Citation: *R.* v. *Marges, 2012 YKTC 102*

Date: 20121106
Docket: 11-00876B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

KELLY MARGES

Appearances:
Eric Marcoux — Counsel for the Crown
Brook Land-Murphy — Counsel for the Defence

RULING ON *CHARTER* APPLICATION
(Sections 8, 9 and 10 Breaches)

[1] Mr. Marges has been charged with having committed offences under sections 5(2) and 4(1) of the CDSA. He also faces several breach of recognizance charges, two of which he has entered guilty pleas to.

[2] Counsel for Mr. Marges has brought an application seeking exclusion of evidence pursuant to s. 24(2) of the *Charter*, alleging breaches of Mr. Marges' section 8, 9 and 10 *Charter* rights.

[3] Counsel is also seeking that the prosecution be judicially stayed, which I assume is an application made under s. 24(1) of the *Charter*, although that was not specifically stated in the Notice of Application.

[4] A *voir dire* was entered into at the start of the trial. Three witnesses testified in the *voir dire*: Cst. Brian White, Operational Communications Centre ("OCC") Operator Angie Hall and Mr. Marges. Filed as Exhibits are the Recognizance Mr. Marges was subject to, a Warrant for Arrest out of Saskatchewan and two overlapping transcripts of recordings of calls between Ms. Hall, two other OCC operators and several members of the RCMP. Cst. White testified that there are two transcripts because there were two work stations with separate recording systems. It was after the initial transcript had been received that the RCMP learned that there was a second recording and had it transcribed as well.

[5] Cst. White testified that he was in his police cruiser parked outside the Lizards bar on Main Street at approximately 1:50 a.m. on March 25, 2012. He was parked there simply to provide a police presence outside the bar at closing time. While parked he noticed an individual known to him through his time working out of the RCMP M Division's drug section, cross the street and go to the side passenger door of a Dodge Caravan, which was parked in front of the Gold Rush Hotel. This individual looked into the vehicle and then came back across the street.

[6] Another individual then crossed the street, entered the passenger side of the van and the van drove to the parking lot at the end of the Gold Rush. The first individual then entered the vehicle in the parking lot.

[7] Cst. White drove into the back alley behind Lizards and the Gold Rush Hotel and observed the van leaving the parking lot at approximately 2:20 a.m. He observed the

van turn right out of the back alley onto 6th Avenue. The van did not engage its right signal light before turning right.

[8] Cst. White activated the police cruiser's emergency lights and the van was pulled over by MicMac Toyota at 2:24 a.m. Cst. White stated that he was suspicious because the driver of the van seemed to be going out of his way to avoid him. He stopped the van because of his concerns about this suspicious behaviour and because the signal light had not been turned on prior to the vehicle turning.

[9] Cst. White had a brief discussion with the individual with whom he had had previous dealings, who was seated in the passenger seat. He then asked the driver, Mr. Marges, for his driver's license and the vehicle registration. These were provided to him. Cst. White could smell liquor in the vehicle and Mr. Marges stated that he had consumed three beers. Cst. White, due to the evidence that Mr. Marges had consumed alcohol, formed the opinion that he had grounds to make the approved screening device ("ASD") demand. As he did not have ASD with him, Cst. White did not make the demand at that time.

[10] Cst. White returned to his police cruiser at approximately 2:24 a.m. and he spoke with Ms. Hall. I note from the time entry on Exhibit "A", one of the two OCC transcripts, that this occurred at 2:24 a.m. Cst. White provided the vehicle registration number and Mr. Marges' driver's license number and personal information. He also asked for the ASD to be brought to the scene from the nearby Detachment. Cst. White stated that Cst. Wallingham arrived within approximately 5 minutes with an ASD, although he conceded in cross-examination it could have been as many as ten minutes.

[11] The query regarding Mr. Marges' driver's license was answered within a minute and Ms. Hall provided information to Cst. White that Mr. Marges had an outstanding warrant for his arrest in Saskatchewan on a charge of possession for the purpose of trafficking. She also advised Cst. White that Mr. Marges was also on a Recognizance out of Saskatchewan, with several terms, including that he stay within 100 km of his residence in Newfoundland, that he abide by a curfew between 11:00 p.m. and 7:00 a.m., and that he abstain from the use of alcohol.

