ONTARIO COURT OF JUSTICE

DATE: 2022 10 18
COURT FILE No.: Sarnia 20-0822

B E T W E E N :

HIS MAJESTY THE KING

— AND —

PRINCE ASANTE

Before Justice M. B. Carnegie
Heard on June 27, 28, 30, July 6, 2022
Reasons for Judgment released on October 18, 2022

Higgins, B. .....counsel for the Crown
Goldlist, J.....counsel for the accused Prince Asante

CARNEGIE J.:

[1] Prince Asante is charged with three counts of possession for the purpose of trafficking in cocaine, fentanyl and methamphetamine, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

[2] Prior to trial, I dismissed his *Garofoli* application challenging the grounds by which both a transmission data recording and tracking warrant were issued. These authorizations led to further evidence which culminated in his ultimate arrest and the discovery of the contraband at issue.

[3] During this trial, the defendant reasonably conceded a variety of issues, including: date, time, jurisdiction, identity of the named person arrested, the continuity of the evidence and photographs presented, the nature of the substances examined as noted by the Health Canada Certificates (Exhibit 1), and that the quantum of narcotics seized from the vehicle the defendant was operating would be sufficient to satisfy me that, if he was in possession of these narcotics, such possession would be for the purposes of trafficking.

[4] However, at trial the defendant sought the exclusion of found drug related evidence pursuant to s. 24(2) of the *Charter of Rights and Freedoms*, citing breaches of both his

right to be free from arbitrary detention and unreasonable search and seizure, pursuant to ss. 8 and 9 of the *Charter*.

[5] That the defendant was a drug dealer, on this evidentiary record, cannot rationally be disputed. But, even drug dealers are afforded *Charter* protection, and if Mr. Asante was arbitrarily detained and, then, unlawfully searched the evidence acquired through such constitutional breaches may be excluded from consideration at his trial resulting in his acquittal. For the following reasons, this is such a case.

Factual Background

(a) Takedown, arrest and search

[6] On May 5, 2020, Mr. Asante was operating a black Ford Fusion motor vehicle, licence marker CJCP052, in the Sarnia, Ontario area. He was the lone occupant of the vehicle which was registered to a Mississauga residence, Chareva Campbell,[1] for which he has no known connection. Police began tracking the movements and transmission data from a mobile phone they believed was being used by a drug trafficker from Toronto. A transmission data recorder and tracking warrant, authorized on April 6, 2020, was founded upon confidential informer information alongside independent investigative efforts. On April 28, 2020, police further received a General Warrant authorization to search a London, Ontario residence they believed the defendant was using as a 'stash house'. When Mr. Asante next attended the Sarnia area, police intended to stop, arrest and search him and then have this 'stash house' searched. Based upon the tracking data, May 5, 2020 was the next opportunity when this phone was heading towards Sarnia. Police effected their planned takedown and searches believing that the tracked phone would lead them to the suspected drug trafficker, Mr. Asante, who would be inside the black Ford Fusion motor vehicle. Believing the vehicle's occupant(s) were attending Sarnia to traffic in illegal substances, police stopped the vehicle on London Line near Blackwell Sideroad at approximately 6:10 p.m.

[7] It turns out that the police were right. Mr. Asante was immediately arrested for possession of methamphetamine, cocaine and fentanyl for the purpose of trafficking and the vehicle he was driving, the targeted black Ford Fusion, was searched incident to that arrest. Inside a jacket on the front passenger seat was found a quantity of substances: 86 grams of cocaine in a plastic bag, and 233 grams of cannabis marijuana. A search of the remainder of the interior compartment did not immediately yield other substances, however, in a cup holder in the centre console 6.24 grams of crystal methamphetamine was later found.

[8] However, these findings did not accord with the lead investigators expectations. Based upon a pattern of information police had received from confidential human sources, they believed more illegal drugs were present in the vehicle. They proceeded to search the vehicle's trunk and, therein, found a significant quantity of controlled substances as well as various drug related paraphernalia and equipment used in the production of drugs. The drugs found, individually wrapped in various Ziploc bags in a variety of locations,

[1] No evidence was called at trial respecting any association between Ms. Campbell and the defendant, or any third-party circumstances surrounding use of her registered vehicle.

included: Fentanyl, totalling 209.6 grams in various colours; and, heroine, totalling 57 grams.

(b) Information gathered prior to takedown

[9] In the preceding two-three years, Sarnia police had observed an influx of trafficking activity sourced through individuals coming from out of town. These parties typically would come to Sarnia, use an alias, stay for a short duration visit and operate out of various locations. All this made it difficult for police to apprehend the newcomers. In response to this trend, Sarnia police canvassed their confidential human sources and this investigation, between January and May, 2020, was one such effort.

[10] Det. Dufton had an overarching role in this investigation. With nine years of policing experience at the time of the defendant's arrest, two of which as part of the Sarnia Police Service Vice Unit, he acted in multiple capacities including as the handler for two of three informants, the affiant of the judicial authorizations, lead investigator, surveillance team member, and while present for the defendant's arrest by Det. David, he conducted the search of the target vehicle incident to that arrest. He went on to chronicle the contents of the vehicle, seize offence related property, craft the exhibit list and submit substances for Health Canada testing. He was the only witness who testified at trial. Det. David's evidence was submitted by an agreed statement of facts (Exhibit 2).

[11] As part of this investigation, confidential informants were used starting in January of 2020. A third informant came onside in April 2020. The information obtained from these independent sources, all drug users who were checked-in with monthly by their handler, formed the principal basis for the three referenced judicial authorizations which, in turn, allowed police to track a suspect cell phone and the target vehicle which culminated in the arrest and search of the defendant on May 5, 2020.

[12] The informants provided generally consistent information respecting a drug trafficker they all knew as "CJ",[2] including the following details:

- each informant identified him as a black male with short black hair who comes from the Toronto area. To CI#1 and CI#2, he was 5'10" tall while CI#3 estimated his height at between 5'8" tall and 5'10" tall. Specifically, CI#1 described him as well dressed and "clean cut" looking while CI#2 described him as having a medium build;

- each informant advised that he was an ounce level dealer in cocaine, methamphetamine and powdered fentanyl. They all purchased substances from him;

- each informant described him as coming to Sarnia regularly to sell/deliver drugs. Specifically, CI#2 said he was in Sarnia weekly, staying for 1-2 days at a time;

[2] Note: CI #1 provided information from January 2020-April 2020 (apparently once a month), CI #2 provided information from January 2020-March 2020 only (apparently once a month), CI #3 provided information in April 2020 only (four times that month).

- each informant stated that while he is in Sarnia, he stays at multiple places in the city;

- each informant described him driving a black sedan or Ford Fusion (CI#3 identified tinted windows) with licence plate marker CJCP052; and

- each informant advised that his contact cell phone number is 226-937-6133.

[13] Beyond this information, Det. Dufton made further investigative inquiries on February 11th and April 1st, 2020 which were principally aimed at trying to identify who "CJ" was, including the following details:

- he queried on police databases any occurrences respecting licence plate CJCP052 and found that:

    - on January 31, 2020, SPS members were conducting unrelated drug investigation surveillance at a suspect Sarnia drug subculture residence. At 2:46pm, this black Ford fusion was noted to pull up adjacent to the home, a female known in the local drug subculture then exited the residence and reached into the open front passenger side window and then returned to the residence. Based on Det. Dufton's training and experience, this was a suspected hand-to-hand drug transaction. The vehicle then departed the area. The driver or any occupants of the vehicle were not seen nor identified;

    - on February 8, 2020, SPS Cst. Urban dealt with a black Ford Fusion for a routine traffic stop. The defendant was identified as the driver and lone occupant of the vehicle. According to Cst. Urban, the vehicle was parked outside a known drug related residence in Sarnia;

    - on February 13, 2020, an OPP officer interacted with this black Ford Fusion on Hwy 402 near the Plympton-Wyoming area (a location east of Sarnia, located within the same County of Lambton) for a non-criminal related broken down vehicle incident. The defendant was identified as the driver;

    - on March 26, 2020, SPS Cst. Urban reported that he observed this vehicle, driven by the defendant, parked in front of a known drug subculture related residence;

    - on March 28, 2020, the black Ford Fusion, was stopped for a *Highway Traffic Act* speeding warning. The defendant was driving at excessive speed through a construction zone on Hwy 401 near the City of Milton;

- from these occurrences, Det. Dufton learned that the defendant was last known to reside on Kipling Avenue in Etobicoke (a city adjacent to Toronto);

- a criminal record check was conducted upon the defendant and a November 2015 conviction for possession for the purpose of trafficking of a Schedule I substance in London, Ontario (amongst other unrelated matters) was revealed;

- a further Ministry of Transportation search was conducted on the defendant confirming his last known address on Kipling Avenue, Etobicoke, that he is 5'8" tall and, based upon his driver's licence photograph, he is a black male with short black hair, brown eyes and "facial scruff"; and

- on April 2, 2020, an open-source internet search on website 'www.freecarrierlookup.com" was conducted yielding that this phone number was associated to Rogers wireless. No production order seeking subscriber information was sought.

[14] This informant information, coupled with these investigative inquiries, satisfied Det. Dufton that the defendant not only regularly operates this black Ford Fusion, but that he was, in fact, the drug trafficker known as "CJ".

