Court of Queen's Bench of Alberta

Citation: R v Bootsma, 2022 ABQB 45

Date: 20220117
Docket: 191292317Q1
Registry: Red Deer

Between:

Her Majesty the Queen

- and -

Randy Stuart Bootsma and Dana Lynn Morin

Ruling on Voir Dire
of the
Honourable Madam Justice Eleanor J. Funk

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Overview

[1] Randy Bootsma and Dana Morin are jointly charged with possession for the purpose of trafficking in cocaine following a traffic stop on a vehicle in which they were both passengers on October 11, 2019.

[2] The police first arrested Mr. Bootsma on an 'outstanding warrant' and conducted a pat down search incident to this arrest. During this search, an officer noticed something was bulging near the front area of Mr. Bootsma's abdomen. The officer pulled back the waistband of Mr. Bootsma's underwear and pulled two zip lock bags with a white powdery substance from inside the underwear.

[3] The police then arrested both Mr. Bootsma and Ms. Morin for drug offences and searched the vehicle in which they had been passengers.

[4] From inside the vehicle, the police located and seized a vial of suspected fentanyl; a syringe that appeared to be 'loaded' with some type of drug; used syringes; a digital scale; two cell phones; a notebook that appeared to be used as a score sheet; and other drug related items.

[5] Mr. Bootsma alleges breaches of his ss. 7 and 8 *Charter* rights and seeks exclusion of all seized evidence. Ms. Morin has not alleged any *Charter* breaches.

Facts

[6] On October 11, 2019, Cpl.'s Pepper and Blaschuk were in their unmarked police vehicle on highway 11 west of Red Deer when they noticed a Pontiac van, driven by an older male, driving eastbound toward Red Deer.

[7] Cpl. Blaschuk had recent source information that this vehicle was owned or driven by someone named 'Ed' and that 'Ed' would drive Randy Bootsma and Dana Morin into Red Deer, to pick up drugs, on a regular basis. The officers knew that both Mr. Bootsma and Ms. Morin were wanted on some type of outstanding warrants. Both Mr. Bootsma and Ms. Morin were known to police.

[8] Through the van's tinted windows, the officers could see the silhouettes of two passengers in the van. They did not know who the passengers were but thought one was a male and the other was a female. The officers decided to follow the van in an effort to identify the passengers and to see what they were doing in Red Deer.

[9] After a couple of hours of surveillance, the police saw the van parked outside of the Cash Casino, in Red Deer. At 12:50 pm, they saw Dana Morin exit the casino and enter the van. At 2:21 pm, they saw Randy Bootsma exit the casino and enter the same van. An older man entered the driver's seat and the van left the Casino parking lot.

[10] The police followed the van as it drove to a few locations in Red Deer. They continued to follow the van as it drove west, out of Red Deer, on highway 11. The van turned north on highway 20; it went through Sylvan Lake, and continued north of Sylvan Lake before coming to a stop on a rural township road. Here, the van parked for about 20 minutes on a graveled parking area. An unknown person on a dirt bike came towards this parking area on a trail, then quickly turned and went back down the same trail. Mr. Bootsma got out of the van and walked down this same path. About five minutes later, he returned to the van and it left the area, eventually returning to highway 11, where it travelled west towards Rocky Mountain House.

[11] Cpls' Pepper and Blaschuk requested assistance from uniformed officers from Rocky Mountain House, to assist with the traffic stop and arrests of Mr. Bootsma and Ms. Morin on their outstanding warrants.

[12] Csts' Pitcher and Madore responded to this call for assistance and drove from Rocky Mountain House east on highway 11 to help with the traffic stop and arrests. At 4:35 pm, the police stopped the van about 20 minutes east of Rocky Mountain House, along highway 11.

[13] Having had previous interactions with Mr. Bootsma where he had tried to run from police, Cpl's Pepper and Blaschuk approached the van quickly and opened its passenger side sliding door. They saw Mr. Bootsma sitting in the van and arrested him on his 'outstanding warrant.'

[14] There is no evidence as to the nature of this warrant. Cpl. Pepper agreed it could have been for missing court, but was not sure. He did not know if the warrant was endorsed or unendorsed.

[15] The officers removed Mr. Bootsma from the van; they handcuffed him; and searched him incident to arrest. Cpl. Pepper said the purpose of the search was for 'officer safety'. Cpl. Blaschuk, who conducted the search, said that he was searching for 'weapons and contraband'. During the search, he noticed a bulge in the front area of Mr. Bootsma's waist. Cpl. Blaschuk pulled back the waistband of Mr. Bootsma's underwear and pulled two zip lock bags, containing a white powdery substance, from inside of Mr. Bootsma's underwear.

[16] Upon noticing the bulge in the waist area, Cpl. Blaschuk believed that Mr. Bootsma was 'concealing something'. He pulled the waistband of Mr. Bootsma's underwear away from his body, by an inch or so, and saw a 'bag or something' partly protruding from the top of Mr. Bootsma's underwear, the rest of the item was concealed inside of the underwear.

[17] There is no evidence as to the size or shape of the bulge that Cpl. Blaschuk saw in Mr. Bootsma's waist area. There is no evidence as to whether the object was hard or soft. Cpl. Blaschuk said he did not know what the item was, other than it seemed to be 'something concealed'. He reached for the item because it was something concealed.

[18] When asked if this was a frisk search or a strip search, Cpl. Blaschuk described this as a frisk search. He described a proper frisk search as handcuffing the person and checking waistbands and armpits. He explained that, in his experience, he has found items such as firearms or knives concealed in these places.

