
CANADA / JUDGMENT

R. v. Young

2020 BCSC 1201

COURT

Supreme Court of British Columbia

DECIDED

23 July 2020

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2020 BCSC 1201 R. v. Young

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Young,

2020 BCSC 1201

Date: 20200723

Docket: 90585-2

90585-3

Registry: Kelowna

Regina

v.

Brodie Curtis Young

Before: The Honourable Mr. Justice G.P. Weatherill

Oral Ruling on Voir Dire

and Reasons for Judgment

Counsel for the Crown

appearing by teleconference:

D. Blumenkrans

Counsel for the Accused:

J.D.A. Watt

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 8, 9, 10, 11,

12, 22, 23, 24, 2020

Place and Date of Judgment:

Kelowna, B.C.

July 23, 2020

Introduction

- [1] THE COURT: Mr. Young faces five Criminal Code ("Code") charges related to possession of a .22 calibre gun, .22 calibre ammunition, and three ammunition magazines, (together, the "Seized Items") discovered by the RCMP during a roadside traffic stop of a white 2004 Hyundai Santa Fe vehicle, ("Hyundai") in which he was riding as a passenger.
- [2] Specifically, he is charged with the following offences:
- unauthorized possession of a firearm contrary to s. 91(1) of the Code;
 - possession of a firearm knowing its possession is unauthorized contrary to s. 92(1) of the Code;
 - occupying a vehicle knowing the presence of a restricted, prohibited firearm contrary to s. 94(1) of the Code;
 - possession of a prohibited firearm contrary to s. 95(1) of the Code; and
 - possession of a firearm while prohibited contrary to s. 117.01(1) of the Code.
- [3] The accused applies under s. 24(2) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 to have the Seized Items as well as certain statements he made to the RCMP ("Statements") excluded from evidence at trial on the basis that the officers infringed his rights under ss. 8, 9, 10(a), and 10(b) of the Charter.
- [4] A voir dire was held to determine the admissibility of the Seized Items and the Statements.

Summary of Evidence on the Voir Dire

- [5] Lake Country (also known as Winfield) is a small community north of the City of Kelowna. It has its own RCMP community policing detachment. The building is comprised of mostly offices and meeting rooms. It has no holding cells, facilities for taking fingerprints, or areas that can be used by detained persons to call lawyers. Although there have been exceptions, those arrested in Lake Country are typically taken to the Kelowna RCMP detachment, a drive of approximately 20 to 25 minutes.

- [6] There were three members of the Lake Country RCMP working the general duty night shift on November 4, 2018. Those officers were Constable Marshineu (an officer with nearly 40 years' experience, the last 14 of which were at the Lake Country detachment), Constable Hutt (an officer with 20 years' experience, the last two of which were at the Lake Country detachment), and Constable Grebe (an officer with 19 years' experience, the last four of which were at the Lake Country detachment). All were attired in the standard police uniform that included a bullet-proof vest, pepper spray, a baton, service weapon, clips, and handcuffs.
- [7] Constable Marshineu was alone in his marked police cruiser driving northbound on Highway 97 through the centre of Winfield. It was shortly after one o'clock a.m. He observed the Hyundai travelling southbound on Highway 97 and testified that he decided to conduct a random and routine traffic stop of it. He said his purpose was to check for licencing, insurance, and sobriety. He turned his cruiser around and followed the Hyundai for a short distance. He did not observe anything of concern. He activated his emergency lights and the Hyundai promptly pulled over and stopped at the side of the highway ("Traffic Stop"). He radioed the Hyundai's licence plate to his dispatch officer and also requested Constable Grebe to attend for backup. Dispatch confirmed that the Hyundai was registered to a Mr. Anthony Roberts with whom Constable Marshineu was quite familiar. Indeed, Mr. Roberts was known by the Lake Country RCMP to be an unsavoury character with a lengthy criminal history including a conviction for robbery and wearing a mask. The Lake Country RCMP knew where he lived and they made a point of keeping an eye on him. They also knew he was the subject of a lifetime weapons prohibition.
- [8] Constable Marshineu's prior dealings with Mr. Roberts included suspecting him of fleeing from a traffic stop a few months previous. He suspects Mr. Roberts led him in a pursuit that eventually had to be called off. Accordingly, Constable Marshineu had a heightened sense of awareness regarding Mr. Roberts.
- [9] Constable Marshineu exited his cruiser and approached the Hyundai. He checked its rear door by tugging on its handle to ensure there would be no surprises. On his way to the driver's side door, he also shone his flashlight into the rear and back seat of the Hyundai looking for signs of potential threats. He engaged in a conversation with Mr. Roberts who was polite and accommodating. Mr. Roberts asked Constable Marshineu why he had been pulled over. Meanwhile, the accused was occupying the front passenger seat of the Hyundai. On Constable Marshineu's request, both occupants promptly, politely, and correctly identified themselves to him. Constable Marshineu noted no signs that Mr. Roberts might be impaired. There were also no licencing concerns. He noted, however, that both occupants appeared more nervous and fidgety than Constable Marshineu was used to seeing while conducting typical traffic stops. He questioned in his mind if the two were up to something criminal.

