

CANADA / JUDGMENT

R. v. Ulm

2015 BCSC 1979

COURT

Supreme Court of British Columbia

DECIDED

30 October 2015

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2015 BCSC 1979 R. v. Ulm

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ulm,

2015 BCSC 1979

Date: 20151030

Docket: 63300

Registry: Chilliwack

Between:

Regina

v.

Timothy Joseph Ulm

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment on Voir Dire No. 1

Counsel for the Crown:

J.S. Barbour

Counsel for the Accused:

R. Dhanu

Place and Date of Trial:

Chilliwack, B.C.

August 25 - 26, 2015

Place and Date of Judgment:

Chilliwack, B.C.

October 30, 2015

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OVERVIEW

- [1] The Crown has charged Mr. Ulm with four firearms-related offences and breach of a court order contrary to s. 117.01(1) of the Criminal Code of Canada, R.S.C. 1985, c. C-46 [Code]. The Crown relied on evidence obtained from the fruits of an August 24, 2014 investigation conducted by two RCMP officers, Constables Powell and Tilman.
- [2] The investigation began sometime before 12:30 a.m., when the first officer involved, Cst. Powell, was on patrol in a marked police car on Lougheed Highway, near the boundary that separates Mission and Maple Ridge. Her attention was drawn to a motorcycle with its lights flashing, which was strapped onto the bed of a truck. This truck was later identified to be the truck of Mr. Ulm. She had a "hunch" the motorcycle might be stolen. She followed Mr. Ulm north, onto the Abbotsford-Mission Bridge, and then pulled him over with her police lights turned on.
- [3] Using Mr. Ulm's driver's licence number, Cst. Powell obtained information through Dispatch, which showed Mr. Ulm was serving a non-custodial conditional sentence. One of the Conditional Sentence Order ("CSO") conditions required Mr. Ulm to always have on his person a copy of the CSO. Cst. Powell also learned that one of the CSO conditions prohibited Mr. Ulm from possession of a firearm.

- [4] The second officer, Cst. Tilman, soon arrived on the scene and became involved in the investigation. At roadside, the officers conducted searches of the cab of Mr. Ulm's truck and motorcycle. The searches of Cst. Tilman and Cst. Powell produced the prohibited firearm and ammunition that eventually became the subject of the four firearms charges and the related breach of court order charges.
- [5] There is no question Mr. Ulm's Canadian Charter of Rights and Freedoms, [Charter] rights were infringed pursuant to s. 24(2) of the Charter. Specifically, Mr. Ulm asked the court to find that his s. 8, 9, 10(a) and (b) Charter rights were infringed, and to exclude all evidence obtained by the Crown after Cst. Powell pulled Mr. Ulm over. The court accordingly entered into a voir dire.
- [6] For the reasons that follow, I found several serious breaches of the Charter that called for exclusion of all evidence obtained and objects seized by the police after Cst. Powell detained Mr. Ulm pursuant to s. 24(2) of the Charter. The Crown called no further evidence and I acquitted Mr. Ulm of all charges.
- [7] The only evidence before the court came from the testimony of the two investigating RCMP officers. The critical task of determining basic facts and of establishing a clear sequence of events was made all the more challenging given the differences between the two officers' testimonies, their lack of recall of some material facts, and the significant internal inconsistencies in the testimony of Cst. Powell, in particular. What follows next is a summary of the facts that is pared down but captures the essentials.

Summary of Facts

- [8] On August 24, 2015, Cst. Powell was alone on patrol on Highway 7 (the Lougheed Highway), west of Mission, British Columbia, when she observed a dark pickup truck with a motorcycle set up in the bed. The motorcycle's lights were flashing. She suspected it was stolen because she thought the Mission area had seen an increase in the incidence of motorcycle thefts. She followed the truck. She wanted to get closer to it, to record its license plate number. She did not notice Mr. Ulm commit any driving infractions between the time when she first noticed the truck on the Lougheed Highway and when she pulled him over on the Abbotsford-Mission Highway).
- [9] Cst. Powell pulled the truck over to investigate whether the motorcycle was stolen. She obtained Mr. Ulm's driver's licence. I found Mr. Ulm had been detained at that point. The officer was minded to further her investigation, "as she had in other cases", through the information on Mr. Ulm's driver's licence and the assistance of Dispatch, who, in other such circumstances, had provided useful information for investigative purposes. In short, the officer "suspected" and "had a hunch" (both terms used) that the motorcycle had been stolen and she intended to investigate her hunch further. She did not tell Mr. Ulm the reason for his detention, did not advise him promptly of his right to instruct counsel without delay, and did not give him the police warning.

