

CANADA / JUDGMENT

R. v. Stafford

2024 BCSC 1172

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 117 R. v. Stafford

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Stafford,

2024 BCSC 1172

Date: 20240617

Docket: 35096

Registry: Fort St. John

Rex

v.

Michael Ricky Andrew Stafford

Corrected Judgment: The text of the judgment was corrected on

August 2, 2024

Before: The Honourable Madam Justice Girn

Oral Ruling on Voir Dire

Counsel for the Accused:

N. Sahebi-Ghazvini

Counsel for the Crown:

G. Hutchings

Place and Dates of Trial:

Fort St. John, B.C.

April 9-12, 2024

Place and Date of Judgment:

Fort St. John, B.C.

June 17, 2024

- [1] This is my oral ruling on voir dire. I reserve the right to correct grammatical errors, add full citations, and to make the judgment more readable in written form. But the substance will not change.
- [2] Mr. Stafford is charged with three counts of possession for the purpose of trafficking contrary to section 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c.19 [CDSA], namely fentanyl, cocaine and MDMA.
- [3] On this application, Mr. Stafford alleges infringement of his rights under the ss. 7, 8, 9 and 10(a) (b) 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]. Mr. Stafford later abandoned the allegations relating to the infringement under s.7.
- [4] Specifically, by way of a Charter application filed April 3, 2024, Mr. Stafford alleges that his rights under s.9 of the Charter were infringed when the police unlawfully arrested him because there did not exist reasonable and probable grounds for his arrest.
- [5] He further alleges that as a result of his unlawful arrest, his rights under s. 8 of the Charter were infringed when the police searched the vehicle driven by him without proper authority.
- [6] Mr. Stafford also alleges that his rights under s.10 (a) and (b) of the Charter were infringed when the police failed to provide him with timely access to counsel on two separate instances.
- [7] Finally, Mr. Stafford alleges a further infringement of his rights under s. 8 of the Charter when the police, following his arrest, conducted a strip search. He takes issue with the decision to conduct the strip search and not the manner in which it was conducted.
- [8] The Crown denies the various infringements alleged by Mr. Stafford's right arguing that both the arrest and the incidental search of Mr. Stafford's vehicle and the strip search were lawful. The Crown also says there was no breach of Mr. Stafford's s.10(a) and (b) Charter rights.
- [9] Three witnesses were called on the voir dire: Constable Alford, Corporal Shillito and Corporal Mereski. Mr. Stafford did not testify at the voir dire.
- [10] I will begin with providing the background facts of the evidence heard on the voir dire to provide proper context.

Background Facts

- [11] On July 31, 2019, at approximately 11:30 a.m., RCMP officers in Fort St. John performed a traffic stop on a vehicle driven by Mr. Stafford. Also present inside the vehicle were an adult passenger along with two children and a dog.
- [12] Constable Alford and Corporal Shillito, both members of the drug section were conducting proactive enforcement patrol. They were in plain clothes driving in an unmarked vehicle when they came upon a red Ford pickup truck that did not have a front licence plate. The vehicle also had a broken taillight with duct tape on it. As a result, a traffic stop was initiated. Prior to approaching the driver's door, Mr. Stafford was observed by the officers making frantic and continuous motions of stuffing something between the seats.
- [13] It was subsequently discovered that the vehicle did not have valid insurance. Mr. Stafford was arrested for driving without insurance. Upon learning his identity, it was discovered that Mr. Stafford was under a prohibition from driving. Constable Alford then arrested Mr. Stafford for driving while prohibited. He did not provide Mr. Stafford with any Charter rights at the time of this initial arrest. Mr. Stafford was then placed into a marked vehicle that had arrived to assist.
- [14] Given that the vehicle had no insurance and Mr. Stafford was a prohibited driver, the vehicle was to be impounded for seven days. Consequently, Constable Alford searched the vehicle for safety reasons. In the center console, gold watch links and baggies of cocaine were located. Mr. Stafford was then re-arrested for driving without insurance and driving while prohibited and arrested for possession of a controlled substance. He was also given his Charter rights at this time.
- [15] As the police detachment was minutes away, access to counsel was not provided at roadside. Corporal Shillito then accompanied Mr. Stafford to the detachment to effect access to counsel while Constable Alford stayed back to deal with the vehicle and do a full search of the vehicle and take photographs.
- [16] Prior to being placed into cells and as a part of the booking process, Mr. Stafford was searched which consisted of a pat down search as well with a wand to search for metal items. Corporal Shillito located \$1,300 in cash and a gold watch on Mr. Stafford's person.
- [17] Concerned that Mr. Stafford may have weapons or drugs on him, Corporal Shillito sought and received approval from his supervisor, Corporal Mereski, to conduct a strip search. No evidence was located on Mr. Stafford arising from the strip search.
- [18] Meanwhile back at the scene, prior to the vehicle being towed, Constable Alford conducted another search of the vehicle, incidental to arrest (being possession of controlled substance). During the search Constable Alford located under the driver's seat a small book type safe containing additional drugs, a scale, small amount of currency and other drug paraphernalia. Constable Alford wrote up an impound report and the vehicle was towed. Constable Alford then attended the police detachment and proceeded to lodge the seized

items into the exhibits locker.

- [19] After logging in the seized items, Constable Alford advised Corporal Shillito of the further items he seized from the vehicle. At the same time, Corporal Shillito advised Constable Alford about the items he located on Mr. Stafford.
- [20] The two officers had a discussion and determined that Mr. Stafford was arrestable for possession for the purpose of trafficking. Corporal Shillito then re-arrested Mr. Stafford and provided Charter rights once again. Mr. Stafford was also given another opportunity to consult with counsel.
- [21] Corporal Shillito then took a warned statement from Mr. Stafford. The Crown does not rely on any statements provided by Mr. Stafford. Mr. Stafford was released without process.

