
CANADA / JUDGMENT

R. v. Wilkinson

2020 BCSC 2230

COURT

Supreme Court of British Columbia

DECIDED

25 September 2020

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2020 BCSC 2230 R. v. Wilkinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wilkinson,

2020 BCSC 2230

Date: 20200925

Docket: 42009-2

Registry: Duncan

Regina

v.

James Christopher Wilkinson

Before: The Honourable Mr. Justice Steeves

Oral Ruling on Voir Dire re ss. 8, 9, 10(a)

and 10(b) Charter Breach Applications

Counsel for the Federal Crown:

B. Lansdowne

Counsel for the Accused

appearing via teleconference:

C. L. Hodson

Place and Dates of Trial/Hearing:

Duncan, B.C.

September 8 - 10, 2020

Place and Date of Judgment:

Duncan, B.C.

September 25, 2020

- [1] THE COURT: Mr. James Wilkinson is charged with three counts under the Controlled Drugs and Substances Act. These relate to possession for the purpose of trafficking of heroin/fentanyl and methamphetamine, and possession of cocaine. He was arrested on July 13, 2019.
- [2] In an application filed July 2, 2020, relying on ss. 8 and 9 of the Charter, Mr. Wilkinson seeks the exclusion of evidence obtained by the police and relied on by the Crown. A voir dire was held, commencing on September 8, 2020. On September 9, 2020, counsel for Mr. Wilkinson applied to amend his application by adding ss. 10(a) and 10(b) of the Charter. This was not opposed by the Crown and I allowed the amendment.
- [3] The background here is that Corporal March and Constable Colgate, members of the RCMP in Duncan, British Columbia, were travelling in an unmarked police vehicle at 11:30 p.m. on July 13, 2019. They were proceeding south on Howard Avenue and were approaching a stop sign at Dingwall Street. On the right was an abandoned lot containing trees and undergrowth. Constable Colgate was driving, Corporal March was in the front passenger seat. They were in plainclothes and were not wearing any vest or other identification. The area was described by the police in their testimony as a high crime area. Corporal March described it as "ground zero" for drug and theft crime in Duncan. The two peace officers were on their way to investigate a theft in the area.
- [4] As the two peace officers approached the stop sign, they passed two males walking on the sidewalk on Howard Street on their right, and in the same direction. Constable Colgate observed that one of the two males was carrying a backpack. The peace officers, in their vehicle, passed the two males. While coming to a stop at the stop sign, Constable Colgate observed in his mirror, or over his shoulder, that the two males on the sidewalk had turned around and were running away in the opposite direction on Howard Avenue. They went into the abandoned lot. Corporal March had not observed the two males running. Constable Colgate said something like, "they are running", to Corporal March. Constable Colgate immediately put the police vehicle in reverse. He backed it up and turned it so the headlights were shining across the sidewalk into the abandoned lot. The two peace officers stayed in the vehicle. There was no siren or emergency lights used.
- [5] One of the two males then came out of the lot and ran down the sidewalk, south on Howard Avenue. Constable Colgate drove the vehicle to intercept the male. He turned right on Dingwall Street and stopped. Both peace officers got out and said words to the effect of,

"Police. Stop." The male was just around the corner at this point and he ran back into the vacant lot. He tripped and fell over an old low fence in the undergrowth. When told to stop, he said, "Okay", but got up and continued running north in the vacant lot parallel to the Howard Avenue sidewalk.

- [6] Corporal March pursued the male and Constable Colgate ran up the sidewalk along Howard Street in the same direction. There was another low fence and the male tripped and fell again, apparently also not seeing that fence. Corporal March had the advantage of seeing the obstacles that caused the male to trip and fall. Constable Colgate had run up the sidewalk and he held the male down after he fell. The male resisted and the two peace officers handcuffed him.
- [7] Constable Colgate traced the male's steps and found a backpack, and two red shoes. The backpack and one shoe was found, and the other shoe was found separately. He was gone a very short time and Corporal March testified that he had put the male in a comfortable position. He observed the male was not wearing shoes. He tried to calm the male and himself down. He asked the male why he ran, and the male said he had been shot before and was afraid of that happening again. Corporal March also requested the male's name, and Mr. Wilkinson identified himself.
- [8] While returning with the backpack, Constable Colgate searched it and he observed packages which he believed contained drugs. There was also cash, an unusual charging cord for a cellphone, an envelope, and a tag for a Mercedes-Benz. He believed there were grounds to arrest the male, and proceeded to do so when he returned to Corporal March and the male. Another police officer arrived and conducted a search of Mr. Wilkinson.
- [9] The backpack included the following items: cash in the amount of \$1,035 in one envelope; a zipped bag with \$1,330; 97.3 grams of heroin/fentanyl; 4.9 grams of crack cocaine; 7.7 grams of powder cocaine; 0.5 grams of methamphetamine; and 53.4 grams of caffeine. A cellphone charging cord was found, as was the tag for a Mercedes-Benz. On Mr. Wilkinson's person was found a key for a Mercedes-Benz and a cellphone matching the charging cord in the backpack.
- [10] As above, Mr. Wilkinson challenges his detention, arrest, and search under ss. 8, 9, 10(a), and 10(b) of the Charter. No submissions were made under s. 24(2) of the Charter, although it is included in Mr. Wilkinson's application. I will consider the Charter issues, beginning with s. 9.
- [11] Section 9 of the Charter states that, "Everyone has the right not to be arbitrarily detained or imprisoned." Mr. Wilkinson says he was arbitrarily detained without grounds, and the Crown disagrees. Mr. Wilkinson was detained on July 13, 2019. If he was validly detained, it was on the basis of an investigative detention. The police have the legal authority to detain someone for investigative purposes. A leading case describes the authority of the police to, among other things, detain "for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime" (R. v.

