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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

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- and -	)	
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accused.	)	
	)	Judgment Delivered:
	)	April 8, 2025

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RULING ON *VOIR DIRE*

GRAMMOND J.

INTRODUCTION

[1] The accused is charged with two counts of second-degree murder relating to the shooting deaths of Jordan Moosetail and Patrick Bighetty in The Pas, Manitoba, on January 15, 2023 (the "Shootings"). He has brought an application under s. 24(2) of the ***The Canadian Charter of Rights and Freedoms***, to exclude evidence obtained

from a cellular phone that was seized after his arrest. These reasons relate to the following preliminary issues heard on a *voir dire* relating to that application:

a) the lawfulness of the accused's arrest on February 1, 2023;

b) the lawfulness of the seizure the cellular phone (the "Phone") from the accused on February 1, 2023;

c) the failure to file a Report to Justice ("RTJ") regarding the seizure of the Phone until March 31, 2023; and

d) an application for leave to cross-examine the affiant of an information to obtain sworn March 10, 2023, in support of a warrant to search the Phone.

[2] On March 28, 2025, I advised counsel of my conclusions on these issues, with written reasons to follow. These are those reasons.

BACKGROUND

[3] The Major Crimes Unit of the RCMP (the "MCU") began investigating the Shootings shortly after they occurred on the morning of January 15, 2023. On January 22, 2023, the MCU issued an internal bulletin (the "Bulletin") reflecting that the accused was "arrestable" in connection with the Shootings.

[4] On January 31, 2023, officers from the MCU and an emergency response team attended at Moose Lake, Manitoba for the purposes of arresting the accused and one other individual. At the same time, the accused was located in The Pas, Manitoba, and was arrested by a general patrol officer who was aware of the Bulletin.

[5] After his arrest, the accused was held in custody for approximately 22 hours, during which time he was interviewed by police. The accused was not charged, and was released on February 1, 2023, at which time the Phone was seized.

LAWFULNESS OF THE ARREST

[6] The accused alleges, pursuant to s. 9 of the ***Charter***, that his warrantless arrest on February 1, 2023, was invalid.

The Law

[7] Section 495(1)(a) of the ***Code*** provides that a person may be arrested without a warrant where there are reasonable grounds to believe that they have committed an indictable offence.

[8] In the leading case of ***R. v. Storrey***, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, the court stated that the police must have reasonable and probable grounds for an arrest, both subjectively and objectively.

[9] In ***R. v. Beaver***, 2022 SCC 54, at para. 72, the court stated, among other things, that a reviewing court must consider the grounds for arrest in existence at the time of the arrest, and not evidence that was discovered after the fact. In addition, when one police officer directs another to make an arrest, the court must review the grounds relied upon by the officer who directed the arrest, not the officer who made the arrest. In this case, counsel agreed that the arresting officer was entitled to rely upon the Bulletin, and that the issue before the court relates to whether the grounds for arrest of the directing officer, Sergeant Amirault, the MCU team commander assigned to the investigation, were sufficient.

Position of the Parties

Defence

[10] The accused argued that there were no reasonable and probable grounds to believe that he had committed an offence in this case, because police had no witnesses identifying him as having been involved in the Shootings, and they did not have a description of the shooters. In addition, although video surveillance may have shown the accused in the general area of the Shootings, there are gaps in that surveillance coverage, and he cannot be identified as having been at the scene.

[11] In addition, the police did not know the time at which the Shootings took place, and as such, they had nothing more than a hunch that he was involved. By February 1, 2023, which was more than two weeks after the Shootings, police knew that they had insufficient evidence upon which to charge the accused, and as such they arrested him with the hope of obtaining evidence from him in the form of a statement, which was an improper purpose for an arrest. In addition, the fact that he was released without charge on February 1, 2023 shows that police had nothing more than a suspicion, which is short of reasonable and probable grounds for arrest.

[12] The accused pointed to ***R. v. Edwards,*** 2022 MBKB 215, where the court held that video surveillance of the accused near a crime scene was an insufficient basis upon which to arrest them.