Discussion

- [22] As I have noted above, Mr. Stafford seeks declarations that his rights under s. 8, 9, and 10 of the Charter were violated. First, with regard to his rights under s. 9, he claims that his detention and arrest were warrantless and not based on reasonable and probable grounds and therefore constituted an unlawful arrest. Second, regarding his rights under s. 8, Mr. Stafford claims that the warrantless searches of his person and vehicle were unreasonable. Third, he claims his s. 10 right was violated by the police when there was a delay in warning and cautioning him for the charged offences.
- [23] Mr. Stafford also says that the court should be concerned about the failure of the officers to take contemporaneous notes on certain key aspects of their investigation which affects the reliability of their evidence. Accordingly, I will begin my discussion with this issue.

Lack of Contemporaneous Police Notes

- [24] Mr. Stafford submits that the law is clear that police are obligated to take accurate notes in a timely fashion. He relies, in particular, to the recent decision by Justice Devlin in *R. v. Hayer*, 2023 BCSC 15 at paras. 174-182.
- [25] The Crown acknowledges that police notes are helpful in reviewing the exercise of police powers, but stresses that they are not always legally required, nor does their absence necessarily frustrate judicial review. The Crown cites, in particular, Justice Jamal's discussion in *R. v. Beaver*, 2022 SCC 54 at paras. 74-77.
- [26] A police witness's credibility is to be assessed according the applicable factors to any witness. These were summarized in *R. v. J.T.*, 2019 BCCA 180 at para. 31, leave to appeal to SCC ref'd, 38775 (14 November 2019), as including:

a witness's demeanor in the witness box, although it is recognized that it would be dangerous to rely wholly on demeanor to convict; internal inconsistencies in a witness's testimony at trial and/or external inconsistencies in a witness's testimony with prior testimony or out-of-court statements; any explanation by the witness for the inconsistencies; any consistent evidence or corroborating evidence to support the witness's evidence, although corroboration is not a requirement; and how a witness withstands cross-examination.

[27] However, where police did not make contemporaneous notes of an incident, and important details from the event are later asserted, the reliability of those details may be suspect: *R. v. McConnell*, 2008 BCSC 505 at para. 133; *R. v. Whitton*, 2016 BCSC 1799 at para. 49.

[28] In *Whitton*, there was a lack of police notes and direct contradictions in evidence as to whether a certain transaction had been observed. Justice MacKenzie cited *McConnell*, and found that, due to the lack of notes and correspondingly suspect evidence, he was "unable to accept the reliability" of the police testimony. As a result, he was not satisfied that the Crown had established reasonable and probable grounds for arrest, and found that the accused's s. 8 rights had been breached.

[29] As Justice Devlin explained in *Hayer* at para. 174, police officers have a duty "to produce accurate, comprehensive, and contemporaneous notes", and that duty "is essential to the proper administration of justice".

[30] However, the Supreme Court has also acknowledged that contemporaneous notes are not necessarily "mandatory in all cases", and that a "lack of contemporaneous notes does not necessarily frustrate judicial review of warrantless arrests": *Beaver* at paras. 75 and 76.

[31] In particular, the comments of the Court at para. 75 are instructive:

[75] I agree that contemporaneous notes are generally desirable when determining whether the police had reasonable and probable grounds for a warrantless arrest, but I disagree that such notes should be mandatory in all cases. This Court has insisted on detailed notes to justify the police conducting warrantless cell phone searches (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 82), and has encouraged them in several contexts, including for strip searches (*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 101), for warranted searches of a computer (*R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 70), and after searching a home incident to arrest (*R. v. Stairs*, 2022 SCC 11, at para. 81). However, our law has never insisted on contemporaneous notes for all warrantless arrests, nor would I impose such a requirement. Insisting on contemporaneous notes in all cases could undermine the ability of the police to respond appropriately to the dynamic situations they face each day.

[emphasis added]

- [32] In other cases, the Supreme Court has also, while acknowledging that contemporaneous notes are not necessarily "a constitutional prerequisite", stated that "notes of how a search is conducted should be kept, absent unusual or exigent circumstances": *R. v. Vu*, 2013 SCC 60. Further, "that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation": *Wood v. Shaeffer*, 2013 SCC 71; see also *Hayer* at paras. 175-176.
- [33] Constable Alford was cross examined at length on his duty to make contemporaneous notes of the incident, in particular his grounds to arrest. Constable Alford testified that he made contemporaneous notes but that he typed a more detailed report approximately 21 days later. He stated that it is not always practicable to make detailed and comprehensive notes during the police interaction or during the same shift. He explained that the Fort St. John RCMP detachment is a small one and members of the drug section are often pulled away from their main duties and seconded to assist with more serious crimes on any given shift and sometimes even for a number of days at a time. Such that it can take two to three weeks before he can get back to the file to make more detailed notes.
- [34] In drafting his more detailed typed statement in this case, Constable Alford used his handwritten notes as well as computer logs to help him with recording accurate times. He also prepared a supplemental report outlining his grounds to arrest.
- [35] While it would have been desirable to have contemporaneous notes as it relates to Constable Alford's grounds to arrest Mr. Stafford, I am not convinced that this necessarily affects his reliability given his explanation and the fact that he did make more extensive notes three weeks later and a subsequent supplemental report.
- [36] I will now address the issue of whether the search of the vehicle was lawful as this is key to the other issues I must determine.
- [37] Section 9 of the Charter protects against arbitrary detention or imprisonment. As noted by the Supreme Court in *R. v. Tim*, 2022 SCC 12, the approach to s. 9 is "generous and purposive" in seeking "to balance society's interest in effective policing with robust protection for constitutional rights": at para. 21. Where an arrest or detention is unlawful, it is necessarily arbitrary and infringes s. 9: *Tim* at para. 22.
- [38] With regard to detention, the police may detain a person for investigative purposes so long as they have "reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary": *R. v. Mann*, 2004 SCC 52 at para. 45.
- [39] The Supreme Court in *Tim* concisely set out the framework for assessing a warrantless arrest, citing the authority in *R. v. Storrey*, [1990] 1 S.C.R. 241, 1990 CanLII 125:

