, which is the first jurisdiction over the Malahat.
- [16] Surveillance was maintained on the van. The van did not stop and no one exited it.
- [17] Constable Woods was part of the VPD surveillance team. He was driving the vehicle. Constable Robb Ferris was his passenger.

- [18] At approximately 3:10 p.m. they passed the van on Highway 1 close to the Leigh Road exit. Constable Woods looked back as they passed the van and saw Mr. Schirmer in the passenger seat. Unfamiliar with Mr. Schirmer, Cst. Woods identified him from a photo that he had seen earlier that day. According to Cst. Woods, Mr. Schirmer was leaning forward as if he was reaching for something at his feet. His opportunity to observe was very brief.
- [19] West Shore RCMP officers Cst. Andy Brown and Cpl. Krauss answered the call for assistance in an unmarked police vehicle. Constable Brown was driving. They spotted the van as it came off the Malahat at around Ice Cream Mountain and were able to get in directly behind it a short distance before the Leigh Road exit. Just before the exit Cst. Brown activated the emergency equipment on the unmarked RCMP vehicle. The van exited onto Leigh Road, slowed down and looked like it was coming to a stop. Constable Brown pulled in behind and stopped. Just as Cpl. Krauss was about to exit the police vehicle, the van quickly accelerated away.
- [20] Constable Brown followed the van as it drove along Leigh Road, turned onto Goldstream Road, then jammed on its brakes to take a sharp right onto Hartsdale Drive, a short, quiet, dead-end residential street.
- [21] As the van took the final turn onto Hartsdale, Cst. Brown observed a male exit the front passenger side, almost rolling out of the van. Constable Brown got a look at the side of the man's face as he fled the car: he was Caucasian, with some facial hair on his chin and possibly upper lip, brown hair, and wearing a blue shirt and black ball cap. He was carrying a black "gym bag or satchel," holding it close to his chest. It may have been over his shoulder. It was not a large bag and appeared to be black. The man ran eastbound through some yards.
- [22] The van then continued for about 150 feet and stopped. Constable Brown and Cpl. Krauss ran to the van. The driver, the lone occupant, was arrested.
- [23] Paul Paine, a long time resident of Hartsdale Drive, was sitting on his back deck looking out at Goldstream Road. As it was a nice day he had all the doors in his house open. He had lived in the neighbourhood for thirty years and described it as quiet, no trouble in it.
- [24] He saw the white vehicle driving along Goldstream and heard a screech as it rounded the corner onto Hartsdale. The RCMP were following not far behind with lights and sirens. He heard the vehicle stop in his or his neighbour's front yard.
- [25] He heard shouting in his front yard then saw a man running from between his neighbours' houses to the north of him. The man ran to the back of his neighbour's yard to the north and hopped the fence into his rear neighbour's yard. This neighbour fronts onto Goldstream, and has the civic address 1126 Goldstream. The backyard of 1126 Goldstream runs behind Mr. Paine's house as well as the house to his north. An about five foot high chain-link fence separates the yards.

- [26] Mr. Paine noticed that the man was holding a black valise type bag. It looked like it was soft leather, about laptop size. He was holding it in his right hand. Mr. Paine could not see if there was a strap on it. After he jumped the fence into the back yard of 1126 Goldstream, the man "ditched" into some bushes. When the man came out of the bushes he was no longer carrying the bag. The man then skirted along the rear fence line and around the far side of the house. Mr. Paine lost sight of him at that point.
- [27] Mr. Paine immediately ran through his kitchen/dining room out to his side deck and yelled to police that he saw a man flee from the vehicle and that he could show them where. Mr. Paine then ran back to his back deck in time to see the same man coming out of the far side of 1126 Goldstream onto Goldstream Road. The last Mr. Paine saw the man he was jogging up Goldstream toward the bike shop at the corner of Leigh and Goldstream Roads.
- [28] Robert Keats and Robert Barron were working in their bike shop located on the corner of Leigh and Goldstream Roads when they heard a vehicle "fly by" with a police vehicle in pursuit. A short time later a man came through the front door of their bike shop. He was "in a hurry" and was sweating and breathless. He had clearly just been running. The man was looking out the front window, then went into the parts room, a side room off the main part of the store.
- [29] When Robert Barron asked if he needed help, the man asked for a moment as he was gasping for air. The man, later identified as Mr. Schirmer, said I'll give you \$1,000 to close your doors right now. Barron replied that he would not do that. Mr. Schirmer then asked if there was a back way out and was told that there was not.
- [30] At about the same time the accused showed up at the bike shop, Cpl. Krauss attended Mr. Paine's residence in answer to his call from his front balcony. Mr. Paine invited Cpl. Krauss to his back balcony and described the route he saw the man run, pointing it out as he did so.
- [31] Corporal Krauss then ran to where the driveway of 1126 Goldstream met Goldstream Road- the last point Mr. Paine saw the man. Corporal Krauss noticed the bike shop. Thinking it would be a good place for a person to "obtain a mode of transportation," Corporal Krauss ran to the bicycle shop.
- [32] Constable McGregor attended the bike shop with Cpl. Krauss. As Cpl. Krauss spoke to the store owners, Cst. McGregor searched the store. As Cst. McGregor approached the tire room, a small room off the parts room, he could see Mr. Schirmer hiding behind the door. The officer called out "police." Mr. Schirmer turned towards him and put his hands towards his waist.

