COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Poirier, 2016 ONCA 582
DATE: 20160720
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Weiler, Simmons and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jeffrey Michael Charles Poirier

Appellant

Matthew Gourlay and Christine Mainville, for the appellant

Croft Michaelson, Q.C., for the respondent

Heard: April 25, 2016

On appeal from the conviction entered on September 5, 2014 and the sentence imposed on September 10, 2015 by Justice John Desotti of the Superior Court of Justice, sitting without a jury.

Weiler J.A.:

A. OVERVIEW

[1] The Sarnia police sought and obtained a general search warrant on information from "five proven reliable confidential informants" that the appellant, an addict and drug dealer, concealed the drugs he sold in his rectum until he made a sale. The general warrant authorized the appellant's detention, "until he

has a bowel movement, significant enough to satisfy the Officer's [*sic*] monitoring … that no packages exists [*sic*] within the rectum of Jeffrey Poirier" if, upon arrest, the appellant refused to cooperate with the police and voluntarily remove the packages of drugs from his rectum.

[2] The police arrested the appellant and took him to the police lockup where he was read the terms of the warrant, strip searched and placed in a special "dry cell" with no running water or usable toilet, meaning that when he wanted to go to the bathroom, he would have to tell police, who would then take him to a commode so police could monitor his excretions. This is known as a "bedpan vigil search". The appellant spoke with his counsel.

[3] In all, the appellant was detained at the police station for a total of 43 hours before being brought before a justice of the peace. For the first 21 to 22 hours, the appellant was handcuffed to the bars of his cell above his head and he could only reach as low as his chest. During the last half of the appellant's detention, he was not chained to the bars of his cell. For approximately nine hours, he was provided with oven mitts to wear over his hands, which were duct taped together. He continued to be handcuffed.

[4] Within the first 24 hours of his detention, the appellant eliminated three packages of drugs from his rectum, containing crystal methamphetamine and heroin. After the appellant excreted a fourth and final package of drugs around

8:30 p.m., and about 30 hours after his initial detention, the police were satisfied the appellant had no more drugs in his rectum, and they removed the handcuffs and oven mitts from his hands. He was brought before a justice of the peace the next morning.

[5] Over the period of his detention, the appellant underwent severe withdrawal symptoms because of his addiction. Except for police supervision, no provision was made for his condition to be monitored

[6] At his trial, the appellant brought a *Charter* application to exclude the drugs from admission into evidence under s. 24(2). He alleged that the general warrant was unlawful and that he had been subject to arbitrary detention and imprisonment under s. 9, that the manner in which the bedpan vigil search was carried out violated his rights under s. 8, and that his right to security of the person had been violated under s. 7.

[7] The trial judge held that the appellant's *Charter* rights were not violated and that, even if they were, he would not have excluded the evidence. He convicted the appellant of possession for the purpose of trafficking heroin (1.5 ounces), cocaine (7 grams), and crystal methamphetamine (2 ounces). The trial judge also found the appellant guilty of simple possession of a small quantity of hydromorphone. He sentenced the appellant to ten years' imprisonment less credit for presentence custody.

[8] The appellant appeals both his conviction and sentence.

[9] In relation to conviction, the appellant makes five submissions:

1) A general warrant cannot issue for a bedpan vigil search because a bedpan vigil search is not a search; it is a detention. In any event any search conducted pursuant to a general warrant can only involve a detention of short duration.
2) The terms of the warrant were defective because they purported to authorize non-compliance with s. 503 of the *Criminal Code* requiring that an accused person be taken before a justice of the peace "without unreasonable delay and in any event within a period of 24 hours".
3) The manner in which the warrant was executed was unreasonable and breached the appellant's rights under s. 8 of the *Charter*.
4) The appellant's detention jeopardized his right to life and security of the person under s. 7 of the *Charter* because the monitoring of his medical condition was inadequate.
5) The evidence obtained should have been excluded pursuant to s. 24(2) of the *Charter*.

[10] In response, the Crown's submissions may be summarized as follows:

1) A bedpan vigil search is a type of search that can be authorized pursuant to a general warrant.

2) While the general warrant could not authorize non-compliance with s. 503 of the *Criminal Code*, the first 24 hours of the appellant's detention were not an arbitrary detention that violated his rights under s. 9 of the *Charter* because the bedpan vigil search was also authorized as a search incident to the common law power of arrest.
3) The manner in which the search was executed was reasonable under s. 8 of the *Charter*, bearing in mind the need to ensure that the appellant did not attempt to extract the drugs from his rectum and consume them.
4) There was no violation of s. 7 of the *Charter*; medical oversight of the appellant was not required because this was not a situation where the appellant had consumed the drugs.
5) If there was a violation of the appellant's *Charter* rights, the breach does not warrant exclusion of the evidence of the drugs which were recovered during the first 24 hours of the appellant's detention. Only the evidence of the drugs obtained after 24 hours should be excluded. As a result, the Crown asks that the conviction appeal be dismissed.