- [10] Constable Marshinew testified that his authority for the Traffic Stop was the Motor Vehicle Act and the Criminal Code. He stated that one of his duties as a police officer is to ensure that drivers comply with those two statutes. He stated that despite knowing that Mr. Roberts drove a Hyundai matching the vehicle that had passed him in the opposite direction, his decision to conduct the Traffic Stop had nothing to do with suspecting it was Mr. Roberts behind the wheel. He says that it was not until dispatch confirmed the Hyundai was registered to Mr. Roberts that the recollection of Mr. Roberts' firearms prohibition and fleeing from a traffic stop months earlier came back to mind.
- [11] Although there were streetlights in the area of the Traffic Stop, the ambient lighting was not very good. In addition to this cruiser's headlights focused on the Hyundai, Constable Marshinew had positioned his cruiser's spotlight to shine through the Hyundai's back window. The Hyundai was equipped with tinted windows and its interior was not well illuminated.
- [12] Constable Hutt was nearby, having just departed Lake Country's detachment a short distance away. He had overheard Constable Marshinew's request that Constable Grebe attend for backup and decided to drive to the scene. He activated his unmarked police Tahoe's emergency lights and pulled in front of the Hyundai. He also knew about Mr. Roberts' infamy and wondered why he was out at 1:15 a.m. Constable Hutt exited his Tahoe and positioned himself behind Constable Marshinew who was at the driver's window. He, too, recognized the Hyundai from prior dealings with Mr. Roberts and knew of Mr. Roberts' significant criminal history. He knew he had to be extra vigilant when dealing with him.
- [13] Despite Constable Marshinew having seen nothing to indicate Mr. Roberts was impaired in any way and although he agreed he had no grounds to do so, he directed Mr. Roberts to exit the Hyundai. He did so, he testified, because both Mr. Roberts and the accused appeared to be nervous and fidgety and he wanted to separate them. Mr. Roberts complied.
- [14] At some point, either as Mr. Roberts was in the process of exiting the Hyundai or after he was already outside, Constable Marshinew caught a quick glimpse of the accused lean forward and quickly stuff something into his jacket. This movement was referred to during the voir dire as the "stuffing motion". Constable Marshinew did not see what the object of the stuffing motion was nor indeed whether there was an object involved. Nevertheless, he immediately suspected the accused had a gun. The stuffing motion surprised and startled Constable Marshinew who immediately advised Constable Hutt that the passenger had stuffed something into his jacket.
- [15] Concerned for officer safety, especially since he already knew Mr. Roberts was known to carry weapons, Constable Marshinew reacted quickly. He turned Mr. Roberts over to Constable Hutt, ran around to the front of the Hyundai, pointed at the accused with his left hand, placed his right hand on his service weapon and, in a loud demanding voice, ordered the accused to show him his hands. The accused appeared very scared. Constable Marshinew described that his eyes were "as big as saucers".

