Date: 20220210
Docket: CR 21-02-02166
(Brandon Centre)
Indexed as: ***R. v. Singh and Deol***
Cited as: 2022 MBQB 24

COURT OF QUEEN'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

		Appearances/Counsel
HER MAJESTY THE QUEEN	)	JANNA HYMAN
	)	for the Crown
	)	
- and -	)	
	)	ANDREW SYNYSHYN
	)	for the Accused (Singh)
BABALJIT SINGH,	)	
MANDEEP DEOL,	)	ANTHONY DAWSON
Accused.	)	for the Accused (Deol)
	)	
	)	JUDGMENT DELIVERED:
	)	February 10, 2022

PUBLICATION RESTRICTION NOTICE: *No information regarding any portion of this voir dire shall be published in any document or broadcast or transmitted in any way before judgment is given in this case.*

LEVEN J.

SUMMARY

[1] This was a *voir dire* dealing with the admissibility of fentanyl and MDA seized from a van on the highway. In short, the drugs should be admitted as evidence.

[2] A police officer pulled the van over for speeding, and asked the driver for his licence and registration. The officer saw a partially-full bottle of whisky in plain view on the back seat, and arrested the driver and passenger for the open-liquor offence. As he sometimes does, the officer generously decided to let the driver and passenger keep the liquor, and went to put the bottle in the rear area of the van, where it could be legally stored.

[3] The officer observed two huge, bulging hockey bags in the rear area of the van. Combined with other suspicious factors, the officer formed a reasonable suspicion that the hockey bags contained illegal drugs. He arrested the driver and passenger for possession of illegal drugs for the purpose of trafficking. The bags turned out to contain huge quantities of fentanyl and MDA. The two accused challenged the admissibility of the drugs and the lawfulness of the drug arrest, based on sections 8 and 9 of the *Canadian Charter of Rights and Freedoms*, *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "*Charter*").

[4] The drugs are admissible and the arrests were lawful. Until he opened the hatch of the van, everything the officer did was lawful. The *voir dire* did not deal with the arrest for open liquor, only with the later drug arrest. The officer did not ask permission to open the hatch and did not ask the accused whether they would prefer him to put the whisky in the back of the van or to pour it out at roadside. He should not have opened the hatch without permission. However, the drugs should be admitted under a s. 24(2) analysis.

[5] Defence counsel argued that the officer's story about letting the accused keep the whisky was simply a ruse to open the hatch and perform an illegal search. I disagree. The officer testified that, after finding open liquor in vehicles, he sometimes pours out the liquor at roadside and sometimes lets the driver keep the liquor (in the trunk or rear area of the vehicle). In this case, he chose to do the latter. I found the officer to be completely credible on this point. With the benefit of hindsight, the officer should have asked permission to open the hatch. Failing to do so was a violation of s. 8.

[6] However, the seriousness of the officer's breach was minor. Far from acting in bad faith, the officer was trying to be generous to the accused. The impact on interests protected by s. 8 was minor. The dangers of fentanyl and MDA are serious, and the quantities of drugs were extremely large. Society has an overwhelming interest in having these alleged offences adjudicated on the merits. After seeing the hockey bags, the officer had lawful grounds for arresting both accused for the drug offence.

FACTS

[7] This is not a comprehensive record of all evidence and argument tendered; it is a concise summary of certain important submissions.

[8] By way of verbal shorthand, I will refer to the three relevant individuals as the "officer", the "driver" and the "passenger". At all relevant times, the passenger sat in the front passenger seat of the van. There was some discussion about whether the passenger did any driving (see below).

[9] On July 28, 2020, the officer was driving on the Trans-Canada highway near Brandon, Manitoba. He saw a van going faster than other vehicles. He paced the van and found that it going about 12 kilometres per hour over the posted speed limit. He pulled it over, with the intention of giving the driver a warning about speeding. (The relevant sections of the *Highway Traffic Act*, CCSM c H60, (the "*HTA*") include s. 95(1)(b) which prohibits speeding).