[11] I would allow the conviction appeal. A bedpan vigil search is a search. It is a type of search that can be authorized pursuant to a general warrant under s. 487.01 of the *Criminal Code,* but, in this case, the warrant was invalid because its language purported to authorize detaining the appellant indefinitely without bringing him before a justice of the peace, thereby violating s. 503 of the *Criminal*

Code. The provisions of s. 503 of the *Criminal Code* are mandatory and cannot be overridden by the terms of a general warrant.

[12] The Crown's submission that the search was nevertheless valid as a common law search incident to arrest must also be rejected. Quite apart from the effect of a breach of s. 503 on the appellant's *Charter* rights, a search incident to arrest must be executed in a reasonable manner and this was not done. The manner in which the search was carried out was not proportionate to the crime alleged and the circumstances. It did not have regard for the appellant's personal dignity as much as possible, or for medical concerns specific to the appellant. Accordingly, the trial judge erred in holding that there was no violation of the appellant's rights under the *Charter*.

[13] As a result of the trial judge's error in concluding that the appellant's rights under the *Charter* were not breached, no deference to his s. 24(2) analysis is warranted. Applying the factors in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, I would hold that, in the circumstances, the administration of justice would be brought into disrepute if the drugs were admitted into evidence, and I would exclude the evidence. Therefore, I would allow the appeal, set aside the appellant's convictions and order an acquittal on all charges.

[14] Although the Crown concedes that the sentence imposed was too long, having regard to my conclusion respecting the conviction appeal, the sentence appeal is moot.

[15] The details surrounding the facts, the trial judge's reasons, and my analysis of the issues follow.

B. FACTS

[16] Police received information from five confidential informants that the appellant was actively dealing in heroin, methamphetamine, and oxycodone in Sarnia. These sources all indicated that the appellant stored significant quantities of drugs in plastic baggies in his rectum, only briefly removing the drugs to make a sale before returning the drugs to his rectum.

[17] On the basis of this and other information, police sought a general warrant under s. 487.01 of the *Code* that would, after police received information that the appellant was in possession of a large quantity of heroin or crystal methamphetamine, authorize the appellant's detention until the drugs could be recovered from his rectum.

[18] The general warrant was granted on November 20, 2012. Its terms read as follows:

> 1. When one of five proven, reliable Confidential Sources referred to in this Application provides information that [the appellant] is currently in possession of a large supply of Heroin and/or Crystal

Methamphetamine, Officers of the Sarnia Police will locate [the appellant] at the first opportunity outside of a dwelling residence and immediately place him under arrest at that time for possession for the purpose of trafficking Heroin and/or Crystal Methamphetamine.

2. [The appellant] will be brought to the Sarnia Police Station. The warrant will be shown and explained to [the appellant].

3. [The appellant] will be given an opportunity to contact his legal counsel.

4. [The appellant] will be taken to a cell where his actions will be constantly monitored by officers of the same sex.

5. [The appellant] will be given the opportunity to do one of the following:

> i) Voluntarily, in the presence of Officers of the same sex, remove the package of Heroin and/or Crystal Methamphetamine from his rectum. If [the appellant] does voluntarily remove only a single package from inside of his rectum, [the appellant] will still be required to provide a bowel movement which will satisfy the Officer's belief that there are no more drugs inside of his rectum. This is due to the information provided by all Sources with respect to the amounts of drugs and multiple packages that [the appellant] will conceal up inside of his rectum at all times, in order to ensure that all of the drugs have been removed or vacated from inside of [the appellant]'s rectum.
>
> ii) Voluntarily have a bowel movement, in the presence of Officers of the same sex, significant enough to dislodge the package of Heroin and/or Crystal Methamphetamine from inside of his rectum, or enough to satisfy Officer's monitoring that no further packages exists within his rectum.

6. Should [the appellant] refuse to cooperate with the provisions outlined in the terms and conditions found in Appendix "A", then [the appellant]'s detention shall continue until he has a bowel movement, significant enough to satisfy the Officer's monitoring to remove the package of Heroin and/or Crystal Methamphetamine or, to have a bowel movement significant enough to satisfy the Officer's

> monitoring that no packages exists within the rectum of [the appellant].

[19] After police received a tip from one of their confidential sources that the appellant was in possession of heroin, crystal methamphetamine, cocaine, and other substances, and that the drugs were packaged to be inserted in his rectum, the warrant was executed on December 5, 2012. The appellant was arrested at 1:32 p.m. and transported to the Sarnia police station. He was strip searched in an open-door room; the search was inadvertently recorded by a video camera. He was read the terms of the warrant.

[20] Following an attempt to reach counsel, at 2:10 p.m. the appellant was placed, alone but under the watch of officers, in a special “dry” cell that was modified to have no running water and a covered sink and toilet bowl. He eventually spoke with counsel. In the “dry” cell, the appellant was handcuffed to the bars of the cell such that he could sit or lie down on a bench next to the cell door, but only reach as low as his chest.