- [16] The accused complied with Constable Marshinew's demand, showed him his empty hands, but then dropped his hands out of sight. This prompted Constable Marshinew to run around to the passenger door, open it, forcefully eject the accused from the Hyundai, spin him around, and pin him against the Hyundai with his hands on its roof. As he did so, a large cylindrical metal object which turned out to be a barrel-type ammunition magazine ("Barrel Magazine") fell out of the accused's coat onto the ground.
- [17] The accused spontaneously volunteered to Constable Marshinew, "It's only .22 bullets". At that point, Constable Marshinew believed there was a gun associated with the Barrel Magazine and demanded that the accused tell him where the gun was that went with it. The accused replied that it was in a black bag on the floor of the Hyundai where the accused had been sitting ("Black Bag"). The accused volunteered, "It's only a .22. I found it". Constable Marshinew asked the accused if he had a licence for the gun and the accused replied that he did not.
- [18] Meanwhile, Constable Hutt had taken control of Mr. Roberts, placed him in handcuffs, secured him at the rear of the Hyundai, and had moved to the passenger side of the Hyundai. He saw the Barrel Magazine lying on the ground. Unlike Constable Marshinew's description, he testified that he saw the accused get out of the Hyundai on his own accord.
- [19] Constable Marshinew immediately arrested the accused for unlawful possession and storage of a firearm and handed the accused to Constable Hutt who handcuffed him and took him away to his Tahoe. Once there, Constable Hutt re-arrested the accused and provided him with both a Charter warning and a police warning. Following Constable Hutt's Charter warning, the accused stated that he wished to speak to a lawyer.
- [20] Constable Marshinew retrieved the Black Bag from the passenger floor and placed it on the hood of his cruiser. At about this same time, Constable Grebe arrived on scene and parked behind Constable Marshinew's cruiser. Constable Marshinew instructed Constable Grebe to search the Black Bag. In the Black Bag mixed in with tools, personal belongings, and other paraphernalia, Constable Grebe located a firearm (later determined to be a Ruger .22 calibre semi-automatic), a "banana" clip and clear plastic clip, both almost fully loaded with .22 calibre ammunition. He also determined that the Barrel Magazine was nearly fully loaded with .22 calibre ammunition. All of these items comprise the Seized Items. He photographed the Seized Items and placed the Black Bag back on the passenger floor of the Hyundai for more photos. He also asked Constable Hutt to remove the accused from the Tahoe and took a photo of him.
- [21] Constable Hutt remained at the scene with the accused handcuffed in the rear of his Tahoe for approximately 20 minutes before leaving to transport him to the Kelowna RCMP detachment for processing. The reason for this extra 20 minutes was not fully explained.

- [22] As it happens, earlier that evening, Constable Grebe was on routine patrol in Lake Country in the area where Mr. Roberts was known to reside. He had seen the accused walking empty handed along the roadway, had turned his cruiser around, and had stopped to talk to him. At that time, the accused did not have the Black Bag with him. While handcuffed in the rear of the Tahoe, the accused told Constable Hutt that he had seen and had talked to a police officer (meaning Constable Grebe) earlier that evening.
- [23] Constable Hutt eventually left the scene with the accused and drove to the Kelowna RCMP detachment, arriving at approximately 2:00 a.m. (35 minutes or so following the arrest). After completing paperwork, Constable Hutt arranged for the accused to contact Legal Aid. Because the accused was going to be released on a promise to appear, the accused stated that he no longer wished to speak to counsel. At 2:25 a.m., the accused was released from custody.
- [24] Mr. Roberts was not ticketed or charged and was allowed to leave the scene in the Hyundai at 2:15 a.m. All told, the officers were at the scene for about one hour.

Discussion

- [25] The defence has the onus of establishing that the Seized Items and Statements ought to be excluded.
- [26] I will begin my analysis with a review of some of the officers' evidence.

Reliability of the Evidence

- [27] In short, I have particular concerns about the reliability of Constable Marshinew's evidence.
- [28] Of greatest concern is Constable Marshinew's evidence about the reason for the Traffic Stop. He testified that he did not know the Hyundai belonged to Mr. Roberts before he decided to initiate the Traffic Stop. I have concluded that he decided to stop the Hyundai either knowing or highly suspecting it was Mr. Roberts he was stopping. This is based on a number of factors including the following:
- Mr. Roberts was notorious at the Lake Country detachment such that the officers stationed there made a point of keeping an eye on him;
 - Constable Marshinew's evidence was that he suspects Mr. Roberts to have evaded a police stop approximately two weeks before;
 - Constable Marshinew knew that Mr. Roberts owned and drove a vehicle identical to the Hyundai; and
 - during Constable Marshinew's first radio call to dispatch and before the owner of the Hyundai was confirmed to be Mr. Roberts, he asked Constable Grebe to attend for backup; it would have been unusual to call for backup in a routine traffic stop.

I have come to this conclusion reluctantly because it means I did not believe Constable Marshinew's evidence on the reason for initiating the Traffic Stop.