- [23] Sections 495(1)(a) and (b) of the Criminal Code provide that a peace officer may arrest without warrant "a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence" or "a person whom he finds committing a criminal offence".
- [24] The applicable framework for a warrantless arrest was set out in *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, at pp. 250-51. A warrantless arrest requires both subjective and objective grounds. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint. The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer. The police are not required to have a *prima facie* case for conviction before making the arrest (see also *R. v. Feeney*, 1997 CanLII 342 (SCC), [1997] 2 S.C.R. 13, at para. 24; *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607, at para. 28; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 45-47; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 73).
- [40] Where an accused challenges the validity of a warrantless arrest, the Crown bears the burden of establishing on a balance of probabilities that the arresting officer had reasonable grounds to believe the accused had committed, or was about to commit when arrested, an indictable offence.
- [41] Section 8 of the Charter guarantees the right to be secure against unreasonable search and seizure. The objective of s. 8 is to protect legitimate privacy interests by balancing those privacy interests against the state's interest in law enforcement: *R. v. Majedi*, 2009 BCCA 276 at para. 17. Where a search is conducted without a warrant, the warrantless search is presumptively unreasonable, and the Crown bears the burden, on a balance of probabilities, of demonstrating that the police acted lawfully, in a reasonable manner: *R. v. Lotfy*, 2017 BCCA 418, leave to appeal to SCC ref'd, 37922 (19 April 2018).

Searches Incident to Arrest

- [42] One circumstance where a warrantless search can be justified is where a search is made incidental to arrest. The main purposes of this common law doctrine are: (1) to ensure the safety of the police and the public; (2) to protect evidence; and (3) to discover evidence: *Majedi*, citing *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 19, 1998 CanLII 838. The power to search incidental to arrest requires that the search be connected with or "truly incidental" to the arrest: *Caslake* at paras. 10, 17, 20, 25. As Chief Justice Lamer held in *Caslake* at para. 17, "the search is only justifiable if the purpose of the search is related to the purpose of the arrest", and, at para. 19, "the police must be attempting to achieve some valid purpose connected to the arrest".

[43] This raises both subjective and objective considerations. Subjectively, "[t]he police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted". Objectively, the "the officer's belief that this purpose will be served by a search must be a reasonable one": *R. v. Mills*, 2018 BCSC 2508 at para. 39, citing *Caslake* at para. 19. As Justice Crabtree put it in *R. v. Johnstone*, 2020 BCSC 316 at para. 63:

The reasonable prospect standard provides that the officer must be able to explain why the search was conducted, the police officer must believe that the purpose will be served, and the purpose must be a reasonable one.

Vehicle Searches Incident to Arrest

[44] The power to search incident to arrest extends to searching a vehicle in certain circumstances, and to which there is a lesser expectation of privacy than in one's home, office, or physical person: *Majedi* at para. 25, citing *Caslake* at para. 34. The courts have emphasized the need for a reasonable, identifiable purpose for the search, and cautioned that undertaking a search for the sake of "due diligence, or completeness, runs the risk of impacting the privacy rights of an individual where there is no legal basis to do so": *Johnstone* at para. 70.

Officer Safety Searches

[45] A search may also be properly grounded in "officer safety". The Supreme Court discussed officer safety searches in *R. v. MacDonald*, 2014 SCC 3:

[32] A search that is reasonably necessary to eliminate threats to the safety of the public or the police -- which I will term a "safety search" -- will generally be conducted by the police as a reactionary measure. In other words, although such searches may arise in a wide variety of contexts, they will generally be unplanned, as they will be carried out in response to dangerous situations created by individuals, to which the police must react "on the sudden". Binnie J.'s observation in *A.M.* in relation to sniffer-dog searches that "the police are generally required to take quick action guided by on-the-spot observations" (at para. 90) is equally applicable to safety searches. Thus, safety searches will typically be warrantless, as the police will generally not have sufficient time to obtain prior judicial authorization for them. In a sense, such searches are driven by exigent circumstances. Even if exigent circumstances exist, however, "safety searches" must be authorized by law.

[46] Ultimately, "where a search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police, the police should have the power to conduct the search": *MacDonald* at para. 40. The police power to search for purposes of officer safety is limited to where there is an "objectively verifiable necessity in the circumstances": *MacDonald* at para. 41.

- [47] The Crown points to Majedi, where the Court of Appeal found that an officer was entitled to search a vehicle to determine whether there were dangerous items in the vehicle:
- [25] The trial judge noted in para. 41 that one of the purposes for the search stated by Constable Chan was "officer safety, with respect to weapons in the car". In my view, this may be an overly narrow recapitulation of the officer's testimony. Recognizing that the vehicle was to be impounded as an incidence of the arrest, I consider the officer was entitled to enter the vehicle to determine whether there were dangerous items inside. In Caslake, the Court noted in para. 34 that "[t]here is a lesser expectation of privacy in a car than there is in one's home or office, or with respect to their physical person". The judge was entitled to conclude that looking to determine whether there were weapons in the car was a proper purpose incidental to the arrest.
- [48] Mr. Stafford submits that his arrest for possession of a controlled substance and the possession for the purpose of trafficking were premised entirely on grounds obtained in violation of ss. 8, 10(a) and 10(b) of the Charter. As a result, he submits that the arrests were unlawful and violated his s. 9 Charter rights.
- [49] Crown takes the position that Mr. Stafford's arrests were lawful. Crown argues that it was reasonable for Constable Alford to conduct the initial search of the vehicle for officer safety because it was a search incidental to Mr. Stafford's arrest for driving while prohibited. The Crown further argues that Constable Alford had sufficient grounds to perform this initial search for safety reasons.
- [50] Given that the initial search and its fruits affect whether or not Mr. Stafford's arrest for possession of a controlled substance was lawful and then the subsequent arrest for possession for the purpose of trafficking, I will begin my discussion on whether the search of the vehicle incidental to Mr. Stafford's arrest for driving while prohibited was lawful.
- [51] There is no dispute that the initial vehicle stop was for a legitimate traffic infraction. It is also not disputed that Mr. Stafford's arrest for driving without insurance was lawful.
- [52] Constable Alford testified that after the vehicle was pulled over he walked to over to the vehicle to speak to the driver. It was then that Constable Alford observed what he believed to be a shuffling motion by Mr. Stafford between the seats which he described as being very aggressive and repetitive. Constable Alford further stated that he found it odd that Mr. Stafford was looking forward with his right arm moving up and down repeatedly. He did not find that to be normal for a traffic stop. He believed it to be consistent with somebody pulling something out of their pocket and shoving it down in between the seats.
- [53] Constable Alford further testified that he believed Mr. Stafford was trying to hide something between the seats but that he did not know what it was. In cross examination, Constable Alford stated that he did not believe it was consistent with someone reaching into their pants to pull out a wallet. He explained that in his experience in conducting many traffic stops, the motion is a slower consistent one, not aggressive and repetitive.