[21] The appellant was held in this manner until 11:21 a.m. on December 6, at which point police placed oven mitts on his hands, secured with duct tape, to provide him with more freedom of movement, but still prevent him from accessing his rectal area. While he remained handcuffed, he was no longer chained to the bars of the cell.

[22] Around noon on December 6, the appellant asked to be taken to the commode and voluntarily passed two packages, each of which contained 28 grams of crystal methamphetamine. The appellant told the officers that that was all he was carrying, but there was no sign of a significant bowel movement in the commode and only a small amount of watery stool.

[23] At 1:05 p.m., the appellant voluntarily passed another package, this one containing 28 grams of heroin. The appellant again claimed that this was the last package, but there was no actual bowel movement in the commode.

[24] Later that evening, police received information from one of their confidential informants that they should recover a package containing brown heroin, cocaine, methamphetamine and pills. This information was relayed to the appellant.

[25] At 8:10 p.m., the appellant asked when his handcuffs would be removed and police indicated that would happen when the terms of the general warrant were met. The appellant then asked to use the commode and produced a significant stool. The stool contained a package which held five smaller plastic bags containing: (i) 14 grams of heroin; (ii) seven packets of heroin each weighing .6 grams; (iii) one gram of cocaine; (iv) eight Dilaudid pills (each of which was 8 mg); and (v) two packages of cocaine each weighing 3.5 grams.

[26] At this point, the police were satisfied that the appellant had no further drugs inside him. The appellant's handcuffs were removed and he was moved out of the dry cell. He was later advised that he would be charged with possession of crystal methamphetamine, heroin, cocaine and Dilaudid, all for the purpose of trafficking.

[27] The police explanation for detaining the appellant in the manner they did was that they did not want him to be able to remove the drugs from his rectum and perhaps swallow them or somehow destroy or conceal them. The door to the appellant's cell was left open so that officers monitoring the appellant could enter quickly if needed, to prevent the destruction of evidence, or to check on the appellant's medical condition.

C. DISCUSSION

[28] As set out below, I am of the view that the general warrant was defective, in that it did not account for the provisions of s. 503 of the *Criminal Code*. Because the availability of a general warrant for a bedpan vigil search has not been previously considered at the appellate level, I will address whether a general warrant can issue for a bedpan vigil search, including whether it is a search. I will then go on to consider the defect in the general warrant in this case. Finally, I will address the Crown's argument that the search, even if not

authorized by the general warrant, was authorized as a valid search incident to arrest.

(1) A bedpan vigil search is a search that can be authorized by a general warrant

[29] Section 487.01(1) of the *Criminal Code* enables a judge to issue a warrant authorizing a peace officer to:

> … use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if
>
> > (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
> >
> > (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
> >
> > (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

[30] In this case, I would hold that the requirements of s. 487.01(1) were met. The issuing judge was satisfied that there were reasonable grounds to believe that the appellant had trafficked drugs; given the issuance of the warrant and the harm to society from illicit drug trafficking, it can be inferred he was satisfied that the second requirement was also met; finally, no other provision in the *Criminal*

Code or any other Act of Parliament provides for a warrant, authorization or order permitting a bedpan vigil search.

[31] The appellant argues that, while s. 487.01 authorizes investigative methods that would otherwise be deemed to violate a person's protected right against unreasonable search and seizure under s. 8 of the *Charter*, it does not authorize a detention to perform the investigation. While acknowledging that a search and a detention may overlap, the appellant submits that anything more than a transitory detention must be specifically authorized by the *Criminal Code.* The appellant cites the DNA warrant provisions in the *Criminal Code*, which specifically authorize both the taking of a DNA sample and a deprivation of liberty to obtain the sample, by way of example.

[32] The appellant submits that the general warrant was unlawful in that it contemplated the appellant's detention in circumstances that would violate s. 9 of the *Charter*, an independently protected constitutional right to be free from unauthorized and unlawful detentions.

[33] The respondent submits that a general warrant can authorize a search together with any detention that is necessarily incident to the search, citing this court's implicit recognition of this fact in *R. v. H. (T.G.),* 2014 ONCA 460, 120 O.R. (3d) 581, at paras. 26 and 48.

[34] I disagree with the appellant's submission that a general warrant cannot issue for a bedpan vigil search because of the length of the detention involved. The common sense principle underlying the jurisprudence is that a general warrant to search includes doing what is reasonably necessary to carry out the search, and may include detention. The length and nature of detention required must take into consideration the nature of the search to be conducted and the necessity to conduct that type of search.