- [33] Concerned that he was reaching for a weapon, Cst. McGregor grabbed Mr. Schirmer's right wrist to put it behind his back and bent him forward slightly. Constable McGregor advised Mr. Schirmer that he was under arrest. Mr. Schirmer indicated that he was not resisting and identified himself by name. Constable McGregor then placed Mr. Schirmer's other arm behind his back and handcuffed him. At some point during the arrest, Mr. Schirmer told Cst. McGregor that he had a sore ankle.
- [34] As Cst. McGregor was escorting Mr. Schirmer out of the tire room, Mr. Schirmer indicated that he wanted his black pleather ball cap which was sitting on a tool box outside the tire room. Constable McGregor picked it up.
- [35] Mr. Schirmer was escorted to the police vehicle which was parked in front of the bike shop. Constable McGregor searched Mr. Schirmer before placing him in the back seat of the police vehicle. He seized a wallet from Mr. Schirmer's pocket.
- [36] Constable McGregor again advised Mr. Schirmer that he was under arrest on outstanding warrants and gave him the police warning and advised him of his right to counsel. Mr. Schirmer told Cst. McGregor that he understood the warnings.
- [37] Within minutes VPD officer Cst. Pistone arrived to take custody of Mr. Schirmer. He met briefly with Cst. McGregor who handed him the accused's wallet and hat. Constable Pistone walked over to where Mr. Schirmer was seated in the rear of the police vehicle, rolled down the window and as he was in plainclothes, identified himself as a police officer. As per instruction from Sgt. Campbell, the officer in charge of the operation, Cst. Pistone advised Mr. Schirmer that he was under arrest for outstanding warrants, possession of drugs for the purpose of trafficking and flight from police.
- [38] Mr. Schirmer was transported to VPD Headquarters by Csts. Pistone and McGregor where he was seen by Emergency Health Services and transported to the Royal Jubilee Hospital to have his ankle treated. His ankle was broken in three places.
- [39] After Mr. Schirmer was arrested, Cpl. Krauss helped VPD look for the satchel. As Cpl. Krauss and VPD Cst. Pollock walked up the driveway of 1126 Goldstream, Cpl. Krauss pointed out the route shown to him by Mr. Paine. They spotted a bag on the ground where Mr. Paine said the man jumped the fence into the yard of 1126 Goldstream. The bag was tucked into bushes but clearly visible. Corporal Krauss saw it from 60 yards away. The bag is black with a blue checkered design.
- [40] Constable Pollock stayed with the bag until Cst. Ferris, the exhibit officer, attended. Constable Ferris noted that the bag was in plain view in a clearing under some bushes in the northwest corner of the fenced back yard. It was not concealed in any way. Constable Ferris further noticed that it looked like it had recently been placed in the garden; it was in pristine condition and had no dirt or grass on it. Constable Ferris seized the bag.