- [54] While corroboration is not required, Corporal Shillito also observed this similar motion. Constable Shillito testified that Mr. Stafford was elevating in his seat and lifting up and the movement appeared to be a frantic and stuffing motion, with the arm and shoulder going up and down. He said that this was concerning from an officer safety perspective.
- [55] Mr. Stafford identified himself to Constable Alford but did not have a driver's licence on him and provided insurance papers, which did not match the vehicle. Constable Alford was able to check the VIN on the driver's door and learned that the VIN on the insurance papers did not match. Constable Alford then advised Mr. Stafford that he was under arrest for driving without insurance and asked him to step out of the vehicle.
- [56] Constable Alford advised Mr. Stafford that he was under arrest for driving without insurance and walked Mr. Stafford to the back of the vehicle. Constable Alford did not immediately provide Charter rights to Mr. Stafford at this point because he had not yet positively identified Mr. Stafford and because typically a person arrested for driving without insurance would be released on scene with a violation ticket. Mr. Stafford does not take issue with this.
- [57] Constable Alford eventually was able identify Mr. Stafford through the BC health card with a picture which matched Mr. Stafford. On this point, in direct examination, Constable Alford testified that he located this piece of identification when he searched Mr. Stafford after exiting the vehicle. However, in cross-examination, he acknowledged that it was obtained while Mr. Stafford was still seated in the vehicle. In my view, nothing turns on this because regardless of whether he was seated or not, Mr. Stafford would have been removed nonetheless once it was confirmed that he was a prohibited driver.
- [58] Mr. Stafford was then arrested for driving while prohibited. Constable Alford stated that he did this from memory. Mr. Stafford was placed inside a marked police vehicle but was not provided with his Charter rights at this point. Constable Alford then proceeded to search the vehicle.
- [59] I note that Mr. Stafford concedes that a search of a vehicle prior to formal arrest is permissible as a search incidental to arrest so long as the officer has reasonable and probable grounds to arrest: See *R. v. Parchment*, 2007 BCCA 326 at para. 38 and *U.S.A. v. Hollaus*, 2020 BCSC 1165 at para. 31.
- [60] However, Mr. Stafford disputes that the search of the vehicle was truly incidental for safety reasons but rather was a ruse to search for drugs given that the vehicle had first been observed in an area known for drug trafficking.
- [61] Mr. Stafford submits that Constable Alford's grounds for searching the vehicle are, and were, unclear as Constable Alford did not take notes at the time of this first instance search. He also argues that Constable Alford's statement three weeks later that he conducted his search for safety of the area does not clarify what grounds he actually had in mind at the time of the search. His supplemental report written some four months later is consistent with what he testified to.

[62] Constable Alford said he searched the vehicle because it was going to be impounded. There is no dispute that because Mr. Stafford was a prohibited driver and had no insurance, the vehicle was going to be impounded.

[63] In cross-examination, Constable Alford stated:

A I went to the driver's area of the truck to -- to

search the area between the seat and the console to ensure that there was nothing in there.

Q Can you elaborate on why you did that?

A Yes. As I said before, because he was arrested for prohib driving, the vehicle was going to be impounded for seven days, which meant that a tow truck driver/operator would come. He'd be sitting in the vehicle. And given the totality that the plates weren't matching the vehicle that the -- the actual vehicle I had dealt with before, and I believe that -- I wanted to search that area to ensure that there was nothing hidden that could cause harm to the tow truck driver or anybody else that got in the driver's seat moving it.

Q And so this is all stuff you had in your mind at the time?

A No, it was as the investigation progressed. Once he was arrested for prohib driving, I recalled his actions during the initial traffic stop and wanted to ensure

that there was nothing placed in there that could hurt the tow truck operator or myself.

Q So if I understand your testimony correctly right now, at the time you went and searched it, you went and searched it because you were concerned about there being an object there that could either hurt the tow truck driver or yourself?

A At that time, yes.

[64] Constable Alford stated that he was not searching for drugs because it was not a drug investigation.

[65] While Constable Alford took three weeks to write his notes, they are nonetheless consistent in regards to his safety concern. As well, he further elaborated in his supplemental report, albeit four months later. I do not accept Mr. Stafford's submission that I should be weary about the reliability of Constable Alford's evidence because of the lack of contemporaneous notes relating to the safety concerns.

[66] I am satisfied that Constable Alford's concerns for safety for the tow truck driver and others including himself was a legitimate reason to search the driver's immediate area of control and was objectively reasonable. His explanation is consistent with the fact that the vehicle was going to be towed, and a tow truck driver would have had to enter the driver seat area. This is supported, in part, by the fact that an impound report was drafted by Constable Alford. As well, the movements of Mr. Stafford immediately after the vehicle was pulled over gives rise to safety concerns on the part of Constable Alford.