[35] I begin my analysis by noting Austin J.A.'s observation in *R. v. Noseworthy* (1997), 33 O.R. (3d) 641 (C.A.), at para. 11:

> Section 487.01 does not provide simply for seizing things which are evidence, contraband or instrumentalities, but rather it provides for the doing of any thing which will yield information concerning an offence, thus paralleling the breadth of the informational privacy interests protected by s. 8 of the *Charter*…. [Citation omitted.]

[36] In the same vein, MacPherson J.A. noted in *R. v. Ha*, 2009 ONCA 340, 96 O.R. (3d) 751, at para. 26, that s. 487.01 speaks to <u>any</u> situation in which the police seek judicial authority to do something that, absent that authority, would constitute a breach of s. 8 of the *Charter*:

> Section 487.01 recognizes that Parliament cannot anticipate or imagine all investigative means or techniques that are or will become available to the police. Section 487.01 focuses not on authorizing specific techniques, at least where there is no interference with bodily integrity, but rather on whether the public interest in authorizing the specific

> investigative technique in issue is sufficiently strong in the circumstances to overcome an individual's constitutional right not to be subject to an unreasonable search or seizure.

[37] It should also be noted that a general warrant can issue when temporal flexibility is required: *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at para. 69. As well, a general warrant can incorporate a term that leaves the precise timing of the execution of the warrant to the police: see *R. v. Lucas*, 2014 ONCA 561, 121 O.R. (3d) 303, at paras. 181-82; *R. v. Paris*, 2015 ABCA 33, 588 A.R. 376, at paras. 19-20.

[38] The fact that a bedpan vigil search takes time and involves detention does not make it any less a search. In *R. v. Greffe*, [1990] 1 S.C.R. 755, Lamer J. for the majority held, at p. 796, that he was not persuaded that there was any immediate necessity to conduct a rectal search of the appellant; he observed that if there were reasonable and probable grounds to believe the accused was a drug courier, “then surely the detention of the accused in order to facilitate the recovery of the drugs through the normal course of nature would have been reasonable.” Similarly, having regard to all the circumstances here, the police had reasonable grounds to believe that the appellant was a drug dealer who carried the drugs in his rectum, and to conduct a passive bedpan vigil search for them.

[39] In *H. (T.G.)*, after observing that the powers granted to the police under a general warrant should be carefully delineated and narrowly construed, Doherty J.A. added at paras. 47-48: “There is … a difference between a narrow construction of the terms of a warrant and a reading that would effectively neuter the search authorized by the warrant.” Apart from measures that would compromise bodily integrity, he held that the authority under a general warrant to view a part of a person’s body, in that case viewing and photographing the accused’s anal area, necessarily includes directing the person to position or move his body so as to allow a full viewing. The issue of the accused’s detention was not specifically raised at trial or on appeal in that case. However, the court recognized that the execution of the general warrant resulted in the accused’s detention from the time he was taken from his home until he was released.

[40] Thus, I would hold that the fact that a bedpan vigil search takes time and involves the detention of the individual while the search is carried out does not make it any less a search.

[41] Section 487.01(1) is subject to the limitation set out in s. 487.01(2), which provides that the section cannot “be construed as to permit interference with the bodily integrity of any person.”

[42] “Bodily integrity” is not defined in the *Criminal Code*, nor am I aware of any jurisprudence defining the term in the context of s. 487.01(2). However, the

Supreme Court of Canada's comments on the nature of a bedpan vigil search in *R. v. Monney*, [1999] 1 S.C.R. 652, are instructive.

[43] In *Monney*, at paras. 29 and 47, the Supreme Court held that the detention of a person suspected of having drugs "on or about his person" pursuant to s. 98 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), for over five hours until he produced urine or a bowel movement, was a search and seizure within the meaning of s. 8 of the *Charter*.

[44] The court noted that, given the "passive" nature of a bedpan vigil search, it is not an invasive procedure, and is analogous to a category two strip search. As to whether a bedpan vigil search interferes with a person's bodily integrity, Iacobucci J. stated, at paras. 47-48:

> There is no doubt that Canadians expect treatment that recognizes a strong sense of modesty concerning bodily functions. A traveller who is detained in a "drug loo facility" and compelled to produce either a urine or bowel movement under supervision is subject to an embarrassing process. In my view, however, a passive "bedpan vigil" is not as invasive as a body cavity search or medical procedure such as the administration of emetics. In this sense, the right to bodily integrity is not to be confused with feelings of modesty, notwithstanding their legitimacy. …
>
> While I conclude that the compelled production of a urine sample or bowel movement is an embarrassing process, it does not interfere with a person's bodily integrity, either in terms of an interference with the "outward manifestation" of an individual's identity, as was the central concern in [*R. v. Stillman*, [1997] 1 S.C.R. 607], or in relation to the intentional application

> of force, as was relevant in [*R. v. Simmons*, [1988] 2 S.C.R. 495].

