

CANADA / JUDGMENT

R v. Smith

2024 BCSC 2676

COURT

Supreme Court of British Columbia

DECIDED

26 November 2024

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2024 BCSC 2676 R v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R v. Smith,

2024 BCSC 2676

Date: 20241126

Docket: 31685-2

Registry: Prince Rupert

R.

v.

Shaun Jackson Smith

Before: The Honourable Justice Greenwood

Oral Reasons for Ruling on Voir Dire #1

Counsel for the Crown:

A. Switzer

Counsel for the Accused:

C. Corriveau

Place and Date of Trial:

Prince Rupert, B.C.

November 18-25, 2024

Place and Date of Judgment:

Prince Rupert, B.C.

November 26, 2024

- [1] THE COURT: The accused, Shaun Smith, is charged with possession of cocaine and possession of cannabis, both for the purposes of trafficking on Indictment 31685-2. The evidence was gathered following his detention, arrest, and a subsequent search of his residence.
- [2] Mr. Smith seeks the exclusion of evidence based on alleged violations of his s. 8 and 9 Charter rights.

Background

- [3] On November 25, 2022, members of the RCMP were responding to a call relating to an alleged domestic assault in progress at Mr. Smith's residence in Skidegate on Haida Gwaii. Two officers, Cst. Gunn and Cst. Murray, attended to the call. Both officers work out of a smaller detachment that provides policing for a variety of communities on Haida Gwaii, including Daajing Giids and Skidegate, on the south side of Graham Island.
- [4] At the time of the events in this case, the detachment consisted of four operational officers and shifts would consist of either one or two officers. When only one officer was on shift, another officer would be on call as a backup officer if the need arose.
- [5] Cst. Gunn was the only officer on shift. At approximately 2:45 p.m., the RCMP received a call from Melissa Stain, a neighbour of Mr. Smith's, regarding a suspected domestic assault in progress in Skidegate. Cst. Gunn was contacted by dispatch at 2:47 p.m. and the information received was relayed to him.
- [6] The nature of the information from the call was that neighbours were fighting in a residence to the left of 561 Skidegate Properties. An unknown female was screaming, "Don't hit me", and crying. A male, identified as "Shaun", was yelling. The dispatcher advised Cst. Gunn that it sounded like the dispute was physical.
- [7] The police treated the situation as a high-risk call. Cst. Gunn was en route at 2:53 p.m. He called Cst. Murray for backup. The RCMP policy was to have a two-person response to incidences of domestic violence for safety reasons.
- [8] Cst. Murray was familiar with the residence and described it over the phone so that Cst. Gunn could locate it. He advised Cst. Gunn that there was a camera system at the residence.
- [9] Cst. Gunn suspected that an assault had occurred at the residence based on the information he was provided. He based that on the language used in the call and his nine years of police experience.

- [10] He explained that the report of a female screaming might indicate distress or panic. Yelling is usually at something or someone. He testified that the phrase, "Don't hit me", is often expressed by an individual who is confronted with an attacker or who has already been hit.
- [11] Cst. Gunn proceeded to the residence at 560 Mountain View Drive with his lights and siren activated, as he considered the call urgent. He could not recall what he did in this instance, but he testified that it was his common practice to turn off the lights and sirens a few blocks before arriving at his destination so as not to alert parties to his presence. He was concerned for the safety of the parties, and he assumed that an assault might still be in progress, so he did not wait for Cst. Murray to arrive.
- [12] Cst. Gunn arrived at the residence shortly after 3 p.m. and attended the area of the stairs leading to the rear door that was used as the main entrance to the house. He testified that he was standing at the bottom of the stairs when Mr. Smith opened the door and stepped outside. Mr. Smith was on a small landing three or four steps above Cst. Gunn. Cst. Gunn's impression was that Mr. Smith was not aware of his presence and was simply leaving the residence for other reasons.
- [13] Cst. Gunn asked Mr. Smith if he was Shaun or Shaun Smith, and Mr. Smith confirmed his identity. Cst. Gunn asked him what was going on. Mr. Smith said that he and his partner had been arguing. Cst. Gunn knew Ms. Markham was Mr. Smith's girlfriend and asked where she was. Mr. Smith made a motion with his head toward the inside of the residence.
- [14] To facilitate a conversation where he was on level ground with Mr. Smith, Cst. Gunn testified that he placed his foot on the lower stair. At that point, Mr. Smith turned to re-enter the residence. Cst. Gunn advised him he was being detained. Mr. Smith told Cst. Gunn he could not enter without a warrant and proceeded into the residence.
- [15] Cst. Gunn followed him into the residence and repeated several times that he was being detained for assault and to put his hands behind him.
- [16] Mr. Smith said he was not going to be arrested, unzipped his hoodie or sweater, and threw it on the ground. Cst. Gunn described Mr. Smith's stance as bladed, meaning at an angle to him, and it -- and it appeared to Cst. Gunn that he was contemplating fighting or resisting his effort to detain him.
- [17] Cst. Gunn testified that he continued to advise Mr. Smith that he was detained and, with handcuffs in his hand, directed him to put his hands behind his back. Cst. Gunn had removed the handcuffs and grabbed Mr. Smith's right arm. Mr. Smith squeezed Cst. Gunn's hand with the cuff between his arm and his chest, causing some pain to Cst. Gunn. There was a moment that Cst. Gunn described as a stare-down. Cst. Gunn told Mr. Smith to place his hands behind him. He then complied and was handcuffed.
- [18] Cst. Gunn estimated that this interaction with Mr. Smith, from his arrival at the bottom of the stairs to handcuffing Mr. Smith, was between 30 seconds and a minute-and-a-half.