- [67] Mr. Stafford relies on Johnstone in which Justice Crabtree found that that the search of the vehicle was not objectively reasonable and a breach of the accused's s. 8 Charter right. In my view, Johnstone is distinguishable. The officers in Johnstone searched the vehicle to locate a copy of a recognizance because they believed the accused was breaching it. These facts are entirely different than the case at bar. It was not an officer safety search. In this case, there is evidence from Constable Alford, corroborated by Corporal Shillito of Mr. Stafford's movements in the vehicle shortly before Constable Alford approached the driver's side. As well, the vehicle was going to be towed. This was not the situation in Johnstone.
- [68] I also find that Cluett is distinguishable. Justice Jenkins found that Mr. Cluett was initially wrongfully detained for a U-Turn and was only arrested for driving while prohibited as a result of this unlawful detention. This is not the situation before me.
- [69] Justice Jenkins analysis also turned on the facts that while Mr. Cluett was being arrested for driving while prohibited one of the officers after learning the vehicle was driven by a prohibited driver opened the driver's door, looked in and saw a baggie of drugs on the console next to the driver's seat, picked it and then proceeded to ask the accused what type of drugs they were. The accused replied it was heroin for his personal use. The accused at that point had not been given any Charter rights prior to this.
- [70] Justice Jenkins did not accept the explanation from the officer who searched the vehicle that it was partly for officer safety and was an inventory search prior to impounding of the vehicle. Justice Jenkins found that there was no basis in the evidence authorizing the search of the vehicle for officer safety given that there were three officers at the scene and the accused had already been placed in handcuffs.
- [71] Accordingly, because the facts in Cluett are very distinguishable, it is not useful for my analysis of the evidence I have heard.
- [72] In Majedi, despite the Court concluding that no issue of officer safety was apparent as a justification for entering the car, the Court nonetheless recognized that because the vehicle was to be impounded as an incidence to arrest, the officer was entitled to enter the vehicle to determine whether there were dangerous items inside.
- [73] In the case at bar, as I have already accepted the officers' evidence regarding Mr. Stafford's movements in the vehicle, it clearly justified a search of the driver's area for safety reasons given that the vehicle was going to be impounded.
- [74] Accordingly, the search of the vehicle incidental to arrest was lawful. As such, the drugs found in the vehicle which led to Mr. Stafford's arrest for possession of a controlled substances makes his arrest lawful and the subsequent arrest for possession for the purpose of trafficking is also lawful.

Strip Search

- [75] R. v. Golden, 2001 SCC 83, is the leading decision on strip searches, and established that in certain circumstances a strip search can be performed incident to arrest. More recently, in R. v. Ali, 2022 SCC 1, and in Tim, the Supreme Court returned to Golden and outlined the framework to be applied to strip searches. Justice Jamal, writing for the majority in Tim, summarized the framework as follows:
- [66] A strip search can be justified at common law as incident to a lawful arrest where there are "reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest" (R. v. Ali, 2022 SCC 1, at para. 2; R. v. Golden, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 99). Reasonable and probable grounds exist to justify a strip search "where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest" (Ali, at para. 2; see also Golden, at paras. 94 and 111). The strip search must also be conducted reasonably, in a manner that "interferes with the privacy and dignity of the person being searched as little as possible" (Golden, at para. 104).
- [76] In other words, Golden requires the following four requirements for a lawful strip search, as summarized by Justice Ross in R. v. Clow, 2022 BCSC 2492:
- a) The arrest must be lawful;
 - b) The strip search must be "incidental" to the arrest, that is, its purpose must be the discovery of evidence of the offence or items that pose a safety risk;
 - c) The police must establish that they have reasonable grounds for concluding that a strip search is necessary, in the particular circumstances of the arrest; and
 - d) The strip search must be conducted in a reasonable manner.
- [77] The Supreme Court has repeatedly emphasized that all strip searches are inherently humiliating, and highly intrusive, even where lawfully performed according to proper procedure: Golden at paras. 83, 99. As with other warrantless searches, strip searches are presumptively unreasonable and the Crown bears the burden of establishing on a balance of probabilities that there were reasonable grounds for the strip search and that the strip search was conducted reasonably: Golden at para. 105.
- [78] Further, "[s]trip searches cannot be carried out as a matter of routine police department policy applicable to all arrestees" and even "a 'routine' strip search carried out in good faith and without violence will also violate s. 8 where there is no compelling reason for performing a strip search in the circumstances of the arrest": Golden at para. 95. The four requirements are exactly that-requirements, such that even if the police have reasonable and probable grounds to carry out an arrest, that does not necessarily provide them the right to carry out a strip search incident to arrest. Additional grounds specific to the purpose of a strip search are also required: Golden at para. 98; see also R. v. Sekhon, 2020 BCSC 2180

at para. 170.