[45] I appreciate that one important distinction between *Monney* and this case is that *Monney* involved a border crossing search where the state interest in protection of the public is greater and an individual's expectation of privacy is lower. Different considerations as to whether the search took place in a manner that was reasonable apply. In *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at paras. 73-74, the Supreme Court explicitly stated that the border context was central to the analysis of whether the strip search and bedpan vigil search in *Monney* were reasonable. But importantly, the court did not indicate that what constituted a search was different. Further, in this case we are not dealing with the standard of "suspects on reasonable grounds", as was the case in *Monney*, but the higher standard of "reasonable grounds to believe that an offence… has been or will be committed."

[46] Further, the court in *Monney* also pointed out a second important distinction that is apt. At para. 44, the court held:

> A second important distinction between the circumstances of this appeal and those present in *Stillman* is that the customs officers, in detaining the respondent in this case and subjecting him to a passive "bedpan vigil", were not attempting to collect bodily samples containing personal information relating to the respondent.

[47] I note that in its recent decision in *R. v. Saeed*, 2016 SCC 24, at paras. 46-47, Moldaver J., citing *Monney*, confirmed that an accused's privacy interest in his own bodily fluids does not extend to drugs contained in his bodily waste. The drugs sought were not "bodily samples" containing personal information related to the accused. The characterization of a bedpan vigil search as a search does not change. (See also *R. v. Jen*, 2014 NWTTC 6, 303 C.R.R. (2d) 143, for an example of a case in which a bedpan vigil search was upheld in the domestic context.)

[48] I would hold that a bedpan vigil search meets the criteria for a general warrant set out in s. 487.01(1) and s. 487.01(2) and does not constitute interference with bodily integrity.

[49] To summarize, a bedpan vigil search is a search within the meaning of s. 8 of the *Charter*. A general warrant issued under s. 487.01 can authorize a bedpan vigil search. The fact that detention of the individual is necessary to conduct a bedpan vigil search does not, in itself, make the warrant invalid. The appellant's submission to the contrary does not accord with the weight of judicial authority. I would reject this ground of appeal.

[50] I would, however, echo the comments of Doherty J.A. in *H. (T.G.)*, at para. 47, that powers granted to the police in any general warrant must be carefully delineated and narrowly construed. As I will discuss below, the general warrant in

this case failed to account for s. 503 of the *Criminal Code*, which constitutes a failure to adequately circumscribe the power granted to the police. Given this, and the fact that the delineation of police powers will be case specific and will vary depending on the circumstances, I need not address whether the general warrant in this case adequately delineated police powers.

(2) The general warrant was defective on its face because it did not take s. 503 of the *Code* into account

[51] Section 503(1) of the *Criminal Code* requires a peace officer who arrests a person, with or without a warrant, to bring the person before a justice of the peace, where a justice is available, without unreasonable delay or in any event within 24 hours of arrest.

[52] The Crown rightly concedes that the terms of a general warrant cannot override s. 503, which is mandatory. Parliament has not seen fit to provide for a warrant authorizing a detention beyond that which is permitted by s. 503, and it is not for the courts to invent such authority.

[53] Further, the Crown acknowledges that the police, in obtaining a general warrant to conduct the bedpan vigil search, were seeking to avoid the provisions of s. 503 of the *Code*. Const. Vosburg testified he thought that because a provincial court judge is a higher authority than a justice of the peace, the judge could authorize non-compliance with s. 503. When the justice issued the general

warrant, the police believed they had received an exemption from compliance with s. 503. Const. Vosburg did not seek a legal opinion from a Crown attorney as to whether his understanding was correct.

[54] Finally, while no term of the general warrant expressly authorized non-compliance with the provisions of s. 503, the warrant does not set out any outer limit of time during which the appellant could be detained.

[55] Indeed, the officers and the trial judge all accepted that the appellant's detention violated s. 503, but appeared to presume that the general warrant could supersede compliance with the section. The trial judge never considered whether the warrant could legally do what it purported to do, and erred in apparently concluding that the general warrant permitted non-compliance by the police with the provisions of s. 503.

[56] In my view, the general warrant was defective in that it did not provide that the appellant's detention, until he excreted the drugs in his rectum, was subject to the requirement that the appellant be brought before a justice of the peace without unreasonable delay pursuant to s. 503.

[57] Section 503 reflects an important fundamental right in our society, namely, the liberty of the subject, which is not to be taken away except in accordance with the law: *R. v. Simpson* (1994), 88 C.C.C. (3d) 377 (N.L.C.A.), at p. 386-87, rev'd on other grounds, [1995] 1 S.C.R. 449. In holding that the accused's detention

was arbitrary in *R. v. Truchanek* (1984), 39 C.R. (3d) 137 (B.C. Co. Ct.), Hogarth Co. Ct. J. stated, at pp. 170-71:

> [E]ven if the detention was but for hours, even if the detention was to obtain evidence of the commission of a serious crime, the deliberate illegal refusal to present [the accused] according to law was in my view a matter of vital importance for the people of this community, as it opens up to the police the idea that any one of us who has the misfortune to be arrested could be held for any length of time in order to extract a confession, to locate evidence and, for that matter, for any other purpose at their whim.