Crown

[13] The Crown led evidence reflecting certain details of the police investigation prior to February 1, 2023, and argued that there were grounds to arrest the accused. More

specifically, Sergeant Amirault testified that she believed there were adequate grounds for arrest based upon the following:

a) pursuant to a review of the video surveillance available to police from the New Avenue Hotel (the "Hotel") from the morning of the Shootings, she believed that the accused was present at the Hotel with three other individuals at around midnight, at which time they procured a case of Twisted Tea beverages. She noted that the surveillance at the Hotel was of "very good" quality and depicted three of the individuals wearing black jackets, and the fourth individual wearing a red jacket;

b) some of these individuals "seemed like they were adjusting something as if carrying a gun", such that Sergeant Amirault consulted with a potential expert witness on this question, who reviewed the surveillance and advised that he believed the accused was carrying a firearm in the Hotel;

c) thereafter, surveillance footage from a variety of sources reflected four individuals walking as a group in the general direction away from the Hotel and towards the scene of the Shootings, including at 12:12 a.m. Again, three of the individuals appeared to be wearing black jackets, and one a red jacket. Sergeant Amirault testified that the four individuals observed on surveillance were dressed similarly and made similar movements to the individuals observed in the Hotel surveillance video;

d) video surveillance of the location where the victims were found depicted what Sergeant Amirault believes was an interaction between the four

individuals and the victims, which included the Shootings, at approximately 12:30 a.m. (the "Clip");

e) a can of Twisted Tea beverage was found on the bumper of a vehicle near the scene of the Shootings;

f) when the four individuals left the area of the Shootings, they proceeded on foot in the direction of a residence that they were seen entering on video surveillance at 12:34 a.m. (the "Residence"), at which time one of them was seen to be carrying a long gun. The individuals appeared to be wearing the same clothing as they were at the Hotel;

g) after the four individuals left the area of the Shootings, no one else entered that area until Emergency Services arrived at the scene;

h) at approximately 1:15 a.m., the accused was arrested at a location close to the Residence, wearing a maroon hoodie that was similar in colour and logo to that seen on the Hotel surveillance video. He was not wearing the jacket, hat, or neck warmer/bandana that he was wearing at the Hotel, and as such police believed that the accused tried to change his appearance prior to his arrest. They later recovered a black jacket from the garbage near the Residence, that looked similar to the jacket that they believe he wore in the video surveillance footage; and

i) police determined that at 1:20 a.m., an individual named Michael Sanderson (who is apparently the accused's cousin) was detained pursuant to ***The Intoxicated Persons Detention Act***, R.S.M. 1987,

> c. I90, and taken into custody. Sergeant Amirault later came to believe that Mr. Sanderson was one of the four individuals of interest. On January 23, 2023, Mr. Sanderson gave a statement in which he identified himself and the accused as two of the individuals at the Hotel, and then recanted that identification.

[14] The Crown argued that on the basis of the foregoing, police had both subjective and objective reasonable and probable grounds to arrest the accused. In addition, the Crown submitted that ***Edwards*** is distinguishable because in that case there was no evidence that the accused had a firearm in their possession, or that they were seen "arguing" with the victim. Here, the Clip reflects that the group of four individuals interacted with two individuals at the location where the victims were found, and one of the four individuals was later seen to carry a firearm into the Residence.

Analysis

[15] The law is clear that the Crown bears the onus to justify the arrest (***R. v. Besharah***, 2010 SKCA 2, at para. 35).

[16] In addition, it is important to note the standard that applies when assessing the lawfulness of the arrest. As the court stated in ***Storrey***, police need not have a *prima facie* case to make a warrantless arrest. Rather, the standard is reasonable and probable grounds.

[17] I accept that in this case there were multiple pieces of video surveillance evidence available to police at the material time, although only one source of surveillance (the Clip) was entered into evidence before me, reflecting what Sergeant

Amirault believed were the Shootings. She also testified that she believed the accused was present in the Clip, based upon the bigger context of the investigation including other video surveillance evidence. She acknowledged that the Clip is of poor quality.

[18] I agree with the accused that police could not have discerned from the Clip alone exactly what and who is depicted in it. Having said that, I accept that the Clip depicts a group of four individuals travelling on foot in a back lane, and engaging with other individuals in some manner. Sergeant Amirault testified that she believed those other individuals were the victims, and she was not challenged on her assertion that the victims were found at the location depicted in the Clip. Similarly, she testified, unchallenged, that subsequent video surveillance of the same location did not show anyone else present in the back lane after the group of four left the scene. I have considered the accused's submissions regarding Sergeant Amirault's description of the Clip, and I have not concluded that there were any significant discrepancies between her description and that which the Clip depicts.