[10] The officer observed that the van was a rental. The officer had a dashboard camera which recorded the events in question. The dashboard video (the "video") was an exhibit at the *voir dire.*

[11] The driver produced a valid driver's licence, valid registration and the van rental contract. The driver's name, but not the passenger's name, was on the contract. The van was rented in Toronto on July 23, 2020, and was due back in Toronto on July 29, 2020. The driver said he drove from Toronto to Vancouver to visit a friend, had a short visit, and then headed back to Toronto. Based on general knowledge of distance and driving time, the officer estimated that the driver must have driven very long hours and must have intended to drive more long hours on the way back to Toronto.

[12] The officer observed a partial bottle of whisky in plain view on the back seat of the van. He decided to arrest the driver and passenger for an open-liquor offence under s. 60(1) of *The Liquor, Gaming and Cannabis Control Act*, CCSM c L153 (the "liquor law"). He intended to give them a "ticket" and let them continue on their way.

[13] There was no evidence at the *voir dire* about who originally bought the whisky or who drank it.

[14] The officer testified that he has seized open liquor more than once in the past. He has done one of two things. Either he has poured out the liquor at roadside, or he has allowed the accused to continue on their way with the liquor in the trunk or rear area of the vehicle (as permitted by s. 60(2)(b) or (c) of the liquor law).

[15] The officer arrested the driver and passenger, and then searched the interior of the van for more open liquor. He found none. He decided to let them keep the whisky in the rear area of the van. To access the rear area, he had to open the hatch of the van. He didn't tell the driver and/or the passenger that he was going to do this, and he didn't ask their permission.

[16] When the officer opened the hatch, he saw two huge, bulging hockey bags. They were partially covered by a piece of carpeting. Some bedding was on top of the carpeting. The video shows part, but not all, of the rear area of the van. Bedding is visible.

[17] The officer testified that the hockey bags were partially visible under the bedding and the carpeting. The video neither confirms nor refutes this testimony.

[18] The video shows that the officer reached into the rear area of the van for about 15 seconds. He appeared to touch the bedding, but the video is not very

clear. The officer then left the hatch open, went to get the whisky bottle, and to put the bottle into the rear area of the van.

[19] The officer testified that he suspected that the hockey bags were full of illegal drugs. Various factors went through his mind. The huge hockey bags were very unusual luggage for a six-day road trip. The officer knew from experience that Vancouver was a major source of illegal drugs. He knew from experience that drug couriers often use rented vehicles (which cannot be seized under property-forfeiture legislation). He thought that the vehicle's itinerary was extremely odd. It seemed irrational that the accused would drive non-stop from Toronto for Vancouver in order to visit a friend; would have a very short visit; and then would turn around and drive non-stop back to Toronto. This itinerary seemed much more consistent with the work of drug couriers than with an alleged visit with a friend. The accused appeared very nervous and they grew more, rather than less, nervous as time passed.

[20] The officer arrested the driver and the passenger for possession of illegal drugs for the purpose of trafficking. He called for backup. He searched the hockey bags and found about 26 kilograms of fentanyl and 50 kilos of MDA. Other officers towed the van away.

THE *CHARTER*

[21] Section 8 of the *Charter* says: "Everyone has the right to be secure against unreasonable search or seizure".

[22] Section 9 of the *Charter* says: "Everyone has the right not be arbitrarily detained or imprisoned".

[23] Section 24 of the *Charter* says:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

ARGUMENT

[24] Defence counsel did not challenge the officer's evidence that the van had been speeding. Defence counsel did not dispute the legality of the open-liquor arrests, and the open-liquor itself was not a subject of this *voir dire.*

[25] The passenger argued that he had standing to raise a section 8 argument. The driver took no position on this issue. Both accused argued that the officer violated section 8 of the *Charter* when he opened the hatch. Both argued that his explanation about wanting to put the whisky in the trunk was a mere ruse. Therefore, the warrantless drug arrests were unlawful under section 9. Therefore, the warrantless search of the hockey bags was also unlawful (because it was not incidental to a lawful arrest). Finally, the drugs should be excluded under section 24(2).