- [10] As mentioned, Cst. Powell considered herself engaged in an investigation of a breach of a court order and theft of a motorcycle. Mr. Ulm could not produce a copy of his CSO papers. However, he provided Cst. Powell with an explanation for not having them on his person that she thought plausible.
- [11] Cst. Tilman arrived on the scene after he heard Cst. Powell on the police radio requesting back up. On arrival at the scene a few minutes after, Cst. Tilman recalled Cst. Powell and Mr. Ulm standing outside the truck. Cst. Powell denied Mr. Ulm had exited the truck at that point. Cst. Tilman saw his role as keeping his eye on the scene to enable Cst. Powell to concentrate on her investigation.
- [12] I found that when Cst. Tilman arrived on scene, Cst. Powell and Mr. Ulm were standing outside the truck. Cst. Tilman overheard part of a conversation in which Mr. Ulm explained to Cst. Powell what he was doing with the motorcycle. He overheard Cst. Powell warning Mr. Ulm about his duty to keep his CSO conditions in his possession at all times. Cst. Powell formed the impression then that Cst. Powell was not going to arrest Mr. Ulm.
- [13] About this same time, Cst. Tilman made a quick first pass on the passenger side of Mr. Ulm's truck. He did not see any objects of concern inside the cab.
- [14] He recalled Mr. Ulm stepped up into the bed of the truck. The exact sequential timing of that action relative to Cst. Tilman's actions was not made clear, but the timing is not critical to the issues. The lights on the motorcycle were still flashing. He recalled that Mr. Ulm put the key into a compartment near the console area of the motorcycle to stop the flashing. It was not explained how, or exactly when, Mr. Ulm received permission to go up into the bed of the truck. Cst. Tilman had no recollection of Mr. Ulm's going up into the bed.
- [15] Cst. Tilman recalled he had been on the scene for about eight minutes when Cst. Powell had Mr. Ulm's registration checked to see if the motorcycle had been reported stolen. It was not reported stolen.
- [16] The vehicle identification number ("VIN") plate on the motorcycle had very small numbers. To make them out, Cst. Tilman testified he had to climb up into the bed for a closer look. Cst. Powell returned to her vehicle to check her computer and to speak to Dispatch.
- [17] According to Cst. Tilman, it was at about this time when he heard from Cst. Powell that Mr. Ulm was not supposed to have weapons in his possession as a term of his CSO. By then, Mr. Ulm had returned to the driver's seat, accompanied by Cst. Powell. They spoke by the driver-side door of Mr. Ulm's truck. Cst. Tilman also moved to that spot. As Cst. Powell spoke to Mr. Ulm, Cst. Tilman looked into the truck and saw a 'butt stock' in the back seat area. A butt stock is the part of a rifle that rests against the shooter's shoulder when the firearm is discharged. He also saw a bag on the driver's side of the back seat. On the passenger's side of the back seat, he saw some items of clothing beside the butt stock. He noticed attached to it some plasticized material designed to hold ammunition. Seeing the butt stock, he became concerned that a barrel to which the butt stock could attach could be nearby. He knew at

that point Mr. Ulm had a CSO that prohibited possession of firearms and he thought there could be a weapon in the truck. He further surmised that if a weapons prohibition had been imposed, there would be a reason for it and he reasoned that if Mr. Ulm had a weapon in his possession, he could pose a danger to the public. He was not concerned, however, about officer safety.