[19] I accept that subjectively, Sergeant Amirault had reasonable and probable grounds to arrest the accused. She testified as to her belief that the accused was present at the scene of the Shootings based upon the whole of the video surveillance evidence available to her, and I accept that evidence. She also testified candidly that police arrested the accused with the hope of obtaining from him an inculpatory statement, which he did not provide, as a result of which he was released without charge, after consultation with the Crown. In my view, the fact that the accused was not charged does not negate the reasonable and probable grounds for his arrest.

The standard that must be met for a valid arrest falls short of that which must be met to lay a charge[1].

[20] I am also satisfied that, objectively, there were reasonable and probable grounds to arrest the accused, because:

a) he was identified as having been present at the Hotel, both in surveillance video and by Mr. Sanderson[2];

b) thereafter, it appeared from multiple surveillance sources that the same group of four individuals traversed other locations towards the scene of the Shootings;

c) the Clip, while of poor quality, supports that a group of four individuals interacted with the victims at the location where they were later found;

d) a can of Twisted Tea, the same beverage procured by the group at the Hotel, was found near the scene of the Shootings;

e) one of the individuals was seen to be carrying a long gun when the group entered the Residence;

f) the accused appeared to have taken steps to change his appearance shortly after entering the Residence, by removing and disposing of certain items of outerwear; and

g) no one else appears to have entered the location where the victims were found after the four individuals left the scene.

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[1] A discussion of these principles is found in ***R. v. McKinnon***, 2013 BCSC 2295, at para. 99, and following.

[2] For the purposes of this *voir dire*, I attach little weight to the fact that Mr. Sanderson recanted his identification of the accused, because of other evidence that the accused was present at the Hotel, including video surveillance.

[21] These factors, taken together, constitute objectively reasonable and probable grounds for the accused's arrest.

Conclusion

[22] The arrest was lawful.

SEIZURE OF THE PHONE

[23] As set out above, the arresting officer was a general patrol officer, and was not part of the MCU team investigating the Shootings. After the accused was arrested and prior to the arrival of the MCU team at the detachment, the arresting officer placed his personal effects, including the Phone, in a locked personal effects bin for safekeeping. The parties agreed that while the Phone was locked in a bin, it could not be accessed by police without a warrant.

[24] When the accused was being processed for release, the Phone was seized by Corporal Furkalo of the MCU.

The Law

[25] Section 489(2)(c) of the ***Code*** provides that police may, without a warrant, seize any thing that they believe on reasonable grounds will afford evidence in respect of an offence.

[26] In ***R. v. Attard***, 2024 ONCA 616, the court stated, with respect to this section that:

> [47] Whether the respondent's car was lawfully seized from the accident scene depends on whether Officer Ball had reasonable grounds, at the time it was seized, to believe it would afford evidence in respect of an offence. Reasonable grounds to believe must be founded in objective facts: *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, at para. 27. The reasonableness of a police officer's belief must be determined having regard to the objective and ascertainable facts as seen through the eyes

> of a reasonable person with the same knowledge, training, and experience as the police officer: *Chow*, at para. 47.

[27] In ***R. v. Caslake***, 1998 CanLII 838 (SCC), [1998] 1 S.C.R. 51, the court stated that, in the context of an arrest, the need for police "to gain control of things or information … outweighs the individual's interest in privacy" (at para. 17). At paragraph 19, the court stated that "truly incidental" to arrest means that the police must be attempting to achieve some valid purpose connected to the arrest, which includes both subjective and objective components. At paragraph 20, the court stated that there must be "some reasonable basis" for what police did.

[28] In ***R. v. Fearon***, 2014 SCC 77, the court noted that "in general, the common law power to search incident to arrest permits reasonable searches within the meaning of s. 8 of the *Charter*" and that "this common law power is extraordinary because it requires neither a warrant nor reasonable and probable grounds. That the exercise of this extraordinary power has been considered in general to meet constitutional muster reflects the important law enforcement objectives which are served by searches of people who have been lawfully arrested" (at para. 45). The court also noted that the search must be linked to a valid law enforcement objective relating to the offence for which the suspect was arrested, which prevents routine browsing through a cell phone.

[29] In ***R. v. Saeed***, 2016 SCC 24, the court stated that a warrantless seizure is valid if it is authorized by law, the authorizing law is reasonable, and the search was conducted reasonably. A seizure incidental to an arrest is valid if the arrest is lawful, if there is a valid law enforcement purpose related to the reasons for arrest, and the search was done reasonably.

[30] In this case, since police did not have a warrant to seize the Phone, the Crown bears the onus of showing on a balance of probabilities that the seizure was reasonable.