[15] This information was then used to secure both a tracking and a transmission data recording warrant, pursuant to ss. 492.1(1) and 492.2(1) of the *Code*, on April 6, 2020. These authorizations were sought to enable a number of investigative avenues, including: establishing a pattern for the defendant's movements; determining the location of any "stash" locations without the risk of compromising surveillance efforts; identifying the defendant's drug supplier; assisting in effective surveillance efforts; identifying if other vehicles are operated by the defendant as part of his trafficking activities; identifying specific locations of interest for the defendant's sales; identifying other drug traffickers the defendant is supplying; and establishing potential patterns for future enforcement action. The justification for these authorizations was not to identify the defendant as the drug trafficker identified by informants as "CJ".

[16] From the tracking warrant authorized for this phone number, Det. Dufton learned that its user spent a lot of time on Soldier Street in Brampton, Ontario which he presumed now to be the Mr. Asante's home. Also, he learned that beyond a presence in Sarnia, Ontario, where the phone would stay for intervals between 30 minutes to 8 hours (the quantity or schedule of which was not provided), it would regularly attend before and after Sarnia visits at 24 Yvonne Crescent in London, Ontario. From this, Det. Dufton concluded that this London address was probably a "stash house" location.

[17] From the transmission data recording authorization, Det. Dufton learned that there were frequent calls made to known Sarnia drug subculture participants (the quantity and schedule of which was not provided), including two specific females he was familiar with.

[18] This information then led to surveillance efforts by the Sarnia Police Service. Assembling a surveillance team inclusive of detectives, a sergeant and intelligence officer, Det. Dufton initiated surveillance, for which he was apart, on April 14, 2020 when he was notified that the tracking information had the suspect phone on route from Brampton to Sarnia. At 1:04pm on this date, they identified the target black Ford Fusion vehicle entering the city limits off Hwy 402. The target vehicle attended upon an address at an apartment building on Ashton Avenue. Det. Dufton was aware that in one of its units

resided a well known local drug trafficker. The occupant of the target vehicle, who could not be identified, attended inside the building to an unknown unit for approximately 13 minutes before the vehicle was seen to leave the parking lot area (note: the driver was not seen exiting the building nor heading back to the vehicle). The target vehicle then attended upon a McDonald's restaurant, had food delivered to the vehicle, then returned to the Ashton Avenue building parking lot. It waited there for approximately an hour. The driver, a black male but, again, unidentified, was seen to have his head down in a fashion consistent with using a cell phone for a period of time. Det. Dufton believed that the driver was engaged in setting up other sales or drug drop-offs. The vehicle then left this parking lot and was pursued to another address known in the drug subculture, on Vidal Street South. Parking on the street adjacent to this residence, a white male walking a dog was observed to approach the Ford Fusion and lean into the open passenger side window for a brief period of time. Det. David, a member of the surveillance team, advised Det. Dufton that he believed that a hand-to-hand drug transaction had taken place. The driver of the target vehicle was again not identified. The vehicle then drove off from this location and the surveillance teams lost site of it soon thereafter.

[19] The next day, on April 15, 2020, tracking placed the subject phone at or around the 24 Yvonne Crescent, London location. As a result, Det. Dufton drove to London and, for over an hour after 3:54pm, he observed the target vehicle parked on the street outside this residential address. In his evidence, Det. Dufton identified this as the address that the target vehicle "always attends when heading to and from Sarnia" according to the tracking data (the quantity or schedule of which was not provided). The defendant was not identified at this scene and no individuals were seen outside this property or interacting with the target vehicle. No effort was made to identify this property's owner or whom may reside there.

[20] On April 24, 2020 at 2:14pm, tracking data again alerted Det. Dufton that the subject phone was now westbound on Hwy 401 towards London, Ontario. Det. Dufton contacted London Police Service Det. Quinn in an effort to have observations made at the 24 Yvonne Crescent location. At 4pm, DC Dunn reported that she "observed" the defendant meeting an unidentified male and shaking hands outside 24 Yvonne Crescent. Det. Dufton did not ask how Det. Quinn identified the defendant as present. He presumed that the identification was based upon prior involvement with the defendant respecting his London area 2015 drug trafficking history.

(c) The evolving plan for arrest and search

[21] On April 28, 2020, a General Warrant pursuant to s. 487.01 was issued which permitted police a window of 30 days to execute a search of 24 Yvonne Crescent in London, Ontario – the site of the defendant's supposed "stash house". As part of the terms of this authorization, Det. Dufton outlined his proposed plan for the arrest and search of the defendant in Sarnia, to immediately be followed by the authorized search of the 24 Yvonne Crescent home. This plan outlined that the London residence search would only occur once:

(1) the tracking of "Prince Asante['s]" phone identified him on route to Sarnia;

(2) when in Sarnia, SPS members would perform a traffic stop of the vehicle "Prince Asante is mobile in";

(3) then, "Prince Asante and other occupants of the motor vehicle will be arrested on reasonable and probable grounds that they are in possession of a controlled substance for the purpose of trafficking"; and

(4) upon arrest, SPS or other Ontario police service members are authorized to immediately attend and search the 24 Yvonne Crescent, London property.

[22] During his trial evidence, Det. Dufton acknowledged that the original plan was unable to be affected on May 5, 2020. That day, he learned that the subject phone was on route westbound towards London at 2:04pm. He briefed the vice unit at 2:20pm and the takedown team at 2:50pm on the particulars of his plan, namely that they would locate, stop and arrest occupants of the target motor vehicle on reasonable grounds to believe they were possessing cocaine, methamphetamine and fentanyl, for the purpose of trafficking. He then contacted LPS Det. Quinn to ensure that the General Warrant search could be affected with the assistance of LPS officers. However, at 5:20pm, Det. Dufton learned that the subject phone had not attended in the area of 24 Yvonne Crescent and, instead, was now westbound on Hwy 402 towards Sarnia. Nevertheless, the takedown plan was not altered. Believing now that a full "stash" would be with the defendant on route to Sarnia, despite the alteration from the previous pattern, Det. Dufton believed that a post arrest search would be justified by the doctrine of search incident to arrest.

[23] At 6pm the target vehicle was identified on Hwy 401. A traffic stop was affected at 6:10pm on London Line near Blackwell Sideroad. The defendant was immediately arrested by Det. David for the present three counts of possession for the purpose of trafficking. He was apparently arrested even before he was asked to identify himself verbally or through documentation. He was secured while the vehicle was moved from its "awkward" position on the roadway to an adjacent Kern's Water store parking lot. While moving the vehicle, Det. Dufton smelt cannabis marijuana and observed, in plain view, a clear plastic bag containing chunked cocaine inside the left front pocket of a jacket on the passenger seat. The vehicle was searched, incident to arrest, yielding the findings already noted.

[24] Also found in the vehicle were three cell phones. However, none of these phones were examined in a cursory or forensic fashion. Police cannot say whether any of these phones used the number 226-937-6133. Further, nothing in the transmission data recorder findings assisted police in identifying the phone's user.

[25] Finally, execution of the General Warrant was called off based upon the defendant's supposed failure to attend upon 24 Yvonne Crescent prior to his arrival in Sarnia and based upon the time gap since his last suspected attendance there.

Legal Framework and Analysis

[26] In assessing the evidence, I instruct myself on several key elements of our criminal law. Mr. Asante is presumed innocent. The Crown bears the burden of displacing that

presumption, and can only do so where the level of proof satisfies me that it is beyond a reasonable doubt that he committed the offences he is charged with. The burden of proof never shifts. It remains with the Crown. Proof beyond a reasonable doubt is inextricably linked with the presumption of innocence that is expressly enumerated in the Canadian *Charter of Rights and Freedoms* in section 11(d). A reasonable doubt is one based on reason and common sense. A reasonable doubt can be logically derived from the evidence or the absence of evidence. A reasonable doubt is not an imaginary or frivolous doubt and the Crown does not need to prove the offence to an absolute certainty since that would be an unrealistically high standard. Finally, the beyond a reasonable doubt standard does not apply to individual pieces of evidence, but instead is considered once the evidence is viewed as a whole.[3]

[27] Here, but for the issue of possession which will be dealt with later, the heart of the issues to be resolved involve the defendant's *Charter* complaints, pursuant to ss. 9, 8 and 24(2). As will be explained, the *Charter* issues are determinative of my ultimate disposition of this case.

