

CANADA / JUDGMENT

R. v. Speck

2022 BCSC 486

COURT

Supreme Court of British Columbia

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2022 BCSC 486 cor1 R. v. Speck

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Speck,

2022 BCSC 486

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Registry: Victoria

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v.

Kirk William Lawrence Speck

Corrected Judgment: The text of the judgment was corrected at paragraph 5 on April 21, 2022.

Before: The Honourable Madam Justice Jackson

Oral Ruling on the Accused's Application Alleging Violations of ss. 7, 8, 9, and 10 of the Charter

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Counsel for the Accused:

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Place and Dates of Hearing:

Victoria, B.C.

February 7 - 9, 2022

Place and Date of Ruling:

Victoria, B.C.

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- [1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.
- [2] The accused in this case, Kirk William Lawrence Speck, has filed a notice alleging violations of his rights under ss. 7, 8, 9, and 10 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter], arising out of his detention and a search of him conducted on September 1, 2019.
- [3] An accused bears the onus of proving alleged violations of their Charter rights on a balance of probabilities, however, in answer to a Charter challenge by an accused in some circumstances, the evidentiary burden remains on the Crown, but to the standard of a balance of probabilities: *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 at para. 15.
- [4] The parties agreed to proceed with the voir dire in two stages: first, making submissions with respect to whether Mr. Speck's Charter rights had been violated; and second, if any Charter violation is found, proceeding to make submissions with respect to the remedy sought by Mr. Speck, namely that the evidence seized be excluded under s. 24(2) of the Charter.
- [5] These are my reasons with respect to the first stage on the question of whether the rights of Mr. Speck were violated by police as he has alleged.

I. CONTEXT

- [6] On August 30, 2019, Constable Hilborne of the Victoria Police Department ("VPD"), an officer with then nine and a half years of experience, and Constable Carver, an officer with then approximately two years of experience, both separately attended a call at an apartment building on Gorge Avenue in Victoria, B.C., unrelated to Mr. Speck.
- [7] After finishing their duties related to that call, both Constable Hilborne and Constable Carver remained in the area speaking with each other. At that point, there was an encounter between Mr. Speck, Constable Hilborne, and Constable Carver at that location (the "August 30 Encounter").
- [8] Constable Hilborne testified that at the time of the August 30 Encounter he had been generally familiar with Mr. Speck, understanding him to be a general person of interest connected with drug trafficking, whose name came up during his time in the Crime Reduction Unit, but that he had had no direct involvement with Mr. Speck before the August 30 Encounter.
- [9] Constable Hilborne testified he could not recall the specific details of the August 30 Encounter. In particular he testified he could not recall whether he had recognized Mr. Speck or whether Constable Carver had recognized Mr. Speck and told Constable Hilborne his name. Constable Hilborne could also not recall who had initiated the August 30 Encounter--whether Constable Carver had asked Mr. Speck to identify himself or whether Mr. Speck was known to Constable Carver. He did not suggest that one of the possibilities

was that he had asked Mr. Speck to identify himself.

- [10] However, Constable Carver's evidence was that Constable Hilborne "definitely" was the one who recognized Mr. Speck and communicated to her who Mr. Speck was, and that before the August 30 Encounter Mr. Speck was unknown to her. Her evidence was that it had been Constable Hilborne who had initiated the August 30 Encounter by communicating with Mr. Speck. I accept her evidence on these points.
- [11] There is no suggestion that Mr. Speck was doing anything inappropriate or illegal during the August 30 Encounter. Nonetheless, following the August 30 Encounter, Constable Hilborne ran Mr. Speck's name through both the police CPIC and PRIME systems. Constable Hilborne logged the August 30 Encounter as a "street check". Around this time the Province and the VPD had initiated a new policy with respect to street checks, which was relatively new at the time of the August 30 Encounter. The policy was not put before me, or described in significant detail. Constable Hilborne testified that under the new policy, police are not to stop people without reason, and if they do stop them they are to tell them that they are free to go and do not have to talk to the police, and there are documents they are required to provide to any person they stop. This was a relatively new change in VPD policy at the time of the August 30 Encounter street check in this case. Constable Hilborne testified that none of the new requirements of the street check policy were complied with during the August 30 Encounter.
- [12] The CPIC / PRIME checks confirmed what Constable Hilborne had already believed, namely that Mr. Speck had criminal convictions for drug trafficking and violence, that he was believed to be in a Victoria gang known to be associated with drug trafficking and violence, and that he had been flagged in the police system as "violent". Nothing further occurred during the August 30 Encounter.
- [13] On September 1, 2019, Constable Hilborne was patrolling alone in a marked police vehicle. While travelling west in the 700 block of Queens off of Douglas, he saw a group of five to seven people standing close together. During his testimony during the voir dire, Constable Hilborne testified he could not recall whether he recognized Mr. Speck as being one of the people in the small group, but he acknowledged that at the preliminary hearing he had testified that he had recognized Mr. Speck as being one of the people in the small group. Constable Hilborne reasonably conceded that memories do not generally improve over time, and that the preliminary hearing was closer to the date of Mr. Speck's arrest.
- [14] Constable Hilborne also conceded that in an officer response report with respect to the taser incident of Mr. Speck (which I will describe later in these Reasons), which he completed during the same shift as the September 1, 2019 arrest, he wrote that "at approximately 01:51 hours [he] was driving past 710 Queens Ave., when he spotted a Kirk Speck in front of the building with a group of people" and that he "knows Kirk Speck as a drug dealer, Norteno gang member, has a history of violence, and known to carry weapons as most drug dealers do" and that he had "known it was Kirk Speck when he saw him and he had seen him the day