[12] Cst. White asked Ms. Hall to contact the RCMP in Saskatchewan and find out whether they wished to have the warrant "extended". Ms. Hall told Cst. White that the warrant indicated that it was radius Saskatchewan only, and CPIC contained no further information. She told Cst. White that she would contact the RCMP in Saskatchewan to enquire further into their intentions. Both Ms. Hall and Cst. White testified that there is usually a note on the CPIC entry accompanying a warrant when the RCMP member in the originating jurisdiction wishes to extend the warrant, and that there was no such note in this case.

[13] Cst. White testified that in the course of events he went back and forth between the police cruiser and the van several times.

[14] Mr. Marges testified that Cst. White went to the police cruiser with his driver's license and registration. Upon his return 5 – 10 minutes later, Cst. White asked him about the outstanding warrant for his arrest out of Saskatchewan. Mr. Marges stated that he told Cst. White it was for having weed in his possession about three years before.

[15] After this conversation, Cst. White returned to his police cruiser. He was informed by Ms. Hall that the response from the RCMP in Saskatchewan was that they did not wish to have the warrant extended. By this time, although it is not certain exactly when, the ASD had arrived. Cst. White returned to the van and gave Mr. Marges the ASD demand and administered the ASD. This occurred at 2:45 am. A "Warn" reading was indicated. As a result, Cst. White advised Mr. Marges that his driver's license would be suspended for 24 hours and the van would be impounded. Cst. White asked that Mr. Marges and the other two individuals wait outside the van while he completed the paperwork for the suspension and the impoundment. Mr. Marges testified that Cst. White told him at this time that the warrant was not going to be extended. Mr. Marges believed that he was being detained at this time only for the purposes of waiting until the ASD-related paperwork was completed.

[16] Cst. White testified that it was his intention to complete the paperwork for the driving suspension and the impoundment and then let Mr. Marges and the others go. He stated that he did not intend to arrest Mr. Marges for any breach of the Saskatchewan recognizance as it was not his practice do so. However, while he was doing the paperwork for the suspension and the impoundment, he received a further call from Ms. Hall indicating that the Saskatchewan RCMP had changed their minds and now wanted to have Mr. Marges arrested and held overnight. Ms. Hall testified that this information was received at 2:51 a.m. Cst. White stated that he received this information between 5 – 10 minutes after he was initially told otherwise.

[17] Cst. White stated that he believed that he had grounds to arrest Mr. Marges based upon the information about the warrant relayed to him by Ms. Hall after she had

been in contact with the Saskatchewan RCMP. He stated that he believed that the warrant to arrest Mr. Marges was in effect in the Yukon and that he had the jurisdiction to arrest and hold Mr. Marges on it.

[18] According to Cst. White, he arrested Mr. Marges on the Saskatchewan warrant at 2:49 a.m. He provided Mr. Marges his right to counsel and police caution, and Mr. Marges stated that he would like to speak to a lawyer. Cst. White then conducted a cursory pat-down search, handcuffed Mr. Marges and placed him in the police cruiser for transport to the Arrest Processing Unit ("APU") at the Whitehorse Correctional Center. Cst. White attributed the discrepancy in times between his evidence and that of Ms. Hall to the way his watch was set. In cross-examination, Cst. White agreed that the only time entries he had made in his notes and reports were at 1:50 a.m., when outside Lizards, and 2:45 a.m. when he gave the ASD demand to Mr. Marges.

[19] Ms. Hall advised Cst. White while he was on his way to the APU that she had a contact number and name for the Saskatchewan RCMP. Cst. White testified that he told Ms. Hall that he would obtain this information from her after he arrived at the APU. He received this information from Ms. Hall between 3:30 and 3:45 a.m. at the APU but did not attempt to contact the Saskatchewan RCMP.

[20] During the ride to the APU, Cst. White asked Mr. Marges some questions regarding the circumstances of the warrant and Mr. Marges told him it was in regard to 20 lbs of marijuana.