- [41] In the bag was a large quantity of drugs- cocaine, heroin, fentanyl, methamphetamine, marihuana and combinations thereof. There were also some big ziplock bags and hundreds of new, unused dime bags.
- [42] The van was seized and searched at VPD Headquarters in a secure garage. This search was done with a warrant and is not in issue. In a grocery bag on the floor of the passenger seat was found a Gatorade bottle two-thirds full of GHB and a small bag containing cocaine residue. In the front passenger door pocket was found an optometrist prescription in the accused's name.

The Issues

- [43] The issues to be decided on this voir dire are as follows:
- 1) Whether the accused was arrested with excessive force in violation of his s. 7 rights,
 - 2) Whether the searches of the satchel/valise located in the garden were in breach of the accused's s. 8 right to privacy; and
 - 3) Whether the accused was wrongfully detained for PPT in breach of his s. 9 rights.
- [44] I will consider each breach separately, then if any breaches are found, will then turn to consider remedy pursuant to s. 24(2).
- [45] The burden is on the applicant accused to establish a breach of his Charter rights on a balance of probabilities.

Issue 1: Section 7- Excessive force on arrest

The Law

- [46] Section 7 guarantees everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
- [47] A police officer is justified in using as much force as is necessary in the circumstances to effect a lawful arrest: s. 25(1) of the Criminal Code.
- [48] Police actions are not to be judged on a standard of perfection. The courts must keep in mind that police routinely engage in dangerous and demanding work and often have to react quickly. They cannot be expected to measure the force required with exactitude: *R. v. Nasogaluak*, 2010 SCC 6 at para. 35.
- [49] Some care must be taken to ensure that assessment of the necessity and proportionality of the officer's conduct occurs within the framework of the officer's reasonable assessment of the circumstances as they existed at the time, not through the lens of hindsight. The police are entitled to be wrong but they must act reasonably: *Bencsetler v. City of Vancouver*, 2015 BCSC 1422 at paras. 150-152.

- [50] The fact of an injury does not necessarily lead to the conclusion that excessive force was used but it may inform the level of force that was employed: Nasogaluak at para.37.
- [51] If the applicant establishes that excessive force use was used, the court must proceed to the second stage of the analysis to determine whether it was also a breach of s. 7.
- [52] The s. 7 analysis will encompass not only the force used but also the police officers' conduct at the time. This may include factors such as whether the police advised their superiors of the injury or whether they ensured that the accused received medical attention: Nasogaluak at para. 38.

Analysis

- [53] Mr. Schirmer claims that Cst. McGregor used excessive force when he took him into custody causing him to suffer a broken ankle.
- [54] Mr. Schirmer testified on the voir dire as follows:
- 1) He was hiding in the back room of the bike shop behind the door leading into the tire room;
 - 2) The room was small and cramped and filled with stuff;
 - 3) He was squished in behind the door standing perpendicular to the door with a three to four foot high pile of tires behind him. He indicated that it was just below hip level. There was a big tool box about 12-18 inches in front of the door, partially blocking the doorway;
 - 4) He heard the police enter the store, and, looking through the crack in the door, saw Cst. McGregor approaching;
 - 5) As Cst. McGregor entered the small room, Mr. Schirmer said, "I'm the one you're looking for." He said that he then put his hands behind his back so he could be handcuffed. The action he demonstrated was a movement of his hands down to his waist/upper hip area;
 - 6) Constable McGregor grabbed the accused's right wrist and placed it behind his back then pushed him forward toward the pile of tires. As this occurred, the accused turned his body and his ankle twisted because he could not move as he was wedged between the tire pile and the door;
 - 7) The officer went to grab the accused's other arm. It was pretty tight in the area. Constable McGregor was sort of falling over him, standing on his ankle. The accused said, "I am not resisting";
 - 8) The accused stated, "I guess the officer was scared/nervous. Anyone in that position would be"; and
 - 9) The officer handcuffed him and stood him up. When he was trying to walk out of the room, the accused noticed that his ankle was hurt.
- [55] Constable McGregor denies injuring the accused or stepping on his ankle.

