

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REX

v.

[REDACTED]
[REDACTED]

**ORAL REASONS FOR JUDGMENT
(RE THE ACCUSED [REDACTED])
OF
THE HONOURABLE JUDGE M. MCKIMM**

Crown Counsel:

A. Van Tine

Counsel for the Accused:

R.L. Neary

Place of Hearing:

Victoria, B.C.

Date of Ruling:

June 3, 2025

VERITEXT LEGAL SOLUTIONS

700 - 925 W. Georgia St. Vancouver, B.C. V6C 3L2
(604)684-4347
www.veritext.ca

[1] THE COURT: The law recognizes an ascending series of privacy interests given state activity. The law recognizes the low expectation of privacy relative to the stopping of a motor vehicle and inquiries made to a motor vehicle operator because motor vehicle operation is a heavily regulated activity in our society. There is therefore a lower expectation of privacy. The state is entitled to intrude on that privacy for less compelling reasons.

[2] There is a level of privacy in asking an individual to leave their motor vehicle and impinging on their liberty to that greater extent. That expectation of privacy also requires the state to satisfy the court that the state has a level of justification higher than that, for example, to stop the vehicle. There is a higher expectation, again, for an individual who is stopped in that fashion to be frisked and searched in a pat-down search. The state must justify that intrusion into privacy. There is also a higher level of privacy, again, in the intrusion of the state into a cursory search of a motor vehicle for officer safety or public safety. That invasion of privacy requires yet further scrutiny and must be justified on a higher and more rigorous standard.

[3] If that search produces an object in plain view, for example, that may well justify a complete deprivation of the liberty of the citizen by way of an arrest. That arrest triggers a significant invasion of privacy and triggers a significant number of *Charter* rights. One of those state intrusions is the search, incidental to arrest, of a motor vehicle and, if objects are found during the course of that search of the motor vehicle, that search must, too, be justified. I see this as a cascading level of privacy interests and an escalating level of state justifications that are required.

[4] I accept unequivocally that an officer who legitimately stops a motor vehicle may well have grounds to simply ask the driver to remove herself from the vehicle. That same officer, during the course of a pat-down search or as a result of information received, may elevate their concerns to one where public safety or officer safety is engaged and that would justify a more intrusive cursory search of a motor vehicle to ensure officer or public safety.

[5] If that were to produce, as I said earlier, in plain view, evidence of criminality justifying on reasonable and probable grounds the arrest of an individual, that, too, may well trigger, incident to that arrest, a fulsome search of a motor vehicle and, if real evidence is found during the course of that search, that is entirely admissible and is constitutionally sound.

[6] The court must be vigilant, though, to be mindful that that escalating invasion of privacy does not simply become a mantra to move directly from the stop of a motor vehicle to the fulsome and complete search of a motor vehicle. In my view, the court must analyze each of the steps along the invasion of privacy to ensure that they were objectively and subjectively justified.

[7] My finding is that, in this case, almost none of the searches, almost none of the invasions of privacy, were justified. I accept that the words of the officer were uttered which, if believed, would have justified the entirety of the search. However, I am not satisfied on the record that this search is any way justified on the evidence that I accept.

[8] At approximately four o'clock in the morning on January 25, 2024, two officers in an unmarked patrol car observed Mr. [REDACTED] walking quickly on a downtown Victoria street. Constable Gilroy, the lead investigator, described Mr. [REDACTED] as a well-known street-level drug dealer. In cross-examination, she conceded that she had no foundation for that belief. Indeed, she had stopped Mr. [REDACTED] a number of times in the past and had never found him in possession of any indicia of drug trafficking.

[9] The officers watched Mr. [REDACTED] shuffle behind a local restaurant and across a strip mall to where a white lifted F-150 pickup truck was parked. The officers described [REDACTED] behaviour as suspicious, though they certainly offered no foundation for such a belief. Mr. [REDACTED] was walking in a well-lit area over to a vehicle that was parked in a perfectly natural way in an extremely well-lit area.