Reasonable and Probable Grounds to Arrest Without Warrant – *Charter* s. 9

[28] Section 9 of the *Charter* enshrines that "everyone has the right not to be arbitrarily detained or imprisoned." A purposive approach to interpreting this provision seeks to balance society's interest in effective policing with a robust protection for constitutional rights.[4] Broadly stated, the purpose of this *Charter* right "is to protect individual liberty from unjustified state interference."[5] Therefore, in the context of police arrest powers, an unlawful arrest is necessarily arbitrary and infringes s. 9 of the *Charter*.[6]

[29] Section s. 495(1)(a) and (b) of the *Criminal Code* affords a peace officer the ability to arrest "a person", without warrant, who on reasonable grounds they believe has committed or is committing an indictable offence. The arresting officer must subjectively believe that they have reasonable and probable grounds to arrest this person and those grounds must also be justifiable from an objective point of view. The arresting officer is not required to demonstrate anything more than reasonable and probable grounds and, specifically, is not required to establish a *prima facie* case for conviction before making the arrest.[7]

[30] When assessing the reasonableness of the acquired grounds, the standard is based upon a reasonable person "standing in the shoes of the police officer." That reasonable person is deemed to have the same level of experience as the officer and an objective assessment of their grounds includes consideration of that experience as well as the dynamics at play leading to the arrest. A reviewing court must acknowledge that a trained officer is entitled to draw inferences and make deductions based upon their experience. The totality of the circumstances relied upon by the officer forms the basis

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[3] *R v Lifchus*, [1997] 3 S.C.R. 320 at para 36, *R v Sanichar*, 2012 ONCA 117 at para 46, and *R v Morin*, [1988] 2 SCR 345 (SCC)
[4] *R v Suberu*, [2009] 2 SCR 460 at para 24; *R v Grant*, [2009] 2 SCR 353 at paras 15-18 and 23
[5] *R v Le*, [2019 2 SCR 692 at para 25; *Grant*, *supra* at para 20
[6] *Grant*, *supra* at para 54; *R v Loewen*, [2011] 2 SCR 167 at para 3
[7] *R v Storrey*, [1990] 1 SCR 241 at paras 15-17

for which this objective assessment is made; it is an error to assess each fact or observation in isolation. Therefore, it is the "constellation of objectively discernible facts" that legitimately associates "the person" to be arrested to the crime.[8] And, when forming their grounds to arrest, an officer may rely upon information from other sources, including other officers, as well as their own observations. Officers are not silos restricted in acting upon only what they personally observe or information they personally obtain. Hearsay evidence obtained from other sources, including other officers, is therefore admissible to the assessment of reasonable and probable grounds to arrest.[9]

[31] A useful list of considerations respecting whether the police have objectively verifiable grounds to arrest a person was provided by Hill J. in *R v Amare*, including the following salient points:

- the police must not only have reasonable grounds in the subjective sense of a personal, honestly held belief, but also the asserted grounds must be justified upon an objective measure of a *reasonable person standing in the shoes of the officer*: *R. v. McKenzie*, *[2013] 3 SCR 250* at paras. 62-3 83: *R. v. Storrey* supra at pp. 250-1;
- the "reasonable grounds to believe" standard consists of "compelling and credible information that provides an objective basis", objectively discernable facts, for drawing inferences as to the existence of factual circumstances: *Mugesser v. Canada (Minister of Citizenship and Immigration)*, *[2005] 2 SCR 100* at para 117;
- the fact "that an experienced constable has a honest subjective belief, while not conclusive, is itself some evidence that the belief is objectively reasonable": *R. v. Biccum*, *2012 ABCA 80*, at para. 21; see also *R. v. Luong*, *2010 BCCA 158* at para. 19; *R. v. Chehil*, *[2013] 3 SCR 220*, at para. 47;
- reasonable probable grounds does not involve a mathematical assessment of facts and circumstances but rather a common sense, a non-technical approach -- it is necessarily a qualitative standard upon which reasonable people can differ in some cases: *R. v. Campbell (2010), 261 CCC 3rd 1* (OCA) at paras. 52-4 (aff'd) *[2011] 2 SCR 549*: *Chehil*, at paras. 29, 62-9: *McKenzie*, at para. 71: *R. v. Ward*, *2012 ONCA 660* at para. 116;
- the standard of reasonable probability applied to the totality of the circumstances considering the relevant facts cumulatively, where credibility based probability replaces suspicion and possibility, does not demand the police officers "always be correct, but that they always be reasonable", *United States v. Clutter*, 674 F. 3d 980, 983 (8th Cir. 2012); and

[8] *R v Hanson*, [2009] OJ No 4152 (SCJ) at paras 57-59; *R v Lawes*, [2007] OJ No 50 (CA) at para 4; *R v Hall*, [1995] OJ No 544 at para 31

[9] *R v Debot*, [1989] 2 SCR 1140 at paras 27-28, 51-52, citing *Eccles v. Bourque*, *[1975] 2 S.R. 739*; *R v Anang*, 2015 ONSC 3463 at para 33

- a court reviewing the existence of reasonable grounds concerns itself "only with the circumstances known to the officers": *R. v. Wong*, *2011 BCCA 13* at para. 19 (leave to appeal denied *[2011] SCCA No. 90*).[10]

[32] Here, Det. Dufton acknowledged throughout his testimony that the most significant evidence leading to the formation of his grounds for the defendant's arrest was the acquired informant information. However, a significant gap was presented within this information. While all these independent informants, it can reasonably be concluded, were referring to the same drug dealer, the identity of that dealer was not revealed. The dealer was identified simply by an uncorroborated alias: "CJ".

[33] It is difficult to imagine a more salient issue for resolution than the identity of a target to be arrested. This is particularly so when police intend to arrest without warrant and then rely upon the search incident to arrest authority to advance the investigation further. Yet, while Det. Dufton's evidence, and his supporting warrant materials, clearly supported the conclusion that he had a subjective belief that "CJ" was the defendant, was that conclusion objectively reasonable when he provided his investigative team with pre-takedown instructions to arrest Prince Assante and any other occupant within the targeted black Ford Fusion motor vehicle? And, was the informant information reliable enough to form the substantive foundation for this reasonable and probable grounds to arrest determination?

[34] The defence fairly conceded that "CJ", as identified by the various informants, was probably a drug dealer. The police certainly had grounds to suspect as much. That much was made obvious at trial. However, I would go further. Given the totality of the evidence provided by the informants, the "CJ" associated vehicle's presence in proximity of known Sarnia drug houses on February 8 and March 26, 2020 when the defendant was known to be the driver, the tracking of "CJ's" cell phone and observed patterns of London and Sarnia short duration attendances, the surveillance observations made respecting suspected hand-to-hand drug transactions observed in proximity of the "CJ" associated vehicle on April 14, 2020 all, in totality, satisfy me that police had reasonable and probable grounds to arrest "CJ" for possession of narcotics for the purpose of trafficking on May 5, 2020. However, did the police have reasonable and probable grounds to believe that "CJ" was the defendant on that date? Det. Dufton made it clear in his evidence that they were one and same person, and that this "person", the defendant, was to be arrested in the black Ford Fusion vehicle, alongside any other occupants in the vehicle.

[35] As noted above, Det. Dufton acknowledged that the acquired informant information formed at the heart of his reasonable and probable grounds for the defendant's arrest. I have little on this evidentiary record to challenge the subjective *bona fides* of this belief. As such, scrutiny of the objective reasonableness of this evidence, and more particularly, its reliability and its capacity to support the officer's conclusion is necessary.

[36] It is also noteworthy when Det. Dufton believed that "CJ" was the defendant, when in his mind he had formulated sufficient grounds to draw that conclusion. According to his

[10] *R v Amare*, [2014] OJ No 5225 (SCJ) at para 83

testimony, on February 11, 2020 he had learned the following information leading to this drawn connection:

> (1) the traffic stop of the target vehicle from February 8th outside a known drug house in Sarnia leading to the defendant being identified as the driver;
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> (2) a criminal record check of this driver revealing a 2015 conviction for a similar drug offence; and
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> (3) a Ministry of Transportation query revealing an address on Kipling Avenue, Etobicoke (Toronto area) with a description of a 5'8" black male with short hair, generally consistent with the informants' descriptor of "CJ".

On a totality review of Det. Dufton's evidence, this is when he formed "reasonable grounds to believe" that "CJ", his targeted drug dealer, was in fact the defendant. He never waivered from this conclusion and, at various places after February 11th in the chronology of the tracking and transmission data recorder warrant, as well as in the General Warrant, and Informations to Obtain (for which the Crown relied during the trial as communicated evidence of his reasonable and probable grounds), Det. Dufton simply replaced references to "CJ" with references to the defendant to make this conclusion more obvious.

[37] For the reasons which now follow, I find that Det. Dufton jumped to this conclusion prematurely. Indeed, by May 5, 2020, insufficient investigative efforts had been made to objectively justify this identity conclusion.

(a) Informant information relied upon for reasonable probable grounds as compared against investigative queries made

[38] As stated, central to Det. Dufton's reasonable and probable grounds to arrest was the totality of informant information he received and relied upon.

[39] When a court is called upon to assess the reliability of informant information, the Supreme Court in *R v Debot* explained that the information received must be compelling, come from a credible source and be corroborated by the police investigation.[11] The factors are assessed in totality and any weakness in one factor may be compensated by strengths in the other two factors. As I am not, here, assessing the viability of a judicial authorization, and given that the primary issue relates to the identity of the drug dealer known as "CJ", a comprehensive *Debot* assessment is unnecessary. The informants' information made plain this identity gap, bridged only collaterally by a general target description, vehicle information, and a phone number. It is what the police did and did not do with this information that forms at the heart of their assessment of reasonable grounds for an arrest.

[40] First, each informant had provided police with information in the past which was not deemed to be false or misleading. They all were aware that providing police with misleading information would negate any consideration that might be awarded to them by police and that they could face criminal charges. They were all drug users, involved in the

[11] *R v Debot*, [1989] 2 SCR 1140 at para 53

Sarnia drug subculture, and therefore were in a position to interact with local dealers. However, as is often the case with vetted informant information geared towards protecting their superordinate confidentiality and safety interests, I am presented with little independent and verifiable credibility evidence. It is not enough to have three independent sources corroborating some information.