[58] Compliance with s. 503 is not simply a matter of form. Nor does it matter that the appellant may not likely have been released by a justice of the peace while the bedpan vigil search was being conducted. If the police had complied with s. 503, the manner in which the appellant continued to be detained would have been subject to court supervision. The appellant's detention would have changed from being a detention pursuant to the execution of the general warrant to a court monitored detention that ensured the ongoing protection of the appellant's *Charter* rights.

[59] The valid investigative purpose that the bedpan vigil search serves is not undermined by compliance with s. 503. As the Crown recognized, it would have been open to the police to take the appellant before a justice by telephone. Moreover, a justice can remand an arrested individual to prison for up to three days at the request of the prosecutor under s. 516 of the *Code*. "Prison" is

defined in s. 2 of the *Code* as including a “lock-up,” and therefore the cells at the police station would appear to come within that definition. The police could have telephoned a justice of the peace and asked for the appellant to be remanded into their custody at the police station for up to three days, or until the appellant had expelled the drugs from his rectum, whichever was sooner.

[60] For this reason, I also cannot accept the Crown’s submissions that there was a violation of s. 503 only after the appellant had been detained for 24 hours, and consequently, that there was no violation of s. 8 in obtaining the drugs excreted prior to 24 hours having elapsed.

[61] First, section 503 requires that the appellant be brought before a justice of the peace “without unreasonable delay”, not just within 24 hours. Instead, 24 hours represents the outer limit: *R. v. Storrey*, [1990] 1 S.C.R. 241, at p. 256. Given the apparent availability of a telephone appearance, the Crown’s argument must be rejected.

[62] Second, the submission creates an artificial divide in what was one course of conduct. In *R. v. Pino*, 2016 ONCA 389, released following the hearing of this appeal, Laskin J.A. held, at para. 48, that evidence obtained prior to a *Charter* infringement may still be considered to have been “obtained in a manner” that violated the *Charter*. Laskin J.A. further suggested, at para. 72, that, when considering whether the “obtained in a manner” requirement in s. 24(2) was met

in a given case, courts should consider, among other things, that "[t]he requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct" and that "[t]he connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections." Even if the Crown were correct that the appellant's rights were only breached after 24 hours, there is no doubt on the facts of this case that the evidence obtained and the *Charter* breach would be both temporally and contextually linked.

[63] For these reasons, I find that the general warrant was defective and did not authorize the search carried out in this case.

(3) Assuming a bedpan vigil search can be conducted incident to arrest, in the circumstances, the search was not carried out reasonably

[64] The Crown submits that even if the warrant is invalid, the search that took place was nonetheless authorized as a search incident to arrest at common law. The Crown relies on *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 24, which states: "The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback."

[65] For a warrantless search incident to arrest to be a lawful search, the Crown must show: 1) the appellant's arrest was lawful; 2) the search was for a valid objective related to the arrest such as the discovery and preservation of evidence; and 3) the search was executed in a reasonable manner: see *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 186; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 27; *Saeed*, at para. 37; see also *R. v. Amare*, 2014 ONSC 4119, at paras. 83-86, per Hill J., aff'd 2015 ONCA 673, for a very helpful summary of the governing principles and jurisprudence concerning the police authority to search without a warrant incident to arrest, as well as the principles governing arrest based upon information from confidential informants.

[66] In this case, the police had reasonable and probable grounds to arrest the appellant given the information they had received from their confidential informants that the appellant was in possession of a large quantity of drugs. The arrest was therefore lawful and the first requirement was met.

[67] The search was conducted in pursuit of valid purposes connected to the arrest, including protecting evidence from destruction at the hands of the arrestee, and discovering evidence which could be used at trial: see *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 19; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 49. The police had reasonable and probable grounds to believe the bedpan vigil search would afford evidence of the offence for which the appellant was arrested. The police had reliable information from their

informants that the appellant's practice was to secret the drugs he sold in his rectum and, importantly, the police had also been informed that the drugs had been packaged for insertion into his rectum. The crucial link between the location and purpose of the search incident to arrest and the grounds for the arrest was therefore present: see *Golden*, at paras. 98-99; *Fearon*, at para. 24.

[68] I recognize that the jurisprudence holds that the general framework of the common law power to search incident to arrest "must be modified so that the common law search power complies with s. 8 of the *Charter* in light of the particular law enforcement and privacy interests at stake in this context": see *Fearon*, at paras. 14-15. For this reason and as noted above, the police must have reasonable and probable grounds to believe the bedpan vigil search will afford evidence of the offence for which the appellant was arrested as well as reasonable and probable grounds to arrest: see *Saeed*, at paras. 74-78.