before" (which Constable Hilborne clarified was in reference to the August 30 Encounter).

- [15] In cross-examination, Constable Hilborne conceded that it is possible he had recognized Mr. Speck immediately as one of the people in the small group that had roused his suspicions.
- [16] I find that Constable Hilborne's memory is likely frail, perhaps because of the passage of time, with respect to whether he recognized Mr. Speck as being one of the members of the small group. I find that Constable Hilborne did recognize Mr. Speck as one of the people in the small group.
- [17] Constable Hilborne testified that he considered the small group of people gathered together to be suspicious, thinking perhaps they were involved in drug activity, and so he turned his police cruiser around to drive past the group again. As he approached the group for the second time, Mr. Speck rode his bike away from the group eastbound on Queens, and then turned north on Douglas travelling on the sidewalk. Constable Hilborne testified that he observed there was a helmet attached to the handlebars of the bike, but that Mr. Speck was not wearing it, and that there were no lights on either the front or the rear of the bike. The Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] prohibits riding a bicycle on a sidewalk, requires cyclists to wear a helmet, and requires a front white-light and a rear red-light on a bicycle after sunset: MVA ss. 183(2)(a), 183(6)(a), 184(1).
- [18] Constable Hilborne testified that he activated the police car lights to stop Mr. Speck with the sole intention of writing him a ticket for the lesser of the three MVA violations he had observed. According to Constable Hilborne, such a ticket would result in a maximum of a \$100 fine.
- [19] After Constable Hilborne activated the police car lights directing Mr. Speck to stop, Mr. Speck stopped and got off his bike. Constable Hilborne then exited the police car. However, Constable Hilborne did not take his ticket book with him, which would be needed to issue a ticket as he testified he intended to do. It was in the trunk of his police car. Constable Hilborne testified he had concerns for his safety, and did not want to turn his back on Mr. Speck to get the ticket book.
- [20] Instead, Constable Hilborne approached Mr. Speck.
- [21] Mr. Speck was wearing a backpack, as well as a hoodie and jeans. As Constable Hilborne approached Mr. Speck, he testified that he observed items bulging in Mr. Speck's pockets.
- [22] Constable Hilborne testified that he asked Mr. Speck whether he had any weapons, to which Mr. Speck responded he did not. Constable Hilborne then told Mr. Speck that he was going to pat him down. There is no suggestion that he asked for permission to do so, or that Mr. Speck consented.
- [23] According to Constable Hilborne, the area where he stopped Mr. Speck was "not a great area", and that it is an area that is frequented by people who do not like the police, and in which serious violent incidents have occurred.