Mann, 2004 SCC 52, para. 45).

- [12] Another case usefully distinguished detention and arrest. That is *R. v. MacKenzie*, [2013] 35 S.C.R. 268, at para. 38. A distinction is made between reasonable grounds to suspect for the purposes of a detention for investigation compared to reasonable grounds for the purposes of an arrest. As is apparent and noted in Mann, the test for investigative detention is a "threshold lower than the reasonable and probable grounds required for lawful arrest" (Mann, at para. 27, citing *R. v. Simpson* (1993), 12 O.R. (3d) 183, at p. 203).
- [13] One similarity between detention and arrest is that for both there must be a subjective belief on the part of the police that the requisite standard, reasonable suspicion or reasonable grounds, has been met. In addition, the belief of the police must be objectively reasonable (*R. v. Reddy*, 2010 BCCA 11, at para. 67, citing Mann at para. 27).
- [14] Here, Constable Colgate testified that he believed the detention of Mr. Wilkinson was justified because of the following factors, what can be considered the subjective belief of the police:
- (1) The area where Mr. Wilkinson was detained was a high crime area. It was the "ground zero" area for crime in the Duncan area. In fact, the two peace officers were on their way to investigate a crime in the area.
 - (2) It was late at night, 11:30 p.m., and it was dark. As well, the two males were wearing dark clothing and one had a backpack.
 - (3) The police were driving an unmarked police vehicle, but, according to the testimony of the two peace officers, it was well known in the community to be used by the police. It had been in the fleet since 2010 and members of the public would say things like, "There goes the undercover police car."
 - (4) After the car passed the two males, they turned and ran into the adjacent vacant lot. The police then quickly backed up and turned so the headlights of the vehicle illuminated the trees and underbrush on the lot. Mr. Wilkinson then ran out, back to the corner, going south, and then turned back into the lot, going north. It was only when the police vehicle stopped at the corner and the two officers got out that they identified themselves as police, and the siren and emergency lights were never activated.
- [15] With respect to whether these factors are objectively reasonable, the Crown urges me to consider them together as the totality of circumstances. I accept that is the appropriate test.
- [16] Nonetheless, I must also say that two males are entitled to walk down a street at night, even in a high crime area and wearing dark clothes, without the risk of interference with their liberty by the police. The evidence is that the police, in their unmarked car, did not have any information about the two individuals; they had not recognized them or otherwise had any basis to associate them with any criminal behaviour. Constable Colgate testified that he and Corporal March were on the lookout for "suspect X", but they quickly concluded that neither

of the two males were this person. In sum, at the time they were first observed, the two males were not doing anything objectionable.