Position of the parties

Defence

[31] The defence argued that there was no reasonable prospect of finding evidence related to the Shootings on the Phone. There is no evidence that the accused had the Phone, or any phone, in his possession on the day of the Shootings, including when he was arrested that day for an unrelated reason. The accused contended that the allegation that he may have used the Phone to communicate with other individuals regarding the Shootings is vague and general in nature. In other words, police had nothing more than a hunch that the Phone may contain evidence, and accordingly they did not have the requisite grounds to seize the Phone, even at the outset of his arrest.

[32] The accused also argued that the seizure of the Phone was not incidental to his arrest, but conversely, was incidental to his release. The seizure was done at the time of his release and was not sufficiently connected to his arrest. The accused's belongings were in locked storage while he was in custody, and were presumed to be returned to him upon his release.

Crown

[33] The Crown argued that the police have the discretion to seize items from an individual incidental to arrest, which is subject to limits. A seizure must be for a valid objective, including the protection or discovery of evidence, and each case must be assessed to see whether a valid objective was met.

[34] The Crown also noted that there are no strict timelines on when a search can be conducted incidental to arrest. Here, the clear purpose was to discover or preserve evidence, so the seizure was still incidental to the accused's arrest, even though he had been in custody for hours. In addition, the investigation involved multiple suspects, so police had good reason to expect that they would have communicated with one another using a phone.

[35] The Crown also noted that the heightened privacy interest that the accused would have in the Phone attaches to the digital information on the device, but not the device itself, such that seizing the Phone did not interfere with the accused's expectation of privacy in his digital information. The Crown noted that the contents of the Phone were not accessed until a warrant was obtained at a later date.

Analysis

[36] I have considered whether Corporal Furkalo had reasonable grounds to believe that the Phone would afford evidence of the Shootings, and the link, if any, between the seizure of the Phone and a valid law enforcement objective. I have also considered the accused's privacy interests in the Phone in the context of the police investigation into the Shootings. My analysis on those factors is as follows.

[37] Both Corporal Furkalo and Sergeant Amirault admitted that they did not know whether the accused had the Phone with him on the day of the Shootings, or whether the Phone was involved in the Shootings in any way. When the accused was arrested on the morning of the Shootings, he did not have the Phone in his possession. Having said that, both officers testified that in their respective experience, phones can contain

significant evidence of an offence, including with respect to an individual's location, communications that they had with others, and photographs that were taken.

[38] This approach is consistent with established law, including ***Fearon***, where the court stated that:

> [145] In practice, the most common benefit of a police search of a cell phone … incident to arrest is that it can provide police with information that may assist in the investigation – a cell phone is a virtual gold mine of information. This is exactly the same reason that a cell phone attracts a heightened expectation of privacy. The fact that a cell phone may keep and access meticulously taken records about almost every aspect of a person's life explains both why searching it would be so useful to law enforcement and why such a search may be so offensive to the person's dignity.

[39] In ***R. v. Wahabi***, 2024 MBCA 70, at para. 96, the court described the nexus between intercepted inmate communications and the offences being investigated as "self-evident and readily understandable." In addition, the court stated:

> [96] As Krindle J remarked in *R v Pangman*, 2000 MBQB 85: "It is a reasonable inference that persons who are known to one another and who trust one another are likely to speak to one another about areas of mutual interest and concern" (at para 34). We see it as a common-sense and reasonable inference that the dramatic circumstances of a recent and very public shooting war between rival drug factions would likely be discussed by a member of one of the factions.

[40] The court in ***Fearon*** also noted that a person who has been lawfully arrested has a lower reasonable expectation of privacy than persons not under lawful arrest (at para. 56), and that, "[s]earches that treat a cell phone … merely as a physical object continue to be permissible incident to arrest" (at para. 155).

[41] This comment was echoed in ***R. v. Reeves***, 2017 ONCA 365, at para. 61, where the court stated that information on a device attracts a heightened sense of privacy,

whereas seizing the device itself does not interfere with that heightened expectation of privacy, and imperils only an individual's property rights.

[42] The accused pointed to ***R. v. Polius***, [2009] O.J. No. 3074 (QL), 196 C.R.R. (2d) 288, where the court held that a phone seizure incidental to an arrest was not lawful. In that case, the seizing officer had not been instructed to seize a cell phone incidental to arrest, yet he did so "without any regard for its evidentiary value in connection with the arrest for an offence that he did not, and could not, particularize" (at para. 18). Thereafter, officers accessed the contents of the phone without a warrant. In my view, these facts distinguish ***Polius*** from the case at bar, and in any event, I note that ***Polius*** pre-dates both ***Fearon*** and ***Wahabi***, and is not binding upon me.