- [24] Constable Hilborne proceeded with the pat down, starting with the front pouch pocket of Mr. Speck's hoodie, and moving clockwise around the pockets of Mr. Speck's jeans, and his waistband, beginning with the right front pocket. Constable Hilborne testified that he saw something bulging in the hoodie pouch pocket and asked Mr. Speck what it was, to which Mr. Speck advised that it was a cell phone. Mr. Speck had not been advised of his Charter rights. At each pocket Constable Hilborne would pat the pocket, ask Mr. Speck what was in the pocket, and determine whether what he felt was consistent with what Mr. Speck described. Constable Hilborne described Mr. Speck as cooperative.
- [25] Constable Hilborne was satisfied that what he felt was consistent with what Mr. Speck was telling him was in his pockets until he got to the front left pocket. At that point Constable Hilborne testified that he felt something irregular that he could not identify by touch. It was not big like a gun, but Constable Hilborne testified that when he asked Mr. Speck what it was Mr. Speck hesitated.
- [26] At that point Constable Hilborne testified his concern grew because he thought it was perhaps a switchblade. As a result of those concerns he pushed the irregular shaped item to the top of the pocket from the outside, in order to see what it was, and in doing so an item that was on top of it came out, which was a plastic Ziploc bag that appeared to contain drugs. In Constable Hilborne's experience and opinion the amount was beyond what would be associated with personal use.
- [27] At that point he advised Mr. Speck he was under arrest for trafficking, but he did not begin to read Mr. Speck's Charter rights.
- [28] Constable Hilborne testified that upon being advised he was being arrested for trafficking, Mr. Speck began to run north on Douglas holding his bike, such that his pace was not very fast. Constable Hilborne jogged after Mr. Speck and broadcast over the radio for help. Constable Hilborne continued to pace Mr. Speck, not necessarily wanting to catch him given Constable Hilborne was alone, but rather hoping to track Mr. Speck until additional police arrived.
- [29] Constable Hilborne testified that in his experience, once additional police resources are called, a fleeing suspect often stops. However, as Mr. Speck was approaching Field Street, he began to hop on his bike. Constable Hilborne, fearing he would lose track of Mr. Speck, pushed Mr. Speck off his bike, causing Mr. Speck to fall to the ground. Constable Hilborne testified that he then tripped over the bike and fell on top of Mr. Speck in the roadway at Field and Douglas.
- [30] Constable Hilborne testified that a struggle ensued during which Constable Hilborne tried to gain control over Mr. Speck, and Mr. Speck attempted to evade his efforts to do so, but that Mr. Speck was not attempting to assault him. Constable Hilborne testified this was "not a great situation". Being on the ground left him unable to control Mr. Speck, but he was able to get up and was trying to put distance between himself and Mr. Speck.

- [31] Constable Hilborne then drew his taser, according to his evidence "in case he needed to use it". As Mr. Speck was getting up, Constable Hilborne testified his momentum in doing so was carrying him towards Constable Hilborne. Constable Hilborne testified he became concerned there was a risk Mr. Speck would assault him and so he tasered him in the chest and stomach, which was effective in causing Mr. Speck to fall back, but his arms were still moving. In Constable Hilborne's experience this is reflective of the person experiencing pain but not yet being incapacitated, so he moved the taser to be pointed at Mr. Speck's ankles, to create an arc to achieve neuromuscular incapacitation, which prevents an individual from being able to move their muscles.
- [32] Constable Hilborne told Mr. Speck he would taser him again if he moved, to which Mr. Speck responded he would not move and stayed where he was.
- [33] According to Constable Hilborne two people then began to come towards the place where he and Mr. Speck were, and asked Mr. Speck whether the cop had tasered him and if Mr. Speck was okay. Constable Hilborne again broadcast on air for help right away, and according to his evidence the two guys left.
- [34] Constable Hilborne testified that other officers, including Constable Carver, were then on the scene "shortly thereafter". Constable Carver took charge of the second search of Mr. Speck.
- [35] Constable Carver proceeded to search Mr. Speck in the presence of Constable Hilborne. According to Constable Hilborne, from the time he activated his emergency lights to the end of the search took less than 10 minutes, the drive to the VPD cells took less than two minutes, and the total time between stopping Mr. Speck and arriving back at the VPD station was 15-20 minutes.
- [36] Constable Carver's evidence was that she arrived at 1:45 a.m., and that the search was conducted at 1:58 a.m. This largely aligns with the evidence of Constable Hilborne. However, I am concerned by the difference between the testimony of Constable Hilborne and Constable Carver with respect to the time that passed before they returned to the VPD cells. According to Constable Carver, they did not return to VPD cells until 2:45 a.m. I accept Constable Carver's evidence with respect to the time. Her memory appeared certain and, based on her testimony, I infer that she made notations of the times in her notes.
- [37] There was no evidence about what happened at the scene after the end of the search but before Mr. Speck was transported to the VPD station, or any evidence explaining the delay at the scene.
- [38] Mr. Speck was not informed of his Charter rights including his right to retain and instruct counsel without delay, until he was taken to the VPD cells. Once advised, he declined to contact counsel.

[39] At 2:51 a.m. it was determined that Mr. Speck should be taken to the hospital because at least one of the taser barbs remained embedded in his skin.

[40] After being seen at the hospital, Constable Hilborne released Mr. Speck from custody on a promise to appear and Constable Carver drove him back downtown.

[41] According to Constable Hilborne, several items were seized from the pockets of Mr. Speck's jeans and hoodie:

- Front left pocket: a baggie with a white rock-like substance which was later identified as fentanyl, a baggie of a white powder substance later identified as cocaine and fentanyl, a lighter, a blue butane lighter, two gift cards, and loose paper money and change;
- Rear left pocket: cigarettes;
- Front right pocket: a plastic container with a pipe brush, a working scale, cash, a small plastic container with a white powdery substance later identified as fentanyl;
- Rear right pocket: a wallet;
- Hoodie pocket: a cell phone; and
- Backpack: a knife and sheath, a collapsible baton, a spray container thought to contain bear spray (although in its opening statement, the Crown invited me to acquit with respect to this offence because it lacked evidence with respect to the contents of the container) and a fanny pack with cash.