- [17] With respect to the unmarked police car, the evidence of Constable Colgate and Corporal March is that it is well known as a police vehicle. Corporal March testified that it might as well have a police decal on it. Specifically, the police officers believed that on July 13, 2019, at the material times, the car had been "made" by the two males and the cover of the police had been "blown". The two officers suggested that everyone, or most of Duncan, knew about the car and its connection to the police.
- [18] That was their evidence and perception, but I am skeptical that everyone in Duncan knew this vehicle belonged to the police. Also, I do not know how that could be proven, or, for that matter, how it could be proven that most people in Duncan knew about the car. If the point is that people in Duncan with experience in the criminal justice system knew the car belonged to the police, I do not have any evidence that Mr. Wilkinson had that knowledge. I also note that the two police officers were in plainclothes, without any identifying clothes such as vests.
- [19] Constable Colgate testified that the actions of the two males were suspicious. By this he meant they ran after the unmarked vehicle was seen and when it passed them in a high crime area. He testified that he wanted to investigate who they were and why they ran. He was questioned about whether there was anything specific in the actions of the two men, and he answered that he relied on the totality of the circumstances. Corporal March testified that he believed that they had an obligation to find out why the two men ran.
- [20] This is an opportune time to describe the evidence of an alternative explanation for Mr. Wilkinson fleeing. After he was detained by the police and while Constable Colgate retraced his steps back through the vacant lot looking for the backpack, Corporal March asked Mr. Wilkinson why he ran. Corporal March testified that Mr. Wilkinson said he was afraid of being shot, because that had happened before.
- [21] Looking at the entire chain of events, there was nothing objectionable in the actions of Mr. Wilkinson until after he was run to ground and his backpack had been retrieved and inspected. He was not detained until that point, because he was not compliant until then, and his s. 9 rights were not triggered until then.
- [22] As above, I cannot conclude that running away from an unmarked car late at night in a high crime area supports the level of suspicion necessary to justify an investigative detention. In my view, something more than a suspicion or hunch is required before reaching the level of a reasonable suspicion (Reddy at paras. 66 and 70; Mann at para. 30; and Simpson at p. 202).
- [23] The Crown relies on a decision of the Ontario Court of Appeal, *R. v. Nesbeth*, 2008 ONCA 579. In that case, the police entered an area where the accused was and they detected a strong odour of marihuana, when that substance was illegal. The accused fled and dropped a backpack that had drugs in it. At trial, the detention of the accused was found to be based

on a hunch and not cause. This was overturned on appeal. A "constellation of factors" was held to be sufficient to provide reasonable grounds for suspicion. While Mann stated that an individual under suspicion was to be "connected to a particular crime", it is not necessary, according to the Ontario Court of Appeal, to pinpoint the crime with absolute precision (Mann, at paras. 18, 20 and 45). As well, although the police did not articulate a subjective belief about the grounds for detention, it could be inferred.

- [24] Applying Nesbeth here, there is no evidence Mr. Wilkinson was committing a crime when he was seen running from the police vehicle. Neither being in the high crime area or carrying a backpack supports a reasonable suspicion. Running away from an unmarked vehicle may give rise to a hunch, but that is not sufficient.
- [25] The cases discuss the role of police experience in cases of investigative detention. In MacKenzie, there is a statement that an officer's "experience and training supported the probative value" of his evidence. Then, in Mann, the Supreme Court of Canada concluded that "an officer's hunch gained by experience" did not amount to reasonable suspicion.
- [26] In the subject case, the Crown relies on the training and experience of Constable Colgate and Corporal March. I accept their subjective assessment of reasonable suspicion based on their training and experience. This is the basis for their views that a high crime area is suspicious, and innocent people do not run from police cars. I have addressed these issues above and I have concluded that, on an objective basis, the police evidence does not elevate suspicion to reasonable suspicion for the purposes of an investigative detention.
- [27] The application by Mr. Wilkinson under s. 9 of the Charter is allowed. That leaves s. 24(2) to be dealt with. As well, if required, the other Charter provisions cited in Mr. Wilkinson's application.
- [28] CNSL B. LANSLOWNE: Yes, My Lord. When discussing with my friend yesterday, I understand Mr. Hodson has a court appearance at 10 a.m. this morning. So my friend and I, I think, if we were -- our intention, if needing to address 24(2), would be to seek a further time before Your Lordship in order to provide those submissions, if that's agreeable to the court. I think -- I anticipate, My Lord, my 24(2) submissions will, in large part, and the admissibility of that evidence in the backpack, will rely on whether or not that search of the backpack was lawful.
- [29] THE COURT: All right. Mr. Hodson?
- [30] CNSL C. HODSON: Yes, My Lord. As my friend indicated, I have court at 10 o'clock in Kamloops here, so I'm not prepared to make submissions on 24(2) under s. 9. There's also the issue of -- well, I take it s. 8 -- and I'll let my friend speak to this. I'll take it that, given Your Lordship's finding on s. 9, the s. 8 flows. But if there is also the s. 10(a) and s. 10(b), which, if established, would affect my submissions on 24(2). And then, also, we require, I think, an understanding of how Your Lordship characterized the search of the backpack.