[29] This lack of candour had the effect of raising concerns about the reliability of Constable Marshinew's evidence generally, examples of which include:

1. Constable Marshinew testified that he was at the driver's side door of the Hyundai and asked Mr. Roberts to get out. He said Mr. Roberts was already out of the Hyundai when he saw the accused stuff something into his jacket. He said he then turned Mr. Roberts over to Constable Hutt who was standing beside him so that he could deal with the accused. In contrast, Constable Hutt's evidence was that he was standing beside and to the rear of Constable Marshinew as he talked to Mr. Roberts who was still seated in the driver's seat of the Hyundai. Constable Marshinew then said, "He stuffed something", and ran around to the front of the Hyundai. According to Constable Hutt, it was he who removed Mr. Roberts from the Hyundai.
2. Constable Marshinew stated that he manhandled the accused out of the passenger seat of the Hyundai, spun him around, and pinned him up against the vehicle, presumably to emphasize to the Court the officer safety issue. Constable Hutt says that Constable Marshinew ordered the accused to get out and the accused complied by exiting on his own.
3. Constable Marshinew's description of Mr. Roberts' demeanour changed over time. He made no contemporaneous notes of Mr. Roberts' demeanour in his notebook. However, at the preliminary inquiry, he testified that Mr. Roberts was "very inquisitive" as to why he had been stopped. At the trial, he testified that Mr. Roberts was "aggressive and demanding". He also testified at trial that Mr. Roberts was fidgeting and his hands were shaking. There is no such description of Mr. Roberts in his notes or in the Report to Crown Counsel that he prepared.
4. At trial, Constable Marshinew testified that during the Traffic Stop he was focused on Mr. Roberts, yet he says he noticed that the accused was shaking and appeared nervous. At the preliminary inquiry, however, Constable Marshinew testified that he did not notice the accused because he was focused on Mr. Roberts. During cross-examination, he conceded that he did not notice the accused shaking or appearing nervous.
5. Constable Marshinew testified that he saw the accused use his left hand to "stuff" something into the right side of his jacket. He could not explain the light source that would have permitted him to see the accused's actions or why he was able to see the accused from the driver's side door as Mr. Roberts was exiting the vehicle. Nevertheless, he stated that he was sure he saw the stuffing motion.
6. Prior to Constable Marshinew making an announcement about the accused's stuffing motion, there was no indication of anything untoward going on or any safety concerns. The accused was cooperative, compliant, and non-threatening, as was Mr. Roberts. He was neither aggressive nor angry. Indeed, the evidence suggests the opposite. Constable Hutt

agreed that other than Mr. Roberts being a notorious person in the eyes of the Lake Country police and that he appeared nervous, there was nothing that Mr. Roberts did to suggest a safety concern.

7. Despite the accused being completely cooperative, Constable Marshinew suggested that there was a police safety issue throughout and he felt threatened even after the accused was placed in handcuffs. Constable Marshinew was a fully armed officer with all the usual protections. Constable Hutt was also present if backup was needed.
- [30] Where Constable Marshinew's testimony conflicted with Constable Hutt's, I prefer that of Constable Hutt.

The Charter

- [31] At issue are ss. 8, 9, and 10 of the Charter. Detention of members of the public restricts the enjoyment of liberty, a right that is protected by s. 7 of the Charter. The Charter guarantees that liberty will only be curtailed in accordance with principles of fundamental justice. Section 9 of the Charter protects members of the public from being arbitrarily detained and s. 10 provides that, on detention, a person has the right to be informed about the reason for the detention and the right to retain and instruct counsel without delay. The purpose of s. 9 is to protect individuals who are going about their business from unjustified interference from the police. A person's Charter rights are triggered immediately at the point of detention: *R. v. Grant*, 2009 SCC 32, at paras. 19-22.
- [32] While the police are charged with law enforcement, which can be risky and dangerous, their powers are not without limits and must withstand the scrutiny of the Charter.

The Traffic Stop

- [33] The Crown properly concedes that the Traffic Stop was an arbitrary detention.
- [34] There is no debate that police officers can randomly stop drivers of vehicles for reasons related to such things as checking licences, insurance, sobriety, and mechanical fitness. This is because traffic stops related to the enforcement of traffic, driving, sobriety, or other vehicle safety laws that are authorized under the Motor Vehicle Act, R.S.B.C. 1996, c. 318, and the Criminal Code, and do not infringe s. 9 Charter rights: *R. v. Kaddoura*, 2009 BCCA 113, at paras. 12-13; *R. v. Woody*, 2018 BCSC 2275, at para. 34.
- [35] However, random traffic stops are limited to their intended purposes. A traffic stop initiated for no valid purpose is flawed and a breach of the Charter: *R. v. Harrison*, 2009 SCC 34; *R. v. Ladouceur*, 2002 SKCA 73; and *R. v. Nolet*, 2010 SCC 24.
- [36] Subject to the foregoing, the police are not entitled to arbitrarily stop vehicles without reasonable and probable grounds to believe the occupants are engaged in criminal activity. They cannot stop a vehicle on a hunch that the occupants might be up to something and they want to search the occupants or the vehicle: *R. v. Mellenthin*, [1992] 3 S.C.R. 615 at 629.

