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Docket: CR 21-01-38882
(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Chantal A. English
	)	for the Crown
- and -	)	
	)	Jonathan C. Pinx
	)	for the accused
KYLE WILLIAM McKENZIE,	)	
	)	JUDGMENT DELIVERED:
accused.	)	December 9, 2022

HARRIS J.

Ruling on *voir dire*

[1] Kyle William McKenzie ("Mr. McKenzie") is charged with five counts of possession of drugs for the purpose of trafficking contrary to s. 5(2) of the ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19 ("***CDSA***"), possession of a weapon for a purpose dangerous to the public peace contrary to s. 88 of the ***Criminal Code***, R.S, c. C-34, s.1 ("the ***Code***") and one count each of possession of property obtained by the commission of a criminal offence contrary to ss. 354(1)(a) of the ***Code***. He seeks to exclude, under s. 24(2) of the ***Canadian Charter of Rights and Freedoms*** ("the ***Charter***"), evidence of drugs, money,

weapon and drug paraphernalia found as a result of a warrantless arrest. Additionally, he alleges that even if the original search is found to be valid, the evidence should nonetheless be excluded as police violated his rights under s. 8 of the ***Charter*** by conducting a strip search of him for which they did not have reasonable grounds.

BACKGROUND

[2] On May 7, 2021 Constables Jordan de Pape and Megan Doyle (collectively "the officers"), members of the City of Winnipeg Police Service ("WPS"), were on routine patrol stopped at a stop sign on the north side of Ellice Avenue at McGee Street. Cst. de Pape noticed that the passenger in the rear driver's side seat in a taxi stopped on McGee on the south side of Ellice did not have his seatbelt on. As the taxi turned east on Ellice, Cst. de Pape activated the emergency lights so that he and Cst. Doyle could enforce s. 186(4) of ***The Highway Traffic Act***, C.C.S.M. c. H60 ("the ***HTA***" or "the ***Act***") in relation to the seatbelt infraction.

[3] The taxi pulled over as did the officers. Cst. de Pape testified that he noticed the passenger frantically trying to connect his seatbelt. As Cst. de Pape came up to the driver's side of the car, he saw that the passenger was buckling his seatbelt with both hands on the right-hand side of his body. He noted that the passenger had his right hand closed, but that there was a baggie sticking out from his hand. He testified that he could see methamphetamine in the bag while it was held in the passenger's closed hand.

[4] He opened the door and told the passenger that he was under arrest for possession of methamphetamine. The passenger reluctantly exited the cab as directed by Cst. de Pape. The passenger identified himself as Kyle McKenzie.

[5] Cst. de Pape testified that Cst. Doyle was on the passenger side of the taxi when all of this occurred.

[6] Cst. de Pape then seized the methamphetamine from Mr. McKenzie and put it into his vest until he handed it over to Cst. Doyle a short time later. Mr. McKenzie was handcuffed for officer safety and escorted to the cruiser car where he underwent a pat-down search of his pockets, again for officer safety, items that could be used to facilitate flight and items related to the offence.

[7] Cst. de Pape removed a cross-body type satchel from Mr. McKenzie and handed it to Cst. Doyle who searched it. Inside, Cst. Doyle found the drugs at issue packed into small baggies, a weigh scale, $280 cash, a knife and drug paraphernalia. Cst. Doyle placed Mr. McKenzie under arrest for possession for the purpose of trafficking pursuant to the ***CDSA*** and cautioned him accordingly. He declined the opportunity to contact counsel. He was then transported to WPS Headquarters ("HQ") on Smith Street. The drive time from the point of arrest to HQ was approximately five minutes.

[8] On arrival at HQ, Mr. McKenzie underwent another pat-down search and Cst. Doyle did an inventory of the items seized at the time of his arrest. Cst. de Pape escorted Mr. McKenzie to the Central Processing Unit on the third floor of HQ where a skin or strip search was conducted by Cst. de Pape.