- [19] Cst. Gunn escorted Mr. Smith from the residence in handcuffs towards the back of his police vehicle in the driveway, as Cst. Murray was arriving at the scene at 3:04 p.m.
- [20] Cst. Gunn testified that his intention was to search Mr. Smith for officer and public safety.
- [21] Cst. Gunn testified that he still did not know the status of the other party to the assault at that stage. There were only two officers present, and he felt it was necessary to secure Mr. Smith in the back of the police vehicle.
- [22] Cst. Murray testified that it was their practice to search a detainee if they were placing him in the back of a police vehicle to ensure there were no means of escape or anything that posed a safety risk to themselves or Mr. Smith.
- [23] He testified that he has seen people slip out of handcuffs and that, sometimes, weapons could be very small. Among the example he gave were a razor blade, something that could burn, or a substance that could cause an overdose if consumed.
- [24] Cst. Murray also testified that he had a conversation with Cst. Gunn on the scene and that Cst. Gunn had advised him that he had knocked on the door and that Mr. Smith had answered and that Mr. Smith had thrown his jacket at Cst. Gunn. Cst. Murray included that information in his subsequent ITO to obtain a search warrant for the residence.
- [25] Mr. Smith was asked to face toward the vehicle. Cst. Gunn was on his right side and Cst. Murray was on his left side. Mr. Smith was wearing baggy sweatpants. Prior to conducting a safety search, Cst. Gunn looked down and saw that the right pocket of Mr. Smith's sweatpants was folded open and he could see a knot or ball of plastic and a \$20 bill. The ball was not protruding from the pocket or causing a bulge. Cst. Gunn pulled the plastic object out of Mr. Smith's pocket.
- [26] Cst. Gunn testified he collected the baggie or plastic ball that he saw to determine whether it possessed anything that could pose a risk to the officers or Mr. Smith. He wanted to ensure that Mr. Smith was not in possession of any weapons, any means of escape, or anything that could be used to harm himself or the police.
- [27] He testified that he had no idea what might have been there. And his thought process was that a small bundle of plastic could contain any number of things. And he provided some examples.
- [28] He testified that if it had been something that did not elevate a safety risk, he would have returned it to Mr. Smith's pocket.
- [29] In cross-examination, he agreed that it was not obvious to him that the plastic knot or ball was a weapon. But stated that it could have contained something that could be used as a weapon.

- [30] When Cst. Gunn pulled the plastic from Mr. Smith's pocket, he observed a number of one inch by one inch "dime bags" containing white rock-like substance that was consistent with cocaine. Based on his experience, given the quantity and the fact that there were between five and ten bags instead of one, there was no paraphernalia for the use of cocaine, and no indication that Mr. Smith had consumed cocaine, Cst. Gunn arrested him for possessing a controlled substance for the purpose of trafficking.
- [31] He then continued the search as a search incident to arrest and seized the \$20 bill and a blue lighter. He checked Mr. Smith's waistband area for concealed weapons or drugs, but did not locate any other items.
- [32] Cst. Murray testified that he was about to conduct a safety search of Mr. Smith's left side prior to putting him in the police vehicle. But when Mr. Smith was arrested, he continued the search as a search incident to arrest. He located a wad of twenty-dollar bills in Mr. Smith's left pocket, totalling \$790. The exhibits were initially placed on the toolbox in the bed of Cst. Gunn's police truck. Cst. Murray then escorted Mr. Smith to his vehicle and Cst. Gunn secured the exhibits in the front seat of his truck.
- [33] Once Mr. Smith had been secured, both officers proceeded together back to the residence and re-entered through the same door which was open. Cst. Gunn estimated that the entire encounter with Mr. Smith transpired very quickly and it was only a couple of minutes or a few minutes between escorting him to the police vehicle and re-entering the house.
- [34] Both officers testified that their purpose in re-entering the house was to ensure the well being and safety of the female, and to ensure there were no other persons in distress or other threats.
- [35] Cst. Gunn attended the bedroom and encounter Ms. Markham. She appeared to be uninjured and said there had been an argument, but she had not been assaulted. Cst. Gunn explored the details with her and proceeded slowly to get her account in the most accurate way possible. But ultimately satisfied himself there were no grounds for an assault charge.
- [36] While Cst. Gunn was speaking to Ms. Markham, Cst. Murray cleared the rest of the residence looking for any other people, but did not otherwise search.
- [37] Cst. Gunn ultimately arrested Ms. Markham based on the cocaine seized, her co-habitation with Mr. Smith, and his knowledge of a previous file involving the same house where she had been previously charged. He allowed her to gather her things and escorted her to his police vehicle.
- [38] Cst. Gunn estimated that he was in the residence from about 3:08 or 3:09 p.m. to 3:18 p.m., when he read Ms. Markham her arrest and Charter warning verbatim from a card in his police truck.
- [39] Cst. Murray estimated the time in the house was around five to seven minutes. Neither officer could say exactly how much time passed.