[19] There is no evidence of the police having previous dealings with Mr. Bootsma where weapons were involved or having reason to think that he might be in possession of any weapons on this date. There is no evidence of Mr. Bootsma being aggressive or uncooperative with the police on this date.

[20] With the discovery of this bag from Mr. Bootsma's underwear, the police then arrested Mr. Bootsma for possession for the purpose of trafficking.

[21] Before the discovery of these items from the underwear, there is no evidence as to whether the police were planning to release Mr. Bootsma from the scene, after arresting him on his outstanding warrant, or if they were planning to take him to the Rocky Mountain House detachment for processing. There is no evidence as to whether the police were planning on detaining Mr. Bootsma in one of their police vehicles, or dealing with him outside of their vehicles.

[22] Cpl. Blaschuk returned to the van to deal with Ms. Morin, who was 'passed out' on the back seat of the van. Cpl. Blaschuk shook her awake. While dealing with Ms. Morin, Cpl. Blaschuk noticed syringes, spoons and other drug related items near her. When she awoke, Cpl. Blaschuk arrested Ms. Morin on her outstanding warrant and 'possession CDSA'.

[23] Once Ms. Morin was out of the van, Cpl's Pepper and Blaschuk searched the van 'incident to arrest'. There is no evidence if this search was incident to arresting Mr. Bootsma for drug offences; or to arresting Ms. Morin for possession of drugs; or incident to the arrests on 'outstanding warrants'.

[24] From inside the van, the police seized two cell phones; alleged 'score sheets'; a small digital scale; used syringes; syringes that appeared to be 'loaded' with suspected drugs; and a vial of purple substance suspected to be fentanyl. There were a number of other personal items in the van that the police did not seize.

[25] Mr. Bootsma argues the search of his underwear went beyond the permissible scope of any frisk or pat down search and was unreasonable, contrary to s. 8 of the *Charter*. He argues this unreasonable search set into motion a series of arrests, searches and charges, all tainted by the initial unlawful search, including the search of the vehicle and the charge that forms the basis of this prosecution. He seeks exclusion of all seized items

[26] Ms. Morin has not alleged any *Charter* breaches.

Law

[27] When an accused person alleges the police have breached one or more of his *Charter* rights, he "bears the burden of persuading the court that his *Charter* rights or freedoms have been infringed or denied . . . [O]nce [he] 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" (***R v Collins,*** [1987] 1 SCR 265 (CanLii) at paragraphs 21-22).

1) Standing

[28] Where an accused person alleges a breach of his right to be secure from unreasonable search and seizure, he must first demonstrate, on a balance of probabilities, that he has a privacy interest in the place searched or in the subject matter of the search (***R v Edwards***, [1996] 1 SCR 128 (CanLii), at paragraphs 43, 45-47, ***R. v. Marakah***, 2017 SCC 59 at paragraph 12).

[29] This is the first step in every s. 8 *Charter* challenge and is premised on the notion that not everyone can challenge police conduct that amounts to a search. Section 8 of the *Charter* is a personal right. It protects people, not places. (***Marakah,*** at paragraph 108, citing ***Edwards***, at paras 45 and 51) [emphasis added].

[30] Whether or not a person has a reasonable expectation of privacy is determined by considering the totality of the circumstances. Factors relevant to the analysis include:

1. Presence at the time of the search;
2. Possession or control of the property or place searched;
3. Ownership of the property or place;
4. Historical use of the property or item;
5. The ability to regulate access, including the right to admit or exclude others from the place;
6. The existence of a subjective expectation of privacy; and
7. The objective reasonableness of the expectation (***Edwards***, at para 45).

[31] Passengers in vehicles do not automatically have standing to challenge searches of those vehicles, even if they are charged in relation to items seized from the vehicles. A passenger must first establish a privacy interest in relation to the subject matter of the search. All of the relevant factors surrounding the passenger's presence in the vehicle will have to be considered in order to

determine whether or not the passenger has a reasonable expectation of privacy (***R v. Belnavis***, [1997] 3 SCR 341 (CanLii), at paragraph 22).

[32] In ***Belnavis***, Ms. Lawrence was a passenger in a vehicle, driven by Ms. Belnavis. The police stopped the vehicle for speeding and, during the traffic stop, the police noticed three garbage bags in the back seat with some clothing with the price tags still on. The police looked in the trunk and found five more similar bags. Belnavis and Lawrence were both charged with possession of stolen property.

[33] The Supreme Court held that Ms. Lawrence, as the passenger, did not have standing to challenge the warrantless search of the vehicle. Aside from being a passenger, there were few factors that would suggest she had a privacy expectation in the vehicle. She did not own the vehicle and the car was being driven by a friend of the car's owner. There was no evidence 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 that would establish some special access to or privilege in relation to the vehicle. There was no evidence she had a subjective expectation of privacy in the vehicle. Without a privacy interest in the vehicle, Ms. Lawrence had no standing to challenge the search of the vehicle. (***Belnavis*** at para 22)

[34] In ***Belnavis***, the Court went on to discuss situations where a passenger may be able to establish a privacy interest. Two examples given were where the passenger is the spouse of the owner or driver, or where the passenger and driver are travelling together on an extended journey and were sharing driving responsibilities and expenses. (***Belnavis*** at para 23)