[9] Cst. de Pape described the room in which the strip search took place as being about 8′ x 8′ with a sink and toilet. There are no cameras in the room. Another male officer accompanied Cst. de Pape and Mr. McKenzie into the room. Before entering the room, Mr. McKenzie had removed clothing so that he was down to one layer. While in the room, at the direction of Cst. de Pape, he removed one piece of clothing at a time and replaced it before removing the next item. After he removed his underwear, Cst. de Pape directed Mr. McKenzie to lift up his scrotum, and bend over and spread his butt cheeks. Nothing was found as a result of this search.

[10] Cst. Doyle said that when they stopped behind the taxi, she did not see frantic movements by Mr. McKenzie as described by Cst. de Pape. She testified that Cst. de Pape arrived at the side of the taxi before she did and when she arrived at the taxi, she did not see anything in Mr. McKenzie's hands nor did she see him reach for anything. She testified that Cst. de Pape had already seized the methamphetamine. She heard Cst. de Pape advise Mr. McKenzie that he was under arrest for possession of methamphetamine. She testified that she was watching the circumstances in the taxi to ensure officer safety and to generally monitor what was happening.

[11] Cst. Doyle testified that Mr. McKenzie exited the taxi at the direction of Cst. de Pape and he was placed in handcuffs and escorted to the cruiser car where a pat-down search for officer safety, items that could facilitate an escape, weapons and items related to his arrest was conducted. A cellphone found in one of his

pockets was seized. A cross-body satchel approximately 10" x 10" x 4" in dimension was removed and searched by Cst. Doyle for the above-noted reasons. Cst. Doyle located the drugs, knife, currency and paraphernalia in the satchel, which led to these charges.

[12] Mr. McKenzie testified that he was at his friend's home that morning although he was uncertain how long he had been there. He states it could have been as early as 11:00 p.m. the previous evening, or as recent as 4:00 in the morning - he was not sure. He testified that he had been smoking methamphetamine and heroin "all night", the last time being just before he got into the taxi. He did not sleep the previous night.

[13] Mr. McKenzie testified that he saw the police car stopped at the stop sign as the taxi was about to turn right on Ellice. He put his seat belt on immediately. As the taxi made the turn, the police activated their emergency lights and the cab pulled over. Mr. McKenzie says he removed his seatbelt when the taxi was pulled over. He testified that Cst. de Pape advised him that he was going to be ticketed for not wearing a seatbelt and directed him to get out of the taxi. He did so. He was asked if he had any outstanding warrants or drugs. He denied both, saying he was on his way home. According to Mr. McKenzie, Cst. de Pape advised that they were going to search him in any event. He was escorted back to the cruiser where his satchel and wallet were searched. It was only when the officers found the drugs during this search that he was placed under arrest.

[14] Mr. McKenzie denies having methamphetamine in his hand while in the taxi as Cst. de Pape alleges. He testified that if he did, he had ample time to put it in his pocket from the time that he saw the police car until when he was approached by Cst. de Pape. Cst. de Pape agreed that Mr. McKenzie had lots of time to conceal the drugs.

[15] He does recall details regarding what happened at HQ. He said that while "the way that de Pape described it (the strip search)", that could have been the way it went. However, he insisted that he was required to get completely naked. He was humiliated by the strip search.

ISSUES

Were Mr. McKenzie's s. 9 rights breached?

[16] The fundamental issue in this *voir dire* is whether Mr. McKenzie had methamphetamine in his hands as alleged by Cst. de Pape. If he did, then Cst. de Pape had the authority to arrest Mr. McKenzie for the offence of possession of methamphetamine and to search his person and belongings incidental to that arrest.

[17] If Cst. de Pape did not have reasonable and probable grounds to arrest Mr. McKenzie for possession of methamphetamine, then his right not to be arbitrarily detained was infringed and the search was not reasonable.

