

84938-2C  
Abbotsford Registry

# IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

TIMOTHY ARCHIE FRASER GALBRAITH

RULING ON VOIR DIRE  
OF  
THE HONOURABLE JUDGE J. SOLOMON

COPY

Federal Crown Counsel:

F. Lepine

Counsel for the Accused:

J. Reveley

Place of Hearing:

Abbotsford, B.C.

Date of Ruling:

January 8, 2018

**VERBATIM WORDS WEST LTD.**

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[1] THE COURT: This is my oral decision on the voir dire to determine the admissibility of evidence. Mr. Galbraith is charged on Information 84938-2C, on a two-count indictment.

[2] Count 1 alleges that Mr. Galbraith, on or about the 8th of September of 2016, at or near the City of Mission, in the Province of British Columbia, did unlawfully possess a controlled substance, heroin and fentanyl, for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

[3] Count 2 alleges that Mr. Galbraith, on the same day, at or near the City of Mission, 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*.

[4] The evidence is straightforward in this matter. On September 8, 2016, Cst. McConaughy (phonetic) and Cst. Thiessen (phonetic) of Mission RCMP attended the area of 32722 Crane Avenue, Mission, B.C., to conduct surveillance. Their target was a Scott Milan (phonetic), a known resident with a warrant for his arrest outstanding.

[5] Officers were also aware that one to two days earlier, the detachment received complaints from neighbours, believed to be two complainants, but clearly the officers were not sure how many. The gist of the complaint was a concern of drug activity related to that residence. The allegation was that there was lots of traffic to and from the residence. There was nothing more specific than that.

[6] At 4:20 p.m. on September 8, 2016, a Kia vehicle parked in front of the target residence with the two males noted to be in the vehicle. The passenger exited the vehicle and entered the target residence. Cst. McConaughy then attends to the vehicle and asks the driver for his driver's licence and registration. He says he did so since when the vehicle was queried, it indicated that the owner was an older woman.

[7] On attendance to the vehicle, the officer noted a crack pipe with residue and an unopened folded knife on the driver's lap. On seeing these items, the officer told the driver he was under arrest for possession of a controlled substance.

[8] The passenger, who has been identified as the accused, exited the residence approximately 30 to 60 seconds after entering that residence and was arrested immediately for possession for the purpose of trafficking. He was given his right to counsel and he made a request for counsel.

[9] The search of his person incidental to arrest located a number of items. In his pants were found 13 baggies of suspected heroin and that totalled 2.49 grams and that is the substance of Count 1 on this information.

[10] The second item was 18 baggies of suspected crack cocaine in the amount of 3.67 grams and that is the subject matter of Count 2 on the indictment and the one bag of each item was analyzed. The first contained a mixture of heroin, fentanyl and caffeine and the second contained cocaine.

[11] He was also found to be in possession of \$78 cash. There was also a cell phone with drug-related texts found on it. The cell phone number, according to one of the officers, is a known Mission drug line with numerous police files associated to it.

[12] The accused was identified in court by the officer and transferred to the detachment about 25 minutes after his arrest. There was less than a five-minute drive to the detachment, so identity is not an issue in this case.

[13] The grounds for the arrest were outlined by the officers and there are four grounds noted: (1) there was the complaints by neighbours one to two days earlier regarding vehicles coming and going from the residence; (2) there was a crack pipe with residue seen on the lap of the driver of the Kia vehicle and the folded knife; (3) the passenger, the accused, was recognized by the officer on exit of the residence. That same officer had arrested him five days earlier for a matter related to possession for purpose of trafficking; and (4) only the passenger was in the residence for only 30 to 60 seconds and the officer believed he attended there to sell drugs to the residents of that dwelling.

[14] With respect to the third item listed above, the fact that the officer had arrested the accused five days earlier, I have the following observation. The officer did not give any evidence to indicate objectively that the arrest of the accused five days earlier was justified. There is no evidence that the accused was in possession of any controlled substances that day and if so, what he was in possession of.

[15] It seems to have subjectively impacted the officer's decision or grounds to arrest but objectively, without more, it is very difficult to assess the reasonableness of those grounds or that particular ground.

[16] In this case, looking at the totality of the evidence, in my view, the objective grounds for the arrest of Mr. Galbraith falls short of the required reasonable grounds standard and falls into the category of suspicion only.

[17] Therefore, the arrest is unlawful and is arbitrary contrary to s. 9.

