

File No: [REDACTED]
Registry: Western Communities

In the Provincial Court of British Columbia

REX

v.

[REDACTED]

**REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE M. MUNRO**

COPY

**Crown Counsel appearing by
videoconference:**

E. Weisenburger

Defence Counsel:

R. Neary

Place of Hearing:

Duncan, B.C.

Date of Judgment:

August 25, 2023

[1] THE COURT: [REDACTED] on or about the 23rd day of June, 2021, at or near the City of Saanich in the Province of British Columbia, did unlawfully possess a controlled substance, to wit, cocaine, for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. Mr. [REDACTED] is also charged on the same date and location that he did unlawfully traffic in a controlled substance, to wit, cocaine, contrary to s. 5(1) of the *CDSA*.

[2] The circumstances, very briefly, are that the police were in receipt of confidential information and, based on that, they stopped the motor vehicle that Mr. [REDACTED] was operating on the day in question, arrested him, and searched, no doubt, his person, but more importantly his vehicle. The search of that vehicle located just under a kilogram of cocaine in a vacuum-sealed bag.

[3] With the allegation date of June 23, 2021, the information in this matter was sworn on July the 8th of 2022. Give or take about three months from there, on November 18, 2022, the accused entered an election to be tried in Provincial Court. Various dates are set for pretrial applications involving *voir dire* issues and disclosure issues as well as this application and the trial proper is scheduled for March the 12th to 15th of 2024.

[4] This is a pretrial application on behalf of the accused pursuant to s. 11(b) of the *Charter* seeking a judicial stay of proceedings pursuant to s. 24(1) of the *Charter* as a result of what the defence argues is a breach of this accused's right to be tried within a reasonable time. From the date of the swearing of the information on July 8th, 2022, to the last of the trial dates of March 15, 2024, 616 days will have passed. The defence concedes, on the basis of deliberation delay, that 56 days should be

deducted from the 616. The resulting delay in coming to the conclusion of the presently set trial is 560 days. It is agreed amongst counsel that a calculation of 18 months in days is 547 and so, based on the principles set out in the Supreme Court of Canada decision in *Jordan* which establishes a ceiling of 18 months to trial for a Provincial Court election, that ceiling in this case will be exceeded by 13 days.

[5] The *Jordan* decision sets out at paragraph 65 the following:

To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[6] What the Crown says here is that the defence, in delaying the entering of the election and plea and getting to the issue of setting a trial date, must bear some responsibility for the overall delay of 560 days in getting to trial. In this case, the disclosure that concerned the defence was video evidence of the roadside stop of the accused's motor vehicle and subsequent arrest and search. That evidence, for whatever reason, was neither disclosed nor referenced in the initial disclosure package. It is unclear as to what the difficulty was in disclosing that evidence in the first instance, never mind once requested. That, says the defence, was the cause of any undue delay in terms of the election and arraignment of this accused in the setting of dates.

[7] On November the 7th of 2022, counsel appeared before Judge Gouge with

the Crown urging the Court to compel the Defence to enter an election and to arraign the matter assuming the election was Provincial Court. With that submission before the Court, there is a discussion between Judge Gouge and Ms.

Weisenburger for the Crown located in the transcript of November 7, 2022, at page 5, commencing line 17. The court says to Ms. Weisenburger:

So Ms. Weisenburger, you don't know at present whether there's one video or two?

[8] Counsel responds :

I haven't had any opportunity to make those inquiries as, again, these are requests that were made over the weekend.

[9] The court says:

What I find surprising about this, Ms. Weisenburger, is that, as I understand it, the Crown's disclosure obligation is not limited to responding to defence requests. The Crown has an obligation to proactively disclose. Am I right about that?

[10] Counsel responds:

Yes, that's correct. We were aware of the video after my friend requested it of the dog search stop from the vehicle that actually did the dog search. The police have not yet provided any of the -- any video from any other vehicles. I haven't looked into which vehicles were on the scene. I know that one of the officers was involved in a police -- or in a car accident on the way and wasn't there. So we've not been provided any additional video yet. I will make inquiries with the officers as to what video is available from which vehicles now that I'm aware that it's an issue.

[11] The court says:

But these events happened 16 months ago. Shouldn't I reasonably expect the police to have sent you the videos a year ago?

[12] Counsel responds]:

They have not sent any videos and I've not made any inquiries so I'm not aware -- it hasn't been brought to my attention that they may exist until now. So ideally, the police would have sent everything that they have right off the hop. I don't know if there are additional videos. Those are the inquiries I'm going to make now.

[13] There is some interruption from defence briefly and then the court says to

Crown:

So, essentially, because the police didn't do their duty in the past 16 months, you're saying that Mr. [REDACTED] should enter a plea today even though he hasn't had disclosure. That fair?