[35] In ***R v Jones***, 2017 SCC 60, the Supreme Court discussed again the analysis to be applied when a person seeks to challenge the reasonableness of a search. The question to be answered is whether the person has a reasonable expectation of privacy in the subject matter of the search. Côté J, for the majority, at paragraph 13, identified four relevant factors in answering this question:

> 1. An examination of the *subject matter* of the alleged search;
> 2. A determination of whether the person has a *direct interest in the subject matter*;
> 3. An inquiry into whether the person had a *subjective expectation of privacy* in the subject matter; and
> 4. An assessment of whether this subjective privacy expectation is *objectively reasonable*, having regard to the totality of the circumstances.
>
> [emphasis added]

[36] The subject matter of a search must be defined functionally, not in terms of physical acts or physical space. Instead, the subject matter of a search is defined with reference to the nature of the privacy interests potentially compromised by the state action. Courts should take a "broad and functional" approach to the question, examining the connection between what the police did and the privacy interest at stake. The task is to determine 'what the police were really after' (***Marakah,*** at paragraph 15, citing ***R v. Ward***, 2012 ONCA 660, per Doherty JA, at paras 65-67, and ***R v. Spencer***, 2014 SCC 43, Cromwell J.at paragraph 26).

[37] Properly defining the subject matter of the search will often easily answer the question of whether the person has a direct interest in the subject matter.

[38] The requirement that the person establish a subjective expectation of privacy has never been a high hurdle. To establish a subjective privacy expectation, the person may rely on, and the Court may assume as true, the Crown's theory of the case (***Jones,*** at para 16-34).

[39] The objective reasonableness of a person's subjective privacy interest is determined in a consideration of the totality of the circumstances. In ***Marakah***, the factors that figured most prominently were: 1) the place where the search occurred; 2) the private nature of the subject matter, i.e. whether the information revealed details of the claimant's lifestyle or information of a biographic nature; and 3) control over the subject matter (***Marakah,*** at para 24).

[40] In ***R v Yusuf***, 2019 ONSC 6121, the accused were charged with firearms offences after the police seized a firearm from a vehicle in which they were all occupants. They argued the police seized the firearm in violation of their *Charter* rights and applied to have it excluded from evidence. The Crown argued the passengers did not have standing to challenge the search of the car.

[41] The Court held the Crown's position failed to account for J Cory's holding in ***Belnavis,*** that a passenger in a vehicle may establish a privacy interest in relation to either the vehicle itself or to the thing seized from the vehicle. Mr. Yusuf had a subjective privacy expectation in relation to the firearm the police seized from the vehicle. This privacy interest arose from the Crown's theory that Mr. Yusuf had possession of the firearm and placed it under the seat in front of him in order to hide it from the police. The Court held this subjective privacy expectation was objectively reasonable. (***Yusuf***, at paras 90-101)

[42] In ***R v Huete and Ortiz***, 2018 BCSC 637, the accused were charged with firearms and drug related offences in relation to items the police seized from a rental vehicle in which they were both occupants. Mr. Ortiz was the passenger in this vehicle. The Crown argued they did not have standing to challenge the search of the car.

[43] The Crown theory was that Mr. Ortiz owned the gun that the police seized from the vehicle. Following ***Jones***, Mr. Ortiz was permitted to rely on this theory. If the initial detention was arbitrary and the initial search of his person was unlawful, Mr. Ortiz would be seeking exclusion of evidence based on infringements of his own *Charter* rights, not those of a third person. On this basis, the Court concluded he had standing to challenge the search.(***Ortiz***, at para 18)

2) Search incident to arrest

[44] Valid arrests give rise to the police power to search the arrested person incident to the arrest. This power does not impose a duty on police to conduct such searches. The police have discretion in exercising this power. Where the police are satisfied that the arrest can be conducted effectively and safely without a search, they need not conduct a search. In assessing the circumstances of each arrest, the police must determine whether conducting a search incident to arrest meets the underlying objectives of this police power (***Cloutier v Langlois***, [1990] 1 SCR 158, at pp. 185-186).

[45] The three valid purposes of searches incident to arrest are: 1) the discovery of an object that may be a threat to the safety of the police, the public or the accused; 2) the discovery of an object that may be used to facilitate the escape of the accused; or 3) the discovery of evidence that could be used in the accused's trial for the offence for which the accused has been arrested. When conducting searches incident to arrest, the police must be attempting to achieve a valid

purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why. There are both subjective and objective aspects to this issue. The police must have at least one of the valid purposes in mind when they conduct the search. The officer's belief that this purpose will be served by the search must be reasonable. (***R v Caslake***, [1998] 1 SCR 51 at paragraph 19).

[46] The police do not need reasonable and probable grounds in order to search incident to arrest. Instead, there must be some reasonable basis for the search. The police may search a person for a weapon, incident to arrest, if under the circumstances it seemed reasonable to check whether or not the person might be armed. If the justification for the search is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the person has been arrested. (***Caslake***, at paras 20-22).

3) Strip searches incident to arrest

[47] The leading authority in Canada on strip searches incident to arrest is ***R v Golden,*** 2001 SCC 83. The police arrested Mr. Golden for drug trafficking offences in a sandwich shop. After conducting a pat down search, and finding no weapons or drugs, an officer took Mr. Golden to a stairwell area, undid his pants, pulled them back and looked inside his underwear, where he saw a package protruding from his buttocks. The officer tried to retrieve the package and eventually brought Mr. Golden to a booth at the back of the restaurant and forced him to bend over a table. From there, the officer pulled down Mr. Golden's underwear, exposing his genitals and buttocks, and tried to remove the package. The police then placed Mr. Golden face down on the floor while another officer removed the package.