- [79] In assessing whether reasonable grounds to justify a strip search existed, mere suspicion is not sufficient. There must be some foundation to the suspicion of concealed weapons or evidence: *R. v. Vixaysongkham*, 2007 BCSC 183 at para. 33, citing *R. v. Douglas*, 2003 BCPC 392. The "reasonable grounds" standard requires more than mere suspicion but less than the civil standard of proof on a balance of probabilities: *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40 at para. 114. As noted above regarding reasonable grounds for arrest, the standard requires an assessment of both the subjective belief of the officer and the objective reasonability of that belief: *Tim* at para 24, citing *Storrey*.
- [80] Mr. Stafford relies on Justice Sharma's warning in *Sekhon* against placing too much weight on the fact that those who are stopped for trafficking often will have more drugs on them and that a mere possibility is not enough: at para. 160 and 161
- [81] Mr. Stafford submits that the strip search was based on unlawful grounds, and alternatively, even if the grounds for arrest were lawfully obtained, that those grounds were insufficient to support a strip search.
- [82] Given that I have determined that the arrest for possession of a controlled substance was lawful, I will now address whether the strip search was still nonetheless unlawful.
- [83] The Crown argues that Corporal Shillito had reasonable and probable grounds to request the strip search, and Corporal Mereski acted appropriately in approving that search. The Crown points to Corporal Shillito's independent observations of Mr. Stafford's movements in the vehicle during the initial vehicle stop, coupled with the baggies of drugs found in the vehicle and the short duration in an area known for drug trafficking. The Crown points to safety concerns for police and Mr. Stafford himself and Corporal Shillito's knowledge that drug traffickers often hide drugs or weapons in their crotch.
- [84] Corporal Shillito testified that prior to booking in Mr. Stafford, he conducted a pat down search, checked the waistband and had Mr. Stafford turn pockets inside out. He also used a wand to check for metal objects. Nothing was located.
- [85] Corporal Shillito said that his grounds to seek approval for the strip search were:
- the observations he made of Mr. Stafford elevating in the driver's seat, reaching down and what appeared to him as stuffing something.
 - the fact that cocaine was recovered from that area in the vehicle.
 - his knowledge that people in possession are also in possession of weapons quite often,
 - to ensure that Mr. Stafford was safe to be lodged into cells.
- [86] Corporal Shillito also stated that the safety concern could have been either drugs or weapons. In this regard, Corporal Shillito stated:

Based on my observations that I had seen, I wasn't satisfied with not following through with the search there because there could be multiple things. There could be, again, weapons, means of escape. There could be additional evidence. There could be additional drugs.

- [87] He also said that in his experience people will often conceal weapons or drugs in their underwear, waistband or near their scrotum.
- [88] In assessing whether the strip search was lawful, it is relevant what the authorizing officer's understanding of the facts that gave rise to his authorization: Sekhon at para 155
- [89] Corporal Mereski authorized the strip search. His evidence was mostly consistent with Corporal Shillito's in terms of the concerns. I note that Mereski is an experienced officer who conducted strip searches in the past. He stated that based on his own experience it is not unusual for individuals to conceal weapons or drugs in their crotch areas. He has seen lighters, cigarettes and many other items concealed on their person. The fact that drugs had already been located inside the vehicle did not reduce his concern. In fact, he eluded to a one plus one rule - if there's one there may be two.
- [90] In Golden, the Court specifically noted that "there is a greater need to ensure that accused persons are not concealing weapons or illegal drugs on their person prior to their entry into the prison environment": at para. 96-97
- [91] It must be remembered that Mr. Stafford had only been arrested for possession of a controlled substance when the decision to conduct the strip search was made. Corporal Shillito had not yet arrested him for the more serious charges of possession for the purpose of trafficking. It is very likely that Mr. Stafford would not have been held in custody pending a bail hearing for the initial possession arrest given that even after additional drugs were located in the vehicle he was released without process. In my view, the concern around Mr. Stafford, other prisoners or the jail staff's safety is simply not a reasonable one.
- [92] The fact that drugs had been located in the vehicle in the area that Mr. Stafford was observed engaging in the "stuffing" motions is a factor that I have considered.
- [93] I have also taken into consideration that Corporal Shillito had already conducted a pat down search and also used a wand to search Mr. Stafford and nothing was located.
- [94] The Crown relies on Clow. In that case Justice Ross found that the strip search was reasonable. However, the facts in that case are distinguishable for a number of reasons. Firstly, there was information that Mr. Clow was always armed and always carried drugs, there was a delay between Mr. Clow departing his residence and being arrested, which made it more likely that he would hidden drugs and weapons underneath his clothing. As well, Mr. Clow was going to be admitted to the cells at the detachment. Justice Ross found that search was grounded on safety of others, meaning individuals at the cells.

[95] On the totality of the evidence, I find that there was only a mere possibility or suspicion that Mr. Stafford was concealing "something" but Corporal Shillito did not know exactly what that could be. This simply cannot be sufficient to justify a strip search. I find that Corporal Shillito did not have the requisite reasonable and probable grounds and therefore the strip search infringed Mr. Stafford's s. 8 rights.

Section 10 Breaches

[96] I will now move onto whether Mr. Stafford's s. 10(a) and (b) Charter rights were infringed.

[97] Mr. Stafford argues that his s. 10 rights were infringed on two separate occasions: first when he was arrested for driving while prohibited and second, when he was arrested for possession for the purpose of trafficking.

[98] Section 10(a) of the Charter protects the right of persons, on arrest or detention, to be informed promptly of the reasons for the arrest or detention. Section 10(a) is "founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it": *R. v. Evans*, [1991] 1 S.C.R. 869 at 886-887, 1991 CanLII 98.

[99] Section 10(b) of the Charter protects the right of persons, on arrest or detention, to retain and instruct counsel without delay and to be informed of that right. As the Supreme Court put it in *R. v. Sinclair*, 2010 SCC 35 at para. 24, "[t]he purpose of s. 10(b) is to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation".

[100] The rights under ss. 10(a) and (b) are connected. On arrest, a person "must be informed of the reason(s) for the arrest so he or she can make an informed choice about whether to exercise the right to counsel and, if the right is exercised, to obtain legal advice based on an understanding of the extent of his or her jeopardy": *R. v. Heppner*, 2019 BCCA 108 at para. 63.

Section 10(a)

[101] The Supreme Court explained the tests under ss. 10(a) in *Evans* at 888:

When considering whether there has been a breach of s. 10(a) of the Charter, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b).

Section 10(b)

[102] As noted in *Sinclair* at para. 27, there are two components of s. 10(b)--the informational component and the implementational component. With the first component, the detainee must be advised of their right to counsel. With the second, the detainee must be given an opportunity to exercise that right to consult with counsel. The implementational

component includes an implied duty on the police to delay questioning the detainee until they have been given reasonable opportunity to consult counsel. Failing to comply with either component "frustrates the purpose of s. 10(b) and results in a breach of the detainee's rights": Sinclair at para. 27. See also R. v. Suberu, 2009 SCC 33 at paras. 37-38.