[40] Both Mr. Smith and Ms. Markham were subsequently provided their Charter rights verbatim from a Charter card and were transported to the detachment while the police secured the scene and obtained a search warrant.

Position of the parties.

[41] The defence position is that Mr. Smith's detention was arbitrary and that the police infringed his right to be free from unreasonable search and seizure based on the manner in which he was detained and searched.

[42] Counsel acknowledges that Cst. Gunn may have had sufficient grounds to briefly detain Mr. Smith outside his residence but says that Cst. Gunn's entry into the home to effect a detention was unnecessary and unreasonable.

[43] The defence also argues that the search of Mr. Smith in the driveway after he was detained exceeded the permissible scope of a search incident to investigative detention and was a breach of s. 8.

[44] Counsel for the defence says that Cst. Gunn was not a credible witness and the court should not accept his account of what took place or the subjective reasons he articulated to justify his actions. The defence argues that the Crown has not met its burden of justifying a warrantless search.

[45] The defence concludes by arguing that these were serious breaches of the Charter and that the police ought to have known that they did not have authority to enter Mr. Smith's home without a warrant and ought to have known that the search of Mr. Smith in the driveway far exceeded what is legally permissible.

[46] These breaches were rendered even more serious by an attempt on the part of Cst. Gunn to mislead the court as to what happened and to make it appear as if he had greater authority than he did to take the actions that he did. Accordingly, the defence says the evidence should be excluded under s. 24(2).

[47] The Crown position is that Cst. Gunn had the lawful authority to enter Mr. Smith's home pursuant to the principles set out in *R. v. Godoy*, [1999] 1 S.C.R. 311 in order to detain Mr. Smith. Crown counsel says that Cst. Gunn was a credible witness and that his actions were consistent with his articulated concerns. She argues that it was reasonable for the police to secure Mr. Smith in a police vehicle to safely clear the residence and that the search incident to detention should be evaluated in that context. The crown position is that the search of Mr. Smith in the driveway was a legitimate safety search and, therefore, there was no breach of s. 8.

[48] Alternatively, the Crown argues that if there were breaches of the Charter, the seriousness falls on the low end of the spectrum, and the evidence should be admitted under s. 24(2).

Scope of the voir dire.

[49] There are certain issues that have not been pursued and do not form part of the voir dire, including:

- a) the defence does not contest the legality of the second entry into the home by Cst. Gunn and Cst. Murray to ensure that Ms. Markham was okay;
- b) no issue is taken with the arrest of Mr. Smith after the crack cocaine was discovered;
- c) no breach of s. 10(b) is alleged; and
- d) the validity of the search warrant obtained for Mr. Smith's residence is not before me (although counsel acknowledge that the outcome of this application may affect the validity of the warrant in later proceedings).

[50] In some instances, evidence touches on these other issues, but only as it relates the credibility, the unfolding of the narrative, and the timing of various events.

Analysis.

The Credibility of Cst. Gunn

[51] In general, I found Cst. Gunn to be a credible witness. His evidence was largely consistent as between his evidence in chief and cross-examination, and he outlined the relevant events in a clear fashion. He acknowledged certain frailties in his notes and certain things that he could not recall. But I did not find him evasive or falling back on his inability to recall to avoid inconvenient questions, as alleged by the defence. I am satisfied that he was responsive to the best of his ability and did his best to accurately describe the events of November 25th, 2022.

[52] In particular, I do not accept that Cst. Gunn intentionally distorted his evidence or attempted to mislead the court. This submission was based, in part, on the fact that Cst. Gunn had reviewed not only his own notes and narrative report, but had also read the Report to Crown Counsel. He described this in cross-examination as a brief perusal and testified that he did not study the report as he did his own notes and his own report. He had also reviewed the transcript of the dispatch call and, what was referred to as, the "CAD ticket", being a record of the information from the dispatcher that was sent to the officer's onboard computer.

[53] I see nothing wrong with the fact that Cst. Gunn reviewed the dispatch call or the CAD ticket. He was a party to the conversations on the dispatch call and had access to the CAD ticket at the time of the events. There are few limits on what materials may be used to refresh a witness's memory: *R. v. Fliss*, 2002 SCC 16, at para. 45.

- [54] It may have been preferable for Cst. Gunn not to review the Report to Crown Counsel, but I am satisfied that his primary source of refreshed memory was from materials that he created or participated in. I am not satisfied that his evidence was tainted by the fact that he perused the Report to Crown. Nor am I satisfied that he pieced together a misleading narrative from third party material to support his actions.
- [55] Counsel also argued that Cst. Gunn, as the Indigenous Liaison Officer in Daajing Giids detachment, had a motive to align his evidence with the Skidegate Band Council, who were taking steps to have Mr. Smith banished from the community. Cst. Gunn was aware of the resolution, but not its status.
- [56] I am not satisfied that the situation with the Skidegate Band Council, whatever it is, has affected Cst. Gunn's evidence. Cst. Gunn did not agree with the suggestion that it had coloured or changed his evidence, and I accept that assertion.
- [57] As I have indicated, in my view, his evidence is based on his recollection of the events as refreshed by his notes and reports. I find it was not influenced by his role as the Liaison Officer for the Skidegate Band Council.