[14] Crown responds:

I don't know if there are additional videos. I haven't made those inquiries yet. So they may -- there may be. I'm not saying that there aren't, but I haven't had a chance to make those inquiries.

[15] The upshot of that appearance was Judge Gouge declined to compel the defence to deal with the matter of election and potentially arraignment and the matter was adjourned over for a brief period of time to November the 18th.

[16] On November the 18th, and that transcript is also present before the court, counsel again appears on the record before Judge Hodge and Mr. Neary indicates on behalf of his client [as read in]:

So, despite the fact that disclosure is incomplete, the issues that were raised on November the 7th were not resolved at this stage and were not to be resolved for some period of time, if at all, even to this date.

[17] Nonetheless, he says:

So, despite the fact that disclosure is incomplete, I'm satisfied at this point that we can arraign, particularly given that we're probably going

to be a little bit of time before a pre-trial conference and hopefully we have the will-say before the pre-trial conference and actually be in a position to fix dates then. And, frankly, I think it would be good to canvass some of the issues in terms of how this has developed and whatnot at the -- at a pre-trial conference.

[18] So Mr. Neary says:

. . . waiving formal putting of the election. It will be Provincial Court, trial by Provincial Court judge; pleas of not guilty; and the request is to go over to the JCMs to set a date for a pre-trial conference.

[19] Frankly, despite the inadequate state of disclosure, the accused, in electing and arraigning within three months following the first court appearance of August 25, 2022, in my view, acted with all due alacrity in getting to the election and arraignment of November 18, 2022. From there, a pretrial conference was required following the procedures set down by the Provincial Court. Given a rough estimate of five days for trial, an accused cannot secure trial time without going first to a pretrial conference to discuss the issues and resulting time estimates.

[20] The matter was adjourned, then, from November 18, 2022, to the JCM to fix a date for a pretrial conference and that was set in the normal course, as I understand it, I have heard nothing to the contrary, for January the 7th of 2023. On January the 7th, in an off-the-record pretrial conference, counsel appeared before Judge Browning who, as I understand it, heard what the issues were at that stage in terms of outstanding disclosure issues and was not satisfied that the matter properly be given a time estimate given those outstanding issues and adjourned the matter to a subsequent pretrial conference scheduled for February 22.

[21] From February 22, the matter was adjourned to the JCM for March the 7th to

fix dates.

[22] On March the 6th, 2023, it is worth noting that the position of the Crown was that their earliest availability for the fixing of any dates, as I understand it, was July 1st of 2024. The Crown, of course, recognizing the delay difficulties with that position, would resile from it in due course.

[23] Of course, one of the primary functions of a pretrial conference is to establish the issues for trial and the appropriate time estimate to litigate those issues. The court was satisfied on January the 7th of 2023 that this could not be accomplished given the ongoing issue with respect to the state of disclosure surrounding the video evidence of the roadside stop, detention, arrest, and search. Frankly, from November the 7th, 2022, right through to February 22, 2023, the Court consistently recognized the significance of this disclosure to the defendant's ability to properly consider the issues for trial and for the Crown, Defence, and the Court to properly arrive at a consensus for the amount of trial time required to litigate those issues.

[24] What the Crown impugns is the timeframe between November 7, 2022, and March the 6th of 2023. They say that entire timeframe ought to be counted as defence delay, notwithstanding the various court appearances and determinations by the court to the contrary in terms of the readiness of the defendant to deal initially with election and arraignment and ultimately with the setting of dates based on appropriate time estimates given the outstanding disclosure issue surrounding the video evidence.

[25] In the alternative, Crown says, the timeframe from January the 9th of 2023 to March the 6th, 2023, ought to be deemed defence delay and deducted from the total

delay.

[26] I just want to be clear here, counsel, I have been referring to the appearance before Judge Browning as January 7.

[27] CNSL R. NEARY: That's correct, Your Honour.

[28] THE COURT: Right. So I do not know where the January 9th comes into play, Ms. Weisenburger. I am looking at that through your materials. It does not make a lot of difference, but I assume that is --

[29] CNSL E. WEISENBURGER: Yes.

[30] THE COURT: -- that should be January 7th, should it?

[31] CNSL E. WEISENBURGER: Yes, we did address it during the oral submissions. That was an error on my part and I apologize.

[32] THE COURT: Yes, I corrected it, but then wrote in "nine" over "six."

[33] CNSL R. NEARY: You see a number, you write it in, right?

[34] THE COURT: So it started as six, I corrected it to nine, and it is seven. So I am returning to my decision.

[35] In the alternative, they say the timeframe from January 7, 2023, to March 6, 2023, ought to be deemed defence delay and deducted from the total delay.

[36] Returning to the decision of the Supreme Court of Canada in *Jordan* at paragraph 47, the court had this to say:

If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling [of 18 months], then the delay is presumptively unreasonable. [and] To rebut this presumption, the Crown must establish the presence of exceptional circumstances.