[26] The Crown argued that, although the driver had "standing" to raise a section 8 argument (he had a reasonable expectation of privacy in the van), the

passenger had no "standing" (no reasonable expectation of privacy in the van). The Crown conceded that the passenger had standing to raise a section 9 argument.

[27] The Crown argued that the officer's conduct under the *HTA* and under the liquor law was proper. The officer's decision to open the hatch was lawful and was not a ruse. The officer honestly wanted to let the accused keep the whisky. The hockey bags, in combination with other very suspicious factors, amounted to reasonable grounds for the drug arrest. The opening of the hockey bags was a reasonable search incidental to the drug arrest. The drugs should be admitted into evidence. In the alternative, even if the officer's opening of the hatch was unlawful, the drugs should be admitted under a section 24(2) analysis.

The passenger's section 8 standing

[28] The key case in respect of the passenger's standing to raise a section 8 argument is ***R. v. Belnavis***, [1997] 3 SCR 341 ("***Belnavis***"). ***Belnavis*** does not actually use the word "standing". Rather, it discusses whether a passenger has a reasonable expectation of privacy for purposes of section 8 of the *Charter.* Later case law has used the word "standing" as another way of describing such privacy rights.

[29] In ***Belnavis,*** the police pulled over a vehicle for speeding. The officer found stolen goods in the passenger area of the vehicle and arrested both the driver and a passenger. Both asserted section 8 rights. At paragraph 22, the majority observed that:

> …the question as to whether a passenger will have a reasonable expectation of privacy in a vehicle will depend on the totality of the circumstances. All of the relevant facts… will have to be considered… In this case, although [the passenger] was present at the time of the search, there are few other factors which would suggest she had an expectation of privacy in the vehicle. First, her connection to the vehicle was extremely tenuous. She did not own the vehicle, she was merely a passenger in a car driven by a friend of the owner of the vehicle. There was no evidence that she had any control over the vehicle, nor that she had used it in the past or had any relationship with the owner or driver which would establish some special access to or privilege in regard to the vehicle… Finally, there was no evidence that she had a subjective expectation of privacy in the vehicle.

[30] However, the majority in ***Belnavis*** added, there might be situations in which a passenger would have a reasonable expectation of privacy. At paragraph 23, the majority pointed out:

> For example, in many cases there would be little difference in the expectation of privacy for the owner-operator of a car and that of his or her spouse. Similarly, if two people were travelling together on an extended journey and were sharing driving responsibilities and expenses, each would be likely to have an equal expectation of privacy in the vehicle.

[31] The parties filed other case law in respect of section 8 "standing", and I have carefully considered all of the cases filed.

[32] In the case at bar, there was no evidence at all about who paid for things like gasoline during the trip from Toronto to Vancouver and back. Nor was there any evidence about whether or not the passenger did any driving. The Crown pointed out that the passenger did not have a valid driver's licence with him. Defence counsel pointed out that, in order for the vehicle to drive from Toronto to Vancouver and back in six days, the passenger must have done some of the driving. There was no evidence at all about the business and/or personal relationships between the driver and passenger.

[33] It would be fair to call a trip from Toronto to Vancouver and back an "extended journey".

[34] There was no evidence about who bought (or who drank) the whisky.

[35] In light of my findings below that the drugs should be admitted into evidence, it is strictly speaking not necessary to determine whether the passenger had "standing" to raise a section 8 argument. However, in the event that I am mistaken, I will deal with the "standing" issue out of an abundance of caution.

[36] It is trite law that, for section 8 purposes, privacy rights vary in degree. For example, one has greater privacy rights in one's residence than in one's vehicle. Under some circumstances, a passenger in a vehicle might have *reduced* privacy rights, without having *zero* privacy rights.

[37] In simple terms, passengers in vehicles do things that pedestrians (or people outdoors) do not. Passengers in vehicles feel free to have conversations of a very personal or confidential nature, knowing that people outside of the vehicle will not hear what they are saying. They say things in the vehicle that they would never say outdoors. In short, in some contexts, passengers in vehicles have at least *some* reasonable expectation of privacy within the vehicle.

