

CANADA / JUDGMENT

United States v. Hollaus

2022 BCCA 272

COURT

British Columbia Court of Appeal

DECIDED

3 August 2022

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2022 BCCA 272 United States v. Hollaus

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

United States v. Hollaus,

2022 BCCA 272

Date: 20220803

Docket: CA47031

Between:

The Attorney General of Canada on behalf of the United States of America

Respondent

And

Wayne Steven Hollaus

Appellant

Corrected Judgment: The cover page of the judgment was corrected on August 4, 2022.

Restriction on publication: no person shall publish in any document, or broadcast or transmit in any way any information disclosed in or in relation to this hearing, that could identify the undercover police officer(s) in the investigation of the Person Sought, including any pseudonyms used by the undercover police officer(s).

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated
October 1, 2020 (United States of America v. Hollaus, 2020 BCSC 2282,
Vancouver Dockets 27435-1 and 27435-5).

Counsel for the Appellant:

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C.C. Benton

Place and Date of Hearing:

Vancouver, British Columbia

April 29, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 3, 2022

Written Reasons by:

The Honourable Mr. Justice Voith

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

Summary:

The Vancouver Police Department assisted an ongoing U.S. Department of Homeland Security investigation by conducting an undercover controlled delivery of imitation cocaine. The police observed the appellant and an associate arrive at a pre-determined location, place the imitation cocaine in their vehicle, and drive away. The police used a traffic stop ruse to retrieve the imitation cocaine and arrest the occupants of the vehicle. The appellant was informed that he was arrested for possession for the purpose of trafficking. The U.S. sought extradition of the appellant. The appellant challenges his committal for extradition, arguing his ss. 8, 9, and 10 Charter rights were violated because he was not arrested for attempted possession for the purpose of trafficking nor was he advised of the U.S. investigation. He argues his arrest was

unlawful for various reasons including that the arresting officer did not have proper grounds to arrest him. He further argues that the use of a ruse by the police tainted his s.10 rights. Finally, he argues the judge provided insufficient reasons. Held: Appeal dismissed. The police had reasonable grounds to arrest the appellant based on information from the operation, shared with the arresting officer, that the appellant had picked up a suitcase which he believed contained cocaine. At that point, he was arrestable for the Canadian offence of attempted possession for the purpose of trafficking. Advising the appellant that he was under arrest for possession for the purpose of trafficking, as opposed to attempted possession for the purpose of trafficking, gave him notice of the jeopardy that he faced and did not breach his Charter rights. The use of a ruse similarly did not offend his s.10 rights. Finally, the judge's reasons, read as a whole, adequately addressed the alleged Charter breaches.

Reasons for Judgment of the Honourable Mr. Justice Voith:

- [1] This is an appeal from an order of committal made under s. 29 of the Extradition Act, S.C. 1999, c. 18, on October 1, 2020.
- [2] On October 24, 2014, members of the Vancouver Police Department ("VPD") assisted an ongoing United States Department of Homeland Security ("DHS") investigation by conducting an undercover controlled delivery of a suitcase containing 26 kg of imitation cocaine in Vancouver. The appellant, Mr. Hollaus, and another individual, Mr. Oliynyk, picked up the suitcase and placed it in the flatbed of a pickup truck driven by Mr. Hollaus. In a pre-determined operational plan, referred to internally as "Tuxedo 25," members of the VPD's Gang Crime Unit ("GCU") used a traffic stop ruse to retrieve the suitcase and arrest the two individuals for possession for the purpose of trafficking without jeopardizing the ongoing American investigation.
- [3] In the course of two voir dire, the appellant raised arguments under ss. 7-10 and 24(2) of the Canadian Charter of Rights and Freedoms in an attempt to exclude the voice identification evidence that was obtained from the appellant's arrest and custodial interview. That evidence formed part of the record that supported the committal order.
- [4] Before the extradition judge, the appellant advanced narrow submissions that raised two primary issues. First, he argued the VPD was not investigating a Canadian offence, but was instead investigating a U.S. offence. Thus, under s. 6(2) of the Criminal Code, it lacked jurisdiction to stop, arrest and search the appellant in order to investigate an offence committed outside of Canada. Accordingly, the stop, arrest and search were unlawful and the appellant's ss. 8 and 9 Charter rights were breached.
- [5] Second, the appellant argued his ss. 10(a) and (b) Charter rights were breached because he was never advised of the true reason he had been stopped and arrested. Specifically, he was not apprised of the ongoing DHS investigation. The failure of the police to provide him with complete information, in turn, prevented him from being able to exercise his right to counsel in a meaningful way.

- [6] The judge dismissed the appellant's arguments. On appeal, the appellant has considerably shifted and expanded the issues that he seeks to raise. For example, he no longer relies on s. 6(2) of the Code or argues that the VPD were without jurisdiction to stop, arrest and search him. Rather he seeks to raise several issues that were not live issues before the judge and seeks to raise some issues that appear to have been conceded before her.
- [7] In my view, for the reasons that follow, the appeal should be dismissed.

Procedural Background

- [8] In response to an extradition request from the United States of America (the "Requesting State"), the Attorney General of Canada sought the appellant's committal for U.S. offences that correspond to the Canadian offence of conspiracy to traffic in Schedule I controlled substances contrary to s. 465(1)(c) of the Criminal Code and s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].
- [9] The Requesting State's case consisted of the record of the case and it summarized both American and Canadian-gathered evidence. The evidence gathered in Canada included the voice identification evidence of Mr. Hollaus that was obtained by VPD Det/Cst. Smart following the October 24, 2014 arrest. Counsel for the appellant acknowledged that the only issue on the extradition hearing was the appellant's voice identification. Unless that evidence was excluded, he accepted he "would have to concede that there [was] some evidence of identification that would lead to a committal order."
- [10] The court entered into a voir dire to determine whether the Canadian-gathered evidence should be excluded under s. 24(2) of the Charter as a result of various ss. 8, 9 and 10 Charter breaches ("Voir Dire No. 1").
- [11] On August 7, 2020 in reasons for judgment indexed at 2020 BCSC 1165, the judge found there was no breach of Mr. Hollaus' s. 10 Charter rights other than a four-minute breach that had been conceded. Counsel for Mr. Hollaus thereafter conceded that this four-minute breach would not warrant a remedy under s. 24(2) of the Charter and the judge formally dismissed the s. 24(2) application on August 24, 2020. This appeal turns almost entirely on the judge's findings and rulings in Voir Dire No. 1 and my various references to her reasons pertain exclusively to the reasons from that voir dire.
- [12] On September 30, 2020, the appellant applied to enter into a second voir dire based on an alleged abuse of process. He again contended that the VPD officers had been acting as agents for the DHS by investigating an American offence on Canadian soil and that this conduct amounted to an abuse of process. On October 1, 2020, in reasons for judgment indexed at 2020 BCSC 1600, the judge dismissed the application, finding the appellant had failed to establish an "air of reality" to his allegation of abuse of process. This ruling is not at issue in this appeal.

General Background

- [13] The facts before the judge were generally not in dispute. Three witnesses testified in Voir Dire No. 1: Det/Cst. Munro, Cst. Lennox and Cst. Dodds, all of whom are officers with the VPD. As the underlying facts are relevant to most grounds of appeal, I have quoted from the judge's summary of the evidence at some length. The judge said:
- [9] On October 16, 2014, Special Agent Maldonado of Homeland Security Investigations contacted Det/Cst. Munro to request the VPD's assistance with the controlled delivery of a suitcase of fake cocaine. The underlying Homeland Security investigation was targeting Mr. Oliynyk and his known associates, including Mr. Hollaus, for their involvement in a cross-border drug smuggling operation between Canada and the United States.
- [10] In the course of their investigation, Homeland Security had intercepted a shipment of approximately 26 kilograms of cocaine they allege Mr. Oliynyk and Mr. Hollaus had directed be picked up in California and smuggled into Canada. Homeland Security requested the VPD's help to facilitate the delivery of 26 kilograms of fake cocaine, with which they had replaced the intercepted drugs, to its intended recipients in Canada. The VPD named its operation "Tuxedo 25".
- [11] Early on October 24, 2014, Det/Cst. Munro conducted a briefing on operation Tuxedo 25. Cst. Dodds and Cst. Lennox, members of the Gang Crime Unit ("GCU"), were present at the briefing. According to the operational plan, an undercover VPD officer would place a suitcase containing the fake cocaine in the trunk of a car, call a number provided by Homeland Security, inform the person who answered the phone that the cocaine was ready for pick up, and provide instructions for the pick up. A VPD surveillance team was to observe the drug transaction, record it and relay their observations over the radio to the operation team that would include VPD GCU members standing by to arrest the individuals who picked up the suitcase of cocaine. Cst. Dodds and Cst. Lennox were two of the GCU members standing by.
- [12] Det/Cst. Munro instructed the GCU members that once they received confirmation that the cocaine had been picked up and the targets were driving away, they were to stop the vehicle to arrest its occupants and retrieve the fake cocaine. In order to protect the ongoing Homeland Security investigation the GCU members were to rely on a ruse, by explaining that the reason for the arrest was possession for the purpose of trafficking. The GCU members were to tell the targets they received a 911 call from an unknown source reporting that they had seen an individual take a suitcase out of a vehicle, place it in their vehicle and drive away.