- [18] About this same time, Cst. Tilman overheard Cst. Powell say to Mr. Ulm she was going to let him go. He was concerned he would be released when there was a possibility he had a weapon. He did not want to see him sent on his way knowing about the butt stock.
- [19] Cst. Tilman asked Mr. Ulm to get out of the truck. He was cooperative and polite throughout. He walked to the back of the truck, as directed. Cst. Tilman and Mr. Ulm had a conversation about motorcycles. It was at that point that Cst. Powell started searching inside the truck at Cst. Tilman's direction. He did not specify to Cst. Powell what she should look for. He explained that he told her to search in such a way that Cst. Powell knew what she needed to look for.
- [20] Cst. Powell looked in the vehicle with a flashlight. Meanwhile, at the back of the truck, Cst. Tilman and Mr. Ulm conversed about motorcycles, a shared interest. Both doors of the truck were open at that point. After Cst. Powell finished her search, she said to Mr. Ulm, "I think you know what I found, you are under arrest".
- [21] After Mr. Ulm was handcuffed, Cst. Tilman conducted another search for more weapons. Cst. Tilman told Mr. Ulm his CSO prohibited him from having weapons in his possession and that he (Cst. Tilman) wished to make sure he did not have any weapons and to make sure he was not in breach of that particular condition, thereby necessitating a further search for weapons.
- [22] In his report to Crown counsel, Cst. Tilman confirmed that he conducted the search because Mr. Ulm's CSO directed he was not to have any weapons in his possession. He did not mention anything about officer safety.
- [23] In his further search, he found a 12-gauge shotgun behind the front passenger seat. He noted that the stock had been removed from it and replaced with a pistol grip stock. That grip matched the barrel and it appeared the butt stock had been removed from the barrel. Cst. Tilman searched Mr. Ulm. He then conducted another search of the vehicle. In the driver's side door compartment, he found a folding knife. A pouch behind the driver's seat contained ammunition for a 12-gauge shotgun. At this point, he estimated that he had been on the scene for about 15 to 20 minutes.
- [24] Cst. Tilman confirmed that Cst. Powell had checked her computer and spoke to Dispatch before he saw the butt stock in the backseat. Further, before his search, he understood Cst. Powell was satisfied the motorcycle had not been stolen; was satisfied with Mr. Ulm's explanation for why he was not carrying his CSO papers on him; and that she was going to let him go.

[25] As for officer and public safety concerns, Cst. Tilman stated he never saw Cst. Powell pat down Mr. Ulm. She did not express any concerns about officer safety at the scene. He was satisfied the motorcycle had not been stolen.

[26] Cst. Tilman agreed that it was not unlawful to have a butt stock in your possession.

Cst. Powell

[27] I will turn now to certain aspects of Cst. Powell's testimony. Cst. Powell has been a member of the RCMP for six-and-a-half years. During her time serving in Mission on general duty, she has been involved in searches and in the preparation of three Informations to Obtain a Warrant.

[28] Dispatch took about three to five minutes to respond Cst. Powell's inquiries with respect to the motorcycle's ownership. Dispatch informed her that the registration was in a state of change, which meant either insurance has been changed, a new registered owner was pending, or that it was in several other possible transitory states that could thwart accurate identification of the status of the vehicle and its current registered owner.

[29] Cst. Powell found the lights flashing significant information because she was aware lights on motorcycles are often rigged to flash when the vehicle has been stolen. She also heard around the detachment that, in 2014, there had been an increase in thefts in the Mission area of cross-country bikes and motorcycles. She was personally involved in the investigation of two cross-country bikes and one Harley-Davidson motorcycle. She could not recall what the historical pattern of thefts of motorcycles had been in the Mission area, but recalled being aware of a significant increase in 2014.

[30] I found there were no reports of a stolen motorcycle or an active criminal investigation ongoing regarding a stolen motorcycle at a time material to this case.

[31] Counsel closely questioned Cst. Powell about the alleged increase in the theft of motorcycles and dirt bikes in the summer of 2014. I will not review the details. For our purposes, suffice to say Cst. Powell's prior involvement in motorcycle thefts in the area was limited, the evidentiary foundation for detachment talk about a rise in thefts was thin and unsubstantiated, and Cst. Powell's knowledge of the pattern, incidence and details of how many thefts there had been was negligible. She testified that she had not investigated the pattern of such thefts over the years and could not say what the increase had been.