[38] In the case at bar, it may well be that the passenger's reasonable expectation of privacy within the van was modest, but I am not prepared to conclude that he had *zero* expectation of privacy. He shared a vehicle on an extended journey and might have shared some of the driving, even though he

had no valid driver's licence. He did not testify at the *voir dire*, so there is no evidence about his *subjective* expectation of privacy in the van, but it would be a fair inference that he had at least a modest subjective expectation of privacy in the van. In short, he had "standing" to at least raise some sort of section 8 argument in respect of the drug search.

Putting open liquor in the trunk

[39] The liquor law defines "inspector" as including police officers. Section 60(1) makes it an offence to keep liquor in a vehicle. Section 60(2)(a) makes an exception for closed liquor (sealed bottles, cans, etc.). Section 60(2)(b) makes an exception for open liquor in the trunk. Section 60(2)(c) makes an exception for open liquor in the rear area of vehicles without trunks (e.g. vans). Section 126 says that police may seize things like open liquor and bring it before a justice. Section 127 says that police may arrest people without a warrant for things like open liquor.

[40] In its Motion Brief, the Crown argued (at para. 60) that the officer's opening:

> …the rear [of the van] to safely store the liquor was within the scope of the search incident to arrest. If the court accepts that the officer's only intention was to store the liquor as permitted by the [liquor law], then there is nothing in this action that goes beyond the scope of the search power. …

[41] At the *voir dire*, the Crown argued that the liquor law, by implication, authorizes police to take open liquor from the passenger area of a vehicle and place it in the trunk (or rear area) of a vehicle. Therefore, the Crown argued, the officer's conduct was authorized under the liquor law itself.

[42] I disagree. The liquor law obviously allows *the owners of liquor* to put open liquor in their trunks etc., but it is completely silent about what police officers should do with the open liquor after they find it. Section 126 allows police to seize the open liquor as evidence and bring it before a justice (i.e. to use it as an exhibit at a trial). However, the liquor law is silent about whether or not an officer can unilaterally put the open liquor into the trunk or rear area without permission.

[43] In the case at bar, the officer testified credibly that he sometimes pours the liquor out at roadside, and sometimes allows the driver to keep the liquor as long as it stays in the trunk. He didn't testify about whether he ever asks permission before opening a trunk (or hatch) in order to place the liquor inside.

[44] The reality is that, in the vast majority of cases, if an officer were to open the trunk or hatch without asking permission, were to place the liquor in the trunk / hatch, and were to tell the driver he could keep the liquor, there would be no legal dispute at all. On the contrary, some drivers would be pleased at being allowed to keep the liquor. Some drivers might even thank the officer.

[45] The case at bar was the rare case where, in the context of open liquor, upon opening the hatch without permission, an officer found evidence of a different (and much more serious) crime.

[46] At the *voir dire*, the officer suggested in passing that, among other things, he was searching for weapons in the rear area of the van. Defence counsel argued that this was the first time the officer had ever raised that notion. The

officer did not elaborate upon his thoughts about weapons. For the purpose of this *voir dire*, I will give the accused the benefit of the doubt by assuming that there was no reason to suspect that weapons might be in the rear area of the van.

[47] As a matter of public policy, police should not be encouraged to open trunks or hatches without permission when there is no reason of any kind to suspect that there is anything in the trunk / hatch that should not legally be there (more on this below). If a generous police officer wants to let the owner of open liquor keep the liquor as long as it is kept in the trunk / hatch, the proper and reasonable thing to do would be to ask permission to open the trunk or hatch, or to let the owner themselves put the liquor in the trunk / hatch.

[48] The officer's decision to put the liquor in the trunk / hatch was neither explicitly authorized nor explicitly prohibited under the provisions of the liquor law. It was not authorized by a search warrant. It was not incidental to the open-liquor arrests. Therefore, I conclude that the officer's decision to open the hatch without permission constituted an unreasonable search of the rear area of the van, in violation of section 8, even if the officer's motives were generous and benign.