[42] The evidence of Constable Carver differed from that of Constable Hilborne with respect to what items were seized. However, as the nature of the differences is not material to the substantive issues that arise on this voir dire, it is sufficient at this point to note there was discrepancy between the evidence of the two officers on that point.

II. SECTION 7

[43] Section 7 provides:

Everyone has 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.

[44] The allegation with respect to a violation of Mr. Speck's s. 7 rights was not particularized. Indeed, counsel for Mr. Speck did not even advise which of the legal right(s) protected by s. 7 grounded the allegation. No submissions were made with respect to the legal principles governing s. 7 violations or the application of the principles of fundamental justice. Without more it is impossible for me to know who has the burden of proof or how the evidence applies to the applicable legal framework. Nor is it possible for the federal Crown to respond.

[45] I find no violation of Mr. Speck's s. 7 rights has been established based on the evidence and submissions presented on the voir dire.

III. SECTION 9

A. Legal Framework

[46] Section 9 of the Charter provides that:

Everyone has the right not to be arbitrarily detained or imprisoned.

[47] Section 9 only protects against arbitrary detention. If a detention is for a purpose authorized under a statutory provision or some other police power, it is not arbitrary and therefore will not constitute a violation of s. 9.

[48] A vehicle stop results in the detention of the vehicle operator and any occupants. If a motor vehicle is stopped based on an observed violation of the MVA (often referred to as a "traffic stop"), this is a lawful purpose and the resulting "detention" is authorized under the MVA, and therefore does not infringe s. 9 of the Charter: *R. v. Kaddoura*, 2009 BCCA 113 at paras. 12-13.

[49] Random stops of a motor vehicle (often referred to as "check stops"), in the absence of any observed violations, but to enforce (by way of checking) traffic or vehicle safety laws or driver sobriety, constitute arbitrary detentions under s. 9 of the Charter, but have been saved under s. 1 of the Charter on the basis that they are justified as a reasonable limit, so long as the actions of the police fit within a pressing and substantial objective such as promoting traffic safety, checking a driver's license and insurance or the mechanical fitness of the vehicle, or the sobriety of the driver: *R. v. Woody*, 2018 BCSC 2275 at para. 34; *R. v. Nolet*, 2010 SCC 24 at para. 22; *R. v. Young*, 2020 BCSC 1201 at para. 34.

[50] In the criminal context, where the police have reasonable suspicion to support an investigative detention, or reasonable grounds to support an arrest, the interference with the suspect's liberty is also authorized and not arbitrary. However, where the police have no such reasonable suspicion or reasonable grounds, they cannot simply stop a motor vehicle and detain the driver or occupants for the purpose of some general inquisition into possible criminal wrongdoing: *Woody* at para. 35. Such an arbitrary stop would not be justified under s. 1.

[51] Thus the focus of the inquiry under s. 9 of the Charter is on determining the basis for the stop: *Woody* at para. 33. In doing so, the reality that sometimes police officers have a mix of reasons, purposes, objectives, or motivations for stopping a motor vehicle, must be acknowledged. In the circumstances of a traffic stop (where an officer observes an infraction), they have an independent basis for stopping the motor vehicle, and the fact that they may have additional concerns or interests does not negate the authority for the stop: *Woody* at para. 43; *Nolet* at para. 37. In such a traffic stop for an infraction under the MVA, the lawfulness of their stop of a motor vehicle will only be negated where the traffic stop was

a ruse or a mere pretext for a general investigation purpose: Woody at para. 43, citing R. v. Madill, 2005 BCSC 1564 at para. 26; Young at para. 35; R v. Huntley, 2021 BCSC 149 at para. 27.

- [52] In determining the intended purpose, it is necessary to examine the authority claimed by the police at each step from the original demand to stop, to the finding of impugned evidence, to determine at what point, if at all, the police infringed the rights of an accused: Nolet at para. 23.

