

[R. v. \[REDACTED\]](#)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

B.D. MacKenzie J.

Heard: November 7, 2016.

Judgment: December 7, 2016

Docket: 163613-2

Registry: Victoria

[2016] B.C.J. No. 2825 | 2016 BCSC 2518

Between Regina, and [REDACTED] [REDACTED] [REDACTED]

(39 paras.)

Case Summary

Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Remedies for denial of rights — Specific remedies — Exclusion of evidence — Application by [REDACTED] to exclude cocaine allowed — [REDACTED] was charged with drug offences — Court held that police breached his rights under s. 8 of Charter, based on lack of contemporaneous police notes as to circumstances leading up to arrest and contradiction in police officers' testimony about source and contents of information that led to arrest — Admitting evidence would bring administration of justice into disrepute — Police acted in disregard for duty to justify grounds for arrest — Canadian Charter of Rights and Freedoms, 1982, s. 24(2).

Application by [REDACTED] to exclude cocaine and marijuana. [REDACTED] was charged with drug and firearm offences. The court held that the police breached his rights under s. 8 of the Charter, based on the lack of contemporaneous police notes as to the circumstances leading up to his arrest and the contradiction in the police officers' testimony about the source and contents of the information that led to the arrest. HELD: Application allowed.

Admitting the evidence would bring the administration of justice into disrepute. The police acted in obvious disregard for their duty to justify the grounds for the arrest. Admitting the evidence would send the message that the police could disregard well-established investigative and arrest standards of which they were well aware. The court should disassociate itself from this negligence, lack of judgment and carelessness by the police in providing reliable evidence. Society's interest in the adjudication of the case on its merits was protected to some degree, as it would proceed to the next stage despite the exclusion of the evidence.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 8, s. 24(2)

Counsel

Counsel for the Crown: R. Fowler.

Counsel for the Accused: R. Neary.

Oral Ruling on *Voir Dire* Re s. 24(2) *Charter* application

B.D. MacKENZIE J. (orally)

1 Mr. [REDACTED] is charged on this indictment with drug and firearm offences following his arrest on April 24, 2014. In reasons indexed at [2016 BCSC 1799](#), I held that the Crown failed to establish that Corporal Pilot had reasonable and probable grounds to direct the arrest of Mr. [REDACTED]

2 The basis for this conclusion was the lack of contemporaneous police notes as to the circumstances leading up to Mr. [REDACTED] arrest, and the direct contradiction in the police officers' testimony about the source and contents of the information which led Corporal Pilot to direct the arrest of Mr. [REDACTED]

3 Accordingly, I determined that the police breached Mr. [REDACTED] rights under s. 8 of the *Charter* to be secure against unreasonable search or seizure.

4 Counsel for Mr. [REDACTED] and the Crown have now made submissions on whether the cocaine and marihuana found on Mr. [REDACTED] person and in his vehicle incident to his arrest should be excluded under s. 24(2) of the *Charter*.

5 In this regard, the Supreme Court of Canada has set out the framework for this analysis in *R. v. Harrison* [\[2009\] 2 S.C.R. 494](#) and *R. v. Grant* [\[2009\] 2 S.C.R. 353](#) in 2009. As the court in *Grant* noted:

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.

The court in *Grant* also reminds us at paragraph 68 that:

The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall reputation of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

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The court then goes on to state at paragraph 69 the following:

Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the reputation of the justice system.

At paragraph 70:

Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term reputation of the justice system.

6 Turning first to the seriousness of the *Charter*-infringing state conduct, the defence here makes two general observations. The first is that the breach of Mr. [REDACTED] *Charter*-protected rights is very serious and this factor can be determinative in the 24(2) analysis. In this regard, the defence notes that Corporal Pilot admitted that he did not believe he had reasonable and probable grounds for Mr. [REDACTED] arrest prior to April 24, thereby making it even more important for him to firm up his grounds for a possible arrest on that date and to gather additional evidence.

7 In addition, the defence submits that the necessity for reasonable and probable grounds for anyone's arrest is a well-settled area of law that police officers have been well aware of for decades. As such, this was not a situation where the police officers were operating in circumstances of "considerable legal uncertainty": (see *Reddy* [2010] B.C.J. No. 49 in our Court of Appeal citing *Grant* at paragraph 140).

8 Given the need for a solid evidentiary basis for Mr. [REDACTED] arrest, the defence highlights the contradiction between Corporal Pilot's testimony and Constable Dovell's testimony as to why Corporal Pilot ordered the arrest of Mr. [REDACTED]. The defence also observes that the lack of notes was highly relevant to the reliability, or lack thereof, of Corporal Pilot's testimony, with the result that I found Corporal Pilot's evidence was unreliable with respect to his grounds to direct the arrest of Mr. [REDACTED].

9 Defence counsel's second general observation on this point is that the unlawful arrest and subsequent search occurred within a larger pattern of Corporal Pilot's unfortunate lack of attention to several aspects of the investigation. In this regard, the defence notes my earlier comments about "a certain casualness with respect to important aspects of this significant investigation", at paragraph 17 of my earlier decision.