Did Cst. Gunn have grounds to immediately detain Mr. Smith?

- [58] Where evidence is obtained as a result of a warrantless search or seizure, the onus is on the Crown to show that the search or seizure was reasonable. A search will be reasonable if it authorized by law, the law itself is reasonable, and the manner in which the search was carried out is reasonable: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527 at para. 15.
- [59] Under s. 9 of the Charter, everyone has the right not to be arbitrarily detained. The purpose of s. 9 is to protect individual liberty from unjustified state interference: *R. v. Tim*, 2022 SCC 12, at para. 20.
- [60] As noted in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at para. 15, the application of s. 9 requires a court to balance individual rights with the societal interest in effective policing. In *Mann*, the Supreme Court of Canada recognized a police power to detain individuals for investigative purposes, so long as the detention is reasonably necessary on an objective view of all the circumstances, and the officer has a reasonable suspicion that the individual is involved in a recent or ongoing offence: *Mann*, at para. 34 and *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725 at para. 30.
- [61] There is a wealth of authority on the reasonable suspicion standard. Reasonable suspicion must be based on objectively discernible facts which can be subjected to rigorous and exacting judicial scrutiny. At the same time, it is a lower standard than reasonable grounds. The focus of reasonable suspicion is on the possibility that the targeted individual is involved in some criminal activity, rather than the probability associated with grounds to arrest. *R. v. Chehill*, 2013 SCC 49, [2013] 3 S.C.R. 220 at paras. 26- 27, 29; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250 at paras. 72- 74; and *R. v. Ahmad*, 2020 SCC 11 at paras. 45-46.

- [62] The inquiry into reasonable suspicion is fact-based, flexible, and grounded in common sense and practical everyday experience assessed through the eyes of a reasonable person armed with the knowledge, training, and experience of the investigating officer. It is not necessary to rule out innocent explanations in order to meet the reasonable suspicion standard: Chehill, at para. 29; MacKenzie at para. 73.
- [63] In my view, the Crown has established reasonable suspicion that a domestic assault had recently taken place or was in progress, and that Mr. Smith might be involved. The information provided to Cst. Gunn included a woman screaming, a male yelling, and a female was overheard saying, "Don't hit me", loud enough to be overheard by a neighbour, who was concerned enough to call the police.
- [64] Cst. Gunn explained his thought process based on nine years of police experience; that the screaming might indicate distress or panic, and the yelling might be indicative of aggression directed at someone. These were common sense conclusions that were supported by the objective facts.
- [65] While there was no definitive evidence that an offence had taken place when Cst. Gunn arrived at the residence, none was required. The question was simply whether there was a reasonable possibility that Mr. Smith was involved in criminal activity.
- [66] When Cst. Gunn arrived and confirmed that Mr. Smith was Shaun, which matched the information provided, there was a clear nexus between Mr. Smith and the suspected offence.
- [67] Counsel for the defence does not contest the existence of reasonable suspicion per se but says that Cst. Gunn could have waited for Cst. Murray to arrive, briefly detain Mr. Smith outside the residence, and spoken to both parties to find out what took place.
- [68] In my view, Cst. Gunn's decision to approach the rear entryway immediately was reasonable in the circumstances. There was urgency to the situation. He had activated his lights and sirens and testified that he assumed an assault might still be in progress, which is why he did not wait for Cst. Murray. He considered that Ms. Markham might be in danger and he needed to ensure the safety of the parties.
- [69] In my view, the immediate detention of Mr. Smith and the separation of the parties was reasonably necessary on an objective view of the totality of the circumstances and in light of the factors that gave rise to the reasonable suspicion that Mr. Smith was implicated in an assault.
- [70] All of this happened within moments of Cst. Gunn's arrival on the scene in a situation where there were a lot of unknowns and time was of the essence. It calls to mind the comments of Justice Iacobucci in Mann that the police must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing: Mann, at para. 16.

[71] In short, I am satisfied that Cst. Gunn had the necessary grounds and justification to immediately detain Mr. Smith for the purpose of investigating an alleged domestic assault.

Should Cst. Gunn's evidence that he was on the ground at the foot of the stairs when Mr. Smith exited the residence be accepted?

[72] There is some dispute as to how the interaction at the door between Cst. Gunn and Mr. Smith took place. The defence argues that I should not accept Cst. Gunn's evidence that he was on the ground at the foot of the stairs when Mr. Smith exited the residence of his own accord because of the evidence of Cst. Murray.

[73] Cst. Murray testified that Cst. Gunn told him, on the scene, that he had knocked on the door and Mr. Smith had answered it. The defence also relies on Cst. Gunn's note, where he wrote, "As reached door, Shaun Smith answered".

[74] Having carefully considered this issue, I accept Cst. Gunn's evidence and find as a fact that he was standing at the foot of the rear stairs when Mr. Smith opened the door to the residence. Cst. Gunn provided the only first-hand account of what transpired and his testimony on this point was consistent in evidence in chief and cross-examination.