[10] They followed Mr. [REDACTED] into the parking lot and watched as he approached this lifted F-150 pickup truck. They decided to stop and detain both Mr. [REDACTED] and the pickup truck. Constable Gilroy activated the police lights and used their police vehicle to block in the F-150. At this point, they knew nothing about the F-150 and they only really had information suggesting that Mr. [REDACTED] was a member of the unhoused street community in Victoria.

[11] Constable Gilroy radioed for backup. Backup arrived at her location one to two minutes later. Constable Jackson exited the police vehicle and detained Mr. [REDACTED] some distance away from the F-150. Constable Gilroy, the senior

officer, exited her police vehicle and approached the driver's door of the white pickup truck. At that point, she testified she had no idea who was inside the white pickup truck. As I indicated, within two minutes, a second fully marked police car arrived and acted as cover.

[12] Constable Gilroy testified that, when she approached the driver's door, she recognized at that time the driver of the white pickup truck as the accused, [REDACTED]. She testified that she recognized Mr. [REDACTED] from an earlier traffic stop. I do not accept this evidence. She has no notes of an alleged earlier traffic stop nor did she disclose that fact in any of her pretrial disclosure in spite of specific requests for any disclosure with respect to her knowledge of Mr. [REDACTED]. She professed on the stand to have simply remembered it the morning of trial. I do not accept that a fact as important as recollecting the identity of the driver of the F-150 simply slipped her mind.

[13] She described [REDACTED] as being muscular and endeavoured to describe him as intimidating. She asked Mr. [REDACTED] to exit his vehicle. He did so. He moved to the rear of the police vehicle. Officer Jackson testified to the contrary that, when they arrived at the truck, [REDACTED] was already out of the truck milling around on the driver's side. This is a significant inconsistency and one that is impossible to reconcile. It is not possible to be satisfied which version of the evidence is true.

[14] [REDACTED] was not handcuffed nor were any steps taken that support Officer Gilroy's assertion that she was in any way concerned about her safety. Though she radioed her position to other officers, there is no suggestion that Constable Gilroy

even bothered to wait for the cover vehicle to arrive before asking Mr. [REDACTED] to either step out of the vehicle or to approach him, whichever version is correct. If she actually had any concern for her safety, she would certainly have awaited the arrival of a cover vehicle that she had called for. Similarly, it is not credible that she was concerned for her safety and yet turned her back on an individual she described as large, muscular, and intimidating and began rooting around in his truck. The suggestion simply does not accord with common sense.

[15] She did not provide Mr. [REDACTED] with any *Charter* warnings upon detention prior to the initial search of the vehicle. Throughout his dealings with the police, Mr. [REDACTED] was the picture of cordiality and cooperation. Indeed, the officer who was tasked with standing by him through the course of the one-hour-long vehicle search that followed described him as being friendly, polite, and of no concern to the officer at all. Mr. [REDACTED] had with him a large pit bull who was also polite, cooperative, and friendly.

[16] When Constable Gilroy patted down Mr. [REDACTED] prior to conducting the "safety search", she found only a cellular telephone. She testified that she had knowledge of a firearms file involving Mr. [REDACTED] and that there was some police intelligence that Mr. [REDACTED] may have been a higher-than-street-level drug dealer. There is absolutely no evidence before this court to substantiate such a belief. Indeed, the evidence simply showed that Mr. [REDACTED] was not suspected in a firearm-related offence, but appears to have been the victim of a firearms-related offence.

[17] Constable Gilroy, having found Mr. [REDACTED] polite, cooperative, and non-threatening and not having found any items on his person that could have put her or the public at any risk, decided to conduct a safety search of the pickup truck. She did not handcuff Mr. [REDACTED] albeit that he was already detained. She turned her back on Mr. [REDACTED] who she had described in her evidence as a large and intimidating individual, and commenced a four or five-minute search of the front seats of the pickup truck. She searched under the seats, around the consoles, on the seats and found nothing related to officer safety.