[41] Second, these informants provided consistent information in a number of relevant areas respecting identifiers of the target drug dealer and his trafficking related traits. However, assessing whether this information was corroborated before reasonable and probable grounds were formulated is also vital. With this in mind, the informants presented the following consistent information which can be measured against other known facts, including:

> (1) *the target's general description* – as a 5'10" black male (5'8" – 5'10" from CI#3) with short black hair and medium build, known to them as "CJ". The defendant's Ministry of Transport records identify him as 5'8" inches tall. His identified skin colour is entirely innocuous and the length of his hair equally so;
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> (2) *the target's general place of residency* – all commented that they believed he was from the Toronto area. Much was made of the defendant's residency in the Toronto area as, somehow, a unique or significant tell for identification. Of course, according to government records, the defendant was last known to reside in Etobicoke, which while admittedly a suburb of Toronto is not one and the same. Indeed, given the relative population disparity between Toronto and Sarnia, it is hard to find any obvious or significant identifying features of Toronto area residency, even when it is attached to repetitive (but unclear how often) visits to Sarnia. There can be innumerable reasons for a Torontonian or area resident to travel frequently to Sarnia, let alone one from a visible minority community;
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> (3) *the target was an ounce level dealer dealing in cocaine, methamphetamine, and powdered fentanyl* – each informant commented to this extent and degree of his trafficking. What I do not have is any evidence respecting the significance, or uniqueness, of this particularized level of trafficking in the Sarnia area. And, I cannot weigh these observations against after-the-fact findings post arrest as that would bely the necessary predetermination of grounds for arrest. Further, all of the informant information received was reactive. They did not, on this evidentiary record, advise that the trafficking would occur on any particular date, let alone on May 5, 2020;
>
> (4) *the target's use of a particular vehicle* – all noted that "CJ" drove a black sedan or Ford Fusion, with CI#1 and C!#2 noting a licence plate marker "CJCP052". Of course, this vehicle was not registered to the defendant but, instead, to a female resident of Mississauga for whom police made, nor attempted to make, any connection to the defendant. Det. Dufton noted, in his training and experience, that it is common for dealers not to use a vehicle that can be traced back to them. This must be considered. However, there remains a lack of any evidence of exclusive possession or use of this vehicle by the defendant between January and May of 2020 – not an inconsiderable timeframe. Instead, prior to arrest and in a timespan of over three months from February 8, 2020, we have four

instances of the defendant being found driving this vehicle, only two of which are inside the City of Sarnia, one on Hwy 402 not far east of Sarnia and the fourth outside the City of Milton, a great distance from Sarnia. Indeed, the defendant is last seen operating this vehicle on March 28th in Milton and, prior, on March 26th in Sarnia, some 38 and 36 days prior to his arrest. It is relevant to consider this time lapse when considering how stale,[12] and therefore probative, this information was on May 5, 2020 when the arrest determination was finalized; and

(5) *the target's phone number* – all noted that "CJ's" phone number was 226-937-6133. According to an open source internet search, this number traced back to a Rogers wireless account. However, police did not follow through with obtaining subscriber information from the telecommunication provider. Det. Dufton first advised, rather remarkably for an experienced detective, that he did not think to seek a Production Order for this information. But, then he qualified this by stating that had he done so, the expected 30 day turnaround from the provision of this information may have made the end product useless as, in his experience, drug dealers often change their phone numbers frequently.[13] This, despite the apparent evidence that "CJ" had been using this number since January 2020 when dealing with CI#1 and CI#2, and was continuing through April 2020 with CI#3. Also, Det. Dufton noted that drug dealers commonly use another name when signing up for mobile phone services. In the end, however, while the informants corroborated each other respecting this number, nothing externally was found to attach this phone number specifically to the defendant. It may be argued that the tracking of this phone, pursuant to warrant, led officers to the exact location of the defendant at the time of arrest. However, given that Det. Dufton had already formed his reasonable and probable grounds to arrest him at least four hours before, at the latest, I cannot use this evidence and the alleged proximity to the defendant at the time of arrest as assisting in the identification of "CJ" as the defendant.

[42] In addition to informant information, which was variously corroborated and contested by independent inquiries, it is noteworthy that on February 11, 2020 Det. Dufton formed his believe respecting the identity of "CJ" following, amongst other searches, a discovered related criminal history dating back to 2015. I must caution myself not to overemphasis a dated though related criminal conviction. Over reliance upon this type of factor, even in the face of an officer's experience that drug traffickers often have like criminal histories, risks, as noted by our Court of Appeal in *R v James*, inviting a dependence upon "stereotypes and prejudices in lieu of evidence".[14]

[43] Having considered the extent of corroboration available outside the internal consistencies noted, and the efforts and lack of efforts made to independently corroborate this information, I must confess that I am not overwhelmed by level on corroboration available for this informant information. More could have and should have been done by police.

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[12] *R v James*, 2019 ONCA 288

[13] The officer was not asked nor provided any comment from his experience about whether drug dealers change their vehicle frequently.

[14] *James*, *supra* at paras 22-23

[44] Finally, I must consider how compelling this information is. Frankly, the details of narcotics sold and the particulars of the target's phone number and vehicle information is admittedly impressive. While revealing the actual identity of the target would be of greatest interest, the informants cannot be faulted for providing a consistent alias offered to them as part of what can be assumed is a guarded trafficking approach. The volume of details, its repetition over four months and the independent first-hand sourcing all bring heightened confidence of the compelling nature of this informant information.

[45] In totality then, I was left marginally satisfied respecting the degree of available corroboration for this informant information. Its credibility was, as expected, low and its compelling nature was admittedly high. Deficiencies in one area can be remediated by strengths in another. This left me less confident than the investigating officer who centred his reasonable and probable grounds upon this informant information. But, that said, some degree of confidence remains and, I believe, the informant information, therefore, marginally satisfies the *Debot* standard.

(b) Surveillance efforts supporting reasonable probable grounds

[46] Common police practice when corroborating informant information is to engage in surveillance activities of suspected individuals. Here, deprived of the suspects identity, police tracked an associated phone number and an associated vehicle to learn more about the suspect and, hopefully, identify or confirm his identity. Ultimately, these efforts were unsuccessful.

[47] It is fair to acknowledge that the target vehicle driven by the defendant was present or in the area of a couple of suspicious drug locations in Sarnia in February and March of 2020. And, this vehicle was present for one suspicious transaction/encounter observed on April 14, 2020, if only the police knew who was driving the target vehicle at that time.

[48] Closer scrutiny of the April 14, 2020 surveillance is instructive. To assist in identifying the defendant, and firmly linking him to the phone number and target vehicle, Det. Dufton assembled a surveillance team.[15] First, the target vehicle was followed to an Ashton Avenue apartment building wherein a known local drug dealer resided. However, police did not learn or observe whether this dealer was contacted by the vehicle's unidentified driver. Det. Dufton inferred, based upon his experience but no proffered observations, that the initial 13 minutes for which the vehicle's driver must have been in the building likely involved a drug transaction. However, no observation of any transaction or interaction was made. His conclusion that the unidentified driver was later waiting and texting others to arrange subsequent local drug sales, after a brief visit to a McDonald's restaurant, is also without any evidentiary foundation other than an innocuous view of the driver looking down repetitively towards what was assumed, but not seen to be, a cell phone. If a transaction had occurred at the Ashton Avenue address, why would this targeted individual return there to conduct other sale inquiries? He could have done likewise in the McDonald's parking lot or virtually anywhere else. All in all, nothing at this initial location, during either time the vehicle was present, can objectively be found to support Det. Dufton's conclusion of drug related activity. The totality of the behaviour is

[15] Of course, as noted, it cannot be forgotten that Det. Dufton testified that he already knew who CJ was as of February 11, 2020.

innocuous enough to lose any probative inferential force, even through the lens of an experienced Vice Unit detective.

[49] Further, the subsequent April 14, 2020 observations outside the Vidal Street South known drug house are equally equivocal. Again, the driver of the target vehicle could not be identified. The white male's conduct, who was walking a dog and then leaned into the vehicle reaching in with his left hand before returning it with a closed fist, is said to be indicative of a hand-to-hand transaction only, particularly, if you assess it through the lens of the vehicle's parked location outside a known drug house. However, this male party was not identified, and he certainly was not known to be associated with the known drug house location nearby. Further, I find that the earlier January 31, 2020 observation of this target vehicle's unknown occupant interacting with a known member of the Sarnia drug subculture likely informed Det. Dufton's conclusion that what he saw on April 14th was a drug transaction. Admittedly, that is one possible interpretation of events amidst a myriad of other potentially innocuous explanations. Of course, neither event yielded any information about the identity of the target vehicle's driver. The best that can be said is that the driver likely had "CJ's" phone with him on April 14th given the tracking warrant data being used.

[50] The April 15, 2020 surveillance effort at 24 Yvonne Crescent in London yielded no information that can assist in identifying the defendant as "CJ". No information respecting the owner of this residence, residents or tenants therein was sought or learned of by police. And, no person associated with the target vehicle parked outside this home was seen.