The Crown's position

[18] The Crown says that the police were acting pursuant to their legal authority when they required the taxi to stop because of a possible breach of the ***HTA***. The

police observed a passenger who was not wearing a seatbelt, a violation of s. 186(4) of the ***Act***, and lawfully stopped the taxi pursuant to s. 76.1 of the ***Act***. I agree. There was no breach of Mr. McKenzie's s. 9 right when he was detained in relation to the seatbelt violation.

[19] Cst. de Pape testified that when he looked into the taxi, he saw what he believed to be methamphetamine in a baggie in Mr. McKenzie's hand. He said that as a police officer, methamphetamine is a drug he had seen 50 times on the street.

[20] Subsections 495(1)(a) and (b) of the ***Code*** authorizes a peace officer to arrest without warrant, "a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence" or "a person whom he finds committing a criminal offence". In this case, the Crown says that Cst. de Pape found Mr. McKenzie in possession of methamphetamine, a criminal offence.

[21] Cst. de Pape's subjective belief that Mr. McKenzie was in possession of methamphetamine was objectively reasonable, forming grounds for his arrest. Mr. McKenzie's s. 9 rights were not breached when he was arrested for possession of methamphetamine.

[22] The Crown says that incidental to the arrest of Mr. McKenzie for possession of methamphetamine, the police were authorized to conduct a pat-down search as well as a search of his satchel.

[23] The three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands

of the arrestee or other, and the discovery of evidence which can be used at the arrestee's trial (***R. v. Caslake***, 1998 SCC 838, [1998] 1 S.C.R. 51 (at para. 19), referring to L'Heureux-Dubé in ***Cloutier v. Langlois***, 1990 SCC 122, [1990] 1 S.C.R. 158). In this case, the police testified that the search was conducted for the purpose of police safety, searching for items which may assist in flight and discovery of further evidence relative to the arrest. This search resulted in the seizure of the drugs, money, knife and paraphernalia at issue.

Mr. McKenzie's position

[24] Mr. McKenzie says that the police did not have reasonable grounds to arrest him as he did not have methamphetamine in his hand as alleged by the Crown. If the police did not have reasonable grounds to arrest Mr. McKenzie, then the search of his person and satchel were unreasonable and the drugs, cash, knife and paraphernalia should be excluded from evidence.

[25] In ***R. v. Collins***, 1987 SCC 84, [1987] 1 S.C.R. 265 ("***Collins***"), the court determined that:

> 21. The accused bears the burden of persuading the court that his Charter rights or freedoms have been infringed or denied…The standard of persuasion is the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not.
>
> 22. …once the [accused] has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.
>
> 23. A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

[26] Mr. McKenzie says the court should prefer his version of events to those of the police. He says that there are inconsistencies between the officers in their evidence that should cause the court concern. He further says the failure of Cst. Doyle to make notes of her own observations regarding this matter until the point at which Mr. McKenzie was cautioned after discovery of the drugs in the satchel is problematic. Not only does the absence of notes impair her ability to refresh her memory about the events, but Mr. McKenzie is also denied the opportunity to consider how those notes may assist him in answer to the very serious charges he now faces. I share these concerns.

[27] In ***Wood v. Schaeffer***, 2013 SCC 71, [2013] 3 S.C.R. 1053 (at para. 67), Moldaver J. concluded that police officers have a *duty* to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Notes are important as part of the investigation of crimes, as an aide to the officer's memory and as a tool to ensure fair trials. It is not clear why we were deprived of the benefit of those notes in this case.

[28] I also share Mr. McKenzie's concern regarding the failure of the police to seize the video from within the taxi, which was clearly open to them to do. Having the benefit of the video could have assisted the court in its fact finding. The best evidence available should always be put before the court.

[29] On the other hand, I do not find Mr. McKenzie to be a reliable witness. He admitted to consuming methamphetamine and heroin throughout the hours leading to his arrest, and did not sleep. He smoked methamphetamine and heroin

only minutes before these events. He said that methamphetamine can cause him to hallucinate if he has not slept. Cst. de Pape observed that Mr. McKenzie was up and down – "emotional".