10 The defence submits that this wider context amplifies the seriousness of the violation, relying on *R. v. Bohn* [2000] B.C.J. No. 867 in our Court of Appeal at paragraph 45. The defence also relies on *R. v. Ling*, [2009] B.C.J. No. 267 another Court of Appeal decision, where *Charter* breaches occurred alongside careless "indeed cavalier errors" by the police.

11 In the present case, the police investigation was pervaded by carelessness and errors, including the troubling contradiction on whether or not any police officer ever witnessed a hand-to-hand drug transaction, which was the alleged catalyst for Mr. [REDACTED] arrest. As the defence submits, the result is that Corporal Pilot's subjective grounds for directing the arrest of Mr. [REDACTED] are left "unanswered", especially when there was no direct evidence of Mr. [REDACTED] dealing drugs prior to the day in question.

12 The defence also argues that while the court should consider whether the police acted in good faith, "good faith cannot be claimed if the *Charter* violation is committed on the basis of a police officer's

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unreasonable error or ignorance as to the scope of his or her authority: (see *R. v. Buhay* [2003] 1 S.C.R. 631 in the Supreme Court of Canada at paragraph 59).

13 On this point, the defence cites the following comment from the court in *Grant* at paragraph 133:

While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is.

14 In this case, there is no issue Corporal Pilot was aware of all of his duties during this investigation.

15 Indeed, as the defence has submitted, there is no doubt Corporal Pilot was "acutely aware" of the need to establish he had reasonable and probable grounds to direct the arrest of Mr. [REDACTED] and that a contemporaneous record of the events that provided him with his grounds to arrest would be critical in establishing he did, in fact, have the requisite subjective belief.

16 In response, the Crown submits that if Corporal Pilot's testimony was consistent with contemporaneous notes of the circumstances leading up to Mr. [REDACTED] arrest, then it would be difficult to resist the conclusion that reasonable and probable grounds did exist for the arrest. In light of this, the Crown characterizes the lack of notes as simply a lapse in Corporal Pilot's professional judgment, rather than a brazen or flagrant attempt to violate Mr. [REDACTED] *Charter*-protected rights. The Crown also observed that a failure to take adequate notes is not, in and of itself, *Charter*-infringing conduct, an observation which I do not disagree with. Accordingly, in the Crown's view, there is less need for the court here to disassociate itself from the police behaviour in this particular case.

17 The Crown also reminds the court that the police expended considerable resources on April 24th with respect to surveillance and the like, in order to firm up their investigation, because they were concerned about compliance with Mr. [REDACTED] *Charter* rights and the necessity for subjective reasonable and probable grounds to effect an arrest.

18 Notwithstanding the able submissions of Crown counsel, I agree with defence counsel's submission on the first prong of *Grant* as set out above, and that the seriousness of the police conduct in this case strongly favours exclusion of the evidence. While the Crown again fairly states that reasonable and probable grounds would have existed for Mr. [REDACTED] arrest if contemporaneous notes had been compiled and did in fact support Corporal Pilot's testimony, in my respectful view, this is beside the point. The Crown's submission on this point implicitly assumes that Corporal Pilot's testimony was reliable and credible, which I have already found it was not.

19 At the same time, I disagree with the defence that there is no evidence from which I can infer that Corporal Pilot was alive to Mr. [REDACTED] *Charter* rights. In fact, the opposite is true. In my view, Corporal Pilot was acutely aware of the need to obtain evidence that would raise his suspicion to reasonable and probable grounds in order to direct the arrest of Mr. [REDACTED]. This awareness on the part of Corporal Pilot of his *Charter* obligations makes the cavalier attitude relating to proper and accurate recording by someone on this crucial point even more disturbing.

20 As the Chief Justice stated in *Harrison*, when considering the seriousness of the *Charter*-infringing state conduct, at paragraph 22:

At this stage the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from *Charter* standards was major in degree, or where the police knew (or should have known) that their conduct was not

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Charter-compliant. On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern.

21 So the question is, given the totality of the circumstances, was the *Charter*-infringing conduct and unexplained omissions of critical evidence in this case serious or merely of a technical nature or the result of an understandable mistake?

22 In this analysis, I consider the following comments of the court in *R. v. Chong*, [2013 BCPC 121](#), at paragraph 62 *apropos*:

For the purposes of the present case, the controlling parameter is the requirement that there be demonstrably reasonable grounds for arrest. Reasonable grounds must exist before the grossly intrusive interference with personal liberty that arrest constitutes can be justified. It is this legal requirement that, when properly observed, confines the exercise of the considerable power of arrest to its proper limits in a free and democratic society.

23 While I do not disagree with the Crown when it says Corporal Pilot's carelessness or negligence does not equate to flagrant misconduct, such as would be the case if the police intentionally destroyed or fabricated evidence, in these circumstances I am persuaded the breach must be considered serious.

24 As such, I agree the court should disassociate itself from this negligence, lack of judgment, and carelessness on the part of the police in providing reliable evidence in this case. Indeed, as Crown counsel has fairly and properly characterized it, these circumstances are "troubling". This conclusion favours exclusion of the evidence.