B. The Parties' Positions

- [53] The defence submits the stop (and the subsequent search of Mr. Speck by Constable Hilborne) was a ruse, aimed at conducting a physical search of Mr. Speck, whom Constable Hilborne knew to have a criminal history involving violence and drug trafficking, and whom he suspected of being involved in further drug trafficking activity, including an association with a Victoria gang associated with drug trafficking and violence. The defence argues the evidence of the two officers who testified on the voir dire conflicts on significant details, which should lead me to reject Constable Hilborne's evidence that he stopped Mr. Speck for the sole purpose of a traffic stop, as unreliable.
- [54] The Crown argues the stop of Mr. Speck was an authorized traffic stop under the MVA, based on Constable Hilborne's observations that Mr. Speck was riding his bike in circumstances that violated three provisions of the MVA, including the offence of operating a bike without a helmet (s. 184(1)), prohibiting cyclists from riding their bikes on sidewalks (s. 183(2)(a)), and requiring cyclists to have a white-lighted lamp on the front and a red-lighted lamp on the back of the bike after sunset (s. 183(6)(a) and (c)). On that basis, the Crown submits Constable Hilborne had a genuine traffic and vehicle safety concern and that his detention was therefore authorized. It argues that a detention cannot be arbitrary if it was carried out for an authorized purpose.

C. Analysis and Conclusion

- [55] The federal Crown cites three cases to support the proposition that Constable Hilborne's stop of Mr. Speck on his bike was authorized under the MVA: Woody, Kaddoura, and Nolet. However, each of the cases involved stops of motor vehicles under the authority of either BC's MVA or, in Nolet, Saskatchewan's equivalent. The MVA grants police the authority to stop motor vehicles for violations of that Act: MVA, s. 79. The Saskatchewan legislation (as set out in para. 14 of Nolet) grants police a similar power. However, the federal Crown could not direct me to any similar provision permitting police to arrest or detain someone operating a bike for violating the MVA. My brief review of the legislation and its regulations yielded no obvious authority.
- [56] As an alternative, the federal Crown relied on s. 495(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46, as providing authority for the stop, but that provision relates to criminal offences, which a violation of the MVA is not.

- [57] Finally, the federal Crown argued the detention of Mr. Speck, for what constitutes a summary conviction offence, was authorized based on the analysis in *R. v. Moore*, [1979] 1 S.C.R. 195. However, the majority of the Court in *Moore* held the officer could only have arrested the defendant for a summary conviction offence if it were necessary to establish his identity. Even if the legal analysis in *Moore* is applicable in the circumstances of the case before me, there was no such need to arrest Mr. Speck for that purpose since on Constable Hilborne's own evidence, he knew it was Mr. Speck at least by the time he turned his lights on, and, as I have found in fact, even earlier. The Crown also relied on *R. v. Weaver*, 2021 BCPC 163, which applied *Moore* in the context of a cyclist stopped under the MVA. However, at para. 15 of *Weaver*, Judge Gouge noted that the defendant did not challenge the lawfulness of his detention and so it does not assist with the analysis of this case.
- [58] For these reasons I find the detention of Mr. Speck on his bicycle for MVA violations was not authorized by law.
- [59] As a result of my conclusion it is not necessary for me to address in detail the further argument of the defence that Constable Hilborne's stop of Mr. Speck was a ruse and not the genuine reason for the stop. I will simply say that I find Constable Hilborne's evidence that the MVA infractions were the sole reason for the stop to be unreliable. It may be that Constable Hilborne's memory of his intended purpose in stopping Mr. Speck that night has also been impaired by the passage of time, but his evidence seems incongruous with the surrounding circumstances.
- [60] I have found that Constable Hilborne immediately identified Mr. Speck as being among the small group he felt looked suspicious. He knew Mr. Speck had convictions for drug trafficking, and was suspected in recent trafficking investigations, and Constable Hilborne suspected there was drug activity happening within the small, closely-gathered group. His reasons for electing to pursue Mr. Speck for MVA infractions instead of continuing to surveil the small group's suspicious activity were unpersuasive, and his choice to pursue Mr. Speck for riding without a helmet instead of maintaining his availability to respond to more serious calls or investigations seems illogical, particularly on what Constable Hilborne described as a busy Saturday night, and for an officer of such experience. While the stop under the purported authority of the MVA was possibly one of the reasons for the stop, I find Constable Hilborne was probably also suspicious that Mr. Speck was involved in some drug offence that night and wanted to pursue it. As it was not suggested, either through Constable Hilborne's evidence or during the federal Crown's submissions, that Constable Hilborne's suspicions rose to a level that warranted an investigative detention, I am not called upon to make any such finding.
- [61] I find Constable Hilborne's stop of Mr. Speck on September 1, 2019, was not for a purpose authorized by law and was therefore arbitrary, contrary to s. 9 of the Charter.
- [62] This detention set off the chain of events that followed, culminating in Mr. Speck's arrest for drug trafficking.

IV. Section 8

A. Legal framework

[63] Section 8 of the Charter provides:

Everyone has the right to be secure against unreasonable search or seizure.