[32] On cross-examination, Cst. Powell confirmed that before she asked Mr. Ulm for his driver's licence and registration, she did not inform him of the reasons for his detention or of his right to retain and instruct counsel without delay pursuant to s. 10(a) and (b) of the Charter. Neither did she inform Mr. Ulm of those Charter rights when she went on to question Mr. Ulm about her investigation of breach of the CSO and the suspected theft of the motorcycle. Her questions put to Mr. Ulm were guided chiefly by information obtained from Dispatch, which in turn provided the information based on Mr. Um's driver's licence.

- [33] Mr. Ulm was unable to provide a copy of his CSO papers. He explained that he had been on Vancouver Island and thought he had left them there, but could not recall where. In any case, he did not have a copy on his person. He further explained he had been on Vancouver Island to pick up a motorcycle belonging to a friend, Matthew Michault, and that he was delivering it to Alberta for him. Cst. Powell recalled she spoke to a Matthew Michault, who Mr. Ulm identified at roadside as the owner of the motorcycle, but she could not recall if she spoke to him at roadside. Cst. Powell confirmed she had no reports of a stolen motorcycle that night. However, by the time Cst. Tilman arrived on the scene, about 10 or 15 minutes after she pulled over Mr. Ulm, she was minded to release him. On cross-examination, Cst. Powell agreed the information she received about the motorcycle did not indicate it was stolen.
- [34] Cst. Powell did not see what Cst. Tilman had seen inside the truck. She learned of it only when he asked Mr. Ulm to get out of the vehicle and questioned him about the butt stock. At that point, she also became concerned about the butt stock and a possible breach of the CSO. She determined that she was not going to let Mr. Ulm go, contrary to her earlier thinking. Cst. Powell's concern for officer safety only arose when Cst. Tilman directed Cst. Powell to look in the backseat while Mr. Ulm was placed in the backseat of her police vehicle.
- [35] On cross examination, Cst. Powell denied it was necessary to inform Mr. Ulm of his s. 10(a) and (b) Charter rights when she first pulled him over. She granted that she was not pulling over the truck for an offence such as speeding; rather it was for investigation of a possible stolen motorcycle. She agreed that she did not have objective grounds to initiate the investigation. Questioned further about her failure to give Mr. Ulm warnings under s. 10(a) and (b), she testified that she had never given those warnings when pulling over a driver, except, for example, if the driver should happen to match a suspect in a robbery. In short, she conceded that the vehicle stop was for the purpose of investigating and pursuing her hunch that the motorcycle was stolen.
- [36] She testified that she requested Mr. Ulm's driver's licence in order to access the RCMP database on whether the driver's licence was valid, background information for investigating whether the motorcycle had been stolen, and whether he was a prohibited driver. She wanted the name of the owner of the motorcycle because she could then find out if Mr. Ulm was in legal possession of it. She testified that she was seeking all such information to assist her in her investigation.
- [37] When counsel questioned her as to why she did not facilitate a call to a lawyer right away at roadside, she testified that she never facilitates a call to a lawyer at roadside.
- [38] As noted earlier, when Cst. Powell pulled Mr. Ulm over to ask for his driver's licence in furtherance of her investigation into the alleged stolen motorcycle, she did not advise Mr. Ulm of his s. 10(a) and 10(b) Charter rights, and did not administer the police warning. At 12:50 a.m., Cst. Powell recited a memorized set of Charter Rights and police warning. Six

minutes later, at 12:56 a.m., Cst. Powell read (from a card) Mr. Ulm his s. 10(a) and (b) Charter Rights and the police warning. He was then arrested for two breaches of his CSO, possession of a firearm, and for not having on his person a copy of the CSO. Arrest for possession of a prohibited firearm came later.