- [13] In accordance with the operational plan for Tuxedo 25, on October 24, 2014, a VPD undercover operator (the "UCO") called a phone number provided by SA Maldonado to arrange for the delivery of the "cocaine". The phone number was one Mr. Oliynyk had used to arrange for the cocaine to be delivered to Vancouver. The UCO told Mr. Oliynyk that she had his "equipment" and arranged to meet him. The UCO had multiple phone conversations with Mr. Oliynyk and heard another male in the background during at least one call.
- [14] The VPD surveillance team observed Mr. Hollaus and Mr. Oliynyk arrive at the pre-determined pick-up location in a Chevy Silverado pickup truck. Mr. Hollaus was the driver and Mr. Oliynyk the passenger. Mr. Oliynyk got out of the pickup truck, retrieved the suitcase of fake cocaine from the undercover officer's vehicle, and placed the suitcase in the flatbed of the truck driven by Mr. Hollaus. The two of them then drove away in the pickup truck. If the suitcase had not been picked up, the plan would have been terminated at this point.
- [15] In accordance with the operational plan, the GCU members then stopped the Chevy Silverado shortly after they were advised over the radio that the occupants of the vehicle had picked up the suitcase of fake cocaine. The traffic stop took place at approximately 12:19 p.m.
- [16] Both Cst. Dodds and Cst. Lennox testified that they believed they had grounds to arrest Mr. Hollaus for the offence of possession of a controlled substance for the purpose of trafficking as soon as they were informed he and Mr. Oliynyk had picked up the suitcase of fake cocaine. Both officers were also aware of the need to keep the vehicle stop low key in order not to jeopardise the ongoing Homeland Security investigation.
- [17] Cst. Lennox initially stopped the vehicle and was the first member to deal with Mr. Hollaus. In a variation of the plan, Cst. Lennox testified that he used the fact that the Chevy Silverado was missing a validation tag on its back license plate as a means to get Mr. Hollaus safely out of the vehicle and towards the back of the pickup, and to ensure that the vehicle could not flee. Once out of the vehicle, Mr. Hollaus and Mr. Oliynyk were both handcuffed and told that they were being detained in relation to a suspicious vehicle check.
- [18] As Cst. Lennox dealt with Mr. Hollaus, Cst. Dodds searched the flatbed of the Chevy Silverado and retrieved the suitcase of fake cocaine. After "discovering" the suitcase of fake cocaine, Cst. Dodds arrested Mr. Hollaus for possession of a controlled substance for the purpose of trafficking.
- [19] The arrest of Mr. Hollaus occurred at approximately 12:23 p.m. Upon arrest, Cst. Dodds informed Mr. Hollaus of his rights pursuant to ss. 10(a) and (b) of the Charter and gave him the official warning. Cst. Dodds identified Mr. Hollaus by comparing his likeness to the photograph on a B.C. driver's license inside the wallet he found on Mr. Hollaus' person during a search of Mr. Hollaus' person incidental to arrest. Cst. Dodds confirmed Mr. Hollaus' identity by having Mr. Hollaus confirm the address on the license.

- [20] Mr. Oliynyk and Mr. Hollaus were taken to the city jail and interviewed in accordance with VPD policy. Det/Cst. Munro testified that the information obtained in the interviews would be passed on to Homeland Security or used by the VPD in the future, but there was no testimony on the voir dire regarding the substance of the interviews. It is understood that voice identification evidence from the interview with the applicant may be relevant in the committal hearing.

The Judge's Reasons

- [14] The judge summarized the legal framework that pertained to five discrete issues. She described those issues as "The Admissibility of Canadian-Gathered Evidence," "Reasonable Grounds to [E]ffect a Lawful Warrantless Arrest," "Search Before Formal Arrest," "The Use of a Traffic Stop - Section 9," and "Section 10(a) and (b) -Traffic Stop Ruse." Under each heading, she described the relevant principles and various authorities that pertained to those principles. There is no suggestion that any aspect of that description reflects error.
- [15] The judge then turned to the submissions of Mr. Hollaus and the Requesting State respectively. Importantly, she identified the focus of the application before her and said:
- [40] Mr. Hollaus' application rests on the mismatch between the ostensible grounds for his arrest, and the true purpose of the investigation. He argues that the police lacked subjective grounds to arrest him because they never intended to arrest him for a Canadian offence. The sole reason for stopping him was to identify persons involved in the drug offence committed in the United States.
- [16] Further, she noted that Mr. Hollaus, relying on s. 6(2) of the Criminal Code, argued that the VPD acted without jurisdiction in furthering an American investigation since it had no intention of pursuing any Canadian offence. Section 6(2) of the Criminal Code provides:

Offences outside Canada

- (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.
- [17] Mr. Hollaus submitted as a corollary to s. 6(2) that if one could not be convicted of an offence committed outside of Canada, there could be no lawful authority to investigate that offence in Canada.
- [18] As I have said, none of the numerous issues Mr. Hollaus now raises relate to s. 6(2) of the Code or assert that the VPD lacked jurisdiction to act. There is, of course, the ongoing assertion, advanced in different ways, that the VPD acted without lawful authority. Nevertheless, it is important to appreciate that the judge addressed each of Mr. Hollaus' submissions in relation to ss. 8-10 of the Charter through the finite lens through which they were presented.

- [19] Accordingly, in response to Mr. Hollaus' submissions, the judge considered whether the "possession of fake or sham drugs constitutes an offence in Canada." The judge observed (at para. 51) that there was "no issue that the factual basis of the alleged attempt to possess cocaine for the purpose of trafficking occurred in Canada." She recognized the Requesting State argued that this attempt was an offence contrary to s. 5(2) of the CDSA and s. 24 of the Criminal Code:
- [53] Attempted possession of a controlled substance for the purpose of trafficking is an offence under Canadian criminal law. The accused's intention is determinative of an attempt pursuant to s. 24. For the offence of attempted possession of a controlled substance for the purpose of trafficking, the focus is on what the accused intended with regard to the substance in their possession, and not the nature of the actual substance.
- [54] In this case, Mr. Hollaus' and Mr. Oliynyk's attempt to possess 26 kilograms of cocaine for the purpose of trafficking was impossible because the police had secretly replaced the 26 kilograms of cocaine with fake cocaine before it reached Mr. Hollaus and Mr. Oliynyk. However, as stated in *United States v. Dynar*, [1997] 2 S.C.R. 462 (at para. 67), s. 24 of the Criminal Code "draws no distinction between attempts to do something possible but by inadequate means, attempts to do the physically impossible, and attempts to do something that turns out to be impossible 'following completion'. All are varieties of attempts to do the 'factually impossible' and all are crimes." Only attempts to commit imaginary crimes fall outside the scope of this subsection. In other words, a factually impossible attempt is still an offence pursuant to s. 24 of the Criminal Code. The fact that the police replaced the real cocaine with a benign substitute does not change the nature of the attempt of Mr. Hollaus and Mr. Oliynyk.
- [55] From the evidence of his actions, I conclude there were grounds to believe Mr. Hollaus intended to be in possession of cocaine in an amount sufficient for the purpose of trafficking. While the suitcase did not contain the expected cocaine, the individuals picking up the suitcase believed that it did.
- [20] The judge did not accept that s. 6(2) of the Criminal Code was engaged and said:
- [57] In this case, the VPD's jurisdiction was not rooted in the investigation of an offence committed in the United States as the applicant alleges. Mr. Hollaus was observed committing a Canadian offence. The fact that the VPD executed operation Tuxedo 25 in order to assist Homeland Security with its investigation of a trans-border drug smuggling operation does not make Tuxedo 25 an American investigation. Nor does it make the CDSA offence Mr. Hollaus and Mr. Oliynyk were observed committing an American offence. The operation occurred entirely in Canada. The undercover operator was in Canada. Mr. Oliynyk and Mr. Hollaus picked up the suitcase of fake cocaine in Canada. They committed an offence contrary to Canadian law in Canada. In these circumstances, I conclude that the VPD had jurisdiction to investigate that offence.