[48] The Supreme Court concluded the police conducted three separate strip searches. First, when the office pulled back Mr. Golden's pants and underwear and looked inside his underwear; second, when they pulled down his pants and underwear; and third, when they conducted a strip search at the police station. The Court held these were not reasonable searches incident to arrest and acquitted Mr. Golden. (***Golden***, at paras 106-119)

[49] The Supreme Court adopted the definition of strip search as, "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments" (***Golden***, at para 47). ". . . [T]his definition distinguished strip searches "from less intrusive 'frisk' or 'pat-down' searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee's genital or anal regions" (***R v Choi***, 2021 BCCA 410, at paragraph 68, citing ***Golden***, *ibid*).

[50] The Court in ***Golden***, at paragraphs 99-102, went on to consider whether the common law power to search incident to arrest includes the power to conduct strip searches. To be constitutionally valid, strip searches must:

1) Be incident to a lawful arrest;
2) Be conducted for the purpose of discovering weapons or evidence related to the reason for arrest;
3) Be based on reasonable and probable grounds; and
4) Be conducted in a manner in accordance with the prescribed guidelines.

Except in exigent circumstances, strip searches should be conducted at police stations and not in the field. (cited in ***Choi***, at paragraph 71).

[51] In ***Golden***, at paragraph 101, the Court set a list of 11 questions that provide a framework for police in deciding how best to conduct a strip search:

1. Can the strip search be conducted at the police station, and if not, why not?
2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
4. Has it been ensured that the officer(s) carrying out the strip search are of the same gender as the person being searched?
5. Will the number of officers involved in the strip search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the persons' genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity, will the person be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[52] In ***Choi***, as part of the booking in process at police cells, the searching officer pulled the waistband of Mr. Choi's underwear away from his body in order to inspect the waistband for needles or other contraband, saying it was common for people to bring drugs and needles into police cells and that the waistband is a common place to hide such things. He was conducting a visual inspection of the waistline area.

[53] The Court of Appeal held that in order, "to fall within the ***Golden*** definition a search must involve the removal or rearrangement of clothing so as to permit an inspection of the *private areas* of the body of an arrestee, whether those areas are fully exposed or they are covered by undergarments alone" (***Choi***, at para 73, emphasis in original).

[54] The search in ***Choi*** involved a visual inspection of the waistband of Mr. Choi's underwear, not his genital or anal area. There was nothing humiliating or degrading about the search, given its limited nature and context in which it took place, which was standard booking-in procedure (***Choi***, at para 75). The Court of Appeal concluded, "[u]nless the area of the body inspected is inherently private, whether exposed or covered by an undergarment, the search will

not fall into the category of a strip search and the additional safeguards will not apply" (***Choi***, at para 80).

[55] In ***R v Pilon***, 2018 ONCA 959, the police found Mr. Pilon, and two other people, while executing a search warrant in a motel room. The police arrested all three. Mr. Pilon resisted the arrest and was ultimately handcuffed behind his back. The police observed him repeatedly trying to place his hands in the front and back of the shorts he was wearing.

[56] While searching Mr. Pilon incident to arrest, the police noticed he was wearing two pair of athletic shorts. They removed the outer pair and discovered a roll of cash tucked into the pocket of the inner pair. One of the officers then decided to look inside the second pair of shorts. Mr. Pilon was not wearing underwear and when the officer looked inside the second pair of shorts, he briefly saw the top of Mr. Pilon's buttocks and an elastic band attached to his penis. The officer then authorized other officers to take Mr. Pilon into the motel room's bathroom and conduct a strip search, which involved pulling the waistband of Mr. Pilon's shorts away from his body so that the police could view his genital area, reaching in and pulling out the objects attached to the elastic band. The officer who removed the objects was wearing surgical gloves and did not touch Mr. Pilon's genitals.

[57] The trial judge found the first search was an 'unintentional strip search' as the police expected that Mr. Pilon would be wearing underwear when the officer pulled out his waistband and looked down his shorts. The trial judge concluded this search did not violate s. 8 of the *Charter*. The second search, in the bathroom, according to the trial judge was a reasonable strip search. The Court of Appeal disagreed and found both searches were unreasonable strip searches.

[58] The Court of Appeal found that when the officer pulled out the waistband of Mr. Pilon's shorts in an effort to view his underwear, he was engaged in a strip search. This first search was minimally intrusive of Mr. Pilon's privacy interests. It was a very quick glimpse of his upper buttocks and groin. Only one officer saw Mr. Pilon's genitals during this search. No one touched Mr. Pilon's buttocks or groin during this first search (***Pilon***, at para 29).

[59] The real concern was not the manner of search but where it was conducted. The searching officer saw Mr. Pilon attempting to reach into the waistband of his shorts. He did not know what Mr. Pilon was reaching for and it did not appear his concerns were safety related. Instead, he had a hunch based on experience, that Mr. Pilon was carrying drugs.

[60] The Court of Appeal held the Crown at trial failed to lead sufficient evidence that there were exigent circumstances based on safety grounds or the need to preserve evidence to justify a field strip search. The first strip search was unreasonable (***Pilon***, at paras 30-32).