[18] I find as a fact that the officer did not have any legitimate safety concerns around Mr. [REDACTED]. This is supported by the fact that at no time was Mr. [REDACTED] ever handcuffed nor were any steps taken to suggest standard police practices around high-risk individuals. She turned her back on Mr. [REDACTED] and conducted the search while he stood metres away. At no time did she advise her partner in the motor vehicle that she had safety concerns about Mr. [REDACTED]. She did not advise or speak to the cover vehicle to take any precautions around Mr. [REDACTED] and, indeed, they did not take any precautions around Mr. [REDACTED]. I do not accept that the officer at the time that she began the search, either subjectively nor objectively, had any legitimate safety concerns which could be the foundation for conducting the safety search. I reject her evidence to the contrary.

[19] In the course of the search, the officer found a Tylenol bottle in which were contained various pills that appeared to the officer to be prescription medications. Indeed, 19-and-a-half Oxycodone pills were located in the Tylenol pill jar. It is not clear from the evidence where the officer found that pill jar. In her notes, she

suggested the pill jar was found in the console. In her evidence at trial, she described the location as both the console at one time and in the cupholder at another time. The officer who conducted the thorough search of the vehicle testified that the Tylenol bottle was in the console.

[20] Constable Gilroy testified that the Tylenol bottle was open and that she could see inside in plain view what she immediately recognized as prescription medications. She did not testify where she found the lid of the Tylenol pill bottle. The officer that conducted the thorough search also could not recall where the cap was when she saw the pill bottle. No photographs were taken of the pill bottle in the location in which it was actually found. The only photograph of the pill bottle is in the hand of the police officer beside which is the cap which is also in the officer's hand.

[21] Now, to the contrary, the accused testified and acknowledged the pill bottle was his, that the Oxycodone pills were his, but they were inside his purse on the passenger seat of the vehicle. I believe the evidence of the accused. His evidence was forthright, certainly against his own interests, and unshaken on cross-examination. His evidence also accords with common sense. He testified that he had previously been heavily addicted to Oxycodone and was now endeavouring to wean himself off the drug and took approximately one pill every 12 hours to stave off the worst of the withdrawal symptoms. Mr. [REDACTED] evidence accords with common sense and, indeed, that it is difficult to imagine that a drug abuser would simply leave illicit drugs open in the middle of a vehicle, particularly when the police show up with their lights on.

[22] I do not accept the evidence of Constable Gilroy that she found the pill bottle in the cupholder open and was able to see instantly this illegal medication. Without knowing precisely where the pill bottle was located, I am satisfied on the evidence of Mr. [REDACTED] that the pills were contained in the pill bottle in his purse and the lid to the pill bottle was not left open such as they could be clearly viewed by the officer conducting a simply survey search.

[23] Having discovered the pill bottle in the search of the vehicle, Constable Gilroy immediately went to Mr. [REDACTED] and questioned him. She asked him if he had a prescription for the Oxycodone pills. She testified that she hoped he would incriminate himself by telling her that he did not have a prescription. That would allow her to arrest Mr. [REDACTED] which would allow her to search his vehicle. At no time prior to questioning Mr. [REDACTED] did she provide him with any *Charter* rights or warnings of any kind.

[24] Mr. [REDACTED] confessed to not having a prescription for the Oxycodone pills as the officer had hoped. She testified that she then arrested Mr. [REDACTED]. She testified that even then he was not handcuffed. Rather, she provided him with his smoking implements and his dog from the vehicle. Mr. [REDACTED] testified that he was not arrested until later after the larger quantity of drugs was found. I accept the evidence of Mr. [REDACTED] on this issue, as well.

[25] Constable Gilroy instructed a third officer, who had now arrived to act as cover, to conduct a thorough search of the vehicle. The search was conducted under the authority of a warrantless search incidental to arrest. The search of the

vehicle conducted by Constable Gilroy and the second officer lasted over an hour. During that search, a large quantity of illegal drugs and cash were found, most particularly -- what is that?

[26] CNSL R. NEARY: Background from -- I think it's background from the cell area, Your Honour.

[27] THE COURT: Okay, sorry. Sorry.

[28] The search of the vehicle conducted by Constable Gilroy and the second officer lasted over an hour. During that search, large quantities of illegal drugs and cash were found, most particularly, hundreds of grams of fentanyl. After the discovery of the large quantity of drugs, the accused was arrested, chartered, and warned.