- [21] On this appeal, the appellant does not take issue with these critical conclusions or findings.
- [22] The judge then turned to address each of ss. 8, 9 and 10 of the Charter. I intend to address aspects of her reasons more fully when I consider the specific issues the appellant raises. For present purposes, however, what is important is that before the judge, the appellant's Charter submissions continued to be largely directed to the same narrow thesis. Thus, in the judge's opening paragraphs under the heading "Sections 8 and 9," she said:
- [58] The existence of reasonable grounds to believe Mr. Hollaus committed a Canadian offence is the starting point to the discussion of his arguments that there were breaches of his s. 8 and 9 Charter rights.
- [59] Mr. Hollaus submits that Csts. Dodds and Lennox lacked subjective grounds to arrest him and search his vehicle because they knew the true purpose of the stop was to further an American investigation. Thus, he says, his detention was arbitrary.
- [60] In my view, the applicant's argument confuses the "grounds" for an arrest with the "purpose" of an investigation. A lawful detention requires that police have reasonable and probable grounds to believe someone has committed an offence before arresting them: *R. v. Storrey*, [1990] 1 S.C.R. 241. In addition, in that case a lawful arrest did not become unlawful simply because the police intended to continue the investigation after the arrest.
- [23] The judge concluded that there had been no breach of the appellant's ss. 8 and 9 Charter rights and she dismissed the application in that respect.
- [24] In relation to Mr. Hollaus' s. 10(a) and (b) Charter rights, it was conceded that there was a four-minute period, beginning with when his vehicle was stopped and ending with his formal arrest, when Mr. Hollaus was subject to a de facto arrest and was not informed of the jeopardy he faced or his right to counsel. It was also apparent that the appellant's vehicle had initially been stopped as a result of a ruse. The judge identified that the "primary issue between the parties" concerned whether the appellant was subsequently given sufficient information about the reasons for his arrest. In particular, Mr. Hollaus argued it was not enough for him to be told of the particular offence for which he had been arrested. Rather, it was necessary, in order for him to meaningfully exercise his s. 10 rights, to apprise him also of the ongoing American investigation. The judge disagreed and said:
- [83] It is an intrinsic aspect of any cross-border drug trafficking operation that there are actions done in Canada as well as in the foreign state. In this case, one of those actions led to an arrest in Canada for an offence in Canada. That there were other aspects to the overall investigation is not determinative of the issue of the exercise of s. 10 rights where the information provided allowed the applicant to know that the action in Canada was the subject of an arrest in Canada.
- [84] In these circumstances, I find Mr. Hollaus' right to counsel was not infringed by the failure of the police to inform him of the entire purpose of the investigation.

The Issues on Appeal

- [25] The appellant has identified four broad grounds of appeal, each of which raises multiple other sub-issues. These broad grounds were recast by the respondent in the following terms:
- 1) Did the extradition judge err in finding that there were reasonable grounds to arrest the appellant once he drove away with the imitation cocaine?
 - 2) Did the extradition judge err in concluding that Cst. Dodds' searches of the Chevy and the appellant were lawful searches incidental to arrest?
 - 3) Did the extradition judge err in finding that the GCU members satisfied the informational requirements of ss. 10(a) and 10(b) of the Charter?
 - 4) Did the extradition judge provide insufficient reasons for her ruling on Voir Dire No. 1?

Standard of Review

- [26] The appellant raises both questions of fact and questions of mixed fact and law on appeal. Where the issue is a question of fact, the appropriate standard of review is palpable and overriding error: *R. v. Shepherd*, 2009 SCC 35 at para. 18. Palpable and overriding error is a highly deferential standard of review. What is required to overturn a finding of fact is an error that is "plainly seen" and shown to have affected the result: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 5-6; *R. v. Le*, 2019 SCC 34 at para. 206, Moldaver J. dissenting. Where the issue involves the application of a legal standard to the facts of the case, the applicable standard of review is correctness, while the factual findings underpinning the ruling are entitled to deference: *Shepherd* at para. 20.

New Issues and Changes in Position

- [27] It is well-settled that appellate courts generally do not entertain new issues on appeal. While appellate courts have the discretion to permit exceptions to the general prohibition, that discretion is normally exercised only on rare occasions where the interests of justice require it: *R. v. Trieu*, 2010 BCCA 540 at para. 56; *R. v. Gill*, 2018 BCCA 144 at para. 9; *Quan v. Cusson*, 2009 SCC 62 at paras. 36-38. This is for various reasons, including that there are no "considered reasons prepared by the court from which the appeal is taken": *Gill* at para. 9.
- [28] There is also a distinction between raising a new issue on appeal and resiling from a position deliberately taken before a trial judge: *Argo Ventures Inc. v. Choi*, 2020 BCCA 17 at para. 31. The standard for changing one's position on appeal is particularly stringent: *Argo Ventures* at paras. 31-33; *R. v. Kimberley* (2001), 157 C.C.C. (3d) 129 at para. 56, 2001 CanLII 24120 (Ont. C.A.), leave to appeal to SCC ref'd, 29033 (13 June 2002); *R. v. Moore*, 2017 ONCA 947 at para. 15.

[29] In this case, the respondent identifies both that some of the issues raised by the appellant were not advanced before the judge and that other grounds of appeal advance issues that were conceded before the judge. And yet, the respondent does not formally contend that we should not entertain these various matters. I recognize that the principles I have referred to speak to this Court's gatekeeping function when an appellant seeks to raise new issues or to revisit concessions it has made. Nevertheless, in the absence of the respondent taking a firm position, I have addressed the substance and merits of the various issues Mr. Hollaus raises.

Issue 1: Did the judge err in finding there were reasonable grounds to arrest the appellant once he drove away with the imitation cocaine?

[30] The appellant has broken this first issue into at least four further sub-issues. Some of these sub-issues are revisited by the appellant when arguing that the judge's reasons are insufficient.

[31] The relevant legal principles are straightforward and not in dispute. When an accused challenges the validity of a warrantless arrest, the burden is on the Crown to demonstrate, on a balance of probabilities, that the arrest was reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278; *R. v. Lofty*, 2017 BCCA 418 at para. 32, leave to appeal to SCC ref'd, 37922 (19 April 2018). To do so, in the circumstances of this case, the Crown must satisfy the two-part inquiry in s. 495 of the Criminal Code: "The first stage involves factual determinations: (a) whether the arresting officer subjectively believed the person arrested was committing a criminal offence in the officer's presence; and (b) the grounds for such belief, i.e. the factual matrix that informed the officers decision": *Lofty* at para. 34, citing *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-51, 1990 CanLII 125. "[T]he second stage involves determining whether the officer's grounds for that belief are objectively reasonable. This is a question of law": *Lofty* at para. 35, citing *Shepherd* at paras. 18-20; *R. v. MacKenzie*, 2013 SCC 50 at para. 54.

[32] The appellant accepts that an officer can arrest or detain a suspect on a direction from another officer. In such cases, it is the directing officer who must subjectively have reasonable grounds in support of the decision to arrest: *R. v. Le*, 2009 BCCA 14 at para. 8. The focus of an assessment of reasonable grounds to arrest is on the officer who decided to effect the arrest and what that officer knew when the decision was made: *R. v. Harms*, 2020 BCCA 242 at para. 45. Where more than one officer is involved in the events leading up to the warrantless arrest, the information provided to the officer who directed the arrest, such as surveillance observations received over the police radio, can form part of the grounds to arrest: *Harms* at para. 44-45 and 55.

a) Did Cst. Lennox and Cst. Dodds "independently" form reasonable grounds in support of Mr. Hollaus' arrest or detention?

- [33] The foundation for this aspect of the appellant's submission primarily rests on the portion of the judge's reasons that state: "Both Cst. Dodds and Cst. Lennox testified that they believed that they had grounds to arrest Mr. Hollaus for the offence of possession of a controlled substance for the purposes of trafficking as soon as they were informed he and Mr. Oliynyk had picked up the suitcase of fake cocaine" (at para. 16) and that "Cst. Dodds, had reasonable and probable grounds for the arrest of Mr. Hollaus." (at para. 63)
- [34] Mr. Hollaus argues that there was no evidence that either Cst. Dodds or Cst. Lennox "independently" formed reasonable grounds in support of the appellant's detention or arrest. He further submits that the judge's conclusion is inconsistent with (a) the evidence of both Cst. Dodds and Cst. Lennox that they were acting on directions from other investigators; and (b) the judge's finding of fact (at para. 12) that "Det/Cst. Munro instructed the GRU members to stop the vehicle to arrest its occupants and retrieve the fake cocaine."
- [35] In my view, this first submission reflects a parsing of the judge's reasons without any consideration of context, the record, the live issues or the submissions of counsel. The record before the judge was clear. Tuxedo 25 was a pre-arranged undercover operation developed and directed by Det/Cst. Munro. Cst. Dodds and Cst. Lennox learned of the operation when they attended Det/Cst. Munro's briefing and were taken through her presentation on the morning of October 24, 2014. They understood that they were to stop the targets using a traffic stop ruse once those targets had picked up the suitcase of imitation cocaine. During the execution of Tuxedo 25, the officers involved in the operation listened to the same police channel over which the surveillance team relayed their observations of the targets. The result was that the members of Tuxedo 25 knew the imitation cocaine had been picked up immediately after it occurred. The targets were thereafter arrestable without further explicit direction to that effect.
- [36] There was never any suggestion before the judge that Cst. Dodds and Cst. Lennox had independently formed grounds to arrest Mr. Hollaus. Indeed, during Cst. Lennox's examination in chief, counsel for Mr. Hollaus interjected to confirm that he did not intend to argue that Cst. Lennox required independent grounds to arrest Mr. Hollaus:

Cnsl. M. Klein: If it assists, I'm not going to make an argument that this particular officer needed grounds. If he was instructed on the basis of others that he was to pull this vehicle over, I take no issue with that in terms of what was present in his particular mind at the time. So if that assists

Cnsl C. Benton: It does, thank you.