[43] I accept that subjectively, Corporal Furkalo seized the Phone to seek to discover evidence that related to the Shootings. In other words, she did not seize the Phone for some other reason or investigation. I also accept that police hoped to find relevant evidence on the Phone in the same way that they hoped to obtain evidence by interviewing the accused. In other words, I accept that subjectively, police seized the Phone in an attempt to achieve a valid purpose connected to the accused's arrest, as required in paragraph 19 of ***Caslake***.

[44] In addition, it is clear that at the material time, police had reasonable grounds to believe that there were multiple individuals involved in the Shootings, such that there could have been conversations as among them on the Phone. Similarly, given that cell phones are, in essence, handheld computers, there was a reasonable basis (which was more than a hunch) to believe that there may have been other evidence of the

Shootings on the Phone, including location data, photographs, or correspondence between the accused and individuals who were not involved in the Shootings. I have concluded, therefore, that Corporal Furkalo had reasonable grounds to believe that the Phone would afford evidence of the Shootings.

[45] This is so despite the fact that the accused was arrested on the morning of the Shootings and did not have the Phone on his person at that time, because the absence of the Phone at the time of his arrest does not necessarily mean either that he did not have it with him previously that morning, or that he did not use it to communicate about the Shootings after the fact.

[46] Put another way, while the contents of an accused's phone will not automatically be relevant to any investigation in which they are involved, to make the seizure reasonable in this case police need not have held a specific belief either that the accused possessed or used the Phone at the time of the Shootings, or that he used it to discuss the Shootings after the fact. This approach is similar to that taken in ***Wahabi***, where the court considered intercepted inmate communications. In my view, the nature of those communications bears similarity to communications on a phone, because both sources give rise to a record of the conversations in which an accused engaged, that they know is being prepared, and that requires a warrant to access.

[47] I also accept that if the officers did not seize the Phone, there was no guarantee that they could retrieve it later, or if they did so, that the same content would be available. That is not to say that arresting the accused created an exigency that would have prompted him to delete data from the Phone. The reality is that the Shootings

occurred on January 15, 2023, and it was possible that relevant data had been deleted prior to the accused's arrest on January 31, 2023.

[48] I will add that it is of significance that police did not access the contents of the Phone immediately or without a warrant. Rather, they did so after a warrant was obtained, and the validity of that warrant will be determined as a separate question in this proceeding.

[49] I will comment next upon the timing of the seizure relative to the arrest of the accused.

[50] In ***Caslake***, the court stated that:

> 23 … The right to search a car incident to arrest and the scope of that search will depend on a number of factors, including the basis for the arrest, the location of the motor vehicle in relation to the place of the arrest, and other relevant circumstances.
>
> 24 The temporal limits on search incident to arrest will also be derived from the same principles. There is no need to set a firm deadline on the amount of time that may elapse before the search can no longer said to be incidental to arrest. As a general rule, searches that are truly incidental to arrest will usually occur within a reasonable period of time after the arrest. A substantial delay does not mean that the search is automatically unlawful, but it may cause the court to draw an inference that the search is not sufficiently connected to the arrest. Naturally, the strength of the inference will depend on the length of the delay, and can be defeated by a reasonable explanation for the delay.
>
> 25 In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier*, *supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

[51] The accused alleged that there were discrepancies in the evidence of Corporal Furkalo and Sergeant Amirault with respect to whether instructions were given to seize the Phone, and if so, when that occurred. Corporal Furkalo testified that from the outset of her attendance in Moose Lake, she was instructed to seize from the accused any clothing that may have matched what was seen on the video surveillance, and any phone in his possession. Sergeant Amirault confirmed that intention, and in my view, that approach made sense in the circumstances of the investigation.

[52] Having said that, as set out above, the arrest was made by a general patrol officer in a different location than that which the MCU team was expecting. There is no evidence before me that the MCU's intention of seizing any phone on the accused's person was communicated to the arresting officer, and in fact, the arresting officer testified that he was not told to seize any phone that the accused had on his person.