[75] Cst. Gunn candidly acknowledged not using the most accurate language in his notes to convey what happened, but he also testified that the purpose of his notes was to refresh his memory and he had limited time to make notes on the scene.

[76] The language used in the notes is somewhat vague and it is not entirely clear to me that it is inconsistent with his account. More importantly, he wrote a detailed narrative report at 4:40 p.m. the same day and there is no evidence of any inconsistency between his narrative report and his evidence.

[77] It is true that, according to Cst. Murray, Cst. Gunn told him he had knocked on the door. But this could easily have been attributable to a miscommunication either because Cst. Murray misheard or, more likely, because Cst. Gunn left that impression with imprecise or inaccurate language. It was a very brief conversation in a dynamic and unfolding situation.

[78] Nor would I draw the conclusion that Cst. Gunn intentionally misstated the evidence to mislead the court. I fail to see the advantage in doing so. Whether Cst. Gunn knocked or was standing at the foot of the stairs has no real bearing on the rest of his account. Either way, there was a brief conversation at the door, an indication that Ms. Markham was inside the house, an attempt to verbally detain Mr. Smith, and Mr. Smith turning and re-entering the residence while telling Cst. Gunn that he could not come in without a warrant.

[79] Cst. Murray also testified that Cst. Gunn said Mr. Smith had thrown his jacket at him. That too was likely a miscommunication and tends to support the fact that not all the information that passed between the two officers at the scene was accurately expressed or recorded. If the jacket had been thrown at Cst. Gunn, that could have been used to embroider his evidence, but he was adamant that Mr. Smith had thrown the jacket on the floor; not at him.

Was entry into Mr. Smith's residence for the purpose of detention a breach of his Charter rights?

- [80] The defence contends that even if there were grounds to detain Mr. Smith initially, the actual detention that took place was unlawful because Cst. Gunn exceeded his authority by going into Mr. Smith's home to effect the detention.
- [81] It is important to recognize that the existence of lawful authority to detain does not end the s. 9 inquiry. The nature and extent of the detention must also be reasonably necessary in the circumstances: *R. v. McGuffie*, 2016 ONCA 365 at para. 38 and Clayton at para. 31.
- [82] Entry into a private home raises the right to be free from unreasonable search and seizure under s. 8 of the Charter. There is no dispute that an individual's expectation or privacy in his or her home is very high and the act of entering a residence is a search. *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37 at para. 26. Warrantless searches of private homes are *prima facie* unreasonable: *R. v. Stairs*, 2022 SCC 11 at para. 50.
- [83] While the privacy interest in a home is very high, it is not absolute. The law recognizes that a police officer's duty to protect life and safety may, in certain circumstances, allow them to forcibly enter private promises without a warrant.
- [84] In *Godoy*, for example, the Supreme Court of Canada held that police officers who were dispatched in response to a 911 call were carrying out their duty to protect life and prevent serious injury. On the fact in *Godoy*, the officers forced entry into the accused's home and that did not constitute a breach of s. 8 of the Charter.
- [85] *Godoy* has been applied in a variety of contexts to justify entries into homes where there are 911 distress calls that give rise to credible concerns about the health and safety of occupants of a residence, and there is a potential aggressor in the house: *R. v. Serban*, 2018 BCCA 382, leave ref'd; *Beaulieu v. Winnipeg*, 2022 MBCA 81 at para. 60.
- [86] In *MacDonald*, the Supreme Court of Canada found that the duty to protect life and safety can justify a safety search outside of the context of a 911 call, where such a search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police (para. 40). In that case, an officer investigating a noise complaint had sufficient grounds to believe that there was an imminent safety threat. The search, which consisted of pushing the door open a few inches to see what was in the accused's hand, was found to be authorized by law because the search was necessary and it was carried out in a reasonable manner. The officer having done no more than was necessary to eliminate the threat.
- [87] In such cases, the intrusion of the police into a private dwelling is limited to the protection of life and safety and includes only those reasonable steps that are necessary to address safety concerns. There is no general power to search the premises or otherwise intrude on a resident's privacy or property beyond what is necessary: *MacDonald* at para. 41; *Godoy* at para. 22; *Stairs* at para. 72; and *R. v. Cote*, 2011 SCC 46, [2011] 3 S.C.R. 215. If the investigation of a 911 or other distress call can be resolved without entry into the home, then such a course of action is mandated: *Godoy*, at para. 22 and *R. v. Jones*, 2013 BCCA 345.