[69] Having regard to the great harm wrought by illicit drugs and the lack of privacy interest in waste expelled from the body in allowing nature to take its course (see *Monney*, at para. 45) I would be prepared to hold that the second requirement of a search incident to arrest is also met.

[70] However, even accepting that the first two requirements of a search incident to arrest are met in this case, the search was not valid because it was not conducted in a reasonable manner.

[71] In *Cloutier*, L'Heureux-Dubé J. dealt with whether a frisk search as incidental to the common law power to arrest without a warrant was lawful. After holding, at para. 62, that the purpose of the search must be related to the objectives of the proper administration of justice and not to intimidate, ridicule or pressure the accused in order to obtain admissions, L'Heureux-Dubé J. held: "The search must not be conducted in an abusive fashion, and in particular the use of physical or psychological constraint should be proportionate to the objective sought and the other circumstances of the situation."

[72] In *R. v. McGuffie*, 2016 ONCA 365, at para. 49, Doherty J.A. stated:

> Section 8, like s. 9, is reflective of an individual's right to be left alone by the state absent justification for state interference with the individual. The constitutional protection in s. 8 rests on the fundamental belief that privacy, in its various manifestations, is an essential precondition to individual liberty and security of the person. State intrusion upon privacy must be reasonable; that is, any law authorizing an intrusion must be reasonable and the manner in which the intrusion is effected must be reasonable…. [Citations removed.]

[73] I begin first with the strip search of the appellant. Although it was reasonable to carry out the search on the basis of the information received by police that the appellant may have concealed drugs within or on his person, the search was carried out in a manner that violated the appellant's right to privacy. It was not conducted in a private area, but an area where one could see into the room; it was inadvertently video recorded. Rather than proceeding incrementally

so as to ensure that the appellant was not completely undressed at any one time, the appellant was completely naked for a period of time: see *Golden*, at para. 101 (conditions 7 and 8).

[74] The bedpan vigil search of the appellant was also carried out in an unreasonable way. The appellant was handcuffed to the bars of his cell using three sets of handcuffs that were linked together for the first 21 to 22 hours of his detention. The handcuffs allowed the appellant to sit or lie on a steel bench or roll over, but prevented him from moving his hands below his chest.

[75] At the very least, the chaining of the appellant to the bars of his cell does not meet the requirement that the use of physical constraint be proportionate to the objective, or strike an appropriate balance between the need for effective law enforcement and the appellant's interests in privacy and dignity. A lesser restriction (oven mitts duct taped to the appellant's hands while handcuffed), proved equally effective at preventing the appellant from removing or consuming the drugs, and allowed the appellant greater freedom of movement. This restraint was also less demeaning to the appellant's dignity.

[76] Moreover, the appellant was lodged in his cell in long johns and only given his track pants to wear overtop after a day had gone by. He had no proper bed, and, initially, no bedding. Only after he complained of being cold, likely due to his withdrawal symptoms, was he given a blanket.

[77] A further factor going to the unreasonableness of the search is the police indifference to the appellant's right to security of the person, one of the three protections afforded by s. 7 of the *Charter*. The right to security of the person is engaged when state action has the likely effect of impairing a person's health: see *Monney*, at para. 55. It takes on an especially important role where investigative techniques employed by the police, such as a bedpan vigil search, are conducted in a manner that has the potential to endanger a detainee's health.

[78] The right to security of the person also includes protection of the psychological integrity of an individual. That is, the right protects against "serious state-imposed psychological stress": see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 57.

[79] Two aspects of this case raise concerns. First the police were aware that the appellant was an addict. From Const. Vosburg's casual conversation with a doctor, he knew that the appellant's withdrawal symptoms would be "like getting the flu times ten", and that Tylenol could provide some relief. Yet even knowing this, and as the appellant began to show symptoms of withdrawal, the police made no provision for measures to ease the appellant's discomfort such as having a doctor assess him for prescription medication, or provide for medical administration of ordinary Tylenol. There is no question that the police simply failed to minimize the appellant's discomfort during his detention.

[80] Second, during the initial phase of the investigation, the police believed that the appellant potentially had heroin and crystal methamphetamine, in fairly large quantities, stored in his rectum. Const. Vosburg testified he was not overly concerned that the packages in the appellant's rectum might rupture, given the information that this was where the appellant regularly stored the drugs he sold, and the fact the appellant seemed to display no concern for himself. However, this does not take into consideration the prolonged period of time over which the drugs could remain in the appellant's rectum if he were unwilling to eliminate them.

[81] The only medical plan the police had was that if the officers observed signs of medical distress they would call an ambulance or take the appellant directly to the hospital. They did not know, however, what risks to the appellant's health would arise if drugs from a packet were to break apart in his rectum, how long it would take before any signs of medical distress would arise, how long it would take to get him to the hospital or to obtain an ambulance, or whether that time was likely to be sufficient to ensure that serious health repercussions did not ensue.