[49] Once the hatch was open, the video shows the officer putting his hand or hands into the hatch for about 15 seconds and touching the bedding. At the *voir dire*, this was referred to as "rummaging". I have already concluded that the

mere opening of the hatch was a section 8 violation. I will deal with the "rummaging" under the section 24(2) analysis below.

Section 24(2)

[50] The tests for applying section 24(2) of the *Charter* are set out in ***R. v. Grant***, 2009 SCC 32, [2009] 2 SCR 353 ("***Grant***"), and many later cases. In ***Grant***, at paragraph 71, the majority explained:

> …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 the 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.

Some later decisions have referred to this as a three-part test or three-part analysis, or have referred to the "three factors".

[51] In ***Grant***, at paragraph 74, the majority added:

> State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[52] In ***Grant***, at paragraph 78, the majority observed:

> An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

[53] The first ***Grant*** factor is the seriousness of the *Charter*-infringing state conduct. In this unique case, the conduct is near the bottom end of the seriousness scale. I have already noted that the officer's testimony about wanting to put the open liquor in the rear area of the van was credible. In some situations, the owner of the liquor might actually have been grateful that the officer did not pour it out at roadside.

[54] An unreasonable search of a vehicle is less serious than an unreasonable search of a residence or of the person of an accused.

[55] Once the front area of a vehicle is being reasonably searched (for open liquor), an improper extension of the search to the rear area of the vehicle is not as serious as other types of improper vehicle searches.

[56] The entire interaction between the officer and the accused at roadside was very short. The police misconduct was not premeditated. The officer acted in haste and made a mistake of judgment, but it was not nearly as serious as the mistakes illustrated in the other section 8 case law. As for the officer's "rummaging" in the hatch, he is not to be commended for this. However, although the video is not as clear as it might be, the "rummaging" was very brief and appeared to be very perfunctory. Even considering the "rummaging", the officer's violation of section 8 was minor and not premeditated. The first ***Grant*** factor favours admission.

[57] The second ***Grant*** factor is the impact of the breach on the *Charter*-protected interests of the accused. It would be glib to say that the accused were the authors of their own misfortune. Had they not been speeding on a busy highway with open liquor in plain view in their van, no police officers would even have contemplated looking for drugs in their van. That fact does not nullify any *Charter* rights, but it does provide some practical context to the situation.

[58] Again, people have lower expectations of privacy in vehicles than in their residences. Drivers (and some passengers) in general have some expectation of privacy in their vehicles. It might be fair to say that drivers speeding down the highway with open liquor in their vehicles have a lower expectation than other drivers. In any event, admitting the drugs in this unique case would hardly be giving police in general a blank cheque to search vehicle trunks / hatches on a whim. It would certainly not open any "floodgates". The second ***Grant*** factor favours admission.

[59] The third ***Grant*** factor is society's interest in the adjudication of the case on the merits. The Crown filed case law in which the Manitoba Court of Appeal discussed the danger of fentanyl. The Crown's brief also included a tab dealing with fentanyl deaths in Manitoba. Strictly speaking, a tab to a motion brief is not evidence. Defence counsel conceded that fentanyl abuse raises serious concerns. For purposes of this *voir dire*, it is sufficient to say that the illegal use of fentanyl in Manitoba today raises very serious concerns for society.

[60] There was no evidence about the dangers of MDA, but I can safely take notice that MDA, like other unlawful drugs, raises at least some serious concerns for society. There was no dispute about the extremely large quantities of the drugs.

[61] The serious concerns in respect of MDA and fentanyl are factors favoring the admission of the drugs. The third ***Grant*** factor favours admission.

[62] Weighing and balancing all three ***Grant*** factors, the unique facts of the case at bar strongly favour the admission of the drugs into evidence.

Section 9

[63] The section 9 arguments of the accused were well summarized in the Motion Brief of the passenger. Lawful arrests can be made either with a warrant or under section 495 of the *Criminal Code*, RSC 1985, c C-46 (the "*Code*"). A police officer can arrest a person if the officer believes, on reasonable grounds that a person has committed or is about to commit, an indictable offence.