- [37] I have already stated my finding regarding the reason for the Traffic Stop. It was not a routine traffic stop as Constable Marshineu suggests. To the contrary, I conclude that Constable Marshineu was on patrol, travelling northbound in Winfield when he saw the Hyundai travelling in the opposite direction and knew or highly suspected that it was Mr. Roberts behind the wheel. He decided to stop the Hyundai and see what Mr. Roberts was up to under the guise of a routine traffic stop. I conclude he was specifically targeting Mr. Roberts.
- [38] Accordingly, the Traffic Stop was initiated for an improper purpose and was a clear violation of the accused's s. 9 Charter right to be free from arbitrary detention.

The Accused's Arrest

- [39] The complicating factor in this case is that the Traffic Stop, which I have determined was illegal, morphed into a further incident that led to the accused's arrest. If there was no Traffic Stop, there would have been no arrest.
- [40] After the Traffic Stop, Constable Marshineu directed Mr. Roberts to exit the Hyundai. In the circumstances, he had no right to do so. Then came the stuffing motion triggering Constable Marshineu's expressed police safety concerns in turn triggering Constable Marshineu to forcibly remove the accused from the passenger seat. This led to the discovery of the Barrel Magazine, the accused's Statements, and the discovery of the Black Bag and its contents.
- [41] I accept that Constable Marshineu saw the accused's stuffing motion. I accept that the stuffing motion was the accused putting something into the inside of his jacket and that Constable Marshineu did not know what it was. It could have been anything including a gun. Given that the accused was in the company of Mr. Roberts, a gun was a reasonable possibility. I have concluded that the stuffing motion observed by Constable Marshineu, given the totality of the circumstances, gave him subjectively and objectively reasonable grounds to believe that there may be a police safety issue. He was therefore entitled to proceed further and take the steps he did respecting the accused. He was entitled to demand that the accused show him his hands and, when he dropped them, to take the steps he took in removing the accused from the Hyundai. I conclude that a reasonable person standing in the officer's shoes would have done the same thing: *R. v. Juan*, 2007 BCCA 351, at para. 27; *R. v. Jir*, 2010 BCCA 497, at para. 24; *R. v. Luong*, 2010 BCCA 158, at para. 18; Nolet at para. 23; *R. v. Mann*, 2004 SCC 52, at paras. 40, 41, and 45.
- [42] In other words, Constable Marshineu's actions respecting the accused were justifiable from an objective point of view: *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250; *R. v. Tran*, 2007 BCCA 491, at para. 6.

Search of the Black Bag

- [43] The search of the Black Bag was made without a warrant. It was therefore *prima facie* an unlawful search. The burden is on the Crown to show that the search was reasonable. It was prompted by the accused answering Constable Marshinew's demand to know where the gun that went with the Barrel Magazine was.
- [44] I am satisfied that the search of the Black Bag was made incidental to the accused's arrest and, if the accused's arrest was legal, so was the search of the Black Bag.

The Accused's Statements

- [45] Constable Marshinew had four interactions with the accused which all occurred during the events that were unfolding quickly:
1. when Constable Marshinew asked the accused to identify himself and the accused complied;
 2. when the Barrel Magazine fell from the accused's jacket and the accused spontaneously stated, "It's only a .22";
 3. when Constable Marshinew responded by asking the accused, "Where is the gun that goes with it?", and the accused responded that it was in the Black Bag; and
 4. when Constable Marshinew asked the accused if he had a licence for the gun to which the accused replied, "No".
- [46] In addition, Constable Hutt had interactions with the accused while he was in the rear of the Tahoe and the accused mentioned that he had found the Black Bag earlier that evening.
- [47] These interactions with the officers will jointly be referred to as the "Statements".
- [48] For the Statements to be excluded, the accused must prove on the balance of probabilities both that they were obtained by way of an infringement of a Charter right and that their admission could bring the administration of justice into disrepute.
- [49] As mentioned earlier, the Traffic Stop was illegal. The stuffing motion is what triggered the confrontation between Constable Marshinew and the accused.
- [50] It was a challenging situation for the officers. It is not easy on these facts to determine when exactly the accused's Charter rights were engaged and when he should have been told of his s. 10(a) and (b) Charter rights.
- [51] However, I conclude that the scene was secure immediately upon the accused being removed from the Hyundai and handcuffed. At that point, the accused's s. 10(a) and 10(b) Charter rights were engaged and he had the right to know immediately the reason for his arrest and his right to counsel: *R. v. Suberu*, 2009 SCC 33, at para. 42.