- [88] The decisions in *Godoy* and *MacDonald* and the police powers recognized in those cases were upheld on the basis of the *Waterfield* test, which involves two questions: (1) whether the action taken falls within the general scope of a police duty, and (2) if so, whether the police action constitutes a justifiable exercise of power associated with the duty: *Godoy*, at para. 12 and *MacDonald*, at paras. 35-36.
- [89] Whether a warrantless entry into a residence is justified by the police duty to preserve life and safety in a given case is a fact-driven inquiry: *Jones*, at para. 27 and *Godoy*, at paras. 11, 22.
- [90] In my view, Cst. Gunn's entry into Mr. Smith's residence to effect a detention was justified in light of the facts and the principles set out in *Godoy* and other cases. The context is important. Cst. Gunn had a reasonable suspicion that an assault had taken place or was in progress and was concerned for the safety of the female occupant of the residence. He had a duty to ensure her safety. Mr. Smith was resistant to being detained, advised Cst. Gunn he could not come in without a warrant, turned his back, and sought to re-enter the house. Given Cst. Gunn's legitimate concern for the female occupant's safety, there was no real alternative for him but to enter the house to complete the detention.
- [91] In *Godoy*, Justice Lamer was not prepared to accept that, when responding to distress calls, the police should "simply take the word of the person who answers the door that there is 'no problem' inside" (para. 20). Mr. Smith was the suspected assailant based on the information that had been provided to Cst. Gunn. Had he not entered the house to complete the detention, it would have allowed any domestic assault that was occurring to continue.
- [92] The court in *Godoy* recognized the reality that one of the hallmarks of domestic violence is its private nature and the fact that abuse occurs within the sanctity of the home. Privacy, while very important, cannot trump the safety of all members of the household. In that context, Lamer J. described it as unthinkable that the police would take the word of a person who answers the door without further investigation. At para. 21, he stated:
- Should the police then take the word of the person who does answer the door, who might well be an abuser and who, if so, would no doubt pronounce that all is well inside? I think not.
- [93] In my view, that concern is only enhanced when there is a legitimate safety concern and the person at the door, who is the suspected assailant, refuses to allow the police to enter.
- [94] While the call to the police in this case was not technically a 911 call, the circumstances are analogous. This was an emergency call relating to a suspected domestic assault in progress and was treated by the police on an urgent basis.

- [95] It is not necessary that the call emanate from the residence police are attending for the principles of Godoy to apply: Serban, Stairs, and Beaulieu, at para. 60. Even when there is no 911 call, courts have accepted that the police may be justified in entering dwelling houses in cases where they have a subjective belief that life and safety are at risk and entry is reasonably necessary to address the risk; Beaulieu at para. 61.
- [96] Cst. Gunn testified that he was concerned that if he did not complete the detention, Mr. Smith could have barricaded the door. Defence points out fairly that there is no evidence that Mr. Smith touched the door, which remained open. But that has to be balanced against the fact that the events took place very quickly. Cst. Gunn had to make decisions in real time. If he had not responded immediately, he could well have lost control of the situation. Where there are legitimate concerns supported by reasonable suspicion of recent or ongoing violence, seconds matter.
- [97] Counsel for the defence quite properly drew to my attention para. 37 of the MacDonald decision, in which LeBel J. sets out three factors that must be weighed when assessing whether police conduct is reasonably necessary and, therefore, justifiable: (1) the importance of the performance of the duty to the public good; (2) the necessity of the interference with the individual liberty for the performance of the duty; and (3) the extent of the interference with individual liberty. In my view, all three factors support the conclusion that Cst. Gunn's decision to enter the residence was justified.
- [98] The extent of interference with individual liberty was appropriate to the situation. Cst. Gunn was inside the residence for less than two minutes, he was only a few feet into the residence, and there is no evidence that he did anything beyond what was necessary in to physically detain Mr. Smith and escort him outside.
- [99] Counsel for the defence argues that I should not accept Cst. Gunn's evidence with respect to his subjective reasons for entering the house at face value. She says that his actions as a whole belie the urgency he says he was operating under. She argues that if it was so urgent to get into the house to assess the safety of Ms. Markham, Cst. Gunn would not have taken so long with Mr. Smith in the driveway; searching him, securing the exhibits first on the bed of the truck and then in the front passenger seat, then securing Mr. Smith in Cst. Murray's car before finally re-entering the house.
- [100] I do not agree for three reasons. First, I am not satisfied that the overall time period was that long. The total time between the time when Mr. Smith was in custody in the driveway, 3:04 p.m., and the first post-arrest Charter warning, 3:17 p.m., was 13 minutes. That time period includes the second entry into the residence when Cst. Gunn spoke to Ms. Markham, the house was cleared, and all urgency had subsided. The second entry was somewhere between five to seven minutes long or approximately 10 minutes long, depending on which officer's time estimate is most accurate. Thus, the police entered the house within the range of three to eight minutes after Mr. Smith had been detained.

- [101] Second, the police were taking steps they considered necessary in the three to eight minutes before re-entering the house. That included searching Mr. Smith for his safety and theirs and securing him in the police vehicle. Some of the urgency had subsided, but the situation inside the house was still unknown. I would not draw the inference that the police were unconcerned or wasting time during that period.
- [102] Third, even if I were to conclude that the police took longer than they should have before re-entering the house, that does not negate the urgency that existed to control the situation when Cst. Gunn first arrived and was concerned for the female occupant's safety. These are difficult situations faced by the police when they are involved in frontline policing. In my view, the court should be slow to second-guess their decisions in the face of legitimate safety concerns.
- [103] Finally, the defence argued there was a simple alternative available to Cst. Gunn in this case. He could have simply waited for Cst. Murray and then spoken to the parties. In my view, that ignores the reality of the situation and the way that Mr. Smith reacted to Cst. Gunn's presence. This was a rapidly unfolding situation with many unknown variables. Evaluating Cst. Gunn's actions based on different circumstances than he was actually confronted with amounts to little more than second-guessing him after the fact. That is not consistent with the principle that police officers must be given some flexibility and latitude to safely and effectively respond to emergency situations.
- [104] In short, neither the timeline of events nor the actions taken by the police once Mr. Smith was detained cause me to question the sincerity or honesty of Cst. Gunn's evidence as to his subjective reasons for the initial entry into Mr. Smith's residence.
- [105] I am satisfied that Cst. Gunn's entry into Mr. Smith's residence to effect a detention was authorized by law. The law itself is reasonable and the manner in which the search was carried out was also reasonable.