- [56] A number of police officers testified that the accused told them that he hurt his ankle jumping over a bike rack in front of the bicycle store.
- [57] Corporal Krauss testified that as he and Cst. McGregor were escorting Mr. Schirmer out of the bicycle shop, he noticed that Mr. Schirmer was limping and asked him what happened to him. Mr. Schirmer nodded his head and half pointed with his lips toward a bike rack that was in front of the store and said, "I jumped over that and fell and hurt my leg."
- [58] Constable Pistone testified that the accused appeared uncomfortable while he was sitting in the rear of the police vehicle so he asked the accused if he was injured. The accused replied that he injured his ankle by jumping over a bike rack in front of the store. Constable McGregor corroborated this evidence. He testified that after Cst. Pistone arrested Mr. Schirmer, he heard Mr. Schirmer tell Cst. Pistone that he thought he had broken his ankle and "mentioned or laughed or joked" that he thought he broke it jumping over a bike rack in front of the business.
- [59] Constable Robinson attended the hospital to assist Cst. Pistone with the accused. Constable Robinson testified that he conversed with the accused at the hospital while they waited for him to be treated. The conversation was general, low key and relaxed. Constable Robinson testified that Mr. Schirmer told him that he hurt his ankle running when he tripped on a bike rack in front of the bike store before he went into the store. According to Cst. Robinson, at this time he said that Mr. Schirmer was "relaxed and almost jovial" and appeared sober and coherent.
- [60] In my ruling regarding voluntariness, I found that Mr. Schirmer made those statements and further found them to be voluntary and admissible as evidence regarding the s. 7 issue.
- [61] Despite that finding, Mr. Schirmer insists that there was no bike rack in front of the store and is adamant that he never saw one.
- [62] There is clear evidence from the store owners that there was at least one wooden bike rack in front of the store. There may have been a metal rack as well but they are not certain as to where it was positioned that day. There is a photograph taken the same day that shows bicycles standing in the wooden rack. There is also evidence that the accused would have passed by this rack when he approached the store.
- [63] There is no evidence that the accused called out in pain during the arrest, in fact neither the store owners nor Cpl. Krauss, all of whom were in the small store at the time heard anything. There is no evidence that Mr. Schirmer said anything to anyone about being injured on arrest.
- [64] Additionally, that Mr. Schirmer would be hurtling over the bike rack in front of the shop makes sense. It was in his path to the shop. According to Mr. Paine, whose evidence I accept, the accused had been running and jumping fences to evade the police. Jumping over a bike rack would be in keeping with his actions.

- [65] I place little weight on the evidence of the store owners regarding whether the accused appeared injured when he entered the store. Mr. Keats testified that he did not notice the accused limping on his way in or out of the store. Mr. Barron testified that the accused was hunched over gasping for air when he came in and was "dragged" out by police and not walking on his own. It was clear that both men were extremely shaken by the accused's appearance at their store and just wanted him gone. According to their evidence, they did not spend very much time with him and had limited opportunity to observe him move about.
- [66] Having considered all of the evidence, I find that the accused broke his ankle jumping over a bike rack and not as a result of police action. I am satisfied that the police did not use force that was excessive in the circumstances. Accordingly I find no breach of s. 7.
- [67] I must add that even if I accepted the accused's testimony, I am still satisfied that Cst. McGregor used no more force than was necessary to effect the arrest.
- [68] At the time Cst. McGregor located the accused, he had the following information:
- 1) That he was "possibly armed";
 - 2) That he had fled police twice: once in a car and the other on foot;
 - 3) That he was carrying a satchel;
 - 4) When no one responded when he and Cpl. Krauss entered the bike shop and yelled "police," Cst. McGregor thought there was a possibility that people may be tied up in the back. His personal risk assessment at that point was "medium to high";
 - 5) He could see the man hiding behind the door and noted that he was fit and that he was sweating;
 - 6) He was concerned that the person behind the door could be armed. The area that the accused was hiding was filled with bike parts which in his experience could be used as "weapons of opportunity"; and
 - 7) When Cst. McGregor confronted Mr. Schirmer and yelled "police", Mr. Schirmer moved his hands to his waistband, an area that weapons are commonly concealed.
- [69] In all of these circumstances it was most reasonable that Cst. McGregor handcuffed the accused in the manner described by the accused.
- [70] As the accused testified, the officer was having trouble handcuffing him in such a cramped spot.

[71] Significantly, the accused did not testify that Cst. McGregor deliberately stomped on his ankle. At best, on the evidence of the accused, any stepping on his ankle was accidental and was due to the cramped, cluttered space. As the Supreme Court of Canada stated in *Nasogaluak*, the fact of an injury does not necessarily lead to the conclusion that excessive force was employed.