[64] The search of Mr. Speck by Constable Hilborne was a warrantless search. Warrantless searches are presumptively unreasonable. The presumption that a warrantless search was unreasonable can be rebutted, but the onus rests on the Crown to do so: *R. v. Buhay*, 2003 SCC 30 at para. 32. The presumption that a warrantless search is unreasonable is rebutted where the Crown demonstrates on a balance of probabilities that the search was reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 22; *R. v. Mann*, 2004 SCC 52 at para. 36; Nolet at para. 21. A search is justified where:

- (a) it was authorized by law;
- (b) the law itself is reasonable; and
- (c) the manner in which the search was carried out was also reasonable.

[65] These three elements are conjunctive; the court must be satisfied all three elements have been established for a warrantless search to be found reasonable.

[66] Whether a search is authorized by law is determined based on a two-part test articulated in *R. v. Dedman*, [1985] 2 S.C.R. 2 and *Mann*, and was framed in *R. v. MacDonald*, 2014 SCC 3 at para. 35 as involving two questions:

- 1) Does the police action fall within the general scope of a police duty imposed by statute or recognized by common law?
- 2) If so, does the police action constitute a justifiable exercise of powers associated with the duty?

[67] At the second stage, the focus is on assessing whether, in the context of the particular circumstances of the case before the court, a safety search was reasonably necessary. In considering that question the court is to "sensitively weigh" a number of factors to balance the police duty against the liberty interest in question. These factors were summarized at para. 39 of *MacDonald* as:

- 1. the importance of the performance of the duty to the public good;
- 2. the necessity of the interference with individual liberty for the performance of the duty; and
- 3. the extent of the interference with individual liberty.

See also: *Mann* at para. 39; *Dedman* at para. 35; *R. v. Clayton*, 2007 SCC 32 at paras. 21, 26, 31.

- [68] If these three factors, weighed together, lead to the conclusion that the police action was reasonably necessary, then the action will not constitute unjustifiable use of police power and the search will be considered lawful.
- [69] Neither of the parties suggested that there were additional factors that should be considered in the analysis.
- [70] The court is to consider the interaction between the police and an accused step by step, from the initial stop onwards, in order to determine whether the police stayed within their authority as the situation developed: Nolet at para. 4; Woody at para. 58.

B. The Parties' Positions

- [71] The federal Crown argues the pat-down search of Mr. Speck was authorized under the common law police power to conduct a safety search, relying on MacDonald, and cases relied on therein. The federal Crown argues the safety search was reasonably necessary and that the search was carried out reasonably.
- [72] The defence submits Constable Hilborne's pat-down of Mr. Speck was a ruse and was aimed at conducting a physical search of him to further a drug investigation.

C. Analysis

1. Authorized by law

- [73] The first stage of the justification analysis asks whether the search is authorized by law. I will turn to address the two-part test to determine that issue.
- a) Does the police action fall within the general scope of a police duty imposed by statute or recognized by common law?
- [74] This is a question of general application.
- [75] A safety search is a physical search that has the power to uncover a broad array of information about an individual: MacDonald at para. 42. As such, it has the potential to significantly interfere with an individual's rights to liberty and privacy.
- [76] Although the federal Crown argues there is a common law police power to conduct a safety search whenever they exercise police powers, I do not understand the scope of police's authority to be so broad or unbridled: MacDonald at para. 41. While it has been recognized that "in general terms" police have a duty to prevent crime and a corresponding duty when crime is committed to bring the offender to justice (Dedman at para. 66, citing R. v. Waterfield, [1963] 3 All E.R. 659 (Eng. C.A.), this general duty does not equate with police duties that are "authorized by law" for the purposes of the s. 9 analysis. The requirement for a duty authorized by law, sufficient to justify the interference with a person or property of a private person, is narrower.