[82] In my opinion, the police have a duty to take reasonable steps to ensure that the accused's safety and security of the person are not compromised as a result of the nature of the search. Reasonable steps can only be taken if the police inform themselves as to the risks of the procedure they are carrying out.

[83] I find support for my position in the jurisprudence. In *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 118, McLachlin C.J. and Major J. held that “delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the *Charter*” since delays in medical treatment can result in serious physical pain, or even death.

[84] Further, *Monney* stands for the proposition that, when confronted with a person in custody who has ingested drugs, state authorities need to take reasonable steps to ensure that person’s safety and security of the person. However, in *Monney*, the Supreme Court considered the threat to the appellant’s security of the person to be self-induced because he was told to advise the customs officers if he felt unwell or wished to see a doctor and he did not do so. In this case, it appears the appellant was not so-advised. In any event, the appellant testified that he asked the police to see a doctor but no effort was made to comply with his request. The trial judge made no finding on the point.

[85] No evidence was before the court as to any meaningful distinction between the health risks presented by a person who has ingested drugs, and a situation like this where the appellant was believed to be storing significant quantities of a variety of drugs inside his rectum.

[86] Having regard to the evolution of s. 7 jurisprudence, and the preplanned circumstances of the appellant's detention, the failure of the police to ensure that serious repercussions to the appellant's health would not ensue from his prolonged detention, or from any possible delay in obtaining medical treatment in the event of an emergency, is an aggravating circumstance that makes the manner of the search and seizure even more unreasonable.

[87] The trial judge erred in holding that the police conducted the search in an appropriate manner. While the trial judge rightly acknowledged that the unusual method of concealing drugs by the appellant warranted the use of a "dry cell" and watchful observation by the police for medical distress, in addition to noting the fact that the appellant was given cigarette breaks, food and water, the trial judge did not consider whether the physical restraint of the appellant was proportionate and whether it interfered with his privacy and dignity as little as possible. Nor did the trial judge consider the serious deficiency in police efforts to understand and plan for the medical risks to the appellant.

[88] I conclude that the manner in which the search was carried out was a flagrant breach of the appellant's rights under s. 8 and aggravated by the police indifference to his rights under s. 7.

[89] Finally, in my view, the failure by the police to bring the appellant before a justice of the peace without delay constitutes an arbitrary detention contrary to

s. 9 of the *Charter.* As the Court of Appeal for Newfoundland and Labrador stated in *Simpson*, a violation of s. 503 must be viewed as an arbitrary detention whether the failure to comply with s. 503 was deliberate or simply neglectful. I agree with that conclusion.

(4) The evidence obtained should have been excluded pursuant to s. 24(2) of the *Charter*

[90] An application to exclude evidence under s. 24(2) of the *Charter* requires the court to assess and balance the effect of admitting evidence obtained in a manner that violates *Charter*-protected rights on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits: see *Grant*, at para. 71. Under the *Grant* analysis, the first two factors pull towards the exclusion of the evidence, while the third pulls towards its admission; in practical terms, the third inquiry is important when one, but not both, of the first two inquiries pull strongly towards the exclusion of the evidence: see *McGuffie*, at paras. 62-63.

[91] Because the trial judge erred in principle in not recognizing the cumulative effect of the *Charter* breaches that took place, no deference is owed to his analysis under s. 24(2): *McGuffie*, at para. 64.

[92] The Crown submits that the seriousness of the *Charter*-infringing conduct in this case is attenuated by the good faith of the police who believed that the warrant exempted them from the requirement to bring the appellant before a justice of the peace under s. 503. In *Grant*, at para. 75, McLachlin C.J. and Charron J. acknowledged that good faith on the part of the police can reduce the need for the court to disassociate itself from the police conduct. However, they also identified what good faith conduct is not:

> [I]gnorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith…. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. [Citations omitted.]

[93] While I accept that the police conduct in this case is somewhat mitigated by their efforts to seek judicial authorization, it does not excuse the overall conduct of the police in this case. The failure to bring the appellant before a justice of the peace without delay is only one part of the picture. As discussed, that breach was compounded by a demonstrated disregard for the appellant`s privacy, dignity, health and safety. In these circumstances, I do not accept that the officers were acting in good faith.

[94] With respect to the second requirement under *Grant*, the impact of the *Charter* breaches in this case was not merely fleeting and technical; it was prolonged and serious.

[95] In this case, the first two *Grant* factors militate strongly in favour of excluding the evidence. Although the offences were serious, and the evidence obtained was real evidence, consideration of this third factor does not outweigh the first two, and I would exclude the drug evidence under s. 24(2).

D. DISPOSITION

[96] Given the exclusion of evidence under s. 24(2), I would accordingly set aside the appellant's convictions, and order that he be acquitted on all charges.

Released: (K.M.W.) July 20, 2016

"K.M Weiler J.A."
"I agree Janet Simmons J.A."
"I agree G.J. Epstein J.A."