Cnsl. M. Klein: Thank you. I'm not saying there's a disconnect between the overall operation and this particular officer.

- [37] Reading the judge's reasons in context, as a whole, and based on the live issues and positions of counsel, it is clear the grounds referred to and relied on by the judge arose from the operational plan that had been developed and directed by Det/Cst. Munro.

b) Could police officers other than Det/Cst. Munro have directed the arrest?

[38] This issue is closely related to the issue I have just addressed. Here the appellant asserts that the judge was required to assess "the existence of reasonable grounds from the perspective of other officers." This assertion is contrary to the evidence before the judge. There was no evidence to suggest that anyone other than Det/Cst. Munro decided that the targets were arrestable once they were in possession of the imitation cocaine or that directed the GCU members to effect the arrest once the pick-up had taken place. Nor was this issue raised before the judge.

[39] In his factum, the appellant specifically names both Det/Cst Lebouillier and the "road boss" as officers who might have given testimony relevant to whether there were reasonable grounds to arrest the appellant. Det/Cst Lebouillier was apparently involved with the preparation of the operational plan. However, there was no suggestion this officer was involved either in leading the investigation or directing the arrest of the targets. That was done by Det/Cst Munro. Similarly, both Det/Cst. Munro's oral evidence and her presentation established that the road boss was to oversee surveillance and determine the timing of the traffic stop ruse, taking into account the safety of people in that area. There was no real suggestion in the record that the road boss would determine whether or not the arrest would take place. Instead, if the road boss had questions or required clarification, he was to seek direction from Det/Cst. Munro as the lead investigator. Although Det/Cst. Munro testified that the road boss might decide to suspend the operation "if something went tragically wrong," it is clear that overall decision making, including the decision to arrest, rested with Det/Cst. Munro. The respondent argues, and I agree, that the suggestion that other officers involved in the Tuxedo 25 operation, and not Det/Cst. Munro, may have directed the arrest of the appellant is speculative and has no support in the evidence.

c) Was Det/Cst. Munro clear as to her grounds for arrest?

[40] Mr. Hollaus next contends that Det/Cst. Munro, "the only directing officer who testified, did not elaborate on the factual matrix that would have supported the existence of reasonable grounds in support of the Appellant[s] arrest. All the record confirms is the existence of a direction to arrest anyone and everyone who attended the meeting point."

[41] In *R. v. Hall* (1995), 22 O.R. (3d) 289, 1995 CanLII 647, the Ontario Court of Appeal held that it is sufficient for an officer to explain why they thought they were entitled to make an arrest: at 299. The officer need not use specific legal words or expressly refer to "reasonable and probable grounds": at 299. In this case, Det/Cst. Munro explained that her authority for directing the GCU members to pull over and arrest the occupants of the Chevy pickup was the CDSA and the fact that the occupants believed that they had picked up a suitcase of cocaine. She developed this evidence at different stages of her testimony and, for example, said at one point:

Q. But I'm not sure if I asked you on what authority was the VPD relying on creating this plan for the gang crime unit members to pull over the target vehicle?

A. My Lady, we were relying on the Controlled Drugs and Substances Act, the CDSA. The targets believed that they were picking up 26 kg of cocaine, real cocaine. We -- that shipment had been intercepted in Washington and we had replaced that with imitation or fake bricks of cocaine that they believed that they were picking up.

Q. And so in terms of the plan for the gang crime unit members to pull over the vehicle, what was the authority that you were telling the gang crime unit members that they had to make the vehicle stop?

A. The same. They were pulling them over under the Controlled Drugs and Substances Act based on the 26 kilos of fake cocaine that they picked up.

[42] Det/Cst. Munro also explained that if the targets had not picked up the suitcase, she would have terminated the operation and the traffic stop of the targets would not have taken place. The appellant's suggestion that the record only confirms "the existence of a direction to arrest anyone and everyone who attended the meeting point" is not consistent with the evidence.

[43] In Harms, this Court said:

[43] The standard applied by the court in assessing the grounds for a warrantless arrest is one of reasonable probability or credibly-based probability that an indictable offence has been committed. This standard is less than the criminal and civil standards of proof, but more than mere suspicion. It envisions a "practical, non-technical and common sense probability" as to the existence of the salient facts and inferences in question: R. v. Jir, 2010 BCCA 497 at para. 27, citing R. v. Debot, [1989] 2 S.C.R. 1140, Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40 and R. v. Sanchez (1994), 93 C.C.C. (3d) 357 (Ont. Ct. (Gen. Div.)).

[44] Det/Cst. Munro knew that the targets believed they were picking up 26 kg of cocaine when in reality that cocaine had been intercepted in the United States. She knew that, following the operational plan, a VPD undercover operator had directed the targets, subsequently determined to be Mr. Hollaus and Mr. Oliynyk, to the parking lot where they would retrieve the suitcase of what they believed was cocaine. Mr. Hollaus and Mr. Oliynyk did exactly that. Mr. Hollaus drove to the parking lot and Mr. Oliynyk retrieved the suitcase of imitation cocaine and placed it in the vehicle. These various circumstances grounded a reasonable probability that Mr. Hollaus and Mr. Oliynyk had committed an offence under the CDSA. There was no dispute on this issue before the judge and, in my view, there is no basis for disputing it at this stage.

d) Did Det/Cst Munro's reasonable grounds require further detail?

- [45] Here the appellant contends "the VPD officers were, or appear to have been, unaware of significant details of the DHS investigation and the VPD undercover operation. In the absence of such knowledge, it is hard to imagine how the police could have directed the arrest of anyone or everyone who attended the meeting point." The appellant provides several examples of such uncertainty. This includes the fact that though Det/Cst. Munro was aware Mr. Hollaus was one of the targets of the DHS investigation, she did not have his photograph; the VPD did not possess information indicating "that the Appellant was orchestrating this particular delivery"; and Det/Cst. Munro "was unaware of who would attend the meeting point."
- [46] The reasonable ground standard did not require Det/Cst. Munro to possess this level of information or detail. The standard applied in assessing the grounds for a warrantless arrest is one of reasonable probability or credibly-based probability that an offence has been committed and, as I have said, it envisions a "'practical, non-technical and common sense probability' as to the existence of salient facts and inferences in question": Harms at para. 43. The Court in Harms also said:
- [44] In assessing whether the grounds for arrest amount to a reasonable probability that an offence has been committed, the court must consider the totality of the circumstances: *R. v. Bracchi*, 2005 BCCA 461 at paras. 21-22. Reasonable grounds may be based on indirect evidence, partial information and reasonable inference drawn from personal observation or information provided by others and the key question is whether the officer's belief was reasonable at the time of arrest, not whether, in hindsight, it turns out to have been accurate: *R. v. Vance* (1979), 48 C.C.C. (2d) 507 (Y.T.C.A.) at 515; *R. v. Bush*, 2010 ONCA 554 at para. 66. In conducting the assessment, the court should not examine the evidence in isolation or a piecemeal fashion: *R. v. Whitaker*, 2008 BCCA 174 at paras. 41-42, leave to appeal refused, [2008] S.C.C.A. No. 296; *Jir* at para. 28. It should also be recalled that, as Justice Doherty stated in *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), a decision to arrest may have been made quickly, based on available information which may be less than exact or complete.
- [47] In this case, based on the totality of the circumstances, it was sufficient for Det/Cst. Munro to know that the targets believed they were picking up 26 kg of cocaine. She had reasonable grounds to direct the arrest of the individuals who picked up and then drove off with the imitation cocaine, without knowing exactly who they were or their precise role in the broader drug smuggling operation.

Issue 2: Did the judge err in finding that Cst. Dodds' search of the Chevy and the appellant were lawful searches incidental to arrest?

- [48] The judge said:

[31] Where the police have reasonable and probable grounds to effect an arrest, a search incidental to arrest may occur prior to a formal arrest. A search incident to arrest may also occur without the police uttering the words "You are under arrest", such as in the circumstances of a de facto arrest. The fundamental question is whether the officer had reasonable grounds to arrest at the time that the search took place: *R v. Bielli*, 2016 ONSC 6866 at para. 72.

[49] The appellant accepts these statements and, in particular, he accepts that a search incidental to arrest may occur prior to a formal arrest: see also *R. v. Dubois*, 2004 BCCA 589 at paras. 10-11. He contends, however, that the judge made several discrete errors.

a) Did Cst. Dodds fail to identify the authority that permitted his search?