[51] Finally, the probative value of Det. Quinn's April 24, 2020 apparent identification of the defendant outside 24 Yvonne Crescent in London is unclear. Det. Dufton was advised that she had identified the defendant outside the home shaking hands with a male. Curiously, Det. Dufton did not think to ask how Det. Quinn made this identification. He simply assumed that Det. Quinn recognized the defendant from his previous 2015 conviction out of London. I received no information that she was even involved in that investigation or was aware of what the defendant looks like. Det. Quinn did not testify at trial. While her hearsay evidence can be relied upon for reasonable and probable grounds, the quality of that information is not beyond scrutiny. Here, Det. Dufton engaged in no scrutiny. Of course, well before this time, Det. Dufton had already satisfied himself that "CJ" was the defendant. All that he was then seeking was a direct association between the defendant and this presumed "stash house". Det. Quinn's unquestioned response was apparently good enough. This entire episode reeks of the risks of confirmation bias. The reliability of this identification evidence is suspect.

(c) The constellation of objectively discernable facts

[52] The Crown implores me, as I must, to avoid overemphasizing individual concerns at the expense of an assessment of the totality of the police known circumstances. I must consider the "constellation of objectively discernable facts" in the hands of Det. Dufton at the time the defendant was arrested. I agree. There is clearly not one factor or piece of information that provides a straight line to reasonable and probable grounds justifying the defendant's arrest.

[53] In consideration of all that has been noted, I view as instructive Det. Dufton's decision making on May 5, 2020 when circumstances evolved from the suspect's perceived offending pattern. Recall, as was outlined in the General Warrant materials, Det. Dufton's theory was that the defendant regularly attended Sarnia to traffic in substantial sums of serious narcotics. His pattern, apparently informed by tracking warrant data, included attending upon his London "stash house" before and after sales visits to Sarnia. It must be noted, however, that I was never presented with any tracking data or evidence outlining the quantity of visits and when they occurred to corroborate the officer's "pattern" conclusion. Nevertheless, this supposed pattern, it was argued, was tactically sound behaviour for a trafficker intent upon avoiding being caught with more narcotics than he had arranged to sell during that visit.

[54] However, this theory was significantly challenged by 5:20pm on May 5, 2020. Then, it was learned, that the tracked phone had not attended at 24 Yvonne Crescent at all. Instead, it was proceeding directly to Sarnia contrary to what had been described as a demonstrated pattern for the defendant. This was an opportunity for Det. Dufton to reassess his investigative theory. It was an opportunity for him to reconsider his takedown plan. Perhaps it was even a realistic opportunity for him to reconsider whether it was the defendant who was indeed driving towards Sarnia on Hwy 402, as opposed to someone else. But, he failed or refused to view it that way. Instead, Det. Dufton pivoted to a perceived opportunity to seize a greater quantum of narcotics given the passing by of the presumed "stash house". Ignoring or minimalizing the import of this obvious behavioural inconsistency, he never considered that the defendant may not be involved. If the phone was on route to Sarnia, then the defendant must be as well. And, that meant that he was attending Sarnia to sell narcotics, even though he skipped the formerly important "stash house" phase. To Det. Dufton's credit, he at least called off the 24 Yvonne Crescent search given the changing circumstances and the 'defendant's' lack of a recent known attendance there, but that does not take away from the reality that as of 2:10pm, he had formulated his takedown plan and was not going to be dissuaded from executing it regardless of the evolving and complicating factual terrain.

[55] Det. Dufton had other options available to him on May 5, 2020. He could have shifted to a surveillance plan in hopes of identifying the driver and observing suspicious transactional behaviour. If that had occurred prior to an arrest, none of these concerns would be relevant and a challenge to his reasonable and probable grounds would have likely been illusory. He could have waited for another day when the pattern materialized as anticipated as his General Warrant application still had weeks remaining by way of execution. Of course, prior to May 5, 2020, Det. Dufton could have made some effort to identity the subscriber of this phone number (whether, or not, that might prove fruitful). He could have sought to find some connection between the vehicle's registered owner and the defendant, with or without the assistance of Toronto area police. He could have continued pre-General Warrant surveillance efforts hoping to identity, beyond supposition, who "CJ" was. He could have asked Det. Quinn some basic questions respecting her identification of the defendant on April 24, 2020. There were many other investigative avenues to pursue. That is not to say that an officer must engage in all investigative options – such a standard would cripple efficient and objectively rationale investigations. But, by fixing his mind on the identity of "CJ" as early as February 11, 2020, he was limiting his capacity to have his conduct objectively rationalized after the fact. In

essence, he was “jumping the gun” and, thereby, cutting corners. That, after the arrest, he did not even ensure that the three cell phones seized were examined to, at least, verify that one of them used the 226-937-6133 number is indicative of this blind approach adopted throughout this investigation.

[56] Beyond these considerations, I was also left concerned by the officer’s late change in his testimony respecting his arrest target – from the defendant to anyone found in this target vehicle. Ultimately, by the completion of DC Dufton’s evidence, he advised that he believed on May 5, 2020 that he had reasonable and probable grounds to arrest whoever was found in the target vehicle, not simply the defendant proper. Indeed, the defendant did not need to be present. All present, whoever they may be, were, on reasonable and probable grounds, subject to arrest. And, presumably, search thereafter. This was a troubling and inconsistent area of his evidence, adopted only during cross-examination when this identity gap was being highlighted.

[57] Further, a distinction can be drawn between the reasonableness standard expected from an application for a search warrant and that found respecting an arrest without warrant. Our Court of Appeal in *R v Golub* commented:

> …Both a justice and an arresting office must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonable standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.[16]

Here, I find that I cannot give much credence to a dynamic arrest scenario prompting immediate decision making by Det. Dufton that prompts cautious critique. That is because, by 2:20pm he had provided members of the SPS Vice Unit with reasonable probable grounds to arrest the defendant. Not anyone in the target vehicle, the defendant. Nothing since that time changed or altered this intention. Det. Dufton was convinced that Mr. Asante would be driving this vehicle and would be in possession of illicit substances for the purpose of trafficking. The change in an expected London ‘stash house’ stop only served to oddly buttressed the detective’s belief and perceived reasonable probable grounds.

[58] Acknowledging a tenuous connection between “CJ” and the defendant, the Crown pivoted to argue that this identity issue was a red herring. Instead, there was plenty of information to establish reasonable and probable grounds to believe that any occupant of this Ford Fusion would be attending Sarnia to engage in trafficking activity. In essence,

[16] *R v Golub*, [1997] OJ No 3097 (CA) at para 18

the vehicle, which was tracked through the phone, was the crucial feature highlighted by the informant information, SPS Cst. Urban's observations of vehicle associations at known local drug houses, and the surveillance efforts from April 14, 2020. This constellation of factors justified the vehicle's driver as legitimately subject to immediate arrest on reasonable probable grounds as of May 5, 2020.

[59] I cannot accept this argument. Plainly, a suspect vehicle, whether it is from the Toronto area or the moon, does not impute criminality to its occupants by virtual of selective viewings of it parked in and around known drug houses in the not recent past. Section 495(1) of the *Criminal Code* identifies that only "a person" is arrestable without warrant who has committed or is found committing an indictable offence. What evidence did Det. Dufton have on May 5, 2020 that an occupant(s) of this vehicle was about to or had committed an indictable offence? All that can be said, in response, is that a prior occupant[s] of this target vehicle, when it had been previously observed by police in Sarnia on four occasions in a four month timeframe may have been engaged in suspect activity on three of those occasions. I have no information, despite the presence of tracking warrant data after April 6th, 2020, respecting how often this vehicle was in Sarnia until May 5, 2020. If I am to believe most of the informants, it would have been on the regular. But, no confirmatory evidence was called. Indeed, acknowledging that the defendant had been operating this vehicle in the Sarnia area on multiple occasions, he not being the registered owner, who's to say someone else does not have access to it? Or, who's to say that the defendant might have an innocent reason to drive it to Sarnia, and hence avoid a stop over at the alleged "stash house" on May 5, 2020?

[60] The formulation of reasonable and probable grounds to arrest "a person", without warrant, can only be assessed from using the state of mind of the arresting or directing officer. It is both his subjective belief and its objective reasonableness that I must assess when I am called upon determine whether the defendant was, here, arbitrarily detained. Alternative theories, particularly those which are entirely inconsistent with the officer's evidence in totality, which may otherwise justify the defendant's arrest are best assessed at the s. 24(2) analysis phase when I assess the serious of any found breach, not when determining whether an arbitrary detention occurred. Further, I find that Det. Dufton's late switch towards an 'any occupant grounds for arrest' theory, which was developed only during cross-examination, was disingenuous and inconsistent with his earlier evidence in-chief and his outlined reasonable and probable grounds within the Information to Obtain attached to the General Warrant of April 28, 2020.

[61] Further, the Crown argues that the judicial authorization of the General Warrant demonstrates, by its issuance, the objective reasonableness of Det. Dufton's reasonable and probable grounds for arrest. I cannot accept this argument. First, the General Warrant authorized a search of a London, Ontario residence based upon tracking data that linked this residence to a suspected, yet poorly identified, drug trafficker. I have not, as part of this proceeding, scrutinized this authorization as it was not ultimately executed. I will not do so now. And, I cannot ignore that its foundational pattern of conduct for this drug dealer was not corroborated on May 5, 2020. Second, an authorization to search a residence, on reasonable and probable grounds, is meaningfully distinctive from an assessment of reasonable and probable grounds to arrest an individual. Often, to demonstrate this

distinction, a search warrant precedes an arrest warrant offering the foundation of a warrantless arrest of an accused.