[61] In considering exigent circumstances where there is a possibility of a weapon, the Court in ***Pilon*** at paragraph 38, cited in ***Golden***, at paragraph 94:

> 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.** [emphasis added]

Analysis

1) Was the search of Mr. Bootsma's underwear a strip search?

[62] Upon stopping the vehicle in which Mr. Bootsma was a passenger and arresting him for an 'outstanding warrant', the police handcuffed Mr. Bootsma and conducted a pat down search. The Defence takes no real issue with this initial pat down search.

[63] The real question is whether the police went too far when they pulled out the waistband of Mr. Bootsma's underwear, after noticing some type of bulge in the front of Mr. Bootsma's clothing, and then reached into his underwear and pulled out two zip lock bags.

[64] The Defence argues this was synonymous with a strip search, conducted on the side of the road, in public view, that compromised Mr. Bootsma's integrity.

[65] The Crown argues this was not a strip search. The extent of the search was to pull out the waistband of Mr. Bootsma's underwear and to remove the bags of drugs from within the underwear. It was not a prolonged act. If anything, the searching officer had a fleeting glance down Mr. Bootsma's underwear.

[66] In ***Golden***, the Supreme Court held the police conducted a strip search when the police undid Mr. Golden's pants, pulled back the underwear he was wearing, and looked down the underwear at his buttocks.

[67] In ***Pilon***, the police pulled back the waistband of Mr. Pilon's shorts. He was not wearing any underwear and the police briefly saw the top of his buttocks and genitals. Applying the definition of strip search from ***Golden***, the Ontario Court of Appeal concluded this was a strip search.

[68] Here, Cpl. Blaschuk noticed something bulging near Mr. Bootsma's waistband while conducting a pat down search. He pulled back on the waistband of Mr. Bootsma's underwear and saw two bags inside of the underwear. He pulled the bags out from Mr. Bootsma's underwear and discovered they contained a white powdery substance. Prior to pulling back on the waistband, Cpl. Blaschuk was not able to see down Mr. Bootsma's underwear. Cpl. Blaschuk described this as a frisk search, and not a strip search.

[69] When I consider the definition of strip search as articulated by the Supreme Court in ***Golden***, and the nature of the searches in ***Golden*** and ***Pilon***, that were held to be strip searches, I am unable to agree with the characterization of this as a 'frisk search'. In pulling back on the waistband of Mr. Bootsma's underwear in order to inspect and retrieve the items concealed in that underwear, Cpl. Blaschuk *rearranged some of Mr. Bootsma's clothing in order to permit a visual inspection of Mr. Bootsma's private areas, including his undergarments.* This, by definition, was a strip search.

[70] For these reasons, I find that when Cpl. Blaschuk pulled on the waistband of Mr. Bootsma's underwear in an effort to determine what was concealed inside of that underwear, he was engaged in a strip search.

2) Was the strip search reasonable?

[71] Strip searches are reasonable only where 1) they are conducted incident to a lawful arrest for the purpose of discovering weapons in the person's possession or evidence related to the arrest; 2) the police establish reasonable and probable grounds justifying the strip search in

addition to the grounds for the arrest; and 3) the strip search is carried out in a manner that does not infringe s. 8 of the *Charter* (***Golden***, at para 99).

[72] Here, the police arrested Mr. Bootsma on an 'outstanding warrant'. There is no evidence as to the nature of that warrant. Without knowing the reason for the underlying arrest, there is no basis to find that the police were looking for evidence related to that arrest when they conducted this strip search.

[73] During the pat down search, Cpl. Blaschuk noticed some type of bulge in Mr. Bootsma's waistband. He said he believed something was being concealed there. He did not know what the item was other than it was something concealed. He said he had to see what it was to know what it was.

[74] Based on this evidence, I cannot conclude that this strip search was conducted for the purpose of discovering weapons. Instead, upon believing there was some unknown item concealed in Mr. Bootsma's underwear, Cpl. Blaschuk reached for the item for the purpose of finding out what it was.

[75] Without evidence the strip search was conducted for the purpose of discovering weapons on Mr. Bootsma's person or evidence related to the arrest on an 'outstanding warrant', the first requirement for a valid strip search has not been met.

[76] Without a basis to find the police were looking for weapons or for evidence related to the arrest on the 'outstanding warrant', there is no evidence to support that the police had reasonable and probable grounds for conducting this search. Instead, the evidence is that Cpl. Blaschuk viewed this search as part of his overall frisk search, incident to the arrest on an 'outstanding warrant'. Without reasonable and probable grounds to justify the search, the second requirement for a valid strip search cannot be satisfied.

[77] Finally, valid strip searches must be carried out in a manner that does not infringe s. 8 of the *Charter*.

[78] There is no real issue that this search was conducted in a manner that was minimally intrusive of Mr. Bootsma's privacy. It amounted to a quick glimpse down the front of his underwear and pulling out two zip lock bags. No one other than Cpl. Blaschuk was involved. He did not touch Mr. Bootsma's genitals.

[79] The real concern is not with how this search was conducted, but rather with where it was conducted. The police conducted this search while Mr. Bootsma was detained, in handcuffs, on the side of a busy highway. The expectation is that strip searches are conducted at police stations. When they are conducted in the field, the Crown must demonstrate exigent circumstances (***Golden***, at para 102).

[80] Cpl. Blaschuk testified that there was an urgency in conducting the search on the side of the road because if the unknown concealed item was a weapon or firearm or 'something that [the officer] had found in waistbands in the past, even if in the back of the police car, a person can manipulate their hands and hurt someone'. In his view, the search had to be done at the scene.