- [103] Once a detainee has been informed of their right to counsel, the detainee may waive the right by choosing not to take the opportunity to consult counsel. As our Court of Appeal cited with authority from R. v. Hollis (1992), 76 C.C.C. (3d) 421, 1992 CanLII 6007, in R. v. Green, 2003 BCCA 639 at para. 6:

In the absence of any evidence from which it could reasonably be inferred either that the detainee does not have a constitutionally sufficient understanding of the right, or that he is physically incapable of asserting it, it is completely consistent with a purposive interpretation of s. 10(b) to put the onus on the detainee to assert the right to counsel before any duty to facilitate its exercise is imposed by the police. Thus, in the absence of any communication on the subject from the detainee, the police are entitled to proceed with their investigation in the same manner as they would be if the right had been waived.

- [104] In that vein, once police have informed the detainee of the right to retain and instruct counsel without delay, and of the existence and availability of legal aid and duty counsel, the detainee bears the onus of asserting that right before the police must meet any duty to facilitate the detainee's exercise of that right: R. v. Bishop, 2013 BCSC 522 at para. 118.
- [105] If the detainee did assert their s. 10(b) right, the Crown must demonstrate that any delay thereafter was reasonable in the circumstances: R. v. Taylor, 2014 SCC 50 at para. 24. While the duties under ss. 10(a) and (b) arise "immediately" upon arrest or detention and upon the detainee requesting access to a lawyer, the "immediacy" may be tempered by a notion of reasonable delay. Taylor, at para. 24, sets out the following principles: (1) the arresting officer must facilitate the detainee's "requested access to a lawyer at the first reasonably available opportunity; (2) the Crown bears the burden of showing any delay was reasonable in the circumstances; and (3) the assessment of whether a delay is reasonable is a "factual inquiry".
- [106] In R. v. Patrick, 2017 BCCA 57, appeal to SCC ref'd, 37514 (3 October 2017), our Court of Appeal clarified, at para. 113, that in undertaking that factual inquiry, "[t]he practicalities of the situation must be taken into account; they inform the reasonableness of the delay in facilitating the exercise of the right". The court must consider whether the Crown has met its burden, and in that consideration, must "meaningfully assess" any stated reasons for delay, before coming to a factual finding of "whether, in the totality of the circumstances, the delay in facilitating contact with counsel was reasonable": Patrick at para. 116.
- [107] Considering the context of this case as a motor vehicle stop, I note the following observations from Justice Shergill in R. v. Abdullahi, 2020 BCSC 1822:

- [35] Sections 10(a) and (b) of the Charter require the police to advise a person upon arrest or detention, the reason for the detention and their right to retain and instruct counsel without delay. These rights are engaged immediately when a driver is stopped by the police, though the manner in which they operate depends on the nature of the stop, i.e., whether it is for enforcement of traffic or vehicle safety laws, or a criminal investigation: Woody, at para. 36.
- [36] When the vehicle stop is based on the enforcement of traffic or vehicle safety laws, the section 10 Charter rights of the detainee are overridden by operation of s. 1 of the Charter. This is because traffic and vehicle safety is considered to be a pressing and substantial objective, which constitutes a reasonable limit on one's s. 10 rights: Woody at para. 37; see also R. v. Strilec, 2010 BCCA 198 at para. 35, 40.
- [37] The s. 10 Charter right is fully engaged when the stop is based on suspected criminal activity. In that case, the detainee has the right to be informed of the reason for the detention and his or her right to retain and instruct counsel without delay: Woody at para. 38.
- [108] Mr. Stafford submits that his rights under ss. 10(a) and (b) were infringed by the police delaying in informing him of his Charter rights and cautioning him for the offences of driving without insurance, driving while prohibited and for possession of a controlled substance.
- [109] Further, despite that the police suspected Mr. Stafford of possession for the purposes of trafficking, the police delayed in advising him that he was under arrest for possession for the purpose of trafficking, "chartering" or cautioning Mr. Stafford for that offence despite a change in legal jeopardy.
- [110] The Crown says that there were no s. 10(a) breaches in relation to the initial series of arrests, because there were no delays in arresting, chartering, and warning Mr. Stafford of all three offences. The Crown also says there was no s. 10(b) infringement because the 3-minute delay between Mr. Stafford's arrest and his warning, during which no evidence was elicited, was reasonable in the circumstances.
- [111] The following is a timeline I have compiled regarding the delay to Mr. Stafford's Charter rights under s.10, based on the testimonies of Constable Alford and Corporal Shillito:
- a) 11:30 a.m.- vehicle stop.
 - b) 11:47 a.m. - Mr. Stafford is arrested for driving while prohibited.
 - c) 11:47 a.m. - 11:50 a.m. - Constable Alford searches vehicle and locates baggies of cocaine and gold watch strips.
 - d) 11:50 a.m. - Constable Alford arrests Mr. Stafford for driving without insurance, driving while prohibited and possession of a controlled substance. He is chartered and warned.

- e) 11:58 a.m. - Constable Alford commences photographing and searching the rest of the vehicle and locates further drugs.
- f) 11:59 a.m. - Corporal Shillito departs scene with Mr. Stafford to detachment.
- g) 12:03 p.m. - Corporal Shillito arrives at detachment with Mr. Stafford.
- h) 12:07 p.m. - Mr. Stafford advises he wishes to speak to counsel of choice.
- i) 12:09 p.m. - Mr. Stafford speaks with counsel of choice.
- j) 12:14 p.m. - Constable Alford leaves scene to head back to the detachment.
- k) 12:43 p.m. - Corporal Shillito conducts strip search of Mr. Stafford.
- l) 1:03 p.m. - Constable Alford seizes cash and gold watch from Corporal Shillito. They make decision to arrest Mr. Stafford for possession for the purpose of trafficking.
- m) 1:56 p.m. - Corporal Shillito arrests Mr. Stafford for possession for the purpose of trafficking and provides Charter rights and access to counsel.