[30] Mr. McKenzie testified that at some point while stopped on Ellice, other officers arrived on the scene. Neither Cst. de Pape nor Cst. Doyle had a recollection of this happening. Mr. McKenzie testified with great uncertainty and confusion about the involvement of these alleged other officers. He also testified that the officers were weighing the drugs on the trunk of the police car, using the scale from his satchel. This was denied by the officers. Moreover, it does not make sense.

[31] Overall, I found that Mr. McKenzie's testimony about what happened roadside before attending HQ was confusing, although I believe he was being honest about what he recalled. In testifying about his attendance at HQ, his memory is vague.

[32] While the evidence leaves me with some concerns about the basis for the search of Mr. McKenzie's satchel and the discovery of the drugs, money, knife and drug paraphernalia, I am not persuaded, on a balance of probabilities, that Mr. McKenzie's rights were infringed. Accordingly, I must conclude that they were not. (***Collins*** at para. 21)

[33] As the police had grounds upon which to arrest Mr. McKenzie for possession of methamphetamine, they were authorized to search him incidental to his arrest.

The Crown has satisfied me that the search was, on a balance of probabilities, reasonable.

The strip search

[34] Recently, Greenberg J. had occasion to consider the issue of strip searches incident to a lawful arrest. Relying on ***R. v. Golden***, 2001 SCC 83, [2001] 3 S.C.R. 679 ("***Golden***"), Greenberg J. said that strip searches will be valid where there are reasonable and probable grounds for the strip search in addition to reasonable and probable grounds for the arrest, and the search is carried out in a reasonable manner. Reasonable grounds will not be established by a general policy to conduct strip searches in all investigations or all investigations of a particular offence (para. 14). As Greenberg J. noted from ***Golden***:

> 94 In addition to searching for evidence related to the reason for the arrest, the common law also authorizes police to search for weapons as an incident to arrest for the purpose of ensuring the safety of the police, the detainee and other persons. However, a "frisk" or "pat-down" search at the point of arrest will generally suffice for the purposes of determining if the accused has secreted weapons on his person. Only if the frisk search reveals a possible weapon secreted on the detainee's person or if the particular circumstances of the case raise the risk that a weapon is concealed on the detainee's person will a strip search be justified. Whether searching for evidence or for weapons, the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search.
>
> 95 The requirement that the strip search be for evidence related to the grounds for the arrest or for weapons reflects the twin rationales for the common law power of search incident to arrest. Strip searches cannot be carried out as a matter of routine police department policy applicable to all arrestees, whether they are arrested for impaired driving, public drunkenness, shoplifting or trafficking in narcotics. The fact that a strip search is conducted as a matter of routine policy and is carried out in a reasonable manner does not render the search reasonable within the meaning of s. 8 of the *Charter*. A strip search will always be unreasonable if it is carried out abusively or for the purpose of humiliating or punishing the arrestee. Yet a "routine" strip search carried out in good faith and

> without violence will also violate s. 8 where there is no compelling reason for performing a strip search in the circumstances of the arrest.
>
> (emphasis added)

[35] Cst. de Pape testified that, "We do a skin search if we believe that the accused may be concealing something on his body and in all drug trafficking incidents, a skin search is always conducted". He also testified that he believed it was *possible* that Mr. McKenzie was concealing something because of all of his moving around. He later confirmed that such searches were "common practice in drug trafficking cases". There was no evidence that there was a compelling reason to conduct a strip search.

[36] A strip search carried out because it was routine in drug trafficking cases and without any reasonable and probable grounds was a violation of Mr. McKenzie's s. 8 rights.

Section 24(2) remedy

[37] The onus is on Mr. McKenzie to demonstrate that evidence obtained in a manner that infringed a ***Charter*** right should be excluded because its admission would bring the administration of justice into disrepute.