Was the search of Mr. Smith in the driveway reasonable under s. 8 of the Charter?

- [106] Once a police officer has lawfully detained a person, they may search the person for safety purposes provided they have a reasonable suspicion that their safety or that of others is at risk. There is no requirement that the police have grounds to believe there is an imminent threat to their safety or the safety of others. Mann, at para. 45; R. v. Dhillon, 2023 BCCA 38 at para. 101; R. v. Sabiston, 2023 SKCA 105, aff'd 2024 SCC 33; and R. v. Webber, 2019 BCCA 208, at para. 65.
- [107] Issues often arise as to the permissible scope of a safety search conducted in the context of an investigative detention. The Mann decision, for example, concerned a pat down search following a brief detention on the street while the police were responding to a call reporting a break and enter. The Supreme Court of Canada held that the pat down search of the accused was reasonable, but reaching into the accused's pocket after feeling a soft object -- which turned out to be marijuana -- was not.

- [108] Since the Mann decision, the jurisprudence has recognized that safety searches incident to a lawful detention are not necessarily limited to pat down searches. Thus, in *R. v. Sheck*, 2015 BCCA 471, a search of a man purse for officer safety was upheld. In *Webber*, a search of the centre console of a car was found to be reasonable. In *Dhillon*, a search of a bag was found to be reasonable. In *R. v. Patrick*, 2017 BCCA 57, questioning the accused was found to be a lawful safety search incident to detention.
- [109] In *Patrick*, at para. 60, Fitch J.A. noted that the power of a search incident to investigative detention is circumscribed by its underlying rationale; the protection of police officers and others from harm that could have been avoided through a minimally intrusive search. After examining the jurisprudence in this area, he summarized the law as follows:
- [94] I take from these authorities the following points. First, the power to search incident to a lawful investigative detention is not necessarily restricted to a physical pat down of the person detained. Second, whether the search was justified and conducted in a reasonable manner must be assessed in light of the rationale underlying the common law power itself -- the prevention of avoidable harm through a brief and minimally intrusive search. Third, the public duties of police officers oblige them to interact with members of the public in potentially dangerous situations; they must be allowed reasonable latitude in determining how to conduct the search in the context of the particular case.
- [110] I think it is fair to say that where the police proceed beyond a pat down search, a court will examine the circumstances with extra care to ensure that the search is consistent with the underlying rationale of ensuring the safety of police officers and others.
- [111] In this case, I am satisfied that Cst. Gunn's subjective perception of possible risk to the safety of himself, Cst. Murray, or Mr. Smith himself was objectively reasonable and justified the brief and relatively unintrusive search that was conducted.
- [112] In my view, unlike the situation in *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408, where it was found that an officer's decision to detain a motorist in the back of his police vehicle to prevent him from fleeing while the officer wrote him a ticket was not reasonably necessary, I am satisfied that the decision in this case to detain Mr. Smith in the back of a police vehicle was reasonably necessary for officer safety.
- [113] There were only two officers on the scene, they had not yet entered the house to complete their investigation of the assault, and the interaction with Mr. Smith to that point had not proceeded without incident. Mr. Smith had sought to refuse entry and did not initially comply with Cst. Gunn's direction that he was under detention, he had taken his sweater off, adopted, what Cst. Gunn described as, a fighting stance, and squeezed Cst. Gunn's hand between his arm and chest during Cst. Gunn's attempt to detain him and had engaged in a stare down with Cst. Gunn.

- [114] While the situation had calmed down somewhat, in those circumstances, in my view, it was reasonable to place Mr. Smith in a police vehicle for the limited time required for the police to safely enter the residence. It is in that context that the protective search must be analyzed.
- [115] The decision to detain Mr. Smith in the back of the police vehicle meant leaving him unattended until such time as the police were able to assess the situation in the house and ensure it was safe. This, in turn, is relevant to the justification for the way the search took place and the prevention of avoidable harm through a brief and minimally invasive search.
- [116] Cst. Gunn was not searching for evidence. I accept his evidence that when he looked down and saw a small ball or knot of plastic in Mr. Smith's pocket, he retrieved it to determine if it posed a risk to the officers or to Mr. Smith himself.
- [117] Cst. Gunn testified that he wanted to ensure it did not contain any weapons, means of escape, or anything that could cause harm to Mr. Smith. This was a relevant consideration as Mr. Smith was then in his care and would be until such time as the detention came to an end.
- [118] In cross-examination, Cst. Gunn agreed it was not obvious that the plastic package was a weapon. But he stated it could have contained something that could be used as a weapon. I accept his evidence that he had no idea what it might be. Among the hypothetical possibilities he mentioned in his evidence were a sandwich, prescription pills, dangerous drugs that could be ingested, or a handcuff key.
- [119] Cst. Murray testified that the purpose of the safety search was to ensure that Mr. Smith did not have the means to harm himself or the officers. He testified that, among his concerns, were a razorblade, something that could burn, or a substance that, if consumed, could cause an overdose. He testified that the items could be very small.
- [120] It is true that, at the time of the search, Mr. Smith was in handcuffs. But handcuffs do not eliminate the possibility that an individual may be able to access dangerous items. In Dhillon, for example, the accused was in handcuffs, but the detaining officer realized that he could still access his bag which caused her concern. In this case, Cst. Gunn testified that his search focused on the area near Mr. Smith's pockets and waistband because those were the areas that he would be able to access.
- [121] The search itself was minimally intrusive. It was very brief and consisted only of Cst. Gunn removing a plastic package that was visible in the pocket of Mr. Smith's sweatpants.
- [122] In summary, I accept the evidence of Cst. Gunn that the sole purpose of removing the plastic object protruding from Mr. Smith's pocket was an honest belief that it was necessary to do so to ensure the safety of Mr. Smith and both officers. He did not treat the situation as a de facto arrest or engage in a search for evidence.