[64] In ***R. v. Storrey***, [1990] 1 SCR 241 ("***Storrey***"), at paragraph 17, the court observed that the *Code*:

> …requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view.

[65] Various Canadian courts have pointed out that reasonable grounds for arrest are more than mere suspicion.

[66] The Crown argued that the officer did have reasonable grounds for arrest once he saw the hockey bags. Various factors went through his mind. The huge

hockey bags were very unusual luggage for a six-day road trip. The officer knew from experience that Vancouver was a major source of illegal drugs. He knew from experience that drug couriers often use rented vehicles (which cannot be seized under property-forfeiture legislation).

[67] The officer thought that the vehicle's itinerary was extremely odd. It seemed irrational that the accused would drive non-stop from Toronto for Vancouver in order to visit a friend; would have a very short visit; and then would turn around and drive non-stop back to Toronto. This itinerary seemed much more consistent with the work of drug couriers than with an alleged visit with a friend.

[68] The officer testified that both accused appeared very nervous and they grew more, rather than less, nervous as time passed. It is normal that a driver pulled over for speeding would be nervous. It is normal that a driver and passenger charged under the liquor law with keeping one bottle of open liquor in a vehicle would be nervous. However, the fact that the driver and passenger appeared to be getting more and more nervous as time went on raised a reasonable suspicion that something other than speeding and open liquor was on their minds.

[69] Defence counsel argued correctly that nervousness alone does not raise a reasonable suspicion for section 9 purposes.

[70] The officer pointed out that he saw cans of energy drinks in the van. I do not consider this to be a suspicious factor.

[71] It is true that many law-abiding citizens rent vehicles on occasion. It is also true that many law-abiding citizens drive to and from Vancouver. It is also true that many law-abiding citizens drive from Toronto to Vancouver and back. It is also true that some law-abiding citizens use hockey bags as luggage. It might even be true that some law-abiding citizens use huge hockey bags as their luggage for six-day (non-hockey-related) trips. It might even be true that some law-abiding citizens cover their bulging hockey bags with pieces of carpeting in the rear area of their vans.

[72] However, putting all of these factors together, and looking at the totality of circumstances, and considering the situation as an organic whole, the Crown's argument is extremely compelling. The officer must have had *at least* a reasonable suspicion, if not an *overwhelming* suspicion, that the hockey bags contained illegal drugs.

[73] It is true that the officer (and the Crown) did not rely on the other suspicious factors as the reason that the officer opened the hatch. The Crown's theory was that the officer opened the hatch in order to let the accused keep the whisky bottle. However, there is no inconsistency in the position that the officer opened the hatch to put the bottle in the rear area of the van *and* that once the hatch was open, the sight of the hockey bags made the other suspicious factors seem much more suspicious than they had been a moment earlier.

[74] The officer admitted that he didn't know that the bags contained fentanyl and MDA until he opened them. Nothing turned on the fact that he didn't know precisely *which* illegal drugs were in the bags before he opened them.

[75] Once the officer had a reasonable suspicion that the bags contained illegal drugs, he had proper grounds for lawful arrests (as per ***Storrey*** and later case law). The section 9 arguments of the accused must fail.

[76] As the drug arrests were lawful, it follows that the opening of the hockey bags was lawful. Opening the bags was not an unreasonable search for section 8 purposes. In practical terms, opening the bags confirmed the officer's reasonable suspicions and revealed exactly *which* illegal drugs were inside.

[77] In conclusion, a weighing and balancing of the relevant section 24(2) factors strongly favors the admission of the drugs into evidence. This would be the case whether or not the passenger had "standing" to raise a section 8 argument. The applications of the accused are dismissed.

[78] I note that one defence lawyer mentioned in passing that this was a "blended" voir dire. However, all of the arguments made by all counsel dealt with sections 8, 9 and 24(2) of the *Charter*. There was some testimony that both accused spoke imperfect English. Indeed, both accused chose to have an interpreter present at the *voir dire*. There was some passing testimony about the interactions between the officer and the two accused. However, no arguments were made about either accused making any sort of involuntary statements to the officer, and no arguments that the Crown was somehow trying

to use any statements made by the accused against them. Perhaps at some pre-trial stage, the voluntariness of statements might have been considered as a potential issue. Other than that speculation, I cannot say anything more about any statements of the accused and/or whether any such statements were voluntary.