- [39] At 12:56 a.m., Mr. Ulm stated at roadside that he wished to speak to a lawyer. Cst. Powell could not recall if he asked to speak to a lawyer at 12:50 a.m., when Cst. Powell recited from memory the Charter rights and the police warning. Cst. Powell relied on her notebook to determine whether Mr. Ulm requested counsel at 12:56 a.m. She noted he said, "Yeah, I just want to go home. I don't want to go down this path." He also told her he wanted to call a lawyer. She then began his transfer to Mission detachment. Cst. Powell made no effort to facilitate a call to a lawyer. She did not recall if Mr. Ulm had a cell phone in his possession. She stated it was not "our practice" to facilitate a call to a lawyer from a roadside location; rather, she facilitates a call as "soon as practicable" usually at the detachment, irrespective of whether she or the arrested suspect has a cell phone with them.
- [40] Cst. Powell arrived at the detachment at 1:18 a.m. At 1:44 a.m., she contacted Legal Services for Mr. Ulm. Cst. Powell testified she could not facilitate a call at the detachment earlier because she needed to look in the Code to see what firearm charges she ought to lay. Nothing else stood in the way of facilitation of the call. Cst. Powell explained she could have set up the call, but then she would have had to arrange for another call to Legal Services after she had figured out the appropriate firearms sections.
- [41] Mr. Ulm spoke to Legal Services at 1:55 a.m. for two minutes. Before this, he had been provided with a s. 10(a) warning for breach of his breach of CSO conditions and for one count for possession of prohibited ammunition and a firearm, but not for any of the several other firearm-related charges he eventually faced. By 5:25 a.m., Cst. Powell had finished her further research and decided to lay other firearms-related sections of the Code, at which point, Mr. Ulm was read his Charter rights, again. She asked him if he wished to speak to Legal Aid or a lawyer. Mr. Ulm responded, "nothing", which Cst. Powell took as a "no".
- [42] As far as timing is concerned, they arrived at the detachment at 1:18 a.m. At 1:44 a.m., the message was left for Legal Services, and at 1:55 a.m. Mr. Ulm spoke to Legal Aid for two minutes. Cst. Powell then investigated further possible charges. At 5:25 a.m., she re-Chartered Mr. Ulm on the additional charges.

Cst. Tilman

- [43] Turning now to some particulars of Cst. Tilman's evidence.
- [44] Cst. Tilman has been a member of the RCMP for six-and-a-half years. On August 24, 2014, he was working in the Mission area on regular duties when he heard that Cst. Powell had pulled over a vehicle on the south side of the Abbotsford-Mission Bridge and was requesting backup. He cannot remember the time he heard that call. He volunteered to go to assist Cst. Powell. He estimates that it took him about five minutes to get there.

- [45] He estimated that he was on the scene for about eight minutes until the time Mr. Ulm was arrested.
- [46] When he arrived on the scene, Cst. Tilman noticed that both Cst. Powell and Mr. Ulm were outside the vehicle.
- [47] Cst. Tilman recalled Mr. Ulm was cooperative. He could not recall the reason Mr. Ulm gave for not having a copy of his CSO on his person, only that he had given some kind of an explanation.
- [48] On his first pass on the passenger side of the truck, Cst. Tilman's objective was to see whether there were any passengers in the vehicle. He was not looking for items at the time, only passengers. When he looked in the backseat area through the tinted glass, he noticed only a box on the backseat with items on top of it. He did not look closely.
- [49] He next observed Mr. Ulm getting into the bed of the truck. Cst. Tilman understood the lights were going off because the keys had not been located close enough to the motorcycle.
- [50] Cst. Tilman recalled that he had been on scene for about eight minutes when the registration was checked to see if the motorcycle had been stolen. The VIN plate was not easy to see and he explained that he had to climb into the bed of the truck to look for it. He recalled Cst. Powell had returned to her vehicle to check her computer and speak to Dispatch.
- [51] When Cst. Powell started to look inside the cab with a flashlight, he estimated about eight minutes had elapsed since his arrival.
- [52] On cross examination, Cst. Tilman confirmed that Cst. Powell had checked her computer and spoken to Dispatch before he saw the butt stock in the backseat. Before that, he understood that Cst. Powell was satisfied that the motorcycle had not been stolen and that she was also satisfied with Mr. Ulm's explanation with respect to the CSO papers and that she was going to let him go.
- [53] On cross examination, he confirmed he saw just the stock of the gun. He confirmed in his police report that while Cst. Powell spoke to Mr. Ulm, he looked inside the vehicle and saw an unattached butt stock. He agreed a butt stock is not a firearm and that it was not unlawful for him to have a butt stock in his possession.
- [54] In his police report to Crown counsel, Cst. Tilman stated he conducted the search because Mr. Ulm's CSO directed that he was not to have any weapons in his possession. There is no mention of officer safety. Cst. Tilman testified that if no weapons were found, Mr. Ulm would be free to go. He understood that when Cst. Powell arrested Mr. Ulm it was for breach of the CSO conditions.