[52] I do not accede to the suggestions by Constables Marshinew and Hutt that they continued to feel threatened after the accused was handcuffed. There were no realistic police or public safety issues. Both occupants of the Hyundai were secured in handcuffs and three fully equipped police officers were present. It was at that point the accused's Charter rights were engaged.

Section 10(a) Rights

[53] The evidence is that immediately upon being arrested, Constable Marshinew properly advised the accused the reasons for his arrest. I accept that evidence and conclude his s. 10(a) Charter rights were not violated.

Section 10(b) Rights

[54] Section 10(b) of the Charter imposes a duty upon the police on arresting or detaining a person:

- (1) to inform the detainee of his or her right to retain and instruct counsel
- (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

(R. v. Taylor, 2014 SCC 50, at para. 23)

[55] Constable Marshinew had a duty to inform the accused of his s. 10(b) right to counsel immediately upon his arrest. Instead, he handed the accused over to Constable Hutt who waited until he had placed the accused in his Tahoe to inform him.

[56] The officers also had an obligation to facilitate the accused's access to counsel at the earliest practical opportunity: Taylor at para. 32.

[57] Upon Constable Hutt providing the accused with his s. 10 (b) Charter rights while in the rear of the Tahoe and upon the accused stating that he wished to consult counsel, in my view, Constable Hutt should have transported him to the Lake Country detachment which was a drive of approximately one minute and facilitated the phone call. To suggest that the policy is to transport detained persons to Kelowna, a drive of 20 to 30 minutes, instead, is not "immediate" or "without delay" as is required. I do not accept that arrangements could not have been made for the accused to be given a private telephone somewhere at the Lake Country detachment.

[58] The evidence is that the accused was arrested at approximately 1:25 a.m. Immediately upon Constable Hutt providing the accused with his 10(b) Charter right, the accused indicated his desire to consult a lawyer. He did not withdraw his desire to speak to counsel until after he

had been taken to the Kelowna RCMP detachment arriving at about 2:00 a.m. when he was told he would be released. In my view, given the availability of the Lake Country detachment nearby, this 35-minute delay with no access to counsel was unreasonable and a breach of his s. 10(b) Charter rights.

- [59] It must be remembered that the accused's s. 10(b) right is not just the right to counsel, it is the right to counsel without delay regardless of the circumstances and regardless of whether evidence may have been elicited before access to counsel has been facilitated: *R. v. Moyles*, 2019 SKCA 72, at para. 81. "Without delay" means as immediately as is reasonable and the failure on the part of Constables Marshinew and Hutt to do so was a breach of the accused's Charter rights.

Section 24(2) of the Charter

- [60] The accused seeks to have the Seized Items and the statements excluded from trial.
- [61] I have concluded that the Traffic Stop was an infringement of the accused's s. 9 Charter rights.
- [62] I have also concluded that the accused's 10(b) Charter rights were violated when he was not provided access to counsel without delay.
- [63] The basis for exclusion of the Seized Items and Statements is s. 24(2) of the Charter which reads:

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

- [64] Section 24(2)'s focus is aimed on the broad impact of admitting evidence obtained by the police in violation of an accused's Charter rights on the long-term repute of the justice system. The decision whether to exclude evidence obtained in violation of the Charter on the basis that to do so would bring the administration of justice in to disrepute involves three lines of inquiry:

1. Firstly is the seriousness of the Charter-infringing state conduct. The more severe or deliberate the state conduct, the greater the need for the courts to disassociate themselves from that conduct by excluding evidence linked to that conduct in order to preserve public confidence in and ensure state adherence to the rule of law.
2. Secondly is the impact of the breach on the accused. To what extent did the breach actually undermine the interests of the accused protected by the infringed right? The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

3. Thirdly is society's interest in the adjudication of the case on its merits. Will the truth-seeking function of the criminal trial process be better served by admission or exclusion of the evidence? Reliability of the evidence and its importance to the Crown's case are relevant at this stage.