[62] As such, I am not convinced that, using a totality assessment of the information gathered by Det. Dufton, he had reasonable and probable grounds to believe that the defendant was the driver of the target vehicle on May 5, 2020, let alone that he was engaged at that time in the commission of or with the intention to commit an indictable offence respecting the trafficking of narcotics. The reasonable grounds to believe standard requires a "compelling and credible information that provides an objective basis", o r objectively discernable facts, for drawing inferences as to the existence of factual circumstances. Det. Dufton's conclusions respecting his target's identity were build upon an unreasonable an foundation. His presumption that the phone's tracking towards Sarnia on May 5, 2020 implied trafficking, and trafficking alone, was also presumptuous. Having made this finding, the defendant's arrest was not in keeping with s. 495(1) of the *Criminal Code* and was therefore unlawful. As such, once the defendant was arrested at this vehicle stop, before he was even identified, he was arbitrarily detained contrary to s. 9 of the *Charter*.

Search Incident to Arrest – *Charter* s. 8

[63] I now turn to an assessment of the defendant's argument that he was subjected to a warrantless search which violated his right to be "secure against unreasonable search or seizure", contrary to s. 8 of the *Charter*.

[64] A warrantless search is *prima facie* unreasonable, and thus contrary to s. 8 of the *Charter*. The Crown bears the burden, on a balance of probabilities, to establish that the warrantless search was otherwise reasonable. A search is reasonable and complies with s. 8 of the *Charter* if: the search is authorized by law; the law authorizing the search is reasonable; and the search is conducted in a reasonable manner.[17]

[65] To be valid, a search incident to arrest, authorized in common law, must meet three conditions:

> (1) the person searched was lawfully arrested;
>
> (2) the search was "truly incidental" to the arrest, i.e., for a valid law enforcement purpose related to the reasons for the arrest; and
>
> (3) the search is conducted reasonably.[18]

[66] In *Cloutier v Langlois*,[19] the Supreme Court identified that a search incident to arrest can supersede the ordinary search requirements without the need for a warrant or reasonable and probable grounds to search because of the fact that it follows an arrest which, itself, requires reasonable and probable grounds or an arrest warrant. Therefore, the legality of the search is derived from the legality of the arrest. If the arrest is found to

[17] *R v Caslake*, [1998] 1 SCR 51 at paras 10-11
[18] *R v Saeed*, [2016] 1 SCR 518 at para 36; *R v Stairs*, [2022] SCJ 11 at paras 6, 35
[19] *Cloutier v Langlois*, [1990] 1 SCR 158; *Caslake*, *supra*, at para 13

be invalid, the search will also be invalid. There is a diminished legitimate privacy expectation flowing from someone who is believed, on reasonable and probable grounds, to have committed or is committing a criminal offence.

[67] The scope of this search power can refer to may different aspects of the search, including the items that may be seized and the place that can be searched. In *R v Caslake*, the Supreme Court included automobiles as a legitimate object for application of this common law search power.[20]

[68] In *Cloutier* and *Caslake*, the Supreme Court identified the main purposes of a search incident to arrest, which include:

> (1) the safety of the police and public;
>
> (2) the protection of evidence from destruction at the hands of the arrestee or others; and
>
> (3) the discovery of evidence which can be used at the arrestee's trial.[21]

The only standard applied to these objectives is whether there is some reasonable basis for doing what the officer did. This is simply to ensure that a "valid objective" is served by the search. It need not rise to a reasonable and probable grounds standard. Most often, for a search to be "truly incidental" to the arrest, it will usually occur within a reasonable period of time after the arrest.

[69] In *R v Lim (No 2)*,[22] the trial judge, Doherty J. (as he then was), offered a relevant analysis of both whether a search was, in reality, incident to a lawful arrest, and whether a search and seizure was reasonable. First, he found that the arrest of a murder suspect relating to bomb plots was not contrived to permit a search of the vehicle he was found beside (which included a search of the vehicles trunk and closed glove box). Intending to arrest him for murder, they found him beside his wide open vehicle surrounded by tools and a torch in his hand. A search incident to his arrest was closely connected in time and place to that defendant's arrest. Second, the reasonableness of the search itself was assessed. Having arrested this suspect, the police turned their attention to finding weapons and relevant evidence. These objectives, public protection and discovery and preservation of evidence, were valid and the search was not done for an oblique or improper motive. The court also distinguished a search of a motor vehicle from that of a dwelling house where there is a more enhanced privacy interest.

[70] Similarly, in *R v Smellie*,[23] a defendant's vehicle was searched incident his arrest for possession of cocaine for the purpose of trafficking. The defendant had been identified by numerous sources and his illegal actions corroborated by surveillance activity which resulted in his vehicle being pulled over and he and his passenger arrested. Then, officers searched the vehicle incident to arrest. A first cursory search yielded nothing. Then, a

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[20] *Caslake*, *supra*, at para 15
[21] *Ibid*, at para 19, 24
[22] *R v Lim (No 2)*, [1990] OJ No 3261 (Gen Div); this decision was approved of in *R v Speid*, [1991] OJ No 1558 (CA) which involved a further search incident to arrest of a motor vehicle
[23] *R v Smellie*, [1994] BCJ No 2850 (CA)

more thorough search yielded (by removal of loose door panel) a substantial quantity of cocaine and drug paraphernalia. The court, having found that there were legitimate grounds for the arrest, further found that an accused and his immediate area, including a vehicle driven by him, can properly be searched incident to arrest, even when a more invasive search is deemed necessary based upon information known to police. The court noted authority for searching trunks of vehicles if police reasonably believe the search areas will yield contraband.

[71] Here, I have already found that the defendant was subjected to an arbitrary detention. As such, he was unlawfully arrested. Without a lawful arrest, the doctrine of search incident to arrest cannot apply. The defendant, therefore, was subjected, while arbitrarily detained, to an unreasonable search and seizure contrary to s. 8 of the *Charter*.

[72] If I am wrong respecting the arbitrary detention breach, and the defendant was lawfully arrested on May 5, 2020, I conclude that his vehicle was searched (and items seized) appropriately and in compliance with the doctrine of search incident to arrest. Upon a lawful arrest, the defendant's vehicle was moved from "an awkward" or dangerous location to an adjacent parking lot. I find nothing improper with this course of action. There is no evidence that it was done to permit any untoward access to the vehicle, e.g. a colourable attempt to allow for an opportunity to smell marijuana in the vehicle and thereby justify its search. Here, Det. Dufton was relying upon the doctrine of search incident to arrest. This was his early intention even prior to the defendant's arrest. He was engaged in an effort to discover relevant evidence and, doing in so, he had authority to search this vehicle rather comprehensively including searching its trunk. While perhaps more comforting, he was under no obligation to secure the vehicle until a search warrant was obtained for later execution. His common law authority post legitimate arrest was comprehensive and sufficient to affect a legitimate search of the vehicle. I simply have insufficient evidence to conclude that the defendant's arrest was a pretext to affect the intended search of the vehicle. Further, seeing cocaine in plain view in a jacket pocket on the front passenger seat post arrest, I would expect a more thorough search of this vehicle to occur, incident to arrest and inclusive of the vehicle's trunk. That is what occurred.

Exclusion of Evidence – *Charter* s. 24(2)

[73] Having found a breach of the defendant's ss. 9 and 8 *Charter* rights, I turn to an assessment of whether the evidence should have been excluded under s. 24(2) of the *Charter*. When a court concludes that "evidence was obtained in a manner" that infringed a *Charter* right, the evidence "shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". As a direct result of arbitrary detention, the vehicle the defendant was driving was unlawfully searched. That search produced the evidence necessary to prove the offences before this court. This evidence was, thus, discovered as part of the same transaction or course of conduct that created the *Charter* breaches. A temporal and contextual connection clearly exists between the *Charter* breach and the impugned evidence. Thus, the evidence was "obtained in a manner" that infringed the defendant's constitutional rights.

[74] The resulting exclusion of evidence inquiry considers three areas: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the accused's *Charter*-protected interests; and (3) society's interest in the adjudication of the case on the merits. When considering these areas, I am to balance these inquiry assessments "to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute".[24] Section 24(2) does not create an automatic exclusionary rule when evidence is obtained in breach of a *Charter* right. The defendant bears the onus of establishing that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute.