[53] Corporal Furkalo testified that when she brought the accused from his holding cell to the processing area at 10:28 p.m. on February 1, 2023, he was releasable. In other words, the decision had been made to release him, and to give back his belongings. Corporal Furkalo testified that she became aware of the existence of the Phone at 10:35 p.m. when she unlocked the property bin and observed the Phone, in the process of releasing the accused. She was not aware of the Phone previously, although I accept that she could have been made aware of its existence in the bin had she either spoken to the arresting officer or reviewed the prisoner log sheet after her arrival in The Pas. Corporal Furkalo testified, however, that while the accused was in custody she was busy, and there was a lot going on, and I accept that she did not turn

her mind to whether the accused had a phone in his possession until the release process.

[54] Upon discovering the Phone, Corporal Furkalo updated Sergeant Amirault, inquired into whether she was to seize the Phone, and was directed to do so. The defence questioned why Corporal Furkalo confirmed instructions with Sergeant Amirault particularly if she had previously received instructions to seize any phone on the accused's person. Corporal Furkalo testified that she would have confirmed the instructions regardless of whether the Phone was seized immediately upon the accused's arrest or at a later time, because she was not privy to all of the details of the investigation. She also testified that since the Phone had been placed in a property bin, the circumstances had changed in her view, and she sought to confirm instructions to seize before doing so. Sergeant Amirault testified that she did not recall any such conversation with Corporal Furkalo, and that she did not have a note of instructing Corporal Furkalo to seize the Phone, but she also stated that she would have given that instruction at the time. In other words, she did not deny giving the instruction as described by Corporal Furkalo.

[55] Corporal Furkalo recorded the Phone as seized at 11:05 p.m., at which time she agreed that the accused was releasable. He was also signed out of custody at 11:05 p.m.

[56] I accept that the MCU had formed the intention to arrest the accused and to seize any phone on his person from the outset of their attendance in Moose Lake, but the reality is that the arrest did not unfold as they expected, either in terms of the location or who made the arrest. The accused's arrest in The Pas by a general patrol

officer was unplanned, and there was a lack of communication between the MCU team and the arresting officer regarding the intention to seize the Phone. As a result, the Phone was placed in a property bin after the accused's arrest. The accused did not argue that the placement of the Phone in a property bin nullified the police's ability to seize it, and in the absence of any such authority, I have concluded that the placement of the Phone in the bin is irrelevant to the validity of the seizure.

[57] I accept that the decision to release the accused was made before the Phone was seized, which is unusual, but in my view, applying the principles set out in ***Caslake***, any negative inference that arose from the delay in seizing the Phone is rebutted by the explanation that although police formed the intention to seize the Phone, the arrest did not proceed as planned. Unfortunately, there was a lack of communication between the investigative team and the arresting officer with respect to the intention to seize the Phone. In the circumstances of this case, the police's explanation for the delay is reasonable, and I accept that they had a valid reason for seizing the Phone. In addition, I accept that the seizure was made for a valid law enforcement purpose related to the Shootings.

[58] I will add that I am not concerned by the fact that Sergeant Amirault did not recall instructing Corporal Furkalo to seize the Phone after she discovered it in the property bin, because the important question is whether the requisite grounds to seize the Phone existed, as opposed to the details of the instructions given to Corporal Furkalo.

[59] On the basis of all of the foregoing, I have concluded that the seizure of the Phone was valid pursuant to s. 489(2)(c) of the ***Code***, and was incidental to the accused's arrest.

Conclusion

[60] The seizure of the Phone was valid.

FAILURE TO FILE THE RTJ

[61] Section 489.1(1)(b) of the ***Code*** provides that police shall, as soon as is practicable, report to a justice that an item has been seized and is being detained. Pursuant to s. 490 of the ***Code***, where an RTJ is made, there is an obligation on the justice to supervise the detention of the item.

[62] As discussed in ***Application pursuant to section 490(1) of the Criminal Code for the detention of things seized, Envelope 28693***, 2022 MBPC 14, ss. 489.1 and 490 provide for an administrative function that relates to the supervision of items seized, to ensure that items are not held indefinitely without judicial oversight (at paras. 23 and 25). In other words, the purpose of an RTJ is to track a seized item, because the individual from whom it was seized has a privacy interest in the item and could apply to have it returned.

[63] In ***Application***, the court conducted a review of the law in this area and stated: "[t]hese cases do establish the failure to file a report to justice in compliance with statutory timelines does not necessarily result in a finding of a *Charter* breach …" (at para. 21).