The officer and the *Neubuhr* case

[79] After the *voir dire* ended but before I finished writing my reasons for decision, ***R. v. Neubuhr***, 2021 MBQB 225 ("***Neubuhr***") was released. The ***Neubuhr*** *voir dire* decision involved the same officer who was involved in the case at bar, a traffic stop, illegal drugs, and *Charter* arguments.

[80] The events in ***Neubuhr*** happened on April 24, 2019. The ***Neubuhr*** *voir dire* decision was delivered orally on October 21, 2021, and written reasons were issued on October 26, 2021.

[81] In ***Neubuhr***, the officer observed Mr. Neubuhr driving a vehicle. The officer ran a routine licence plate search and discovered that it was an inactive Alberta licence plate. The officer pulled the vehicle over and spoke to Mr. Neubuhr, who immediately volunteered that the vehicle was unregistered and that he had no driver's licence. The officer did a further computer check and learned that Neubuhr had an inactive Saskatchewan driver's licence, no criminal record, no warrants, and he showed no signs of impairment. There was no open liquor in plain view. For some reason that he never explained, the officer put Neubuhr under arrest for his *HTA* violation, and placed him in the back of the

officer's police car. The officer called for backup and arranged to have the vehicle Neubuhr was driving towed away.

[82] After arresting Neubuhr, the officer did a bumper-to-bumper search of Neubuhr's vehicle. He found an empty beer can, but no actual liquor. In the back seat of the cab, the officer eventually found a satchel containing methamphetamine and fentanyl.

[83] The ***Neubuhr*** *voir dire* dealt with the arrest and the search and seizure of the drugs.

[84] At paragraph 25, the court in ***Neubuhr*** concluded:

> Given the facts as revealed in the testimony of the Arresting Officer, he could have and should have issued a notice to appear to the accused and allowed the accused to walk away to find lodging for the night or figure out some other way to make his own arrangements to leave Brandon.

Therefore, the arrest violated section 9 of the *Charter.*

[85] At paragraph 33, the court in ***Neubuhr*** pointed out that there is nothing unlawful about having an empty beer can in a vehicle.

[86] At paragraph 61, the court in ***Neubuhr*** observed that the police service:

> …clearly crossed a bright red line in this case and I would describe this as serious police misconduct that weighs heavily in favour of a finding that admission of the resulting evidence would bring the administration of justice into disrepute.

[87] At paragraph 69, the court in ***Neubuhr*** pointed out that there was nothing about the traffic stop that suggested that the accused was engaged in *Criminal Code* or liquor law offences:

> …Arresting someone in these circumstances for driving without a valid driver's licence, when the unregistered vehicle must be towed and by

> definition no further driving offence can occur, is the height of unreasonableness and arbitrariness.

[88] Not surprising, after doing a *Charter* section 24(2) analysis, the court in ***Neubuhr*** ordered that the evidence (the illegal drugs) be excluded.

[89] After ***Neubuhr*** was released, counsel for the Accused Singh made a motion. In simple terms, he asked that I consider the ***Neubuhr*** decision in relation to my decision about section 24(2) of the *Charter.*

[90] Counsel referred to four cases: ***R. v. Wasserman***, 2018 MBQB 151, affirmed 2020 MBCA 1 ("***Wasserman***"); ***R. v. Thompson***, 2013 ONSC 1527 ("***Thompson***"); ***R. v. Harflett***, 2016 ONCA 248 ("***Harflett***"); and ***R. v. Holloway***, 2021 ONSC 6136 ("***Holloway***").

[91] In ***Wasserman***, the courts considered an alleged pattern of abuse by a specific officer in multiple cases. The courts did not decide that such a pattern could never be considered, but they declined to consider the allegations under the particular circumstances of that case.