[112] I will begin with addressing whether Mr. Stafford's s. 10 Charter rights were infringed on the first arrest. Mr. Stafford was arrested for driving while prohibited at 11:47 a.m. Constable Alford then proceeded to search the vehicle. After locating the drugs inside the vehicle, he then re-arrested Mr. Stafford for driving without insurance, driving while prohibited and possession of a controlled substance and provided Mr. Stafford his Charter rights at 11:50 a.m. Mr. Stafford indicated a desire to speak to counsel.

[113] In regards to Mr. Stafford's rights under s. 10(a), there was a three minute delay. I find that under the circumstances this was not unreasonable.

[114] It must be remembered that despite the need for immediacy, a detainee's opportunity to contact counsel generally may be delayed in order to allow the police to conduct a search incident to arrest. Justice Lamer explains this general rule in *Debot* at 1146:

The right to search incident to arrest derives from the fact of arrest or detention of the person. The right to retain and instruct counsel derives from the arrest or detention, not from the fact of being searched. Therefore immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel. There are, in my view, exceptions to this general rule.

[115] As well, both Constable Alford and Corporal Shillito explained that it was not feasible to provide roadside access to counsel. As well, the detachment was a mere 4 minute drive. I accept this as being reasonable in the circumstances.

[116] At 12:07 p.m. Mr. Stafford was given access to counsel but he wished to speak to counsel of choice. This was done at 12:09 p.m. As such, there was a 17 minute delay in providing Mr. Stafford access to counsel. Corporal Shillito testified that Mr. Stafford needed to be booked

in and processed before access to counsel could be provided. While it would have been preferable to provide Mr. Stafford his access to counsel immediately upon arrival at the detachment, I am not satisfied that the delay was unreasonable given the explanation provided by Corporal Shillito. Accordingly, I find that Mr. Stafford's rights under s. 10 of the Charter were not infringed in relation to the initial arrest.

- [117] In regards to the second arrest, once the additional drugs were located by Constable Alford, Mr. Stafford's jeopardy changed.
- [118] Mr. Stafford submits that despite suspecting him of possession for the purposes of trafficking, the police delay in "chartering" or cautioning him for that offence despite a change in legal jeopardy infringed Mr. Stafford's s. 10 rights.
- [119] Just because the police provide ss. 10(a) and (b) warnings to the accused, does not necessarily absolve them of responsibility to provide additional ss. 10(a) and (b) cautions afterward. Instead, where developments in the investigation mean that the initial advice is no longer "adequate to the actual situation, or jeopardy, the detainee faces", then to ensure the purpose of s. 10(b) is fulfilled, "the detainee must be given a further opportunity to consult with counsel and obtain advice on the new situation": Sinclair at para. 51.
- [120] Once the additional drugs were located, the police had an obligation to facilitate Mr. Stafford's access to counsel at the earliest practical opportunity: Taylor at para. 32.
- [121] Constable Alford located the additional drugs and other items at 11:58 a.m. He testified that he needed to deal with the exhibits immediately after he arrived at the detachment. However, in cross examination, he also agreed that he had a police radio and could have informed Corporal Shillito about the safe and its contents immediately so that Corporal Shillito could re-charter Mr. Stafford given that his jeopardy had changed. It was clear that Mr. Stafford was arrestable for possession for the purpose of trafficking at that point given what was located by Constable Alford. Had that occurred Corporal Shillito could have also advised Constable Alford of the items he located on Mr. Stafford. But that did not happen nor did it occur when Constable Alford first arrived at the detachment at 12:14 p.m.
- [122] Once Constable Alford arrived at the detachment, he and Corporal Shillito have discussions at 13:03 p.m. Even at that point it took another 53 minutes before Mr. Stafford was finally arrested for possession for the purpose of trafficking and able to exercise his Charter rights at 13:56 p.m.
- [123] Constable Alford acknowledged that the exhibits were not at risk if he had first spoken to Corporal Shillito about the additional items located in the vehicle.
- [124] As well, Corporal Shillito's explanation for the delay further reflects a disregard for Mr. Stafford's rights. In cross examination, Corporal Shillito explained the delay:

I wouldn't say that it wasn't time sensitive, but I would say that there was a conversation or maybe a discussion, and then also, we had to look at the totality of everything, right, from the initial traffic stop to the behaviour displayed, to the drugs located, the additional search of the vehicle or the additional search of the safe done by Constable Alford.

Based on all of those factors and that sort of thing, that -- I believe that's what would have caused any delay, if anything, but just because we find all of these drugs, it doesn't mean in every situation that we're going to proceed with charges or arrest that person for that offence, right?

Sometimes there's discretion used. But in this case, once the drugs were located, we kind of built grounds or had a discussion to show that, "Yeah, no, this is PPT based on the money, based on, you know, actions at the traffic stop, based on what we're seeing in the box", and so, then the decision was made to have him arrested and Chartered for PPT.

[125] In my view, this was not the earliest practical opportunity nor was it immediate or without delay and it was not reasonable.

[126] I find the officers made the decision to prioritize other tasks over advising Mr. Stafford that his jeopardy had changed and facilitating his Charter rights including access to counsel at the earliest opportunity and without delay. There is no reason why this could not have happened soon after Constable Alford located the additional drugs or even after he arrived at the detachment.

[127] In all of the circumstances, I find Mr. Stafford's s. 10 Charter rights were infringed when the police failed to provide him with his rights without delay.

Conclusion

[128] I am satisfied on all of the evidence over the course of this voir dire that Mr. Stafford has established that his rights under s. 8 of the Charter were infringed when the police conducted a strip search of him.

[129] As well, I find Mr. Stafford's rights under s.10 of the Charter were infringed when the police failed to re-arrest him for possession for the purpose of trafficking and provide him with his Charter rights and warnings without delay.

[130] Accordingly, the focus of the inquiry will now shift to whether the evidence should be excluded or admitted into evidence under s. 24(2) of the Charter.

"Girn J."

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