- [31] THE COURT: All right. So are you both saying that if you had my decision on s. 8 and s. 10, that would help -- that would inform your position on 24(2)?
- [32] CNSL B. LANSDOWNE: It would, My Lord.
- [33] THE COURT: Yes, okay. Mr. Hodson?
- [34] CNSL C. HODSON: Yes, My Lord. Certainly, if there were more breaches, it would create a pattern, and that certainly would affect my submissions.
- [35] THE COURT: Yes, all right.
- [36] With respect to Mr. Wilkinson's application under s. 8 of the Charter to exclude the evidence contained in his backpack, and assuming that the Crown's application under s. 24(2) is successful, I conclude he abandoned the backpack while running away from the police. He gave up his ability to control or regulate the backpack when he released it, and there is no evidence he attempted to hide it for a later retrieval. In addition, where it was dropped was an area owned by a third party unknown to Mr. Wilkinson and he had no control over access to the property (R. v. Schirmer, 2020 BCSC 209, at paras. 79 to 89; R. v. Murray and Golding, 2016 NLTD(G) 75, at paras. 44 and 55).
- [37] With respect to s. 10(a) and 10(b) of the Charter, taken together, they state that everyone, on arrest or detention, has the right to be informed promptly of the reasons and their right to retain and instruct counsel without delay, and to be informed of their right to retain and instruct counsel.
- [38] The evidence here is that the material events happened very quickly. The police testified that the first sighting of them was about 11:30 p.m. and they were Chartered at 11:36 p.m. The time of 11:30 p.m. may have been an estimate and not one based on observing the actual time. So the total time could have been less than six minutes. Six minutes does seem to be a long time for the three men to engage on Howard Street, go to the corner, and then run back a short distance into the vacant lot.
- [39] The evidence is also that Mr. Wilkinson was given his s. 10(a) and 10(b) warnings a short time after he was detained on the ground. The only event that occurred after that was Constable Colgate retracing the short distance back to the first fence where Mr. Wilkinson had tripped the first time. Constable Colgate retrieved the backpack and shoes and then returned to Mr. Wilkinson and Corporal March. Constable Colgate had opened and inspected the backpack while walking back.
- [40] Taken overall, I conclude that Mr. Wilkinson was informed of his right to counsel, including his right to retain and instruct counsel, within two to six minutes of his detention. In my view, this was done promptly and without any delay.
- [41] CNSL B. LANSDOWNE: My Lord, thank you for those further reasons. It certainly assists in what I anticipate my submissions will be on 24(2).

- [42] THE COURT: All right. So I will leave that with counsel and you can arrange with scheduling for time for 24(2) submissions.
- [43] CNSL B. LANSDOWNE: Yes, My Lord. We have the October 5, 2020 fix date; that the intention was, on October 5th, to fix the date for this decision. I'm going to suggest that we keep that fix-date date, and my friend and I will coordinate with trial scheduling to find some time before Your Lordship for those submissions. I believe I'll be about 45 minutes in submissions.
- [44] THE COURT: All right. Mr. Hodson?
- [45] CNSL C. HODSON: Yes, My Lord, I probably will be about an hour. I think the -- yes, I think we might need a half a day; perhaps a day, if Your Lordship wishes to consider the matter and render a decision that day.
- [46] THE COURT: Yes. Yes. Sorry, what is scheduled for October 5th?
- [47] CNSL B. LANSDOWNE: October 5th we have a fix date, My Lord, already scheduled for this matter.
- [48] THE COURT: Okay. So I do not think we can leave -- so, Madam Clerk, this matter is --
- [49] THE CLERK: Is scheduled for Duncan for the 5th of October to fix a date in [indiscernible/ not near microphone].
- [50] THE COURT: So the fix date -- the fix date is scheduled?
- [51] CNSL B. LANSDOWNE: Yes.
- [52] THE CLERK: Yes, it's --
- [53] THE COURT: Okay.
- [54] THE CLERK: -- already scheduled. And I need to know if the accused is required.
- [55] CNSL C. HODSON: We have a counsel designation notice on file, Madam Registrar --
- [56] THE CLERK: Thank you.
- [57] CNSL C. HODSON: -- and I'm happy to appear on Mr. Wilkinson's behalf.
- [58] THE CLERK: All right. Thank you.
- [59] THE COURT: All right. So Mr. Wilkinson will not be there?
- [60] CNSL C. HODSON: That's what I would request.
- [61] THE COURT: Yes.
- [62] CNSL C. HODSON: My Lord, I'm wondering also -- and I don't want to put Your Lordship on the spot, but I'm wondering if written reasons of Your Lordship's decision will be available for us to consider?

[63] THE COURT: Ultimately they will. I cannot promise October 5th. Is that what you are thinking?

[64] CNSL C. HODSON: That's what I was asking, My Lord. I think it's fine. I took pretty thorough notes. I just was wondering. But, if it's not possible, it's like no issue.

[65] THE COURT: Yes. Well, I am just trying to reflect. Usually, at some point, a transcript ends up in front of me, and I review it, and then I make any minor changes, and then sign it. So I do not know -- I do not know the timing of that. Certainly -- well, by October 5th you will either have it or you will not.

[66] CNSL C. HODSON: Yes. Thank you, My Lord.

[67] THE COURT: All right. Okay. Thank you.

[68] THE CLERK: Order in court.

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

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Prepared on 28 October 2026 · Esheria