Discussion

- [55] As the search was warrantless, the onus was on the Crown to prove on the balance of probabilities that the search itself was lawful; and that if so, it was conducted in a reasonable manner.
- [56] I found from the outset and throughout the investigation, Mr. Ulm's Charter rights were violated. The officer's investigation fell into a pattern, which, in their totality, constituted a serious violation of those rights.
- [57] As mentioned earlier, gaps and inconsistencies in the officers' evidence, particularly that of Cst. Powell, undermined the reliability of their testimony. Witness testimony must be cohesive, consistent, and coherent enough to allow the court to determine from the sequence of events what the officers were intending at material times and whether Mr. Ulm's Charter rights were respected throughout. Occasional memory lapses are to be expected, but the work requires that officers remember details of all the material events, or at least to have compiled notes of them soon after the events from which they can give the court a clear account of events and what they were thinking at the time.

S. 9 Arbitrary detention

- [58] There is no question Cst. Powell detained Mr. Ulm, as, later, so did Cst. Tilman.
- [59] Police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that their safety or that of others is at risk, they may conduct a protective pat-down search of the detained individual. They must conduct the detention and the pat-down search in a reasonable manner. The investigative detention should be brief. The detained individual is not obliged to answer questions posed by the police: *R. v. Mann*, 2004 SCC 52, at para. 45 [Mann].
- [60] To be lawful, a detention must be reasonably necessary on an objective view of the circumstances, "informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion the particular individual is implicated in the criminal activity under investigation." *Mann*, at para. 34.
- [61] An officer invoking the power of investigative detention must subjectively believe that the requisite standard has been met, and the officer's belief must be objectively reasonable: *R. v. Reddy*, 2010 BCCA 11, at para. 67, [Reddy]; *Mann*, at para. 27.
- [62] No traffic infraction occurred to justify pulling Mr. Ulm over and detaining him for investigation of the infraction. Cst. Powell implicitly acknowledged she did not believe she had reasonable grounds to arrest Mr. Ulm. Considering her testimony on the subject of

detention as a whole, I found Cst. Powell effectively acknowledged she did not have the grounds required to detain Mr. Ulm to investigate whether the motorcycle was stolen. She characterized her thinking as a "hunch", which I find was rooted in very thin soil of information about what was an unsubstantiated rise in motorcycle thefts in Mission. She acknowledged that she detained Mr. Ulm to obtain more information so she could investigate a hunch/suspicion.

[63] I found the Crown failed to show Cst. Powell subjectively believed that the requisite standard has been met and such belief was not objectively reasonable considering the constellation of facts she relied on. If there were a reasonable concern about flashing lights distracting other drivers, or that the driver might be in some difficulty, as a courtesy an officer might have cause to inquire, but that is not the case here, and this was not a dual investigation (i.e. investigation of a traffic infraction that is joined by a criminal matter). Cst. Powell lacked reasonable grounds to suspect in all the circumstances that Mr. Ulm was connected to a particular crime and that his detention was necessary.

[64] Mr. Ulm's detention was arbitrary.

S. 10(a) Reason for detention and police warning

[65] After Cst. Powell unlawfully detained Mr. Ulm, she failed to tell him she had done so to investigate whether the motorcycle he was carrying was stolen and that he was not obliged to answer questions. Cst. Powell maintained she had no obligation to advise Mr. Ulm of the reasons for his detention and to advise him of his right to remain silent. She stated she had never done so in other cases when she pulled over motorists, except in cases where the driver resembled a person being sought by the police for an offence such as a robbery. But I found that what occurred in this case was equivalent to such a scenario because Cst. Powell detained Mr. Ulm in the first place to investigate a criminal offence: *R. v. Suberu*, 2007 ONCA 60, at para. 40.

[66] Further, regarding the breach of condition that came to light through the means of Mr. Ulm's driver's licence that Cst. Powell required him to produce, the following passage from Reddy is apt:

[73] [E]ven when police officers lawfully detain someone reasonably suspected of being in breach of a probation order, they do not have a general power to search incidental to that detention for evidence of the suspected breach. It is clear from *Mann* that police officers may only conduct relatively non-intrusive protective searches incidental to a lawful investigative detention, and that such searches can be undertaken only when the officers have a reasonable basis for believing that their safety, or the safety of others, is at risk: para. 45. More specifically, as Iacobucci J. stated in *Mann*, "[the decision to search] cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition": para. 40.