[50] The judge found that Cst. Dodds lawfully searched the Chevy incidental to arrest. Mr. Hollaus contends that in doing so, she overlooked "Cst. Dodds' evidence that he searched the truck to confirm the presence of the suitcase and that he did not search the truck incidental to arrest." In aid of his submission Mr. Hollaus relies on the following evidence, arising from the cross-examination of Cst. Dodds:

Q. Okay. And -- but they hadn't been arrested at that point in time?

A. No.

Q. So at that point in time this wasn't a search incident to an arrest?

A. No.

[51] Mr. Hollaus concedes that a "search preceding formal arrest is permitted as a search incidental to arrest provided that the officer has reasonable and probable grounds to arrest." He goes on, however, to contend that the searching officer "must subjectively be aware of and point to the authority that permits the search."

[52] This submission is addressed in testimony Cst. Dodds gave during his re-examination. He explained that his authority for the search of the Chevy were the "grounds of direction" that the occupants of the vehicle were arrestable as soon as they had picked up the suitcase of imitation cocaine:

Q. Constable Dodds, what was your authority to search the back of the truck?

A. [F]rom the briefing I was operating under the grounds of direction from the investigators and going from the pickup of the controlled delivery there'd be a suitcase of fake drugs in the back of the vehicle.

Q. Grounds of direction. So what does that mean?

A. So it means, the investigators were saying that -- they're saying a controlled delivery of fake drugs. The people who pick up the suitcase from this location, identified by the surveillance team, will be arrestable for possession for purposes of trafficking once you pull that vehicle over.

Q. So what was your authority for the search?

A. [I]t was from the investigator saying that this suitcase believed to be -- or had fake drugs in it was picked up by the occupants of that vehicle, placed in their vehicle and driven away from the scene of the controlled delivery.

[53] Thus, Cst. Dodds did, on re-examination, clarify or explain his authority for the search of the Chevy. The apparent conflict that arises earlier in his testimony is understandable in that his search of the Chevy occurred during the four minutes that the appellant was under de facto arrest. The Attorney General of Canada had conceded that the appellant was subject to a de facto arrest during this four-minute time period and the judge referred to that concession in her reasons.

b) Was the search to identify Mr. Hollaus unlawful?

[54] It is to be recalled that after Cst. Dodds informed Mr. Hollaus of his rights under ss. 10(a) and (b), Cst. Dodds searched Mr. Hollaus, incidental to arrest, and compared his likeness to the photograph on the B.C. drivers license that was inside the wallet he found on Mr. Hollaus' person.

[55] Mr. Hollaus accepts that a search for identification to confirm an arrestee's identity is within the scope of a valid search incidental to arrest and he acknowledges that "Cst. Dodds searched the Appellant for identification incidental to arrest." He contends, however, that Cst. Dodds' search was tainted because DHS also wanted to know the identities of the targets who had picked up the imitation cocaine. Here he makes two different and somewhat inconsistent submissions. First, he asserts, based on the evidence of Det/Cst. Munro, that "one of the aims of the investigation was to collect identification evidence to assist the DHS" (emphasis added).

[56] However, a dual purpose alone does not make a lawful search unlawful: *R. v. Kaddoura*, 2009 BCCA 113. In *Kaddoura*, a police officer responded to a radio dispatch that requested a vehicle be pulled over for the purpose of identifying its occupants. He assumed the requested stop was for the purposes of a drug investigation. When he located the vehicle in question, the officer noticed that the left tailgate was damaged. This was a violation of a provision of the Motor Vehicle Act Regulations, B.C. 26/58. After pulling the vehicle over, the officer asked the driver to come to the rear of the vehicle with him. He pointed out the damage to the brake light and warned the driver that it was unlawful to drive the vehicle in that condition. He then had the driver show him his driver's license.

[57] The trial judge found that because the officer's "aim or purpose" in stopping the vehicle was to identify its occupants, the stop was an arbitrary detention that violated s. 9 of the Charter and that, in obtaining the accused's driver's license, the officer had obtained "conscriptive" evidence, the admission of which would render the trial unfair: *Kaddoura* at para. 11.

- [58] This Court concluded that the trial judge had erred in law in finding that the motor vehicle stop was an arbitrary detention and further found that the officer "was fully entitled to request that the driver produce his license and vehicle registration documents. The fact that the officer had other reasons to want to identify the driver does not transform a lawful stop into an unlawful one": at para. 12.
- [59] The Court further observed the accused "did not have a Charter right not to be identified by the police -- in requesting his driver's license and recording the details of it, the police acted under statutory authority and committed no unlawful act": at para. 13. Finally, the Court said: "[the officer] had witnessed a violation of the Motor Vehicle Act, and was entitled to stop the vehicle, and obtain the driver's identification. The fact that he also wished to know who was driving for the purposes of a drug investigation did not transform the lawful detention into an arbitrary one": at para. 24.
- [60] Mr. Hollaus similarly had no Charter right not to be identified by Cst. Dodds. The search of Mr. Hollaus was within the proper scope of a search incidental to arrest and the fact that the search may have served a second purpose did not undermine the authority for the search.
- [61] Mr. Hollaus' second submission asserts that the "search of the Appellant for identification did not relate to and was not truly incidental to the arrest for the offence of possession for the purposes of trafficking" (emphasis added). Rather, it was directed to the American investigation.
- [62] This submission, however, indirectly challenges the various findings made by the judge at para. 57 of her reasons and that I have quoted earlier at para. 20.
- [63] The respondent argues that absent palpable and overriding error, these factual findings are entitled to deference. I do not understand the appellant to disagree. Certainly, none of the grounds of appeal he raises seek to challenge these findings. Thus, in my view, there is no basis for this submission and no merit to the issues raised under this ground of appeal.

Issue 3: Did the judge err in finding that the GCU members satisfied the requirements of ss. 10(a) and (b) of the Charter?

- [64] Before the judge, Mr. Hollaus argued primarily that his rights under ss. 10(a) and (b) of the Charter had been infringed because he had not been advised of the "true reason" why he had been pulled over, that being to further the DHS investigation. This was an aspect of the general theme that Mr. Hollaus faced "no jeopardy whatsoever in Canada." The respondent conceded, and the judge found, that there had been a four-minute breach of the appellant's s. 10 Charter rights arising from delay in advising the appellant of his right to counsel. It was also patent the VPD had used a traffic ruse to stop Mr. Hollaus' vehicle and that he had initially been misinformed about why he had been stopped. In the ensuing s. 24(2) hearing, counsel for Mr. Hollaus accepted that because "the s. 10 breaches were of such brief duration" and could "almost be described as technical [and] inadvertent" they did not give rise to any Charter remedy.

- [65] On appeal, Mr. Hollaus has expanded the issues he wishes to raise under s. 10 and seeks, apparently, to revisit his concession. Mr. Hollaus accepts that "the relevant section 10 principles are not contentious." The judge succinctly described those principles:
- [37] Section 10(a) of the Charter enshrines the right of the individual to be informed promptly of the reasons for their arrest or detention. Section 10(b) requires that the individual be both advised of their right to counsel and given the opportunity to exercise that right without delay.
- [38] The requirement under s. 10(a) is that the police provide the detainee with sufficient information to fully appreciate the extent of their legal jeopardy. The right attaches immediately following detention to ensure that the detainee has the information necessary to properly exercise their right to counsel and right to silence.
- [39] While s. 10(a) is an informational requirement, s. 10(b) imposes two separate obligations on the police: the duty to inform the detainee of their right to counsel and a separate duty to facilitate access to counsel if requested. The two obligations under s. 10(b) do not arise simultaneously. The duty to inform a detained person of his right to counsel arises immediately upon arrest or detention, but the duty to facilitate access to counsel arises once the detainee requests to speak with counsel. If the detainee requests access to counsel, the police are then obligated to facilitate access at the first reasonable opportunity: *R. v. Taylor*, 2014 SCC 50 at para. 24.
- [66] To this I would add the following statement from *R. v. Taylor*, 2014 SCC 50:
- [21] The purpose of the s. 10(b) right is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *Manninen*, at pp. 1242-43. The right to retain and instruct counsel is also "meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination": *R. v. Suberu*, [2009] 2 S.C.R. 460, at para. 40. Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy "is able to make a choice to speak to the police investigators that is both free and informed": *R. v. Sinclair*, [2010] 2 S.C.R. 310, at para. 25.
- a) The failure to advise Mr. Hollaus of the DHS investigation at the time of arrest
- [67] Here, Mr. Hollaus makes two related submissions. First, he relies on the judge's statement (at para. 75) that "the purpose of the stop was to further the American cross-border investigation. There was no intention at that time to hold and charge the applicant in Canada, but rather to release him and recover the fake drugs." Based on this finding he contends that "at the time of his arrest, [he] was not facing any jeopardy for the Canadian offence; rather, his real jeopardy was in relation to the DHS investigation."