[64] In ***R. v. Garcia-Machado***, 2015 ONCA 569, the court stated: "it is clear that an individual retains a residual, post-taking reasonable expectation of privacy in items

lawfully seized and that *Charter* protection continues while the state detains items it has taken. … the requirement in s. 489.1(1) to report to a justice as soon as practicable plays a role in protecting privacy interests" (at para. 45) and that, "[i]f seized property is detained without complying with s. 489.1(1), then its continued detention is not authorized by law" (at para. 46).

[65] In this case, the Phone was seized on February 1, 2023, and a warrant to search the Phone was obtained on March 10, 2023, but the RTJ was not accepted for filing until March 31, 2023.

[66] Corporal Furkalo testified that on or about February 2, 2023, she sent an e-mail to the exhibit officer assigned to this matter and asked them to file the RTJ. The officer advised that they would do so, but on or about March 3, 2023, Corporal Furkalo was advised that the RTJ had been rejected, and that, as the seizing officer, she was required to sign the RTJ. She did so, but on March 29, 2023, she was advised that the RTJ was rejected again. As such, on March 31, 2023, Corporal Furkalo prepared and filed a new RTJ, which was accepted.

[67] I accept Corporal Furkalo's evidence that she directed the filing of the RTJ promptly after the seizure. Having said that, I do not have direct evidence from the exhibit officer as to the details of their attempts to submit the RTJ, including when the first version thereof was submitted. Similarly, I do not have copies of all of the correspondence exchanged relative to the filings and rejections of the RTJ. In other words, the nuances of why the RTJ was rejected and why the officers did not take action more quickly are not in evidence before me.

[68] I accept that on March 31, 2023, Corporal Furkalo took steps to prepare and file the RTJ herself, and that the filing delay was not the result of any specific intention on her part. Having said that, in the absence of a clear understanding of the details of all relevant events, I have concluded that the RTJ was not filed as soon as was practicable, such that s. 489.1 of the ***Code*** was violated.

[69] I appreciate that this violation of the ***Code*** could be found to be minor or technical in nature, particularly given that the Phone is physical evidence, and that the accused did not attempt to have the Phone returned to him before the RTJ was filed on March 31, 2023. Having said that, I am satisfied that ***Charter*** protection continued to be afforded to the accused after the seizure, and that the continued detention of the Phone was not authorized by law given the late filing of the RTJ. As such, there was a breach of s. 8 of the ***Charter***.

Conclusion

[70] The late filing of the RTJ constituted a breach of the ***Charter***.

LEAVE TO CROSS-EXAMINE THE AFFIANT

[71] On March 10, 2023, Corporal Stanley McCutchin (the "Affiant") affirmed an affidavit in support of an application for a warrant to search the Phone, and the warrant was granted on the same date. The accused seeks leave to cross-examine the Affiant.

The Law

[72] In ***R. v. Damianakos***, 1997 CanLII 4334 (MBCA), 126 Man. R. (2d) 81, at para. 23, the court stated that leave to cross-examine will not generally be granted.

[73] In ***R. v. Pires***; ***R. v. Lising***, 2005 SCC 66, the court stated that the extent to which cross-examination "becomes a necessary adjunct to the right to make full answer

and defence depends upon the context. The *Garofoli* threshold test requires that the defence show a reasonable likelihood that the cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge." In other words, the court should focus upon the likely effect of the cross-examination in terms of undermining the basis of the warrant and grant leave where there is a reasonable likelihood that it assist the court in deciding a material issue. Conversely, if there is no such reasonable likelihood, cross-examination should not be permitted.

[74] I recognize, as stated in ***R. v. Morelli***, 2010 SCC 8, at para. 58, that an affiant must present all material facts (whether or not they are favourable), that they should avoid incomplete facts, and that they should not invite conclusions that would not be reached if the omitted facts were disclosed.

[75] In addition, as the court stated in ***R. v. Tekleab***, 2023 MBPC 51, citing ***R. v. Camara***, 2005 BCCA 639, "[s]imple errors in an ITO do not, alone, give rise to the right to cross-examine…" (at para. 50).

Defence

[76] The accused pointed to the following issues in the affidavit in support of his request to cross-examine the Affiant:

a) the affidavit did not reflect that when the accused was arrested at 1:15 a.m. on the morning as the Shootings, he did not have a phone in his possession;

b) the affidavit reflected that a witness identified the accused as being present at the Hotel, which was inaccurate because the witness did not name the accused personally;

c) the affidavit reflected that a witness heard "tapping" sounds at a particular time, when the witness in fact advised police that she did not know at what time she heard the tapping sounds;

d) the affidavit reflected that a witness encountered a group of aggressive individuals on the morning of the Shootings, when the witness actually stated that only one individual in the group was acting in an aggressive manner; and

e) the affidavit included references to another shooting incident (the "Other Shooting") that occurred on the same morning as the Shootings, and suggested that the same individuals were involved in both incidents, which police knew was inaccurate.