[21] After arriving at the APU at 3:02 a.m., Cst. White conducted a more thorough pat-down search of Mr. Marges. He stated that he did so for three reasons: 1) to look

for evidence, 2) for safety reasons, and 3) to prepare an inventory of Mr. Marges' possessions to be itemized on the C-13 form.

[22] Prior to conducting the search, Cst. White asked Mr. Marges if he had anything on him that would hurt him, to which Mr. Marges replied that he had three marijuana joints. Cst. White also located some cocaine in Mr. Marges' coat pocket. Mr. Marges was wearing the coat at the time this was located. Mr. Marges "blurted out" that this was 1 oz of cocaine. Cst. White located another substance that Mr. Marges stated was half an ounce of MDMA. Cst. White also located the three joints of marijuana, a marijuana grinder, a cell phone and $195.00 in cash. Mr. Marges told Cst. White that the jacket was not his.

[23] After locating the drugs, Mr. Marges was *Chartered* and warned again.

[24] Mr. Marges was provided the opportunity to speak to counsel at 3:15 a.m., following which he was given over to a Corrections Officer to be lodged in cells.

[25] Later that same day, Cst. White received e-mail correspondence from the Saskatchewan RCMP indicating that they were not going to extend the warrant for Mr. Marges. They have since changed their mind again and advised Cst. White that they intend to come and get Mr. Marges for return to Saskatchewan after he has concluded the Yukon matters.

Positions of Counsel

S. 9 Arbitrary Detention and Unlawful Arrest

[26] Counsel for Mr. Marges argues that he was arbitrarily detained. The first prong of her argument is that there was a 15 – 21 minute delay between the time that Cst. White formed the suspicion Mr. Marges was operating a motor vehicle after consuming alcohol, and the breath demand being made. Mr. Marges was not free to leave the scene and was not told why he was being kept there. Section 254 of the *Code* requires that the ASD demand be made forthwith after a police officer has a reasonable suspicion that the operator of a motor vehicle has alcohol in his blood (***R.*** v. ***Williams,*** 2007 YKTC 17 at para. 5). A failure to comply with the forthwith requirement constitutes an arbitrary detention.

[27] Mr. Marges' counsel also argues that his arrest on an unendorsed warrant from Saskatchewan was unlawful. Defence says that Cst. White improperly arrested Mr. Marges on the warrant, as it was not in force within the Yukon and none of the grounds for a warrantless arrest set out in s. 495 of the Code were applicable. At most, Cst. White had the basis for an investigative detention of Mr. Marges while he took further steps to obtain additional information regarding the basis for the warrant and whether the Saskatchewan RCMP in fact intended to take the required steps to execute the warrant in the Yukon.

[28] Crown counsel, on the other hand, submits that the arrest of Mr. Marges was lawful. Counsel cites the provisions of s. 503 in support of his position, stating that it is implicit in this section that there is a power of arrest. In the alternative, counsel submits that the provisions of s. 495 authorized the arrest of Mr. Marges.

[29] Crown says that Mr. Marges was almost immediately arrestable, either on charges for breaching his recognizance, or on the arrest warrant out of Saskatchewan. The fact that Cst. White did not immediately arrest Mr. Marges, shows that Cst. White was taking reasonable steps to avoid arresting Mr. Marges unlawfully.

S. 8 Unreasonable Search and Seizure

[30] Defence counsel submits that the search of Mr. Marges in which the drugs were found was unlawful as it flowed directly from his unlawful arrest. Although I have not yet heard argument on s. 24(2), counsel has indicated that she will be seeking the exclusion of the drugs found during this search.

[31] Crown counsel submits that the arrest of Mr. Marges was lawful and therefore the search was also lawful.

S. 10 Reasons for Detention and Right to Counsel

[32] Counsel for Mr. Marges submits that his s. 10(a) and (b) *Charter* rights were breached because he was not promptly informed of the reasons for his detention and he was not informed of the right to speak to legal counsel and/or provided the opportunity to do so without delay.