- [68] In relation to this issue, the appellant seeks to rely on the judge's statement in isolation without regard to the judge's further findings that Tuxedo 25 was a Canadian operation and that Mr. Hollaus had committed a Canadian offence. I have above (at para. 20) set out these and other related findings made by the judge. There is, again, no challenge to these findings.
- [69] Second, he submits, relying on *R. v. S.E.V.*, 2009 ABCA 108 at para. 23, that "the inquiry that the Judge had to answer was 'whether the accused can reasonably be supposed to have understood the basis for the investigation.'" He argues, for example, that "[the] arrest for possession for the purposes of trafficking would not put him on notice about the DHS investigation" and that "[t]here is no evidence of any information conveyed to the appellant that would have been capable of putting him on notice about the DHS investigation."
- [70] In relation to this issue, the appellant somewhat overstates the purport of the statement he relies on from *S.E.V.* The relevant passage, in full, states:
- [22] It is trite that individuals who are detained for investigative purposes must generally be immediately advised, in clear and simple language, of the reasons for the detention: *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at para. 21, *R. v. Kelly* (1985), 7 O.A.C. 46, [1985] O.J. No. 2 (QL) at para. 14. An individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy: *R. v. Black*, [1989] 2 S.C.R. 138, 50 C.C.C. (3d) 1 at para. 24. In assessing whether the s. 10(a) requirement has been met, it is the substance of what the accused can reasonably be supposed to have understood in all the context and circumstances of the case, rather than the formalism of the precise words used, which governs: *R. v. Evans*, [1991] 1 S.C.R. 869, 63 C.C.C. (3d) 289 at para. 35.
- [23] The pertinent question is whether the accused can reasonably be supposed to have understood the basis for the investigation: *Evans* at para. 35, *R. v. Carrier*, 2008 ABCA 134, 429 A.R. 107 at para. 7; *R. v. Lund*, 2008 ABCA 373, 440 A.R. 362 at para. 11. Failure to inform a suspect that he is being "arrested" and that he will be charged with a particular offence does not violate s. 10(a) if, on the facts, the suspect understood the basis for his apprehension by the police and hence the extent of his jeopardy: *R. v. Latimer*, [1997] 1 S.C.R. 217, 112 C.C.C. (3d) 193 at para. 31. In order to validly waive the right to counsel, the accused must generally understand the sort of jeopardy he faces but need not be aware of the precise charge faced, nor of all the factual details of the case: *R. v. Smith*, [1991] 1 S.C.R. 714, 63 C.C.C. (3d) 313 at para. 28.
- [71] Section 10(a) required that Mr. Hollaus generally understand the jeopardy he faced at the time of his arrest by the VPD. That jeopardy was in relation to his arrest in Canada for the Canadian offence of possession for the purpose of trafficking. Although there was an ongoing American investigation, the appellant was not under arrest in relation to that investigation. Further, as the judge noted, there was no evidence that Mr. Hollaus faced any pending criminal charges in the United States at the time of his arrest on October 24, 2014.

- [72] Mr. Hollaus seeks to rely on *R. v. Borden*, [1994] 3 SCR 145, 1994 CanLII 63. In my view, *Borden*, a decision referred to by the judge, arose in different circumstances. Section 10(a) is engaged on "arrest or detention." In *Borden*, the Court found that the accused had been simultaneously detained in relation to two offences without being advised of the second investigation. Specifically, Justice Iacobucci, for the majority, said: "Once matters reached a point at which the officers were investigating two offences, the respondent was detained in relation to both of them, and had the right to be informed of this dual investigative intention": at 165-66. In this case, the evidence established, and the judge found that Mr. Hollaus was arrested in relation to a single Canadian offence: possession for the purpose of trafficking.
- [73] In *R. v. McWhirter*, 2017 BCSC 2314, as a result of an ongoing investigation into suspected drug trafficking, an officer was requested to conduct a traffic stop that became the subject of a *voir dire*. One part of the judgment, which I will return to, addressed whether the traffic stop ruse the officer used was prohibited by the various Charter provisions relied on by the accused. The accused also argued that the officer "was obligated to advise them of the ongoing drug investigation for which he had reasonable and probable grounds to arrest [them]": at para. 142. The judge, however, concluded that "when [the officer] detained each of the accused he advised them that he was detaining them for possession of drugs. It cannot be said that in those circumstances the accused could not have understood the jeopardy which they each then faced": at para. 145.
- [74] *R. v. Evans*, [1991] 1 SCR 869, 1991 CanLII 98, a case referred to in *S.E.V.*, establishes that when considering whether there has been a breach of s. 10(a), "[t]he question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b)": at 888.
- [75] In this case, the judge concluded:
- [81] Mr. Hollaus was informed of the reasons for his arrest as soon as he was told he was under arrest for the Canadian offence of possession for the purposes of trafficking. In my view, once he realized he was under arrest for that offence, he also had sufficient knowledge of the purpose of the arrest and the extent of his jeopardy to effectively exercise his right to counsel.
- [76] I see no error in this conclusion
- b) The ruse
- [77] For ease of reference I have summarized aspects of the factual history from the judge's reasons that I referred to earlier. That history confirms that Det/Cst. Munro had instructed the GCU members to rely on a ruse after they had stopped the Chevy. They were "to tell the targets they had received a 911 call from an unknown source reporting that they had seen an individual take a suitcase out of one vehicle, place it in their vehicle and drive away": at para.

12. The traffic stop occurred at 12:19 p.m. However, Cst. Lennox, who initially stopped the vehicle and was the first member to deal with Mr. Hollaus, varied the plan and "used the fact that the Chevy Silverado was missing a validation tag on its back-license plate as a means to get Mr. Hollaus safely out of the vehicle and towards the back of the pickup": at para. 17. Mr. Hollaus and Mr. Oliynyk were both handcuffed once they were out of the vehicle and told they were being detained in relation to a "suspicious vehicle check": at para. 17. Cst. Dodds searched the flatbed of the truck and, after "discovering" the suitcase of fake cocaine, arrested Mr. Hollaus for possession of a controlled substance for the purpose of trafficking. That arrest occurred at approximately 12:23 p.m.

- [78] A ruse does not arise in circumstances where a police officer stops a motorist arbitrarily without having any grounds to do so. Rather, a traffic stop ruse is a planned and intentional investigative tool where the police have already formed reasonable grounds to detain or arrest but have a legitimate police objective to initially disguise those grounds: see *R. v. Vuozzo*, 2013 ABCA 130 at paras. 43-44, leave to appeal to SCC ref'd, 35473 (24 October 2014).
- [79] Mr. Hollaus contends the judge's ruling under s. 10(a) reflects errors, insofar as it relates to the police's use of a ruse. First, he says that the judge failed to find the police committed two breaches of s. 10(a). The first alleged breach occurred when Cst. Lennox informed the appellant of the missing validation tag and required that Mr. Hollaus come with him to the back of the pickup truck. Cst. Lennox admitted in his evidence he believed the validation tag was to be displayed at the back of a commercial vehicle, when in fact it was to be displayed at the front of the vehicle. Indeed, counsel for Mr. Hollaus had referred to this misapprehension on the part of Cst. Lennox in his closing submissions to the judge. The second breach occurred when the police informed him that he was detained in relation to a suspicious vehicle check.
- [80] Mr. Hollaus asserts that "section 10 of the Charter does not permit the police to misinform detainees about the true reason for their detention or arrest." But this proposition is uncontroversial. Before the judge, it was conceded that there had been an initial violation of Mr. Hollaus' s. 10 rights. The question had been what the consequence of that violation was. Counsel for Mr. Hollaus accepted that the s. 10 violation, and both aspects of that violation (delay and misinformation) were patent on the record before the judge, was brief in duration and largely technical in nature. The breach of Mr. Hollaus' s. 10 rights did not, he accepted, support a s. 24(2) remedy.
- [81] This leads to the judge's second purported error. Mr. Hollaus argues that the judge erred in concluding that "any breach of [Mr. Hollaus'] s. 10(a) and (b) rights ended upon his arrest following the discovery of the drugs that had been substituted for the intercepted 26 kilograms of cocaine." Here too, he raises two separate issues. First, he now contends that the initial s. 10 breach "tainted" the subsequent Charter warnings he received. He argues that in this case, the police initially misinformed him about why he was being detained and that "subsequently, the police made no efforts to dispel that misinformation and its effect from the Appellant's mind." He further argues, relying on *R. v. Bielli*, 2021 ONCA 222 at para.

85, "[i]f the information is inaccurate, it taints the ability of counsel to give meaningful and responsive advice."