25 With respect to the second *Grant* factor, this considers the issue from the accused's perspective and asks whether the breach seriously compromised his or her underlying interests or again whether the breach was merely trivial or transient in its impact: see *Harrison*, paragraph 28.

26 On this point, the defence submits that the police conduct had a serious impact on Mr. [REDACTED] *Charter*-protected interests and cites *R. v. Boyd*, [2011 BCPC 137](#), for the proposition that "an arrest is the ultimate form of state interference with the liberty of an individual", that quote at paragraph 37, with the end result that the impact on a person's liberty in these circumstances is indeed much more than trivial: again see *Harrison* at paragraph 31.

27 In response to this question, the Crown recognizes the detention and arrest and eventual strip search of Mr. [REDACTED] were not insignificant or trivial, but suggests these events did not have an egregious impact on Mr. [REDACTED] *Charter*-protected interests. The Crown further contends that the search of Mr. [REDACTED] vehicle is less serious than a search of a dwelling place or a seizure of bodily evidence. Moreover, no statements were conscripted from Mr. [REDACTED]

28 Nevertheless, the Crown again fairly acknowledged that this factor weighs in favour of the exclusion of the evidence and that indeed the analysis in this case should "really come down" to the first *Grant* factor and overall conduct of the police.

29 In the present circumstances, I am satisfied that, similar to the court's conclusion in *Harrison*, while the breach here may not be egregious, I find it is clearly a significant intrusion on Mr. [REDACTED] *Charter*-protected interests. This factor militates in favour of excluding the evidence.

30 I now turn to the third *Grant* factor. This factor concerns society's interest in the adjudication of a

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criminal case on its merits. Here the defence submits that excluding the evidence found on Mr. [REDACTED] person and in his vehicle would not result in an automatic acquittal, as is often the case when evidence is excluded. This is because following Mr. [REDACTED] arrest, the police obtained search warrants for property associated with Mr. [REDACTED]. As a result of a search, the police located additional drugs, as well as a handgun and ammunition. This evidence gave rise to further counts on the indictment charging Mr. [REDACTED]. The defence also notes that even though the evidence here is "real" and therefore reliable evidence, and trafficking in narcotics is always a serious offence, such circumstances do not necessarily outweigh the other factors in this case that weigh in favour of exclusion.

31 As Justice Frankel said at paragraph 107 in *Reddy* in our Court of Appeal, referring to serious drug offences:

The dangers that such conduct creates cannot be overstated. However, the public also expects those engaged in law enforcement to respect the rights and freedoms we all enjoy by acting within the limits of their lawful authority.

32 The Crown again properly concedes that excluding the evidence obtained at the time of the arrest in this case would not "gut" the Crown's case against Mr. [REDACTED]. However, the Crown contends that because this evidence is reliable and, if admitted, would in all likelihood be conclusive of Mr. [REDACTED] guilt, excluding it would thus clearly affect the proceedings. However, this latter submission has never been the determining factor in a s. 24(2) analysis.

33 In any event, as I have noted, unlike in many cases, exclusion of the evidence here would not leave the Crown with no case against the accused, an outcome that could, of course, undermine the truth-seeking function of a trial and which can often weigh against exclusion of the evidence.

34 In the end, there is no doubt that the offences Mr. [REDACTED] faces are serious. The evidence is reliable and society has a strong interest in adjudicating such cases on their merits. On the other hand, I agree that excluding the evidence would not necessarily terminate the Crown's case, even though at this point it is unknown how excluding the evidence might affect the rest of the proceedings, if at all.

35 Further, "the public also has a vital interest in a justice system that is beyond reproach": see *Harrison* at paragraph 34. In my view, this factor weighs in favour of exclusion. Indeed, the Crown again acknowledged that, given the totality of the circumstances in this case, this factor, too, would weigh in favour of exclusion of the evidence.

36 In balancing the three factors in order to arrive at an ultimate decision, the following statement in *Harrison* at paragraph 36 is again instructive:

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 reputé of the administration of justice that must be assessed.

37 In my view, given the totality of the circumstances, the evidence must be excluded. The police in this case acted in obvious disregard for their duty to justify the grounds for Mr. [REDACTED] arrest. While this analysis and ultimate conclusion are not to punish police conduct, admitting the evidence found incident

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to Mr. [REDACTED] arrest would send the message that the police can disregard well-established investigative and arrest standards of which they are well aware. Corporal Pilot's actions were clearly negligent, and while I am not prepared to find there was bad faith, conversely this conclusion does not equate to a finding of good faith: see *Ling* at paragraph 53.

38 Finally, the Crown's case will proceed to the next stage, despite the exclusion of this evidence. As a result, society's interest in the adjudication of the case on its merits is protected to some degree.

39 Balancing all the *Grant* factors with the circumstances here, I am persuaded that, in the long term, the administration of justice would be brought into disrepute if the evidence was admitted, so the defence application is granted and the evidence will be excluded.

B.D. MacKENZIE J.