[29] Sorry, can we turn that down? It is just a little annoying.

[30] CNSL R. NEARY: Mr. Sherriff, is there a way to mute control to pretrial?

[31] THE CLERK: Your Honour, I can mute the video unit, but I tend to have to disconnect and dial back in if we wanted to hear him later.

[32] THE COURT: That is okay. Let us just -- you cannot just turn the volume down?

[33] THE CLERK: No, unfortunately, I cannot.

[34] THE COURT: Okay, well, we will just forge on.

[35] After the discovery of the large quantity of drugs, the accused was arrested, chartered, and warned. At that time, he was handcuffed and placed in the back of the police vehicle. After some discussion, he was released and allowed to go on his way. No effort was made to, as is the common practice, seize the vehicle for the purposes of a civil forfeiture, although clearly there were more than ample grounds to do so.

[36] It is common ground that the only grounds to search this vehicle are the grounds created by the discovery of the pill bottle during the safety search. As I indicated above, I do not accept the officer's testimony that she had any concerns for her safety. In my view, this was a warrantless search under the pretext of a safety search. The officer had no grounds whatsoever to conduct the search of the truck. She either conducted that search because she believed Mr. [REDACTED] might possess drugs based on some undisclosed police intelligence or simply his mere presence around Mr. [REDACTED] who she tried to characterize as a street-level drug dealer.

[37] I should note parenthetically, as well, that there was no foundation for this bold assertion that Mr. [REDACTED] was a well-known street-level drug dealer. In her own evidence, she testified that she had stopped Mr. [REDACTED] in the past on more than one occasion and had never found him in possession of narcotics to support an inference that he is a drug dealer.

[38] Officer Gilroy's evidence is laced with inconsistencies both internally and as between herself and Constable Jackson. She made no notes contemporaneously

with the search indicating that she conducted the safety search or found the Oxycodone in plain view. Indeed, she made virtually no notes at all at the scene, rather, crafted her Report to Crown Counsel a day later at the police station. While contemporary notes are not essential, certainly her failure to make any effort to memorialize events at the scene greatly weakens the reliability of her evidence: see *R. v. Whitton*, [2016] B.C.J. No. 2046.

[39] In my view, this is a warrantless search of a motor vehicle and a clear violation of the accused's rights under s. 8 of the *Charter*. The comprehensive search of the vehicle under the auspices of a search incidental to arrest was simply bootstrapping the first unlawful search into a more substantial search but for which the first unlawful search the officer had no grounds to search the vehicle, nor was the finding and opening of the pill bottle a lawful use of her authority under a purported safety search. She conceded that there were not going to be weapons such as would place her or the public at risk in the pill bottle.

[40] Although I find the pill bottle was removed from the accused's purse, I do not opine on whether the search of the purse fell within the scope of her safety search authority. I do certainly find that the opening of the pill bottle vastly exceeded any such authority even assuming she did have legitimate safety concerns, which evidence I also reject.

[41] The unlawfulness of the initial search is compounded by the deliberate questioning of the accused with respect to his ownership of the pills in the Tylenol jar which the officer found during the initial warrantless search. The officer made no

effort to *Charter* or warn the accused, who was clearly detained, prior to asking him questions in order that he might incriminate himself. Indeed, it is my view of the evidence that she was quite deliberate and calculated in her questioning of the accused. I would classify the failure to warn the accused and the search of the vehicle both as flagrant and deliberate violations of the accused's *Charter* rights.

[42] Considering the search of the vehicle, I find the language in *R. v. Del Corro*, [2019] A.J. No. 489, from the Alberta Court of Appeal particularly instructive:

[48] Since *Mann*, there has been a limited extension of police search powers following an investigative detention. In *R v MacDonald* ... the Supreme Court recognized that officers who have investigatively detained a suspect may conduct a “safety search” in certain circumstances. The exact limits of safety searches incident to investigative detention are unclear. For example, the Supreme Court did not expressly say that officers may conduct vehicle searches or searches of personal items (such as bags) for safety reasons. Some appellate courts have held that safety searches can extend to vehicles and backpacks ... However, in every case where a search extends beyond a pat-down, the circumstances must disclose serious safety concerns requiring something more than a pat-down: *Plummer* at para 79.