S. 8 Unreasonable search or seizure

- [67] Mr. Ulm was not provided with any Charter warnings before either Cst. Tilman or Cst. Powell searched the interior of the truck, or the motorcycle in the bed of the truck. I found no basis for a search based on officer or public safety concerns. Neither officer raised any realistic concern for officer safety. Had there been any real concern about officer or public safety, it seems unlikely the officers would have tolerated Mr. Ulm gaining the ascendant position on the truck bed; standing above them in that position, a suspect could have gained possible access to potential weapons stashed, e.g. into a compartment on the motorcycle, or somewhere in the bed of the truck. Even assuming Mr. Ulm's detention was not arbitrary, as in the circumstances it was, Cst. Powell and Cst. Tilman did not have a general power to search incidental to that detention for evidence of Mr. Ulm's breach of his CSO, or evidence the motorcycle had been stolen. [Reddy, at para. 73.]
- [68] I found Mr. Ulm had a privacy interest in the truck and its contents. The expectation of privacy in a vehicle is not as high as it is in a person's home, office or on their person, but it is well recognized by the law: *R. v. Edwards*, [1996] 1 S.C.R. 128.
- [69] Searches conducted pursuant to a lawful investigative detention must be minimally intrusive. The searches conducted in this case could not be characterized as minimally intrusive. They did not end with discovery of the butt stock, which the officers knew was not a firearm and possession of it was not an offence. The officers thoroughly searched the cab of the truck, searched under the seat, unwrapped packages and looked into compartments. Further, they jumped up into the bed of the truck to obtain the VIN for the motorcycle.

CONCLUSIONS

- [70] In summary, Cst. Powell did not have reasonable grounds to detain Mr. Ulm for investigative purposes. His detention was arbitrary and breached s. 9 of the Charter. Mr. Ulm's arbitrary detention then tainted all of the officer's subsequent actions. Because the officers did not have reasonable grounds to detain Mr. Ulm for an investigative search, they did not have reasonable grounds to search for the offence of breach of a CSO, or firearms-related offences. They did not have reasonable grounds to arrest Mr. Ulm until after they conducted searches that violated s. 8 of the Charter. The searches were not conducted pursuant to a lawful arrest. Further, searches of the truck's cab and the motorcycle were not minimally intrusive and violated Mr. Ulm's rights pursuant to s. 8 of the Charter.
- [71] Standing alone, Mr. Ulm's rights under s. 10(a) and (b) of the Charter were also violated. From the outset, he was not informed promptly of the reasons for his detention. He was not promptly advised of his right to instruct counsel without delay. He was not advised of those rights before a search was conducted.

- [72] The reasons for failing to promptly facilitate Mr. Ulm's rights when he was arrested at roadside are inadequate, considering the circumstances in this case. Also inadequate are the reasons for the delay at the detachment, which further violated Mr. Ulm's 10(a) and (b) Charter rights.
- [73] In Reddy at paras. 91 - 94, Frankel J. summarized the application of s. 24(2) of the Charter when the judge has to determine whether to admit or exclude evidence, which required the court to:
- [91] [A]ssess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:
- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
 - (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little); and
 - (3) society's interest in the adjudication of the case on its merits.

See also: Harrison at para. 2

- [92] With respect to the first factor--seriousness of the breach--the greater the level of state misconduct, the greater will be the need of the courts to disassociate themselves from that conduct. Wilful or reckless disregard for Charter rights will, therefore, tend to support exclusion: paras. 71-74. Further, as the Chief Justice and Charron J. noted (at para. 75):

"Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: [citations omitted].