[33] Defence counsel submits that Mr. Marges was clearly detained by Cst. White's roadside stop. The original purpose of the detention was a lawful traffic stop due to the failure of Mr. Marges to signal a right hand turn. The purpose of the detention went beyond the traffic stop and became two-fold: firstly, to conduct the impaired driving investigation and, secondly, to conduct a drug investigation, once Cst. White learned about the warrant out of Saskatchewan. Counsel concedes that the drug investigation

was only in relation to the validity of and potential arrest on the warrant and does not argue that Cst. White was investigating whether Mr. Marges was currently in possession of illegal drugs.

[34] Defence says that while a right to counsel was not automatically triggered by Mr. Marges' detention on the impaired driving investigation, the 16 – 21 minute delay between the stop and the ASD demand imposed an obligation on Cst. White to both inform Mr. Marges of why he was being detained and provide him the information and opportunity at roadside to use a phone to contact a lawyer.

[35] Defence counsel also submits that Mr. Marges had the same right to counsel when Cst. White detained him for the warrant investigation, and that this was not provided to him.

[36] Defence further submits that Cst. White failed to hold off questioning Mr. Marges after his arrest and before he had the opportunity to contact legal counsel, despite Mr. Marges stating that he wished to do so.

[37] Crown counsel says that Cst. White was acting properly with respect to the impaired driving investigation and that no right to counsel was triggered until Mr. Marges was arrested on the warrant. To the extent that there was a relatively lengthy delay prior to the ASD being administered, Cst. White was reasonably conducting a parallel investigation regarding the Saskatchewan warrant. In these circumstances, Cst. White was not obligated to provide Mr. Marges immediately either the information regarding his right to counsel or the opportunity to exercise the right.

[38] With respect to the warrant, Crown submits that Cst. White did properly inform Mr. Marges of the fact that there was an outstanding arrest warrant for him out of Saskatchewan for possession for the purpose of trafficking prior to arresting him, and then informed Mr. Marges at the time of arrest that he was being arrested on that warrant. Prior to the arrest, Mr. Marges' right to counsel was not engaged. Once Mr. Marges was arrested, Cst. White promptly advised Mr. Marges of his s. 10(b) right.

[39] Crown counsel concedes that Mr. Marges' right to counsel was breached when Cst. White continued to ask him questions between the time of his arrest and his being given the opportunity to speak to counsel. Crown indicates he will not be seeking to have any of Mr. Marges' statements to Cst. White between the time of his arrest and his speaking to counsel admitted into evidence.

Analysis

[40] What occurred here was that a traffic stop turned into an impaired driving investigation. Shortly after this investigation commenced, a parallel drug investigation on an extra-jurisdictional warrant also started. The drug investigation ended when Cst. White received information that the Saskatchewan RCMP did not wish to have their warrant extended. The impaired driving investigation continued. It was drawing to a conclusion, in that Cst. White was preparing the paperwork for Mr. Marges in regard to a license suspension and vehicle impoundment, when, based upon the change in the Saskatchewan RCMP's position on extending the warrant, the drug investigation re-commenced and resulted in the almost immediate arrest of Mr. Marges on the warrant.

Disentangling the various threads of Mr. Marges' detention, arrest, and subsequent search has proven complicated, to say the least.

The initial vehicle stop and Mr. Marges' detention

[41] I find that the initial stop of Mr. Marges' van by Cst. White was lawful. The failure of the van to make a right turn signal provided Cst. White the basis to make a traffic stop. The smell of liquor in the vehicle and the statement by Mr. Marges that he had consumed three beers provided grounds for Cst. White to begin an impaired driving investigation. While Mr. Marges' detention on this basis, for the impaired investigation, was lawful, he was not properly informed of this reason for it until he was given the ASD demand, the timing of which is an issue I discuss below.

[42] I also find that the information provided by the OCC operator during the query of Mr. Marges' driver's license provided a foundation for Cst. White to inquire further into the warrant and the intentions of the Saskatchewan RCMP with respect to extending the warrant into the Yukon. Mr. Marges' detention on this basis was also lawful, and I find that he was, for all practical purposes, informed of it through the conversation he had with Cst. White approximately five to ten minutes after he surrendered his license. By then Cst. White had determined that the outstanding warrant was an independent ground on which to detain Mr. Marges, and there was no unusual delay in advising him of this reason.