[77] The accused argued that the affidavit did not reflect full and frank disclosure, and that he should have the opportunity to canvass with the Affiant whether these issues constituted honest errors and omissions, or whether the Affiant exhibited bad faith when he prepared the affidavit.

Crown

[78] The Crown argued that the affidavit was not required to be prepared perfectly, and that in this case the defence has full disclosure, so there is no need to clarify any issues through cross-examination. Rather, the accused can argue the validity of the warrant without cross-examining the Affiant, on the basis of the amplified record. In addition, if necessary, some excerpts of the affidavit could be excised.

Analysis

[79] I have categorized the accused's proposed areas of cross-examination into three areas:

a) an omission relative to whether the accused had a phone in his possession when he was arrested on the morning of the Shootings;

b) errors in what three witnesses told police in their respective statements; and

c) the inclusion of information regarding the Other Shooting.

[80] I am not prepared to allow cross-examination on the omission referenced at paragraph 79(a) above, because as I concluded at paragraph 45 above, the absence of the Phone on the accused's person at the time of his arrest that morning does not necessarily lead either to the conclusion that he did not have it with him at the time of the Shootings, or that it would not contain details of who, if anyone, the accused may have communicated with about the Shootings. In other words, in my view, whether the accused had the Phone with him at a particular moment in time, including his arrest on January 15, 2023, was not material and would not reasonably impact the Affiant's expressed belief that searching the Phone would assist in the investigation.

[81] In addition, the amplified record reflects clearly that the accused did not have the Phone with him when he was arrested on the morning of the Shootings. In other words, that evidence is available to the accused without cross-examination. In those circumstances, I am not satisfied that there is a reasonable likelihood that cross-examination on this point will elicit testimony of probative value that will assist me in determining a material issue to be decided.

[82] With respect to the second category referenced at paragraph 79(b) above, I accept the accused's submissions that there appear to be discrepancies in the affidavit as compared with the witness statements in evidence before me. Having said that, each of the relevant, multi-part paragraphs in the affidavit is followed by a notation that apparently reflects how the Affiant learned the information in that paragraph. In each instance it was from another officer, either through a synopsis that they had prepared, or from a conversation with them. Having said that, there are no synopses or records of conversation in the evidence before me. As such, it is unclear whether the Affiant learned the whole contents of each paragraph from the same source, and whether the apparent discrepancies in the affidavit arose directly from the sources upon which the Affiant relied, or whether he erred in his interpretation of those sources.

[83] I appreciate that the accused wishes to explore with the Affiant whether any of the errors were deliberate or malicious attempts to mislead the authorizing justice, or were good faith errors, and in my view these questions may be relevant to the validity of the warrant. I appreciate that any mischaracterizations of the witness statements might be properly addressed by excision, but I have concluded that cross-examination of the Affiant on these points may elicit testimony of probative value, particularly in the context of the third category, as discussed below.

[84] With respect to the third category, I note that at least six paragraphs of the affidavit include references to the Other Shooting. In addition, the affidavit reflects: "[w]itnesses in the area have told police that there was a group of 4 males, one wearing a red jacket and the others wearing black jackets, seen running away from the house [at which the Other Shooting took place]". The source of this information is not

cited in the affidavit, and according to defence counsel, it does not exist in the disclosure in this matter, which is of concern.

[85] I note also Sergeant Amirault's evidence that police determined that the Other Shooting was unrelated to the Shootings, although it is unclear from her evidence when that determination was made relative to the date on which the affidavit was sworn.

[86] On the basis of the foregoing, I am satisfied that there are questions about the inclusion of the references to the Other Shooting in the affidavit, and the reliability of the above-quoted statement in particular, that gives rise to a reasonable likelihood that cross-examination on these points would elicit testimony of probative value that will assist me in determining a material issue to be decided.

Conclusion

[87] The accused may cross-examine the Affiant on the areas referenced at 79(b) and 79(c) above, followed by an opportunity for the Crown to re-examine.

CONCLUSION

[88] In summary: the arrest was lawful, the seizure of the Phone was valid, the late filing of the RTJ constituted a breach of the ***Charter***, and leave to cross-examine is granted, in part.

_____

J.