[81] The difficulty with Cpl. Blaschuk's sense of urgency is that it was premised on the mere possibility that the item concealed in Mr. Bootsma's underwear might be a weapon.

[82] The Court in ***Golden*** considered exigent circumstances and held **the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search.** (***Golden***, at para 94).

[83] Cpl. Blaschuk's primary concern was that something was concealed in Mr. Bootsma's underwear and that he needed to see it in order to know what it was. The circumstances of this case did not otherwise appear to raise the risk that Mr. Bootsma was concealing a weapon. Instead, the arresting officers were familiar with Mr. Bootsma. They knew him to run from the police in the past. On this date, they suspected Mr. Bootsma had travelled to Red Deer to pick up drugs and was bringing those drugs back to Rocky Mountain House. Nothing in the evidence suggests the police had any particular concern that Mr. Bootsma was concealing a weapon.

[84] What's more likely, given the police suspicions that Mr. Bootsma had travelled to Red Deer to pick up drugs, and now was found with a bulge in his clothing with a bit of a bag protruding from his underwear, is that Cpl. Blaschuk expected to find drugs when he pulled back the waistband of Mr. Bootsma's underwear to retrieve the concealed item.

[85] In my view, when the police searched Mr. Bootsma's underwear, they were acting on a mere possibility that Mr. Bootsma might be concealing weapons. This is not sufficient to justify a strip search in the field.

[86] For all of these reasons, I find that the police strip search of Mr. Bootsma was not reasonable. In conducting this search, the police were not looking for weapons or evidence related to the arrest on an outstanding warrant; the police did not demonstrate they had reasonable and probable grounds for the search; and, without exigent circumstances, the field strip search was not conducted in a reasonable manner. I find the strip search violated Mr. Bootsma's s. 8 *Charter* rights.

[87] It was only with the discovery of the two bags from Mr. Bootsma's underwear that the police arrested him for possession for the purpose of trafficking. The evidence does not satisfy me that there would have been any other basis to arrest Mr. Bootsma for this offence without the results of the unreasonable strip search.

[88] Without a valid search, the arrest for possession for the purpose of trafficking was not valid. I find the arrest of Mr. Bootsma for this offence violated Mr. Bootsma's s. 7 guarantees to life, liberty and security of the person.

3) Does Mr. Bootsma have standing to challenge the search of the vehicle?

[89] After arresting Mr. Bootsma in relation to the two bags of white powdery substance seized from his underwear, Cpl. Blaschuk returned to the van to deal with Ms. Morin.

[90] Ms. Morin had been sleeping on the van's back seat. While Cpl. Blaschuk was waking her up, he noticed needles, a bong, spoons, and a purple substance in a vial in the area around Ms. Morin. Cpl. Blaschuk arrested Ms. Morin on her outstanding warrant and for "possession CDSA". He turned Ms. Morin over to a female officer; photographed the van; and searched the van 'incident to arrest'.

[91] The Defence argues the search of the van would not have happened *but for* the unreasonable search of Mr. Bootsma and the arrest that flowed from that search. On this basis, the Defence argues the warrantless search was unreasonable.

[92] The Crown argues Mr. Bootsma has not established standing to challenge the search of the van. The Crown heavily relies on the Supreme Court's ruling in ***Edwards***, pointing to the fact that Mr. Bootsma was not the owner or driver of the van; he did not have keys for the van; and he did not say anything to the police to express ownership or possession of any items in the van.

[93] The Defence cited the ***Edwards*** factors in asserting standing to challenge the search of the van and relied on the fact that Mr. Bootsma was a passenger in the van that had travelled from Rocky Mountain House to Red Deer and back to Rocky Mountain House on this date to support his claim for standing.

[94] I must consider the issue of standing based on the guidance provided by the Supreme Court in ***Jones*** and ***Marakah***. Following this guidance, the first step is defining the subject matter of the search. My task is to determine 'what the police were really after' (***Marakah***, para 15).

[95] The police arrested Mr. Bootsma for possession for the purpose of trafficking after discovering two bags of suspected cocaine from his underwear. It stands to reason that when the police searched the van incident to arrest, what they were really after was evidence in further support of this arrest. What they seized, among other things, were cell phones and alleged score sheets. The photos and evidence from the officers who searched the van reveal there were many other personal items in the van that were not seized.

[96] When viewed in this way, the subject matter of the search was not the van in which Mr. Bootsma had been a passenger. Instead, the subject matter was items from within the van that might provide evidence to show that Mr. Bootsma was engaged in drug trafficking.

[97] When the subject matter of the search is defined in this way, it becomes clear that Mr. Bootsma had a direct interest in these items.

[98] The next step is to determine whether Mr. Bootsma had a subjective privacy expectation in these items and if so, whether that subjective expectation was objectively reasonable.

[99] The Crown's theory is that on the offence date, Mr. Bootsma paid the driver of the van, 'Ed', with drugs in exchange for 'Ed' driving Mr. Bootsma from Rocky Mountain House to Red Deer, to pick up drugs.

[100] At trial, the Crown would rely on text messages seized from at least one of the phones to support an argument that Mr. Bootsma was engaged in drug trafficking conversations. The Crown would rely on the score sheets to argue that people named "Dana" and "Randy" were both 'workers' and 'runners' in a drug trafficking group in Rocky Mountain House and that the accused, Dana Morin and Randy Bootsma, are the people named in these score sheets. The Crown would argue at trial that the presence of a vial of fentanyl in the van supports a finding that the accused were involved in drug trafficking.