- [77] Nonetheless, a safety search falls within the general scope of the common law police duty to protect life and safety, including officer safety, and that duty has been held to be reasonable: MacDonald at para. 43. Therefore, for safety searches, the requirement that the police action fall within the general scope of a police duty imposed by statute or recognized by common law is generally easily satisfied: MacDonald at para. 35. Defence counsel did not make any submission to the contrary.
- b) Did Constable Hilborne's pat-down of Mr. Speck constitute a justifiable exercise of safety-search power?
- [78] This is a question of specific application and focusses on the particular police action at issue. It is this question that is often at the heart of the inquiry into whether an accused's s. 8 right has been violated. That is true with respect to the case before me.
- [79] First, it is helpful to be clear about what is meant by a "safety search" as that term is referred to in the case law. A "safety search" is a search that is reasonably necessary to eliminate an imminent threat to the safety of the public or the police: MacDonald at para. 40. It will "generally be conducted by the police as a reactionary measure" and carried out "in response to dangerous situations created by individuals, to which the police must react 'on the sudden'" and in a sense are "driven by exigent circumstances": MacDonald at para. 32.
- [80] Because of the risk that a safety-search power might be abused, it is constrained by the requirement of objectively verifiable necessity: Mann at para. 40; MacDonald at para. 31. For the infringement to be justified, the police action must be "reasonably necessary" for the carrying out of the particular duty in light of all of the circumstances: Mann at para. 39; MacDonald at para. 36. In order to satisfy this requirement, an officer "must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk": Mann at para. 40; MacDonald at para. 31. In McDonald, the Court noted that the legal threshold to justify safety searches is reasonable suspicion.
- [81] The legality of a safety search depends on its reasonable, objectively verifiable necessity in the circumstances of the matter: R. v. Tse, 2012 SCC 16 at para. 33, as cited in MacDonald at para. 41. A search cannot be justified on the basis of a vague concern for safety, but must be based on "reasonable and specific inferences drawn from the known facts of the situation": Mann at para. 41. A determination that a safety search was necessary to address an imminent threat to the safety of the public or the police, requires the existence of circumstances establishing the police had a reasonable suspicion that there was an imminent threat to the safety of the public or the police: MacDonald at para. 41; R. v. Webber, 2019 BCCA 208 at paras. 48-50.

[82] Safety searches may legitimately attend investigations of MVA violations, at least insofar as they involve motor vehicles: Webber at para. 67; R. v. Thibodeau, 2007 BCCA 489 at para. 10, leave to appeal ref'd [2007] S.C.C.A. No. 592. For the purposes of this voir dire I will assume, without deciding, that safety searches may legitimately attend investigations of MVA infractions related to bike operation.

i. The importance of the performance of the duty to the public good

[83] It was not argued that the performance of the duty to protect the safety of the public, from which the power to conduct safety searches derives, was not of vital importance. As Justice Savage observed in Webber at para. 1:

The fundamental duty of the police is to protect life and safety. In the course of this duty, police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others. On occasion, in furtherance of this duty, a citizen's liberty will be interfered with. Sometimes, when it is reasonably necessary in the circumstances, the police are authorized to conduct a limited search for the purpose of ensuring their own and the public's safety.

ii. The necessity of the interference with the individual liberty for the performance of the duty

[84] Constable Hilborne decided to do a safety search when he got out of his patrol car, before he approached Mr. Speck. His reason for approaching Mr. Speck was to conduct the search. Constable Hilborne testified he had a concern for his physical safety based on certain facts known to him at the time he decided to conduct the safety search. Constable Hilborne knew who Mr. Speck was at that point in time, knew he had a criminal record for offences involving drug trafficking (which he testified is often accompanied by possession of weapons), knew Mr. Speck had convictions for violent offences, believed Mr. Speck to be associated with a gang that was itself associated with drug trafficking and violence, and had been flagged in the police's database as "violent". He also testified he believed the particular corner of town he was in was an area frequented by people who dislike the police, and where serious violent crime had taken place on numerous occasions in the past.

[85] I find some aspects of Constable Hilborne's testimony implausible. For example, his testimony was that he first saw a group of between five and seven people congregating and what he suspected might be drug activity, and that because of his suspicion he turned his patrol car around to take a closer look. Yet rather than maintaining surveillance of that group, he elected to pursue Mr. Speck for the sole reason of enforcing bicycle infractions under the MVA.

[86] Constable Hilborne also testified that the arrest occurred on a Saturday night and that it was "busy" for police officers. Again, I find it improbable that Constable Hilborne would elect to pursue Mr. Speck solely for the purpose of conducting an MVA bike stop (assuming he had authority to do so, which I have concluded he did not) rather than remaining available to deal with more serious incidents that could arise.

- [87] Nonetheless, for the purposes of this stage of the analysis I am prepared to accept Constable Hilborne's evidence with respect to his subjective concern for his safety. The question is whether his subjective concern was reasonable in all the circumstances.
- [88] Constable Hilborne stepped out of his patrol car with the intention of conducting a safety search of Mr. Speck, because he knew that in order to issue an offence notice to him under the MVA, he would need to turn his back to retrieve his ticket book from the trunk of the patrol car. All of the factors that gave rise to Constable Hilborne's suspicion that there was an imminent threat to his safety were known to him at that time. He had not yet seen the bulge in Mr. Speck's hoodie pocket, and Mr. Speck had not yet "hesitated" in response to Constable Hilborne's questions about what was in one of his jeans pockets. Mr. Speck had been cooperative and compliant to that point, stopping when directed to do so. Nothing Mr. Speck had done at that point in time factored in to Constable Hilborne's decision to conduct the safety search. Constable Hilborne's suspicion that there was an imminent threat to his safety, distilled to its essence, was aroused because of Mr. Speck's history, the part of town he was in, and the fact he was on patrol alone. In my view those circumstances only gave rise to a vague concern for safety, one that would arise every time an officer is on patrol alone, and stops someone they know to have a history of violence in an area of town they consider unsafe.
- [89] There were other options open to Constable Hilborne, which he acknowledged during his evidence. Constable Hilborne could have called for backup before approaching Mr. Speck. He could have directed Mr. Speck to another location to alleviate his officer safety concerns. Further, it may have been possible for Constable Hilborne to resolve any concerns he had related to public safety associated with Mr. Speck's alleged MVA violations (although no public safety concern was expressed by Constable Hilborne during his testimony) by issuing a warning to Mr. Speck and directing that he put on the helmet that Constable Hilborne testified was strapped to the handlebars of the bike.