If it cannot, the delay is unreasonable and a stay will follow.

[37] In my view, given the conduct of the Defence and the cause of any delay in the fixing of dates in this matter, which was detected very early on by the defence in terms of the disclosure issue, and their conduct in attempting to get that video evidence or wills to explain its absence was consistently found by the Court to be of significant merit to justify adjourning the matter until that disclosure issue was resolved. Notwithstanding that, on November 18 of 2022 in an unsatisfactory state of disclosure, the Defence was prepared to make an election and to arraign the accused. The Court at pretrial conferences on January 7th of 2023 and February 22nd of 2023 considered that outstanding disclosure issue and ultimately dates were still arranged by early March for *voir dire*s in the fall and ultimately for trial time as indicated in March.

[38] In my view, what caused the delay in the fixing of dates in this case is the inexplicable absence of any reference to video evidence in the initial disclosure package and the equally inexplicable extraction process of repeated and prolonged attempts to get clarity as to the nature of that disclosure, disclosure repeatedly recognized by the court to be critical to the defence's ability to understanding the case it had to meet and the issues at hand.

[39] So, in terms of the timeframe to get to the fixing of dates, I am not prepared to lay any of that at the feet of the defence. I would not subtract any of that timeframe for defence delay. In that circumstance, given the calculation that places this matter with a Provincial Court election as 13 days over the presumptive unreasonable limit, the Crown must establish the presence of exceptional circumstances. If it cannot,

according to *Jordan*, the delay is unreasonable and a stay will follow.

[40] Returning to *Jordan* at paragraph 77:

As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex.

I note both the use of the terms "exceptional circumstances" and "particularly complex." The court carries on:

This too requires elaboration. Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases [the court goes on] arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute.

[41] Crown says in argument and in their written argument filed with the court at paragraph 111, the allegations themselves in this case are not particularly complex. Crown submits that the disclosure, arraignment, and scheduling process have been complex and that the nature and number of issues in dispute also contributes significant complexity. At paragraph 112 of that argument, Crown says, as they argued *viva voce* before me [as read in]:

The arraignment and scheduling of dates in this matter has been of such complexity that it has required two appearances in docket court to obtain judicial direction and five pretrial conferences. The Crown respectfully submits that the need for such extensive judicial case management to facilitate the scheduling of trial dates is a significant hallmark of complexity.

[42] I note that the impugned timeframe by the Crown running from November 7 to

March the 6th of 2023 only encompasses two of the pretrial conferences. The other pretrial conferences dealt with other issues along the way, but do not appear to have added any complexity or further delay in the matter. The Crown concedes that the allegations themselves are not particularly complex, but that the arraignment and scheduling of dates have been of sufficient complexity that I should find exceptional circumstances. Given the concession that this is not a particularly complex prosecution, I am hard put to find that the accused in raising proper disclosure issues somehow generated a complexity in the arraignment process that should now count against them in the Jordan analysis.

[43] I have been referred to numerous authorities and I will quote from *R. v. Roberts*, 307 BCCA 2020, at paragraph 86, Justice Frankel reading for the court says the following in terms of the issue of complexity:

While the *Jordan* majority used the expression “particularly complex” to describe cases for which additional time will be justified, it also used the expression “exceptionally complex”: at para. 127. This latter expression was also used by the majority in *R. v. Williamson* ... decided the same day as *Jordan*. The adverbs “particularly” and “exceptionally” reflect the fact that the complexity-exception bar is a high one and that the cases that reach it will be the exception, not the rule. This is further evinced by the fact that the presumptive ceilings were set taking into account the increase in the complexity of criminal trials that has occurred since the early 1990s, and the time the defence requires to prepare and present its case ... Indeed, the minority judges in *Jordan* opined that “[f]or the vast majority of cases, the ceilings are so high that they risk being meaningless” ...

[44] I note that the nature of the case in *Jordan* was itself found to not be a particularly complex prosecution. On its face, it would appear to be significantly more complex than the one I have before me. I can say that as well with respect to numerous other authorities that have been provided where “particularly complex”

was not found to be applicable. I do not find that this prosecution meets that high bar of "particularly complex."

[45] Therefore, in all of the circumstances, I cannot find that the Crown has discharged its onus to show exceptional circumstances by way of a particularly complex prosecution in any of the manners suggested, of which there are many, by the Supreme Court of Canada in *Jordan*.

[46] In those circumstances, I find that there has been a violation of this accused's right to be tried within a reasonable time contrary to s. 11(b) of the *Canadian Charter of Rights and Freedoms* and, as such, given the authority in *Jordan*, I have no choice, given the delay that is before me, to enter a judicial stay of proceedings pursuant to s. 24(1) of the *Charter* and I do so.

(REASONS CONCLUDED)