- [82] Though Bielli arose in different circumstances, it provides useful guidance. In Bielli, the police began an investigation into a suspected criminal organization operating illegal gambling online and in the City of Toronto. The police believed that the appellant was a central figure in the organization. They suspected the appellant travelled regularly between London and Toronto to collect money for the organization. They were concerned that the appellant might mix these funds with other monies when he returned home and that "the investigation was losing evidence every week": at para. 7. One of the lead investigators wanted to seize evidence from the appellant without disclosing or compromising the ongoing investigation.
- [83] The police developed a plan whereby the appellant would be stopped on the highway after making his collections. If the appellant did not commit a highway traffic offence, the officer would nevertheless initiate a vehicle stop. So as not to put the investigation in jeopardy, the appellant would not be arrested. The appellant's vehicle would be searched for the evidence the police were seeking. Importantly, the lead investigator instructed "that the appellant should not be arrested for criminal organization and gaming offences but that he should be told that he was being investigated and detained for possession of proceeds of crime": at para. 15. The appellant would not know "what he was actually under investigation for"; he would know he was being investigated for money in the car but not for criminal organization, book[making] or money-laundering charges": at para. 15. The lead investigator knew "that the appellant would not know his full jeopardy": at para. 16. Further, the lead investigator "agreed that the appellant's lawyer inevitably had to be misled about what was really going on; his lawyer could not be fully informed": at para. 19.
- [84] The details of the execution of this plan were complex. An officer stopped the appellant, telling him that his driving had raised suspicion. After conducting a check, the appellant was told that he was being placed under investigative detention as his record showed a connection with the Hells Angels. The officer said he would be searching the appellant's car for contraband and weapons. The appellant spoke with his lawyer in private while in the police cruiser. The officer then searched his vehicle and found a large amount of cash. After some time, the officer advised the appellant that he was being investigated for possession of proceeds of crime. The appellant again spoke to his lawyer. The appellant was ultimately released without being charged and after being detained for nearly 3 hours: at paras. 24-28.
- [85] The appellant was subsequently arrested two months later. He was charged with "conspiracy to commit an indictable offence, possession of proceeds of crime exceeding \$5000, committing an indictable offence for the benefit of a criminal organization, and two counts of possession of the proceeds of bookmaking exceeding \$5000": at para. 31.

- [86] The Court of Appeal for Ontario reviewed three ruse cases the trial judge had relied on. In *R. v. Dibble*, 2011 ONSC 399, the police were engaged in a "Guns and Gangs taskforce" investigation. Mr. Dibble was not a target but was observed leaving a building with a gym bag suspected to contain illicit drugs. A surveillance officer immediately instructed the Ontario Provincial Police to stop and search the car but to avoid divulging the reason for the search. They were asked to create a false reason for the search. The car was stopped and the police told Mr. Dibble that this was on account of a radar detection signal. After searching the car, including the gym bag, the police found cocaine. Mr. Dibble was then arrested for possession of cocaine for the purpose of trafficking. The Crown conceded a breach of ss. 10(a) and (b). In addressing s. 24(2), the trial judge stated that though the police had not complied with the requirements of s. 10, they had acted "to protect the investigation and not to intentionally circumvent Mr. Dibble's section 10 rights": at para. 42. She also concluded that the breaches were minor and made in good faith: at para. 42.
- [87] In *R. v. Grant and Campbell*, 2015 ONSC 1646 [Grant], the police had information that individuals would be attending a specific nightclub and carrying firearms. Based on surveillance outside the nightclub, the police believed that one of the two accused placed a firearm in a vehicle. The police determined they were not going to let the vehicle travel far from the nightclub without stopping it but, given public safety concerns, did not want the interaction to take place in the parking lot. After allowing the vehicle to leave the nightclub and travel a short distance, the police stopped the vehicle for two purposes: the criminal firearms investigation and observed seatbelt infractions under the Highway Traffic Act, R.S.O. 1990, c. H-8. The police only told the two accused of the Highway Traffic Act infraction. The police told the accused they were detained, walked them to a police car, searched the vehicle, and found a firearm. They then informed the occupants that they were under arrest for possession of a firearm and advised them of their right to counsel. The trial judge found that both ss. 10(a) and (b) had been violated: at para. 109. However, the judge found s. 10(a) had been complied with about three minutes after it should have and that the delay was motivated by an ongoing concern over the whereabouts of the firearm believed to be in the vehicle: at paras. 115-17. As such, the s. 10(a) breach was not a serious breach. It was technical, short-lived, and had been committed honestly and in good faith.
- [88] Finally, in *R. v. Whipple*, 2016 ABCA 232, the police had obtained a general warrant that authorized the police to use a ruse to effect a traffic stop. The accused was again advised of the real reason for his arrest within minutes of the vehicle stop.
- [89] In *Bielli*, the Court of Appeal distinguished *Dibble*, *Grant*, and *Whipple* on different bases. Both *Dibble* and *Grant* involved "spur-of-the-moment decision making by the police, not a planned, intentional violation of the Charter": at para. 96. Further, "[t]he cocaine in *Dibble* and the firearm in *Grant* were dangerous contraband that could cause harm to the public, and the conduct in *Grant* was motivated by safety concerns": at para. 96. Still further, in each of *Dibble*, *Grant* and *Whipple*, the accused had been advised of the real reason for their arrest within minutes of the vehicle stop: paras. 96-97. Importantly, the accused in each of

Dibble, Grant and Whipple "could undertake their defences shortly after their detentions or arrests whereas [in Bielli] the appellant was not informed that he was under investigation for possession of proceeds of crime until nearly an hour into his detention and he was not charged for over another two months": at paras. 98 and 102. Finally, the Court in Bielli, though recognizing the trial judge's finding the police acted in good faith was entitled to deference, concluded the finding on "this constellation of facts was unreasonable": para. 103.

- [90] Several relevant considerations emerge from these authorities. First and importantly, there was no suggestion in Dibble, Grant or Whipple that the use of a ruse by police to initially misinform an individual of the true reason for their detention "tainted" the subsequent Charter warning the individual received. Instead, the court in each case recognized that there been an initial Charter violation that was short-lived and technical in nature that did not warrant a Charter remedy under s. 24(2). Other decisions to similar effect include McWhirter and R. v. Sheck, 2015 BCCA 471, leave to appeal to SCC ref'd, 36736 (12 May 2016).
- [91] Further, in each of these cases the police, after initially engaging in the ruse, properly informed the person who had been detained or arrested of the reasons for that detention or arrest.
- [92] Though the Court in Bielli emphasized the urgency or safety considerations that had caused the police in Dibble and Grant to rely on a ruse, such exigent circumstances merely inform the severity of the breach that arises from the ruse. In McWhirter, for example, the ruse relied on was part of a more carefully constructed plan.
- [93] Based on these various considerations, it is clear that the circumstances of this case do not align with those of Bielli. Cst. Lennox confirmed that the initial ruse, conceived by Det/Cst. Munro, was intended to keep things "very low-key" and to "create a ruse to safely get [Mr. Hollaus and Mr. Oliynyk] out of the vehicle." He further confirmed that his subsequent reliance on the absence of a vehicle tag allowed him to "take [Mr. Hollaus] away from the control and care of that vehicle, ensuring his safety, the public safety and again preserving the evidence at play ". The use of the ruse was short-lived. Four minutes after the police first stopped Mr. Hollaus, he was advised he was being arrested for possession of a controlled substance for the purpose of trafficking. Certainly, another aspect of the ruse was to conceal the DHS investigation, but there was no need, as I have earlier explained, to advise the appellant of the ongoing American investigation.
- [94] In my view, there is no merit to the assertion, in the circumstances of this case, that the ruse relied on by the police "tainted" the subsequent Charter warnings the appellant received.
- [95] The second issue Mr. Hollaus raises is that:

The police failed to inform the Appellant about the Canadian offence for which he was under de facto arrest-- attempted possession for the purposes of trafficking. Instead he was advised about an offence, the commission of which was impossible given the presence of fake cocaine. This means that the appellant ultimately received advice about an offence that legally did not exist.

[96] I start with the observation that counsel for Mr. Hollaus did not press this issue before the judge. To be clear, counsel had, in his written submissions and in arguing that the stop, search and arrest of the appellant were illegal, said:

The purported reason for the stop and the arrest was possession for the purpose of trafficking. As we now know, this cannot be so because there was never any controlled substance in the suitcase that was retrieved. The Applicant was never in possession of any drug.

[97] In its written submission, the Attorney General of Canada responded as follows:

While the suitcase did not contain the promised cocaine, the individuals picking up the suitcase believed it did. Attempted possession of a controlled substance for the purpose of trafficking is an offence under Canadian criminal law. The fact that the police replaced the promised cocaine with a decoy preventing the completion of the offence, does not change the nature of what Mr. Hollaus and Mr. Oliynyk were attempting to do.

[Footnotes omitted.]

[98] Before the judge, counsel for Mr. Hollaus said:

And I take no position with regard to the suggestion that there can be attempted possession of cocaine. I have no difficulty with that. The applicant submits that the activities of the police must be judged by what they actually did, and not what they could have done.

At no time in any of the evidence did the police officers testify that they were thwarting to attempt to possess -- an attempt to possess cocaine. At all material times, the police were investigating an offence committed in the United States. Notwithstanding the true purpose of the investigation, the reason given for the stop was possession of a controlled substance.

So as I said, an attempt is a lesser included offence. I say it's of no moment because the police were not investigating a Canadian offence.