[38] In ***R. v. Tim***, 2022 SCC 12, Jamal J. set out principles that guide the determination of whether evidence was "obtained in a manner" that violates the ***Charter***:

> [78] This Court has provided guidance as to when evidence is "obtained in a manner" that breached an accused's *Charter* rights so as to trigger s. 24(2):
>
> > 1. The courts take "a purposive and generous approach" to whether evidence was "obtained in a manner" that breached

> an accused's *Charter* rights (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38).
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> 2. The "entire chain of events" involving the *Charter* breach and the impugned evidence should be examined (*R. v. Strachan*, 1988 CanLII 25 (SCC), [1988] 2 S.C.R. 980, at pp. 1005-6).
>
> 3. "Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct" (*Mack*, at para. 38; see also *Wittwer*, at para. 21).
>
> 4. The connection between the *Charter* breach and the impugned evidence can be "temporal, contextual, causal or a combination of the three" (*Wittwer*, at para. 21, quoting *R. v. Plaha* (2004), 2004 CanLII 21043 (ON CA), 189 O.A.C. 376, at para. 45). A causal connection is not required (*Wittwer*, at para. 21; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 83; *Strachan*, at pp. 1000-1002).
>
> 5. A remote or tenuous connection between the *Charter* breach and the impugned evidence will not suffice to trigger s. 24(2) (*Mack*, at para. 38; *Wittwer*, at para. 21; *R. v. Goldhart*, 1996 CanLII 214 (SCC), [1996] 2 S.C.R. 463, at para. 40; *Strachan*, at pp. 1005-6). Such situations should be dealt with on a case by case basis. There is "no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote" (*Strachan*, at p. 1006).

[39] While the discovery of the evidence was not causally connected to the breach of Mr. McKenzie's s. 8 rights, there was a temporal and contextual connection sufficient to meet the "obtained in a manner" threshold. (***R. v. Gessen***, 2022 MBKB 210 at para. 33)

[40] The admissibility of evidence that has been obtained in a manner that violates the ***Charter*** is dependent on a consideration of three factors:

- the seriousness of the state conduct;
- the impact of the breach on the accused's ***Charter*** rights; and

- society's interest in adjudication of the case on the merits.

(***R. v. Grant***, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 71 ("***Grant***"))

[41] As the court noted in ***Grant*** (at para. 70):

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

[42] The strip search was a serious breach of Mr. McKenzie's ***Charter*** right:

> 89 … strip searches can be humiliating, embarrassing and degrading for those who are subject to them, and any *post facto* remedies for unjustified strip searches cannot erase the arrestee's experience of being strip searched. Thus, the need to prevent unjustified searches before they occur is more acute in the case of strip searches than it is in the context of less intrusive personal searches, such as pat or frisk searches. As was pointed out in *Flintoff*, *supra*, at p. 257, "[s]trip-searching is one of the most intrusive manners of searching and also one of the most extreme exercises of police power".
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> 90 Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy.
>
> (***Golden*** per Iacobucci and Arbour JJ.)

[43] There was no compelling reason to conduct this humiliating and invasive search of Mr. McKenzie. The fact that it occurred as a matter of routine 12 years after the Supreme Court of Canada ruled that routine strip searches violate an accused person's s. 8 rights makes it even more egregious.

[44] The strip search was a serious invasion of Mr. McKenzie's privacy and his human dignity. 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 (***Grant*** at para. 78).

[45] The last part of the ***Grant*** test requires a consideration of society's interests in adjudication of Mr. McKenzie's case on the merits. There is no doubt that society has a keen interest in the prosecution of alleged drug traffickers. However, the public is entitled to expect that the police will cease practices that the courts determine are unconstitutional. I can do no better than echo the words of Greenberg J. when she said (at para. 45):

> While s. 24(2) is not to be used to punish the police, the court must disassociate itself from long standing systemic abuses of police authority.
> …

[46] Accordingly, the evidence seized from Mr. McKenzie will not be admitted at trial.

_____ J.