- [93] As for the second factor--impact of the breach on the accused--it was observed that "[t]he impact of a Charter breach may range from fleeting and technical to profoundly intrusive". The more serious the impact is on the rights of the accused, the more likely it will be that exclusion is warranted: paras. 76, 77.
- [94] The last factor--society's interest in a decision on the merits--involves the question of "whether the truth seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": para. 79. The reliability of the evidence is an important consideration, as is the importance of the evidence to the truth-seeking function of the trial. Although "seriousness of the offence" remains a consideration, it has far less importance than under the Collins/Stillman framework, because s. 24(2) focuses on the long-term implication for the repute of the administration of justice, and not the public's short-term desire for a conviction: para. 84.

- [74] I found the officers Charter-infringing conduct serious. As per Reddy at para. 101, "The critical factor in situating [Cst. Powell's] conduct along that fault line is that at the time of [her] encounter with [Mr. Ulm,] [Cst. Powell] either knew, or ought to have known, that [she lacked] the power to detain [Mr. Ulm] based on a bare suspicion that" the motorcycle on the truck bed of Mr. Ulm's truck might be stolen. She acknowledged she had no grounds for arrest. There was no nexus between a particular criminal activity known to her and Mr. Ulm.
- [75] The officers proceeded with an intrusive search absent reasonable grounds for detention or arrest, and without a reading of Mr. Ulm's s. 10(a) and (b) Charter rights. Prompt access to counsel was not facilitated. "Absent exceptional circumstances, deliberate, negligent or willfully blind state conduct does not equate with good faith": R. v. Dhillon, 2012 BCCA 254, at para. 76 [Dhillon].
- [76] I find the effect of the state's non-compliance with Mr. Ulm's Charter rights had a significant impact on him. As stated at para. 31 of R. v. Harrison, 2009 SCC 34, [2009] 2 S.C.R. 494, as cited at para. 77 of Dhillon:
- [31] being stopped and subjected to a search by the police without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial. As Iacobucci J. observed in Mann, the relatively non-intrusive nature of detention and search "must be weighed against the absence of any reasonable basis for justification" (para. 56). [Emphasis in original.]
- [77] In the case at bar, the investigation was intrusive and intensive.
- [78] Where a series of Charter offences occur, the significance of the Charter offences, as well as the seriousness of the state conduct, increases: R. v. Lauriente, 2010 BCCA 72, at paras. 27 - 29. Mr. Ulm's detention was not a brief inconvenience. The failure to advise him of the reasons for his detention and to give him prompt access to legal counsel strikes at the heart of the Charter's purposes. Standing alone, the delay in advising Mr. Ulm of the reasons for his detention and of his right to instruct counsel was excessive.
- [79] What amounts to "without delay" within the meaning of s. 10(b) varies depending on the circumstances: R. v. Comacho, 2011 BCSC 175, at para. 42 [Comacho]. But where a telephone is available, s. 10(b) requires the police to allow a suspect to use it. As Barrow J. noted in Comacho, at para. 44, "exigent circumstances" in a particular case may make a denial acceptable. But as stated in R. v. Manninen, [1987] 1 S.C.R. 1233, generally, refusing access to counsel until the suspect is taken to the police station is not justified. As we saw in this case, Mr. Ulm was not only denied opportunity to instruct counsel at roadside, his access at the station was also denied while Cst. Powell researched the firearms sections of the Code.
- [80] Society's interest in a decision on the merits involves the question of "whether the truth seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": R. v. Grant, 2009 SCC 32, at para. 79. Without the evidence

seized, the Crown is left with no case. Breach of a CSO condition such as a prohibition against possession of a firearm is a serious offence. Possession of a prohibited weapon and breach of other firearms offences are also serious matters. The community has a strong interest in controlling use of firearms. It expects compliance with the terms in CSOs and that offenders who violate them will be punished and in some instances, required to serve the remainder of their sentence in custody. Excluding the evidence as sought by Mr. Ulm may send the message that breaches of CSOs are not regarded with the seriousness they deserve. That acknowledged, the breaches in this case, both individual and cumulative, were egregious. The court must distance itself from them; overlooking such breaches effectively sends the message that the court may not uphold the Charter, even in the circumstances of serious state violations. In conclusion, I found public confidence in the administration of justice calls for exclusion of the evidence. For the foregoing reasons, I earlier granted the accused's s. 24(2) application and excluded from evidence all the information and objects obtained by the police after Mr. Ulm was detained by Cst. Powell.

"N. Brown J."

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Prepared on 29 October 2026 · Esheria