[18] Since the arrest was not lawful, the search incidental thereto amounts to a s. 8 breach. Crown has not established its reasonableness on a balance of probabilities.

[19] Accordingly, I find breaches of s. 8 and 9 and I will now hear submissions on s. 24(2) and whether the evidence should be admitted or excluded.

(RULING ON VOIR DIRE CONCLUDED)



# IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

TIMOTHY ARCHIE FRASER GALBRAITH

RULING re s. 24(2) CHARTER APPLICATION  
OF  
THE HONOURABLE JUDGE J. SOLOMON

COF

OH NO  
WE ALSO NEED  
24(2)!  
(SAME DAY SUBJECT)

Crown Counsel:

Counsel for the Accused:

Place of Hearing:

Date of Ruling:

They're on it!  
24(2) now  
attached.  
-V Feb 5/18

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[1] THE COURT: This is my ruling on the s. 24(2) application. Earlier today I ruled on the breaches being alleged by the accused with respect to his rights as protected by ss. 8 and 9 of the *Charter of Rights*. I found the breaches as alleged by the accused in this matter.

[2] I will not review in detail the s. 8 and s. 9 decision but this 24(2) decision, obviously, must be read in conjunction with my findings under s. 8 and s. 9.

[3] I have been provided by defence counsel, the decision of ***R. v. Huynh***, 2010 BCSC 1553, a decision of the British Columbia Supreme Court. At paragraph 127 the court sets out the 24(2) test. Quoting from paragraph 127, it states as follows:

When assessing whether evidence is to be excluded pursuant to s. 24(2), there is a threefold inquiry that must now be made as a result of the court's decision in *Grant*, *Suberu*, and *Harrison*. The three factors are as follows:

- (1) the seriousness of the *Charter*-infringing state conduct;
- (2) the impact of the breach on the *Charter*-protected interests of the accused; and
- (3) society's interest in the adjudication of the case on its merits.

[4] In this particular case, I find that under the first heading, the seriousness of the *Charter*-infringing state conduct, this favours exclusion of the evidence.

[5] I found that the arrest was unlawful and it violated the liberty interests of the accused.



[6] The police in this case did not have the necessary grounds to direct the arrest of Mr. Galbraith. They did have other investigative means that they could have employed in this case but they chose not to employ them.

[7] As in the *Hyunh* case, the investigating officers here did have the power to detain pursuant to an investigative detention but they did not do so. They proceeded in the absence of the requisite reasonable grounds to affect an arrest.

[8] With respect to the second factor, the impact of the breach and the *Charter*-protected interests of the accused, once again, I find that the analysis under this second test favours exclusion of the evidence.

[9] As in the *Hyunh* case, the detention here in the search of the accused person had a serious impact on his liberty and privacy interest. He was stopped and arrested without reasonable grounds for that arrest. This impacts on his expectation of liberty and privacy in a way that is more than trivial.

[10] Quoting from paragraph 139 of the *Huynh* case, the court states near the end of the paragraph:

Section 8 is a positive right and one that protects the autonomy and dignity of the individual.

As in *Huynh*, once again the analysis of this factor weighs in favour of exclusion of the evidence.

[11] The third factor favours admission of the evidence. This factor requires an analysis of the society's interest in an adjudication on the merits of this case, and now quoting from paragraph 140 of the *Hyunh* decision, the court states:

In this line of inquiry, the court looks at the truth-seeking function of the trial process as a relevant factor. However, *Grant* also states that the admission of reliable evidence without regard to the manner in which it was obtained, is inconsistent with the *Charter's* affirmation of rights. Nevertheless, the evidence is key to the Crown's case, and it is reliable evidence despite the *Charter* breaches. The accused acknowledged that this factor favours admission of the evidence, and I agree with that acknowledgement.

The same applies to the case at bar.

[12] Paragraph 141 of *Hyunh*, the court states:

How, then, does one balance these factors? The court in *Grant* has said that the balancing of the factors is not simply a determination as to whether the majority of the relevant factors favour exclusion or admission in a particular case; the court must look at the long-term repute of the justice system.

[13] In this case, I agree with Crown that there has been an absence of bad faith on behalf of the police but, nonetheless, when I look at the totality of the circumstances of the arrest of Mr. Galbraith and the subsequent search and in balancing all of these factors, I find that the long-term reputation of the administration of justice favours exclusion of the evidence.

[14] Accordingly, I am persuaded that, balancing all the relevant factors, the evidence must be excluded in this case.

(RULING RE s. 24(2) CHARTER APPLICATION CONCLUDED)