[72] Mr. Schirmer's s. 7 application is dismissed.

[73] Turning to the next issue: whether the warrantless searches of the satchel/ valise breached Mr. Schirmer's s.8 Charter rights.

Issue 2: s. 8 - Unlawful searches of the bag

The Law

[74] Section 8 guarantees that everyone has the right to be secure against unreasonable search or seizure.

[75] Section 8 only protects a reasonable expectation of privacy: *R. v. Edwards*, (1996) 104 C.C.C. (3d) 136.

[76] Government action constitutes a "search" within the meaning of s. 8 where it intrudes upon some reasonable privacy interest: *R. v. Evans*, [1996] 1 S.C.R. 8 at para. 11.

[77] The first question to be answered in relation to an alleged s. 8 violation is whether the applicant had a reasonable expectation of privacy in respect of the subject matter of the search: *Edwards* at para. 45. The onus is on the applicant to prove on balance that he had such an expectation: *R. v. Nolet*, 2010 SCC 24 at para. 30.

[78] The question of whether a person has a reasonable expectation of privacy is to be determined on the totality of the circumstances which may include the following factors:

- 1) presence at the time of the search;
- 2) possession or control of the property or place searched;
- 3) ownership of the property or place;
- 4) historical use of the property or item;
- 5) the ability to regulate access, including the right to admit or exclude others from the place;
- 6) the existence of a subjective expectation of privacy; and
- 7) the objective reasonableness of the expectation.

Edwards at para. 45.

[79] In the recent decision of *R. v. Jones*, 2017 SCC 60, the Supreme Court of Canada affirmed the doctrine of abandonment but diminished the subjective expectation to a presumption in many circumstances as follows:

The importance of the subjective expectation element is therefore attenuated in the s. 8 analysis, and the evidentiary foundation required to establish that element is accordingly modest. A subjective expectation of privacy can be presumed or inferred in the circumstances in the absence of the claimant's testimony or admission at the voir dire (see Patrick, at para. 37; Tessling, at para. 38; Cole, at para. 43). The modest evidentiary foundation necessary to establish one's subjective expectation of privacy therefore reflects the notion that s. 8's normative import transcends an individual claimant's subjective expectations. [Emphasis added.]

- [80] In *R. v. Patrick*, 2009 SCC 17, the Supreme Court of Canada acknowledged a subjective expectation of privacy in household garbage but held that this subjective expectation could not be reasonably held when the garbage was placed near the property line for collection. Justice Binnie for the majority said this about the concept of abandonment:
20. The concept of abandonment is about whether a presumed subjective privacy interest of the householder in trash put out for collection is one that an independent and informed observer, viewing the matter objectively, would consider reasonable in the totality of the circumstances (Edwards, at para. 45, and Tessling, at para. 19) having regard firstly to the need to balance "societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement" (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293); secondly, whether an accused has conducted himself in a manner that is inconsistent with the reasonable continued assertion of a privacy interest and, thirdly, the long-term consequences for the due protection of privacy interests in our society.
 22. In *R. v. Dyment*, [1988] 2 S.C.R. 417, La Forest J. treated abandonment as fatal to a reasonable expectation of privacy. He held that when an accused abandons something, it is "best to put it in Charter terms by saying that he [has] ceased to have a reasonable expectation of privacy with regard to it." (p. 435).
 23. In *R. v. Stillman*, [1997] 1 S.C.R. 607, McLachlin J., in dissent, but not on this point, stated that "[t]he purpose of s. 8 is to protect the person and property of the individual from unreasonable search and seizure. This purpose is not engaged in the case of property which the accused has discarded" (para. 223). (To the same effect see Cory J. for the majority at para. 62, and Major J., concurring in part, at para. 274.)
 24. This may be contrasted with the situation in *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, where a locked safe containing confidential documents had been stolen (not discarded) and the accused had never acted in a manner inconsistent with the continued assertion of a privacy interest in the information contained therein. When the police, after recovering the stolen safe, decided to scrutinize the documents inside (and the accused subsequently was charged with tax offences), they infringed the s. 8 reasonableness line.