[101] Assuming the Crown's theory to be true, it is easy to infer that Mr. Bootsma did not expect these items to be seen. I find Mr. Bootsma had a subjective expectation of privacy in relation to the subject matter of the search.

[102] In determining whether this subjective expectation was objectively reasonable, I must consider the totality of the circumstances. Here, the relevant factors include:

1. Mr. Bootsma was present at the time of the search;

2. He was a passenger in the van. There is no evidence that he owned the van;
3. There is no evidence that Mr. Bootsma could regulate the access of anyone else to the van;
4. The police had some information that a person named 'Ed' was driving Mr. Bootsma from Rocky Mountain House to Red Deer to pick up drugs on a regular basis. On this date, a person named 'Ed' was driving the van. The van appeared to travel from Rocky Mountain House to Red Deer and was returning to Rocky Mountain House when the police stopped it;
5. The Crown's theory is that Mr. Bootsma paid Ed with drugs in exchange for this trip; and
6. The expectation of privacy in vehicles is lower than in other private spaces.

[103] The Crown emphasized Mr. Bootsma's lack of proprietary interest in the van and in his inability to control access to it. While interests such as ownership and possession are relevant to the issue of standing, they are not determinative of the issue. Control and access have an effect on the privacy analysis, but rarely an 'all or nothing' effect (***Jones***, at para 41).

[104] The information revealed from the searches exposed biographical information about Mr. Bootsma, including private text messages and a ledger with details of an illegal drug trafficking organization.

[105] On balance, I conclude that Mr. Bootsma had a reasonable expectation of privacy over the subject matter of the search. The searches revealed some level of biographical information over which it is reasonable to expect that information would remain private. Mr. Bootsma's weak connection to the van in terms of ownership or control does not eliminate his privacy interest in relation to the subject matter of the search.

[106] For these reasons, I find Mr. Bootsma has standing to challenge the search of the van.

4) Was the vehicle search reasonable?

[107] As a warrantless search, the search of the van was presumptively unreasonable. The Crown bears the burden of showing, 1) the search was authorized by law; 2) the law authorizing the search was reasonable, and 3) the search was conducted in a reasonable manner (***R. v. Collins***, [1987] 1 S.C.R. 265 at paragraph 23; ***Hunter v. Southam***; ***R. v. Nolet***, [2010] 1 S.C.R. 851 at paragraph 21; ***R. v. Shepherd***, [2009] 2 S.C.R. 527 at paragraph 1).

[108] Mr. Bootsma argues the search of the van would not have happened *but for* the unreasonable strip search and resulting arrest for possession for the purpose of trafficking.

[109] The Crown argues the search of the van would have happened anyway because the police observed needles and other drug items in the van when they woke up Ms. Morin.

[110] Cpl. Blaschuk testified that when he returned to the van to deal with Ms. Morin, he observed needles, spoons, and other drug items. in the van. He arrested Ms. Morin for an outstanding warrant and 'possession CDSA'. He turned Ms. Morin over to a female officer, then photographed and searched the van 'incident to arrest'.

[111] There is no evidence of whether this search was incident to Mr. Bootsma's arrest for possession for the purpose of trafficking; or for Ms. Morin's arrest for possession; or for their arrests on 'outstanding warrants.'

[112] To the extent that the search of the van was incident to Mr. Bootsma's arrest for possession for the purpose of trafficking, I have already found that the strip search was unreasonable and resulting arrest was invalid. Without a valid arrest, there can be no valid search incident to arrest. The search of the van can be justified on this basis.

[113] The Crown argues the police would have searched the van in any event after seeing needles and other drug items in the van. There is no evidence of this. The Crown has not met its burden of demonstrating the search of the van was authorized by law.

[114] For these reasons, I find the warrantless search of the van was unreasonable and contrary to s. 8 of the *Charter*.

5) Would admitting the evidence bring the administration of justice into disrepute?

[115] Having found the police violated Mr. Bootsma's ss. 7 and 8 *Charter* rights, I must now determine if admitting the evidence obtained in violation of these breaches would bring the administration of justice into disrepute.

[116] The analysis here involves assessing the long-term effect of admitting the evidence obtained in violation of the *Charter* on the public confidence in the justice system, with particular regard for: 1) the seriousness of the breaches; 2) the impact of the breaches on Mr. Bootsma's *Charter* protected interests; and 3) society's interest in adjudication of the case on the merits (***R v Grant***, [2009] 2 S.C.R. 353, at paragraph 71)

a) Seriousness of the breaches

[117] At the first stage, the Court examines the *Charter* infringing state conduct. More severe or deliberate breaches lead to a greater need for the Court to dissociate itself from such conduct by excluding evidence and to ensure state adherence to the rule of law. The main concern is to preserve confidence in the rule of law and its processes.

[118] When assessing the seriousness, the task is to situate the state infringing conduct on a 'scale of culpability'. Inadvertent, technical or otherwise minor infringements impact less on the rule of law and reputation of the administration of justice than willful or reckless disregard of *Charter* rights (***R v Le***, 2019 SCC 34, para 143).

[119] The existence of multiple *Charter* breaches is relevant to determining the seriousness of the state infringing conduct.

[120] Here, I have found three separate *Charter* breaches, starting with the unreasonable strip search. From this search flowed the invalid arrest for possession for the purpose of trafficking and then the unreasonable search of the van.