[92] Similarly in ***Thompson***, the court concluded that past conduct of a particular officer or a particular police force could be considered in some situations, but that ***Thompson*** was not one of those specific situations.

[93] In ***Harflett***, the court considered the repeated actions of an officer, as documented in a number of decisions, in doing a section 24(2) analysis, and ultimately excluding certain evidence. In that case, courts found that an officer had a habit of stopping and searching every vehicle without reason. The courts considered this to be an improper fishing expedition.

[94] In ***Holloway***, there was some evidence of racial profiling and past misconduct by a particular officer. At paragraph 126, the court commented:

> …Just because a police officer may have been found to have used racial profiling in the past does not of course mean that he or she used it subsequently. But it is a relevant consideration and defence counsel should, if the law allows it, be properly armed with the necessary evidence in order to facilitate a racial profiling argument.

[95] Based on the case law, defence counsel argued that I can consider what the ***Neubuhr*** decision said about the officer's conduct. In his brief, counsel argued that "these two cases demonstrate an attitude and pattern of behavior by [the officer] that is wholly inconsistent with *Charter* values and should be denounced in the strongest way".

[96] The Crown did not argue that the four cases cited above were wrongly decided. On the contrary, the Crown agreed that the past conduct of a police officer, as documented in case law, can be considered in certain situations.

[97] However, the Crown argued that ours is not one of those unusual situations. Firstly, our facts are very different from the facts in ***Neubuhr***. Secondly, ***Neubuhr*** was just released so it is too recent to illustrate an alleged "pattern" of improper behavior by the officer.

[98] I conclude that the Crown is correct.

[99] Both our case and ***Neubuhr*** involve *HTA* offences (speeding, and driving without a valid licence). Both involve vehicle searches leading to drug charges. Both involve section 8 violations by the same officer. However, that is where the similarities end.

[100] In our case, the uncontradicted evidence of the officer was that, after pulling over the vehicle for speeding, he intended to let the driver go on his way with a warning. In ***Neubuhr***, when the officer learned that the driver had no licence, instead of giving the driver a notice to appear (as he should have), the officer (for reasons never explained) put the driver under arrest and placed him in the back of a police car.

[101] Furthermore, in ***Neubuhr***, after arresting the driver, the officer made the frankly outrageous decision to search the entire vehicle (front area and rear area) because of an empty beer can. In our case, the uncontradicted evidence is that the officer saw open liquor in plain view in the back seat, which was an obvious liquor law violation.

[102] In ***Neubuhr***, the outrageous search following the baffling arrest led to the discovery of the drugs. In our case, the officer made a mistake, which in other circumstances would have been benign. As I explained above, when the officer testified that he wanted to let the accused keep their half bottle of whisky, as long as it was legally stored in the rear area of the van, I found him to be completely credible. In different circumstances, the driver and/or passenger might even have thanked the officer. However, as noted above, the officer did violate section 8 when he opened the hatch without permission.

[103] In short, there is simply no "pattern" at all. The same officer violated section 8 of the *Charter* twice, in situations with a couple of superficial similarities.

[104] The officer is certainly not to be commended; he should be much more aware of his *Charter* obligations in the future.

[105] However, because of the tremendous factual differences, ***Neubuhr*** has no practical effect on my decision.

FINAL COMMENTS

[106] I note that, in the Motion Brief of the passenger, defence counsel raised a potential argument in passing (at para. 78):

> … Further, as [the driver] was the lawful renter of the minivan, and driver at the time of the traffic stop, there is nothing tied to the discovery of the hockey bags to indicate that [the passenger] had control of them at any time.

Neither the driver nor the passenger testified at the *voir dire.* In theory, one or both might choose to testify at the trial. Perhaps there might be other defence witnesses at the trial. Of course, at the trial the onus will be on the Crown to prove both accused guilty beyond a reasonable doubt. Perhaps the trial court will have the benefit of evidence that was not tendered at the *voir dire.* I have already explained why the drugs are admitted into evidence. Beyond that, I make no further comment.

[107] I thank all counsel for their articulate briefs and submissions, and for their courteous conduct.

_____J.