- [123] I am also satisfied that the reasons he articulated were objectively reasonable. As noted in *R. v. Crocker*, 2009 BCCA 388 at para. 72, and Patrick, at para. 94, weapons may be very small and even microscopic in size. It was not unreasonable to search the unknown bundle to ensure it did not contain a weapon, a means of escape, or any other item that might have caused a safety risk.
- [124] As Iacobucci J. said in *Mann*, at para. 43, "police officers face any number of risks every day in the carrying out of their policing function and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible". With that in mind, the following comments of D. Smith J.A. in *Crocker* are apposite:
- [71] In summary, police have a duty to investigate crime. Courts should be reluctant to second-guess an officer's testimony as to his or her honest belief in the need for a protective safety search where he or she can articulate reasonably clear and focused reasons that inform their risk assessment. This is particularly so where the objective grounds for the search closely mirror those factors that inform to the officer's subjective belief. See also Cornell, [2010] SCC 31, at paragraphs 23 and 24.
- [125] I am satisfied the search of Mr. Smith in the driveway of his residence was a valid safety search incident to his investigative detention for assault. Accordingly, I find there was no breach of his s. 8 Charter rights.
- [126] I am satisfied the Crown has met its burden of establishing that the detention of Mr. Smith was lawful and that the warrantless searches that took place were reasonable under s. 8 of the Charter.

Section 24(2).

- [127] In the event that I am wrong with respect to Cst. Gunn's authority to enter the residence or with respect to the safety search that was undertaken, I will address s. 24(2).
- [128] The law is not in dispute. A court, considering whether to admit evidence under s. 24(2) must consider the seriousness of the Charter-infringing State conduct, the impact of the breach on the Charter-protected interests of the accused, and society's interests in the adjudication of the case on its merits: *R v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.
- [129] It is the cumulative strength of the first two lines of inquiry considered together that determines the pull towards exclusion. The third line of inquiry will seldom tip the scale in favour of admissibility when the first two lines, taken together, make a strong case for exclusion: *R. v. Lafrance*, 2022 SCC 32 at para. 90.
- [130] It is always serious when police officers exceed their authority, but I would place this case relatively low on the spectrum of seriousness. With respect to entry into the house, Cst. Gunn had a reasonable suspicion that an offence was taking place and an honest belief in his authority to enter the house under the principles of *Godoy*. He was faced with a dynamic and unfolding situation, and the possibility of domestic violence within the home.

- [131] I do not accept the defence argument that he acted in bad faith. At most, he misapprehended the limits of the law.
- [132] With respect to the search in the driveway, Cst. Gunn was motivated by a concern for safety and I do not accept that he distorted his evidence to justify more intrusive powers of search than were otherwise warranted.
- [133] If the safety search exceeded what was legally permissible, it did so only narrowly and in a difficult situation where there remained some urgency to re-enter the house. Cst. Gunn was not searching for evidence and I find there was no intention on his part to misuse his powers; all of which serve to attenuate the seriousness of a breach.
- [134] I accept that the impact of the breaches would be significant as Mr. Smith's privacy interest in his home is very high. Even partial entry into a residence may reveal any number of things about an individual. Similarly, Mr. Smith has an expectation of privacy in his pockets and the search led directly to the discovery of evidence.
- [135] Even so, there are some factors that ameliorate the impact of the breach to a limited degree. The entry to the home was brief, no more than necessary to effect the detention, and it did not include a broader search of the home. The safety search, if it was a violation of Mr. Smith's privacy, was not particularly intrusive and the way it was carried out was not excessive.
- [136] The evidence seized was reliable evidence on the third branch and is important to the Crown case. I am satisfied society has an interest in having the case decided on the merits. This factor favours admission of the evidence.
- [137] Looking at the factors together, I find the cumulative strength of the first two lines of inquiry pull toward exclusion of the evidence, but not strongly. The third line of inquiry favours admission of the evidence. Balancing the three factors, I am not satisfied that admission of the evidence would bring the administration of justice into disrepute. I would admit the evidence.

"Greenwood J."

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Prepared on 29 October 2026 · Esheria