(a) The seriousness of the *Charter*-infringing conduct

[75] Here, I am called upon to settle whether the police engaged in misconduct from which the court should dissociate itself. This is not with the intention of punishing the police but, is instead aimed at "preserving public confidence in the rule of law and its processes."[25] I must situate this conduct on a "spectrum" or a "scale of culpability". At the more serious end would be a wilful or reckless disregard of the defendant's *Charter* rights, a systemic pattern of *Charter*-infringing conduct, or a major departure from the *Charter* standards. At the less serious end of the scale are *Charter* breaches that are inadvertent, technical, or minor, or which reflect an understandable mistake. Such circumstances are said to minimally undermine public confidence in the rule of law, and thus dissociation is much less of a concern.[26]

[76] I would place this infringing conduct closer to the more serious scale of culpability. Without undertaking a sufficient investigation to corroborate the informant information, particularly as it relates to the crucial area of identifying the targeted drug dealer, Det. Dufton engaged in speculation, mere suspicion or a hunch. That he was proven accurate post arrest is of no matter and is entirely irrelevant to my analysis. Sort cuts were taken and obvious investigative avenues and changes in circumstances were ignored, which lead me to conclude that a systemic issue is in play. When Det. Dufton authorized the "takedown", nothing was going to change that course. Police blindly did not even first identity who they were arresting. It was enough that he was inside a vehicle of interest.

[77] That Det. Dufton sought and received three judicial authorizations does not insulate his conduct from scrutiny. That he called off the execution of the General Warrant, when its terms and execution plan was no longer viable, does not amount to a demonstration of good faith. Frankly, despite some efforts to legitimize this investigation, police recklessly jumped the gun and prematurely arrested the defendant just because he was driving a suspect vehicle associated to a targeted phone. Even had the police fashioned reasonable and probable grounds to arrest any occupant of this suspect vehicle, based upon the totality of their concerns, which I find that they did not, much more would have been necessary to bridge the gap between the vehicle's suspected historical misconduct and its present *contra* pattern some three weeks later.

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[24] *R v Grant*, [2009] 2 SCR 353 at para 71
[25] *Ibid* at para 73
[26] *Ibid* at para 74; *Le*, *supra* at para 143

[78] Given these findings, I find that this factor favours the exclusion of evidence obtained by a search of this targeted vehicle.

(b) The impact on the defendant's *Charter*-protected interests

[79] This second line of inquiry considers the impact of the breach on the defendant's *Charter*-protected interests. I am called upon to ask whether the breach "actually undermined the interests protected by the right infringed".[27] Again, I must situate this impact on a spectrum, ranging from impacts that a fleeting, technical, transient, or trivial to those that are profoundly intrusive or that seriously compromise the interests underlying the rights infringed. The greater the impact on *Charter*-protected interests, the greater the risk that admission of the evidence will bring the administration of justice into disrepute. This is because "admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute."[28]

[80] Here, I have found two associated *Charter* breaches. The interests protected by s. 9 of the *Charter* include the protection of "individual liberty from unjustified state interference", while the interests protected by s. 8 of the *Charter* include individual privacy and human dignity. I would characterize these breaches as having a relatively profound and intrusive impact on both valued interests.

[81] With respect to the s. 9 *Charter* breach, the police took a short cut in the reliability assessment exercise mandated when dealing with informant information and in filling evidentiary gaps with independent investigative effort. In doing so, they deprived the defendant of his liberty. The defendant was not lawfully detained for any legitimate purpose due to a premature 'takedown' determination because he happened to be an occupant of a suspect vehicle. That he was not even identified before being arrested speaks for itself.

[82] With respect to the s. 8 *Charter* breach, his vehicle was searched comprehensively while he was arbitrarily detained. I acknowledge that he has a limited privacy interest in this vehicle, particularly given that it was not his own. Further, the first drugs found were observed in plain view on the front passenger seat and inside a centre console cup holder. That said, this viewing was only occasioned by a premature 'takedown' arrest which militates against these mitigating features which could have justified a search in the event of a legitimate traffic stop. Finally, I find it difficult to imagine how this contraband would have been discoverable but for these *Charter* breaches. A legitimate strategy incorporating further investigative efforts was an option ignored by the police bent upon attached this vehicle search, doctrinally, to their presumed authority to blindly arrest.

[83] As a result, I find this line of inquiry leans towards the exclusion of evidence.

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[27] *Grant*, *supra* at para 77
[28] Ibid at para 76

(c) Society's interest in the adjudication of the case on the merits

[84] The third line of inquiry considers factors such as the reliability of the impugned evidence and its importance to the Crown's case. I am to ask "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion."[29] Reliable evidence critical to the Crown's case, as here, will generally pull toward inclusion.

[85] I have no trouble concluding that this factor, for obvious reasons, militates towards inclusion of this evidence. Evidence involving the seizure of drugs is always serious and merits inclusion in the adjudication process were possible.

(d) The final balancing

[86] The final step in the s. 24(2) analysis involves balancing the factors under these three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term repute of the administration of justice. This involves a quantitative exercise, one that is not capable of mathematical precision.[30] The balancing is prospective: it aims to ensure that evidence obtained through a *Charter* breach "does not do further damage to the repute of the justice system."[31] The balancing is also societal: the goal is not to punish the police, but rather to address systemic concerns by analyzing "the broad impact of admission of the evidence on the long-term repute of the justice system."[32]

[87] I have concluded that the first line of this inquiry strongly favours exclusion of this evidence, the second does so moderately and the third line pulls strongly in favour of admission. In my view, on the totality of the evidence heard during this blended trial, the final balancing favours, indeed compels, the exclusion of evidence. Here, an experienced officer cut corners and did not adequately identify the target of his serious investigation before ordering a 'takedown' arrest even after his arrest and search plan, as outlined in his evidence and within a General Warrant application, was substantively altered by changing circumstances. This lack of flexibility, this rigidity of investigative intent, demonstrates blind spots in the mind of this police investigation which had the effective of substantially interfering with the defendant's *Charter*-protected interests.

[88] Naturally, I am alive to the risks that these very serious substances pose to Sarnia and our province at large. As I have already commented, there is no doubt that the officer's suspicion was right and that the defendant was, then, a significant drug dealer. However, I am also alive to the risk posed by a corrosion of *Charter*-protected interests under the guise of a 'war on drugs' and their purveyors. None of these areas of scrutiny and identified legal standards fall outside the norm for police notice. Failing to adequately investigate such serious offences puts every citizen at risk of arbitrary detention and a resulting unreasonable search and, regrettably, necessitates that this court distance itself from this *Charter*-infringing conduct. To meaningfully do so, I find that I must exclude the seized evidence from the target vehicle pursuant to s. 24(2) of the *Charter*.

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[29] *Ibid* at para 79
[30] *Ibid* at para 86
[31] *Ibid* at para 69
[32] *Ibid* at para 70

Was the defendant in "possession" of the substances found in the target vehicle?

[89] If my *Charter* breach or exclusion of evidence findings are in error, it is helpful that I consider whether the defendant was in "possession" of the substances found within the vehicle he was operating at the time of his arrest. This finding, in furtherance of the defence admissions earlier noted, would otherwise be determinative his culpability for these offences.

[90] *Charter* analysis aside, to find the defendant guilty of possession of a controlled substance for the purpose of trafficking, there must be evidence capable of establishing the following elements:

> (1) that Mr. Asante was in *possession* of a substance – truly the live issue for determination;
>
> (2) the nature of the that substance (here conceded by the Exhibit 1 Certificates of Analysis making out the subject controlled substances);
>
> (3) that Mr. Asante knew (or was wilfully blind) that the substance was a controlled substance (as evident by the narcotic's packaging); and
>
> (4) that he had possession of the controlled substance for the purpose of trafficking in it (a point already conceded by the defence, with good reason given the quantum of substances present, their packaging and the paraphernalia and production materials also found).

[91] The Crown's case against the defendant appears to be based on a theory of personal and/or constructive possession. Moreover, the Crown's case is circumstantial.[33] This means that in order to convict, an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits. I must consider other possible theories inconsistent with guilt which arise from the evidence or lack of evidence; however, the Crown need not negative every speculative suggestion. As Cromwell J. explained in *R v Villaroman*:[34]

> When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible

[33] Referenced evidence sourced from Det. David that the defendant acknowledged possession of the cocaine in his jacket on the passenger seat, while under caution, is inadmissible hearsay which was not proven to be voluntarily provided to a person in authority and cannot, therefore, be used to buttress a claim on "possession".

[34] *R v Villaroman*, 2016 SCC 33 at para 37

theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

(a) Proving possession

[92] 'Possession' is defined in s. 4(3) of the *Criminal Code* and includes: personal possession, constructive possession, and joint possession.[35] Section 2(1) of the *Controlled Drugs and Substances Act* incorporates the definition of possession found in s. 4(3) of the *Criminal Code* so that any *CDSA* offence of which possession is an essential element (as here) may be proven in any manner permitted by s. 4(3) of the *Criminal Code*. Any of these three means of possession can support the essential element of possession. This case engages predominated engages a personal possession theory but, I will not forestall consideration of a constructive possession theory even though none was advanced. Knowledge and control are essential elements in both personal and constructive possession.[36]

[93] 'Personal possession' requires an accused to know he has it and know what it is, while having control over it. 'Constructive possession' does not involve an accused having physical custody of the subject-matter. It is established when an accused has the subject-matter in the actual possession or custody of another person, or in any place, whether belonging to or occupied by the accused or not, for the benefit of the accused or someone else.[37] 'Constructive possession' is complete where the defendant:

(1) has knowledge of the character of the object;

(2) knowingly puts or keeps the object in a place, irrespective of whether the place belongs to or is occupied by the accused; and

(3) intends to have the object in the place for the use or benefit of the accused or of another person'[38] .