25. Abandonment is therefore an issue of fact. The question is whether the claimant to s. 8 protection has acted in relation to the subject matter of his privacy claim in such a manner as to lead a reasonable and independent observer to conclude that his continued assertion of a privacy interest is unreasonable in the totality of the circumstances.

[Emphasis added.]

- [81] In *R. v. Nesbeth*, 2008 ONCA 579, a case factually close to the case at bar, the accused, while fleeing from police, threw his knapsack down a stairwell. Police officers retrieved it, and on opening it found a large amount of cocaine. Justice Rosenberg reviewed the Edwards factors and held that the accused did not have a reasonable expectation of privacy for the following reasons:

- [22] Far from having possession or control of the knapsack, the respondent attempted to divest himself of possession and control. He gave up the ability to regulate access to the property when he threw it away

- [23] By his conduct in intentionally throwing away the knapsack, the respondent had precluded himself from relying on s. 8 protection

[Emphasis added.]

Analysis

- [82] The accused admits no proprietary interest in the bag. He relies on the Crown's theory that it belongs to him to establish his subjective expectation in the contents pursuant to Jones, above.
- [83] The accused argues that although the bag was left in a stranger's yard, he still maintained a reasonable expectation of privacy in it. He takes the position that it was hidden with the clear intent of going back to retrieve it. Finally, he contends that the fact that it was hidden gives rise to a reasonable expectation of privacy, both subjectively and objectively.
- [84] The Crown counters that Mr. Schirmer intentionally discarded his bag while he was fleeing police and in doing so lost the ability to regulate access to it. He could not therefore have a reasonable expectation of privacy.
- [85] I agree with the Crown.
- [86] The evidence from Mr. Paine is that he watched the man run through yards carrying a bag. The man then jumped a fence and ducked into a bush area of his neighbour's garden. When the man reappeared, he no longer had the bag with him. He started running again. When Mr. Paine last saw the man, he was running toward the bicycle shop.

- [87] I accept Mr. Paine's evidence. It was detailed and unshaken on cross-examination. Most importantly, his evidence fits with and is corroborated by all of the other evidence: that is the evidence that the bag was found where Mr. Paine said the man no longer had it and that the bag fit with Mr. Paine's description of it.
- [88] I find that the bag was not obscured from view. Photographs show that it was left sitting on bark mulch tucked under, but not hidden by, some bushes in a garden. No effort had been made to hide it from plain view. It was clean; it had no garden debris on it. It could be seen in a gap in the branches. In fact, according to Cpl. Krauss, he spotted the bag from 60 feet. The yard belonged to a third party that was unknown to the accused. The accused had no control over who had access to the yard. Nor did he have any control over who had access to the bag while it sat in the garden. I find that the bag was deliberately left in the garden so the police would not find the drugs in it.
- [89] I am satisfied, as in Nesbeth above, that the accused, in throwing his bag away while he fled police, intentionally divested himself of possession and control such that he lost the ability to regulate who had access to it. He also precluded himself from relying on the protection of s. 8.
- [90] Since the accused's s. 8 rights were not engaged, the searches of the bag were not unlawful.
- [91] That leaves the final issue, whether the accused's s. 9 rights were infringed.

Issue 3: Arbitrary arrest - s. 9

The Law

- [92] Section 9 guarantees that everyone has the right not to be arbitrarily detained or imprisoned.
- [93] A person is not arbitrarily detained when already under valid detention for another charge: *R. v. Nelson*, 2010 ABCA 349 at paras. 25-27.

Analysis

- [94] The accused argues that his arrest for PPT amounts to arbitrary detention as the grounds to arrest him on this charge were based on suspicion alone and not articulable cause.
- [95] While I am not convinced that there were grounds to arrest the accused for PPT, the arrest was lawful as there were grounds to arrest him on the outstanding warrants and for fleeing police.
- [96] Once the bag was searched by Cst. Ferris minutes later, the police did have reasonable grounds to arrest the accused for PPT.
- [97] Accordingly in all of the circumstances there was no wrongful arrest.

Conclusion

[98] In conclusion I am not satisfied that any of the accused's Charter rights were breached. The applications are dismissed.

"The Honourable Madam Justice Murray"

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