iii. The extent of the interference with individual liberty

- [90] The law will only justify a safety search to the extent it was reasonably necessary in order for the police to fulfil their duty to protect life and safety. That aspect of the analysis mirrors my analysis with respect to whether the manner in which the search was carried out was reasonable. I will not repeat it here.
- c) Conclusion on whether the exercise of the power to conduct a safety search was justified
- [91] The pat-down search of the accused in this case was not a reactionary measure or a response to a dangerous situation created by Mr. Speck, nor was it driven by exigent circumstances. There were other avenues open to Constable Hilborne that would have alleviated any perceived need for a safety search. While Constable Hilborne may have suspected there was an imminent threat to his safety, it was, in my view, only a vague suspicion and not objectively reasonable in all of the circumstances. In the particular circumstances of this case I find the safety search was not reasonably necessary and

therefore was not justified.

2. Is the law reasonable?

[92] The Supreme Court of Canada has held that the lawful authority underlying safety searches is reasonable: MacDonald at para. 43. Defence counsel did not suggest otherwise.

3. Was the manner in which the search was carried out reasonable?

[93] I heard evidence about two searches of Mr. Speck on September 1, 2019. The first was conducted by Constable Hilborne, and the second was conducted by Constable Carver. It is the first search that was the basis of Mr. Speck's allegation that his s. 8 rights were violated.

[94] The search by Constable Hilborne was minimally intrusive. There is no evidence that Constable Hilborne searched Mr. Speck's body or reached inside Mr. Speck's pockets, but instead only touched the outside of Mr. Speck's pockets. The time between the detention and the discovery of the drugs was short.

[95] In the circumstances, I find the search was carried out reasonably.

D. Conclusion

[96] For these reasons, considering all of the circumstances based on the evidence in the voir dire, and the submissions of counsel, I find the pat-down search of Mr. Speck by Constable Hilborne was not justified. Therefore, the presumption that it was unreasonable, which arises because it was a warrantless search, is not rebutted. I find Constable Hilborne's actions violated Mr. Speck's right to be free from an unreasonable search.

V. Section 10

[97] Section 10 of the Charter provides:

Arrest or detention

10 Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

[98] I am satisfied that Mr. Speck was informed of the reasons for his arrest promptly. The evidence is that this happened at the scene contemporaneously with the discovery of the drugs in his front left pocket.

[99] However, approximately an hour passed between the time Mr. Speck was advised that he would be placed under arrest (at the scene) and the time he was advised of his Charter rights at the VPD cells. There is no explanation for that delay.

[100] As Justice Donegan set out in *R. v. Lukacs*, 2021 BCSC 641 at paras. 144:

[144] Section 10(b) of the Charter provides that everyone detained or arrested has the right to retain and instruct counsel without delay. This requires the police to comply with three corresponding duties:

1. To inform the detainee of his right to retain and instruct counsel without delay and the existence and availability of Legal Aid and duty counsel;
2. If a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise that right (except in urgent and dangerous circumstances); and
3. To refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

(*R. v. Bartle*, [1994] 3 S.C.R. 173 at p. 192; *R. v. Taylor*, 2014 SCC 50 at para. 23).

[101] The constitutional duty of the police to inform a detainee of their right to counsel arises "immediately" upon detention or arrest. The Crown bears the burden to show that a given delay was reasonable in the circumstances: *Lukacs* at para. 145.

[102] In this case I have no evidence explaining the delay; there is no evidence of any exigencies or practicalities that would have prevented Mr. Speck of being advised of his right to counsel at the scene.

[103] For these reasons I find Mr. Speck's right to be informed of his right to retain and instruct counsel without delay was breached.

VI. SUMMARY

[104] In summary, for these reasons, I am satisfied Mr. Speck has established on a balance of probabilities that his rights under ss. 8, 9, and 10(b) of the Charter were violated on September 1, 2019.

[105] I find Mr. Speck has not established on a balance of probabilities there was a violation of any of his rights under s. 7 of the Charter on September 1, 2019.

"Jackson J."

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