[49] The Supreme Court in *MacDonald* held that an officer may conduct a safety search if he or she “believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search” ... The standard is not satisfied if the officer only has reasonable grounds to suspect that a safety search is necessary to protect officer safety or public safety. Nor is the standard met if the officer conducts a search without believing that public or officer safety is at stake. There is debate as to whether “believes on reasonable grounds” imports the requirement of “reasonable and probable grounds” familiar from the law on arrest, or whether it sets an intermediate standard between “reasonable suspicion” and “reasonable and probable grounds” ...

[43] In the case at bar, the court must consider both the objective and subjective elements of Constable Gilroy's deliberate intention to search. As indicated above, I am not satisfied on any reasonably objective standard that officer safety or public safety were ever engaged in the detention of Mr. [REDACTED] nor, indeed, do I accept or believe that Officer Gilroy subjectively believed that her safety required the initial search of the vehicle. Without meeting even the lowest standard, I am entirely satisfied the initial search was clearly a violation of Mr. [REDACTED] s. 8 *Charter* rights.

[44] In summary, there are two clear and serious violations of Mr. [REDACTED] *Charter* rights. The first is the warrantless search of his vehicle and the second, of course, is the failure to provide him his *Charter* rights prior to interrogating him regarding the contents of the pill bottle. Mr. [REDACTED] therefore, seeks a ruling that the evidence found as a result of the search which followed those two *Charter* breaches ought to be excluded.

[45] The Supreme Court of Canada in *Grant* defined the test for exclusion as follows:

... whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of

these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

[46] Naturally, the more serious the offending state behaviour, the more necessary it is for the court to disassociate itself from that behaviour by way of excluding the evidence; see *R. v. Reddy*, 2010 BCCA 11. Of course, one must always balance that exclusion of the evidence, particularly in a case such as this where large quantities of lethal substances intended for distribution to the public are found, as a fatal effect on the truth-seeking process and does, as in this case, allow the clearly guilty party to walk free.

The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

Quoting *R. v. Harrison*, [2009] 2 S.C.R. 494.

[47] In terms of my s. 24(2) analysis, I find this serious breach of Mr. [REDACTED] s. 8 *Charter* rights is made more serious by the deliberate breach of his 10(b) rights upon detention and the deliberate failure to provide him with any *Charter* rights prior to asking him incriminating questions at the roadside. In the language of *Harrison*, I

find the breaching police conduct is both "brazen and flagrant" and, as the court wrote in *Harrison*:

To appear to condone wilful and flagrant *Charter* breaches that constituted a significant incursion on the [accused's] rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it.

[48] This is true in spite of the fact that the evidence to be excluded is both reliable and the exclusion puts the prosecution at an end. This court cannot condone the intentional breaches in this case in spite of the serious consequences of exclusion. To allow the evidence to be used in this prosecution does little more than to condone serious and flagrant *Charter* violations and sends a clear message to the public that the *Charter* has little meaning.

[49] In the result, the application to exclude the evidence is allowed and there will be an order pursuant to s. 24(2) that any evidence obtained during the search of Mr. [REDACTED] vehicle is excluded.

[50] CNSL A. VAN TINE: Thank you, Your Honour. The Crown's calling no further evidence.

[51] THE COURT: All right. The voir dire is closed. The Crown's case --

[52] CNSL R. NEARY: Given the --

[53] THE COURT: -- is closed. The case is dismissed.

[54] Mr. [REDACTED] I find you not guilty of the charge.

[55] That was badly hashed, but --

[56] THE ACCUSED: Thank you, Your Honour.

[57] THE COURT: Mr. [REDACTED] I have excluded the evidence. The Crown is calling no further evidence. The case against you is dismissed.

[58] THE ACCUSED: Okay, thank you.

(REASONS FOR JUDGMENT CONCLUDED)