[121] Good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his authority (***R v Buhay***, 2003 SCC 30, at para 59).

[122] In ***R v Admasu***, 2021 ABQB 228, Justice Henderson, wrote at paragraphs 44-45:

> [44] The presence or absence of "good faith" and the presence or absence of "bad faith" are relevant considerations in the first line of inquiry in a s 24(2) analysis: ***Grant*** at para 75; ***R v Del Corro***, 2019 ABCA 156 at para 64 to 66. "Bad faith" on the part of police, including wilful or flagrant disregard of *Charter* standards should always be seen as serious, and as a result, the Court should tend to disassociate itself from the conduct. On the other hand, while "good faith" may reduce the need for the court to disassociate itself from police conduct, there are still instances where, despite "good faith", the conduct of police is such that the Court must disassociate itself from it.
>
> [45] I conclude that police were not acting in "good faith" in this case. As was noted in ***Grant*** at para 75, police ignorance of *Charter* standards, negligence or wilful blindness can also lead to an inference of "bad faith" or an absence of "good faith".

[123] These cannot be considered 'good faith' errors on the part of the police. The Supreme Court of Canada in ***Golden*** defined strip searches and articulated the constitutional threshold for valid strip searches incident to arrest in 2001. This was not a situation of the police operating in the context of a novel legal issue.

[124] The fact that Cpl. Blaschuk believed he was conducting a 'frisk search' when he pulled back the waistband of Mr. Bootsma's underwear and pulled two plastic bags out from the underwear demonstrates a lack of understanding of the limits the Supreme Court placed on this type of police activity nearly 20 years before this arrest and search. The police are rightly expected to know what the law is (***R v Le***, at para 149).

[125] The strip search on its own represents a significant departure from *Charter* standards on the part of the police. The fact that further *Charter* breaches directly resulted from this search further impacts the seriousness of the state infringing conduct. I find the seriousness of the breaches strongly favours exclusion of the seized evidence.

b) Impact on Mr. Bootsma's *Charter* protected interests

[126] At the second stage, the Court considers the seriousness of the impact of the breaches on Mr. Bootsma's *Charter* protected interests. The more serious the impact, the greater the risk that admitting the evidence may signal to the public that *Charter* rights are of little actual avail to the citizen.

[127] Section 8 of the *Charter* protects personal privacy interests. This right is fundamental to the relationship between the state and its citizens. In ***Golden***, at paragraph 90, the Supreme Court held that strip searches represent a significant invasion of privacy and are often humiliating, degrading and traumatic experience for the people subjected to them.

[128] I note here that the strip search was minimally intrusive in its scope and duration. It does not follow that the impact on Mr. Bootsma's privacy interests was trivial. Even a brief and fleeting strip search must be weighed against the absence of any reasonable basis for its justification.

[129] Following the strip search, the police arrested Mr. Bootsma for an offence for which they otherwise had no grounds to arrest him. This resulted in a vehicle search that turned up more incriminating evidence. Through all of this, Mr. Bootsma was detained in a police vehicle for up

to an hour before being transported to the police detachment for processing. He has been detained in custody since.

[130] I find the impact on Mr. Bootsma's privacy and liberty interests is significant. This strongly favours excluding the evidence.

c) The public's interest in adjudication on the merits

[131] The final inquiry asks whether the truth-seeking function of the trial would be better served by admitting or excluding the evidence.

[132] Under this analysis, the Court should consider how informed members of the public would view the charges and related *Charter* breaches, and whether a reasonably informed person would lose faith in the system if the evidence were admitted or if it were excluded.

[133] The reliability of the evidence and its importance to the prosecution are only one part of the s 24(2) analysis. Where the first two branches of the ***Grant*** analysis make a strong case for exclusion, the third branch will seldom tip the balance in favour of admitting the evidence (***R v Le***, at para 141-142).

d) Balancing the factors

[134] Here, the evidence is crucial to the Crown's case and without it their case against Mr. Bootsma fails. The evidence is reliable. There is no question that the police seized drugs from Mr. Bootsma's person and further drugs and related items from the vehicle.

[135] Mr. Bootsma is charged with possession of cocaine for the purpose of trafficking. Drug trafficking is a serious crime. Society has an interest in punishing and preventing the sale of illegal drugs. Society also has an interest in having a justice system that is above reproach, especially where the charges are serious (***Grant***, at para 84). The seriousness of the alleged offence does not diminish the impact on Mr. Bootsma's *Charter* protected interests.

[136] On balance, the reliability of the evidence and seriousness of the offence do not justify admitting the seized items into evidence. In my view, the fact the police conducted a strip search without apparent regard for or an understanding of the limits the Supreme Court of Canada has placed on such searches is conduct from which the Court must dissociate itself.

[137] In light of the breaches I have found here, admitting the evidence seized during the strip search and subsequent search of the vehicle would bring the administration of justice into disrepute.

Conclusion

[138] For all of these reasons, the evidence obtained from the unreasonable searches of Mr. Bootsma and from the van in which he was travelling are excluded. As Ms. Morin has not alleged any *Charter* breaches, this remedy is in relation to Mr. Bootsma only.

Heard on the 4th to 7th day of January, 2022.
Dated at Red Deer, Alberta this 17th day of January, 2022.

Eleanor J. Funk
J.C.Q.B.A.

Appearances:

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for the Crown

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for the Accused, R. Bootsma

G. Lebessis
for the Accused, D. Morin