[94] The Crown must prove the essential elements of personal or constructive possession by direct evidence, by circumstantial evidence or by a combination of direct and circumstantial evidence.

[95] As noted, when assessing available inferences from the circumstantial evidence marshalled, I must assess whether the only reasonable inference available supports a finding of "possession". In doing so, I must assess available inferences drawn from the evidence taken as a whole. The absence of evidence from the defence, by implication, deprives this court of an innocent explanation respecting the inculpatory facts grounding the Crown's theory of personal or constructive possession liability. I cannot imagine an innocent explanation without a sufficient evidentiary foundation to ground it in reality – to do so would be unreasonable.

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[35] *R v Morelli*, [2010] 1 SCR 253, at para 15
[36] *R v Lights*, 2020 ONCA 128; *Morelli*, *supra* at para 15
[37] *Morelli*, *supra* at para 17
[38] *Lights, supra* at para 47; *Morelli*, *supra* at para 17

[96] I am faced with three distinct areas of the vehicle where controlled substances were found – in the jacket pocket on the passenger seat (30 grams of cocaine in a plastic bag, and 233 grams of cannabis marijuana), in the centre console cup holder of the vehicle (6.24 grams of crystal methamphetamine) and in the trunk (several individually wrapped packages in Ziploc bags containing: Fentanyl, totalling 209.6 grams in various colours and Heroine, totalling 57 grams). As the defendant is not charged with any offence related to cannabis marijuana or heroine possession, I will dispense with further consideration of that. As a result, I will consider possession of the substances by location found.

[97] First, the following are relevant facts respecting whether the defendant was in possession of the cocaine found within his jacket on the passenger seat:

(1) while the defendant did not own this vehicle, he was the driver and lone occupant of it on May 5, 2020;

(2) on the evidence of Det. Dufton, this cocaine was found inside an opened jacket pocket, in plain view, on the front passenger seat as depicted in photograph 2-3 in Tab 2 of Exhibit 1, well within reach of the defendant while operating the motor vehicle; and

(3) I heard no evidence that there were various or other jackets or clothing inside the vehicle that might complicate a natural inference that this jacket belonged to the defendant.

[98] Second, the following are relevant facts respecting whether the defendant was in possession of the methamphetamine found in the cup holder in the centre console:

(1) while the defendant did not own this vehicle, he was the driver and lone occupant of it on May 5, 2020;

(2) on the evidence of Det. Dufton, this methamphetamine was found inside an open cup holder in the centre console of the vehicle. Curiously, it was not apparently initially noted by Det. Dufton, at least based upon his trial evidence. However, its location and plain view status is clearly evident in photograph 7 of Tab 2 of Exhibit 1, showing this substance stored in a small bag inside the passenger side cup holder. It is well within reach of any driver of this vehicle; and

(3) I heard no evidence that might rationally connect this substance to any other person.

[99] Third, the following are relevant facts respecting whether the defendant was in possession of the fentanyl found in the trunk of the vehicle:

(1) while the defendant did not own this vehicle, he was the driver and lone occupant of it on May 5, 2020;

(2) on the evidence of Det. Dufton, this fentanyl was found wrapped in a variety of different plastic bags, within various containers, distributed throughout the trunk

> of this motor vehicle. When accumulated, in consideration of the nature of potency of this illicit substance, a significant quantum was here found. As shown in photographs 4-6, 8-24 in Tab 2 of Exhibit 1, these substances were found amongst a variety of fentanyl production related products variously stored. As described by Det. Dufton, fairly it would appear, this was a virtual fentanyl production "lab" found inside the trunk of this vehicle; and
>
> (3) I heard no evidence that might rationally connect these substances to any other person.

[100] Is the fact that Mr. Asante was operating the black Ford Fusion, and that it contained a substantial quantity and value of stolen controlled substances enough, on its own, to ground the requisite knowledge and control to establish possession? In considering the defendant's driving status, I must acknowledge that he was the lone occupant of this motor vehicle upon his arrest. I have no evidence suggesting any other person had care or control of this vehicle any time proximate to the police search. I must also acknowledge that the defendant was not the registered owner of this vehicle, though he was found to be operating it on at least four occasions in the preceding three months. Therefore, there is some evidence, a real connection, marginal as it may be, between the defendant and this vehicle beyond his mere driving on May 5, 2020. This, I find, lends some weight to the usual presumption that a vehicle's driver has both knowledge and control of the vehicle's content. That aggravating substances were found both inside the driving compartment and the trunk lends further credence to the driver's awareness and control of the whole. Without any conflicting evidence, it may be unrealistic or speculative to conclude that the contraband and/or suspect property could have been introduced to this vehicle without the defendant's knowledge.[39]

[101] However, driving a motor vehicle does not, *pro forma*, settle the issue of knowledge and control of all that is found therein. As Hill J. observed in *R v Anderson-Wilson*:

> Not everyone who drives or rides in a car containing concealed illegal objects necessarily knows the presence or nature of those objects: *R. v. Amado*, *[1996] B.C.J. No. 1943* (S.C.) at para. 33. In unlawful possession cases, where the prohibited item is concealed or not readily visible in a vehicle driven by the accused, the courts have generally required more than simply evidence of the proximity of the accused and the item: *R. v. Green; R. v. Rawlins, supra* at 281; *R. v. Bauer*, *[2003] B.C.J. No. 505* (C.A.) at para. 18; *R. v. Anderson, supra* at para. 26; *R. v. Iturriaga, [1993] B.C.J. No. 2901* (C.A.) at para. 9.[40]

[102] Finally, the value of the contraband found in close proximity to the defendant is a factor in my knowledge and control assessment. As was observed by Watt J.A. in *R v Bains*:

> Where the subject matter of which an accused is alleged to be in possession is a controlled substance of significant value, it may be open to a trier of fact to infer not only knowledge of the nature of the subject, but also knowledge of the

[39] See: *R* v *Marryshow*, [2003] OJ No 1332 (SCJ) and *R v McIntosh*, [2003] OJ No 1267 (SCJ)
[40] *R v Anderson-Wilson*, [2010] OJ No 377 (SCJ) at para 75

> substance itself: *R. v. Blondin* (1970), 2 C.C.C. (2d) 118 (B.C.C.A.), at p. 121; *R. v. Fredericks*, [1999] O.J. No. 5549 (C.A.), at paras. 3-4; *R. v. To*, 1992 CanLII 913 (B.C.C.A.); and *R. v. Bryan*, 2013 ONCA 97, at para. 11. It is a reasonable inference that such a valuable quantity of drugs would not be entrusted to anyone who did not know the nature of the contents of the bag or other container.[41]

Further, in *R v Balasuntharam*[42] the court noted that it can often be inferred that valuable property or contraband would not readily be left unaccounted for or by a person knowing and controlling it. Here, we have property that is certainly valuable. Although I do not have direct evidence at trial respecting its value, I can take notice based upon judicial experience that these illicit substances in this quantity have significant value. Of course, possession, beyond a reasonable doubt, must be more than a function of enhanced opportunity. That said, the defendant's lone occupancy and the substantial quantity of controlled substances throughout this vehicle, found in his jacket, beside him in a cup holder and overwhelmingly throughout the trunk, stored amidst significant narcotic production related materials, leads invariably to an overwhelmingly conclusion that Mr. Asante was not merely wilfully blind to its presence, but was specifically aware and had actual control over these substances. I simply have no other rational or evidence based inference consistent with a lack of knowledge or control over these substances available. On this evidentiary record, to conclude otherwise would be speculative and folly.

[103] I am, therefore, satisfied that the Crown has proven, beyond a reasonable doubt, that Mr. Asante was in possession of the charged illicit substances found in the black Ford Fusion he was operating at the time of his arrest. Given the defence concession that, if possession is found, sufficient evidence exists to permit a finding that such possession was for the purpose of trafficking, I finding that I also make, and that these substances are controlled Schedule I substances contrary to the *Controlled Drugs and Substances Act*, the Crown has met its culpability burden. This finding would have been determinative, but for my earlier findings respecting the admissibility of the substances in question.

Conclusion

[104] Despite the variety of information considered, judicially authorized investigative procedures utilized, and the quantum of illicit narcotics found in his possession, I am nonetheless compelled to conclude that the police lacked reasonable and probable grounds to believe that the defendant was committing, or intent upon committing at the time of his arrest, the charged offences. While the investigating officer's suspicions proved accurate, they were suspicions alone which failed to rise to objective discernable facts supportive of reasonable and probable grounds. As such, the defendant was arrested without sufficient cause, arbitrarily detained, and the resulting search incident to arrest was unlawful. The contraband then found must be excluded as evidence at this trial. Without this evidence available, the defendant is, by implication, acquitted of these charges.

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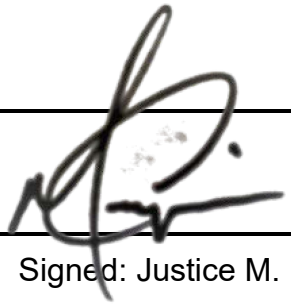
[41] *R v Bains*, [2015] OJ No 5191 (CA) at para 157
[42] *R v Balasuntharam*, [1997] OJ No 6517 (Gen Div)

Released: October 18, 2022



Signed: Justice M. B. Carnegie