[99] Elsewhere, counsel for Mr. Hollaus said:

If the Requesting State says the basis for this stop was attempted possession of cocaine in Canada, I say this. None of the evidence demonstrates that. The sole purpose of this stop was to further a Homeland Security investigation. The police had no jurisdiction to do that. They're not entitled to investigate a United States offence. If they have no jurisdiction to investigate that offence, the stop was unlawful, the search was unlawful. And no matter what, the fact that they never disclosed the true nature of the purpose of the stop, i.e., that it was a United States offence, it was a violation of s. 10(a) and 10(b).

- [100] This returns us to the fact that the submissions initially made before the judge were narrow and directed to a very different issue. The appellant did not advance the sub-issue he now raises on appeal. Having said that, in my view, the issue has no merit.
- [101] I referred earlier to Evans and S.E.V. to describe the informational requirements of s. 10(a). The judge also referred to the following statement in *R. v. Goodkey*, 2015 BCCA 64, leave to appeal to SCC ref'd, 36323 (13 August 2015):
- [113] Section 10(a) of the Charter provides that on arrest or detention, a person has the right "to be informed promptly of the reasons therefor". Mr. Krieger submits that Constable Wikstrom breached this right by telling him only that he was being arrested for "smuggling". I do not agree. In my view, the trial judge dealt with this issue correctly when he stated:
- [50] In determining whether there has been a Charter breach, it is important to take a purposive approach to defining the state's obligations. One is entitled to know the grounds upon which one is detained for the purpose of knowing what position to take; whether to submit, to speak, or to retain counsel. The accused need not know all the particulars but the substance only of why he was detained. Having considered the description of the duties of arresting officers in *R. v. Evans*, [1991] 1 S.C.R. 869 and *R. v. Wong* (1998) 52 C.R.R.(2d) 89 (B.C.C.A.) I am of the view that considering the circumstances in this case the accused understood generally the jeopardy he faced upon his arrest and could make an informed decision on his need for legal advice. Accordingly Cst. Wikstrom cannot be said to have breached Mr. Krieger's Charter rights when he failed to elaborate on the grounds for arrest after Mr. Krieger insisted upon speaking to counsel.
- [102] Mr. Hollaus' contention that s. 10(a) required the VPD to specify that he was under arrest for the offence of attempted possession for the purposes of trafficking is contrary to the principle that s. 10(a) does not require an accused to be told the precise or technical offence they may face. Looking to the circumstances of his arrest, Mr. Hollaus would have been aware that he had just driven the Chevy to a parking lot and that Mr. Oliynyk had retrieved a suitcase from another vehicle. He had been informed that he was under arrest for possession for the purpose of trafficking after the suitcase was seized from the back of the Chevy. In these circumstances, in my view, the appellant had sufficient information to allow him to make an informed decision about whether he wished to waive his right to counsel or assert it and consult with a lawyer.
- [103] One last point remains under this ground of appeal. The appellant relies on the recent decision in *R. v. Tim*, 2022 SCC 12 to support his s. 10 argument. In *Tim*, the arresting officer saw the appellant try to hide a pill which the officer correctly identified as Gabapentin. However, the officer incorrectly believed that Gabapentin was a controlled substance under the CDSA and arrested the appellant for possession of a controlled substance. He then conducted a search incidental to arrest and found a loaded handgun. The Court held that the arresting officer's subjective belief that he had reasonable and probable grounds to arrest the appellant had been based on a mistake of law and thus could

not be objectively reasonable: at para. 39. An arrest based on a mistake of law is unlawful and infringes s. 9, and the searches incidental to that unlawful arrest were necessarily arbitrary and breached s. 8: at paras. 41-43, 48.

[104] Mr. Hollaus relies on the following statement from Tim to support his submission that the police violated his s. 10(a) Charter rights:

[41] I do not accept this submission. The officer arrested the appellant for possession of gabapentin specifically. The officer knew the facts -- he correctly identified the pill as gabapentin -- but mistakenly concluded that possession of gabapentin was an offence, when, in law, it was not. That brings this case squarely within Frey and Kosoian. It makes no difference whether the mistake of law involves a non-existent offence, or an existing offence that could not be engaged on the facts, even if true, relied on by the officer. In both instances, the mistake of law precludes a lawful arrest. The courts below erred in concluding otherwise.

[105] In *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, one of the decisions referred to in Tim, the police had arrested a young woman who did not hold the hand rail on an escalator in a subway station. The Court found that the offence alleged against her did not exist in law. In Tim, conversely, the offence of possession of a controlled substance did exist, but could not be engaged on the facts.

[106] In this case, possession for the purposes of trafficking is an existing offence. The judge referred to and relied on s. 24 of the Criminal Code and *United States of America v. Dynar*, [1997] 2 S.C.R. 462 at para. 67, 1997 CanLII 359, where the Court explained that different types of attempts to do the "factually impossible" were nonetheless all crimes. It is only, as the judge said, "attempts to commit imaginary crimes [that] fall outside the scope of [s. 24 of the Criminal Code]": at para. 67.

[107] Further, under s. 660 of the Criminal Code, "[w]here the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt." Had Mr. Hollaus ultimately been charged and tried for the offence for which he was arrested he nevertheless could have been convicted of the attempt to commit that offence. In my view, Tim is neither helpful nor analogous to the present appeal.

Issue 4: Did the Judge provide insufficient reasons for her ruling on Voir Dire No. 1?

[108] The legal standard that addresses the sufficiency of a judge's reasons is largely determinative of this ground of appeal. In *R. v. G. F.*, 2021 SCC 20 at para. 68, the Court, relying on *R. v. Sheppard*, 2002 SCC 26 at para. 42, explained that "the duty to give reasons is driven by the circumstances of the case ". Further, the task of appellate courts is narrow:

[69] [Appellate courts] must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. As McLachlin C.J. put it in *R.E.M.*, "The

foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded": para. 17. And as Charron J. stated in *Dinardo*, "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues": para. 31.

- [109] Reasons must be both factually and legally sufficient. Factual sufficiency is ordinarily "a very low bar": G.F. at para. 71. Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *Sheppard* at paras. 64-66, cited in G. F. at para. 74. To succeed on appeal, an appellant is required to demonstrate either error or the frustration of appellate review: *Sheppard* at para. 54, cited in G.F. at para. 79.
- [110] Mr. Hollaus contends the judge's reasons are insufficient in three respects. First, he asserts that Cst. Dodds and Cst. Lennox "testified that they were operating on directions from other officers. The Judge's reasons do not allow for a meaningful review of how and why she rejected the officer's testimony and concluded that they had independently formed the grounds in support of the Appellant's detention and arrest" (emphasis in original).
- [111] At paras. 35-37 of these reasons, I said that the portions of the judge's reasons that the appellant relies on to suggest that Cst. Dodds and Cst. Lennox formed "independent" grounds to arrest Mr. Hollaus reflects an unrealistic parsing of those reasons and bears no relationship to the record, the live issues before the judge, or the submissions of counsel.
- [112] Second, Mr. Hollaus submits that "none of the officers ever testified to their subjective belief that the Appellant was committing the offence of attempted possession for the purpose of trafficking. Beyond a number of conclusory statements on this point, the Judge offered no analysis in support of her conclusion" (emphasis added).
- [113] Each of Det/Cst. Munro, Cst. Lennox and Cst. Dodds testified that they believed there were grounds to arrest the appellant once he and Mr. Oliynyk picked up the suitcase of imitation cocaine. The credibility of these officers was not challenged before the judge and there is no evidence contesting their honest belief that there were grounds to arrest the individuals who had picked up the imitation cocaine. The subjective component of the reasonable grounds requirement was never at issue before the judge. Nor was the issue that the appellant was only committing the offence of attempted possession for the purposes of trafficking advanced in any meaningful way. It is necessary to assess the judge's reasons as a whole, having regard to the record and the live issues before her. In my view, that assessment supports the sufficiency of the judge's reasons.
- [114] Third, Mr. Hollaus submits that "Cst. Dodds expressly stated that the search of the Appellant's truck was not pursuant to the power of search incidental to arrest. Given this testimony, the Judge ought to have explained how and why she rejected it and arrived at the opposite conclusion" (emphasis in original).

- [115] At paras. 52 and 53 of these reasons, I explained that the limited portion of Cst. Dodds' evidence that the appellant relies on omits his subsequent re-examination. When the whole of Cst. Dodds' evidence is considered, together with the Attorney General's concession that the appellant was subject to a de facto arrest once his vehicle had been stopped, it is apparent that the judge did not reject Cst. Dodds' evidence and that there was no need for her to further develop the issue.
- [116] Finally, Mr. Hollaus asserts that if this appeal establishes any Charter breaches, it may be necessary to undertake a fresh s. 24(2) assessment. As I do not consider that any of the grounds raised support the existence of a Charter breach, there is no need to undertake that assessment.

Disposition

[117] In my view, this appeal, and each of the grounds it raises, should be dismissed.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"

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Prepared on 28 October 2026 · Esheria