(Grant at para. 71)

- [65] These factors do not operate as a three-part test, but rather as considerations that are to be weighed to determine whether, on balance, and having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute in the long term: *R. v. Huete*, 2018 BCSC 1417, at para. 10. The assessment must be made from the perspective of a reasonable person: Grant at paras. 68 and 85-86.
- [66] Constables Marshinew and Hutt's conduct cannot be viewed in isolation from each other. To the accused, they were both the police. He was riding as a passenger in the Hyundai driven by Mr. Roberts. For no reason, they were pulled over. They were both questioned by Constable Marshinew and they both fully cooperated with him. Mr. Roberts was asked to exit the vehicle and, all of a sudden Constable Marshinew was at the front of the Hyundai shouting and pointing at him with his hand on his pistol and with a demand that he raise his hands.

Seriousness of the Breach

- [67] Respecting the first Grant factor, in my view, the s. 9 breach was on the higher end of the seriousness scale because the Traffic Stop improperly targeted Mr. Roberts who was simply driving late at night with the accused as his passenger. Constable Marshinew suspected Mr. Roberts was up to no good. The public should be allowed to go about their business without being randomly and arbitrarily detained under the guise of a traffic stop to check for sobriety, insurance, and licencing. In my view, what occurred was egregious and deliberate and, if allowed, could lead to serious erosion of public confidence in the justice system. There is a need for the court to disassociate itself from such behaviour.
- [68] This factor favours exclusion of the Seized Items and Statements from evidence.

Impact on Protected Right

- [69] Respecting the second Grant factor, I consider that the impact of the breach on the accused's privacy was serious. It was intimidating, scary, and intrusive. He was shouted at in a threatening fashion by a highly armed officer with one hand on his gun. On Constable Marshinew's evidence, the accused was fearful for his safety. When weighed against the totality of the events, this too favours excluding the evidence.
- [70] Additionally, the breach of the accused's s. 10(b) Charter rights is also serious and favours exclusion of the Seized Items and the Statements.

Interest in Fair Trial on the Merits

[71] Regarding the third Grant factor, society's interest in the adjudication of the case on its merits favours admission of the Seized Items and Statements. The prosecution of cases involving persons in possession of prohibited weapons is aimed at keeping our communities safe.

The Balancing

[72] Ultimately, the issue boils down to the admissibility of the Seized Items which are real evidence and essential to the Crown's case. There are no reliability issues with regard to the Seized Items that militate in favour of their admission.

[73] Balancing the Grant factors and considering the totality of the events surrounding the accused's arrest, the breach of his Charter rights as earlier discussed, it is my view that allowing the Crown to use the evidence obtained as a result would have the effect of bringing the administration of justice into disrepute.

[74] I conclude that the administration of justice is best served by excluding the Seized Items and the Statements. While there is no debate that a case involving possession of prohibited weapons is serious and the police goal of curbing gun violence is important, this is a case where the officers overstepped. This Court must disassociate itself from this form of state intrusion and not condone it.

[75] On balance, the importance of maintaining the protections afforded the accused by the Charter outweighs the societal interest in the matter being adjudicated on the merits.

Decision

[76] It follows that the defence application must be allowed. I rule that the Seized Items and the Statements cannot be admitted at trial pursuant to s. 24(2) of the Charter.

[77] Those are my reasons. Mr. Blumenkrans? Mr. Blumenkrans?

[78] MR. BLUMENKRANS: Oh, sorry, My Lord, I was muted there. My apologies. Yes, Crown is not calling any further evidence in this matter.

[79] THE COURT: All right. Mr. Watt?

[80] MR. WATT: No evidence on behalf of the defence.

[81] THE COURT: Any submissions?

[82] MR. WATT: No submissions.

[83] MR. BLUMENKRANS: No, My Lord.

[84] THE COURT: So we are back into the trial proper. There is going to be no further evidence from the Crown, no evidence from Mr. Watt. Accordingly, Mr. Young, if you could stand. Given the lack of evidence in this case, I have no alternative but to find you not guilty of the charges as set out in the indictment. So you are free to go.

"G.P. Weatherill J."

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