[43] With respect to the impaired driving investigation, it is clear in law that s. 254 requires that both the breath demand and the provision of the sample be made forthwith upon the officer forming the suspicion that the operator of a motor vehicle has alcohol in

his system (see ***R. v. Woods***, 2005 SCC 42). While a delay in either making the demand or in administering the ASD may be justified, it must be reasonably necessary in the circumstances (***R. v. Megahy***, 2008 ABCA 207).

[44] In the present case, the primary reason for the initial delay in making the demand was the fact that Cst. White did not have an ASD in his police cruiser. After the ASD arrived, the subsequent delay in making the demand and administering the ASD was due primarily to Cst. White making inquiries into the Saskatchewan warrant. While there is an understandable pragmatic reason for this delay, the correct approach, at a minimum, would have been to comply with the forthwith requirements of s. 254(2) as soon as Cst. Wallingham arrived with the ASD and not wait another 6 – 16 minutes before making the breath demand and obtaining the sample. Alternatively, as Mr. Marges was in possession of a cell phone, Cst. White could have made the demand at the outset of the investigative detention and then provided him the opportunity to contact counsel during the delay.

[45] In my view, Mr. Marges should have been provided the ASD demand as soon as Cst. White had the grounds for making the demand. It is better that any delay arising out of not having the ASD immediately available occur between the giving of the demand and the taking of the breath sample than prior to the giving of the demand. The reason is that the detained person is made aware of the reason for his or her detention early in the investigation and then can make an informed decision about whether they wish to contact counsel while waiting. This right to contact counsel can be triggered when delay occurs, depending on the circumstances in which the delay occurs.

[46] I find that the requirements of s. 254(2) were not complied with. As per *Woods*, at para. 15, the failure to comply with the immediacy requirement of s. 254(2) constitute breaches of Mr. Marges s. 8 and s. 9 *Charter* rights. As well, Mr. Marges' s. 10(a) and 10(b) rights were breached in the course of the investigation. Mr. Marges should have been advised of the reason for his detention and of his right to contact counsel. He also should have been provided a number for duty counsel. He had a cell phone, and this call could readily have been made from the roadside while Cst. White was waiting for the ASD and completing other inquiries.

[47] However, Mr. Marges was not only detained for the impaired driving investigation. At various points during the roadside stop, he was also detained with respect to Cst. White's investigation into whether the Saskatchewan warrant was meant to be extended. Defence argues that the failure to advise Mr. Marges that he had the right to contact counsel with respect to this situation was a distinct breach of his s. 10(b) right.

[48] As I said earlier, Mr. Marges was aware early on that at least part of the police interest in him was due to the outstanding Saskatchewan warrant, so no s. 10(a) concerns arise with respect to this reason for detention. It is clear, however, that the right to retain and instruct counsel is triggered at the outset of an investigative detention, although preliminary or exploratory encounters do not necessarily constitute a detention within the meaning of the *Charter*. The immediacy of the police obligation to inform a detainee of his right to counsel is circumscribed by concerns about officer or public safety, or reasonable limitations prescribed by law and justified under s. 1 of the *Charter*. See ***R. v. Suberu***, 2009 SCC 33.

[49] The investigation undertaken by Cst. White into the outstanding warrant went beyond the preliminary or exploratory, and Mr. Marges was not free to leave. The constable had Mr. Marges' driver's license and intended to keep Mr. Marges until he was satisfied that the warrant was not to be extended. There were no public or officer safety concerns that lent any urgency to the situation. Mr. Marges was advised of this basis for his detention, and he should have been advised of his right to contact a lawyer. Again, with the time delay, the opportunity to contact counsel could also have been provided and the call could have been accomplished from the roadside.

[50] There was as well a third distinct breach of Mr. Marges' s. 10(b) right to counsel, which occurred after his arrest. Although at the time of arrest Cst. White properly advised Mr. Marges of his right to retain and instruct counsel and was going to facilitate that contact once they had arrived at the APU, he did not hold off questioning Mr. Marges between the time of his arrest and the time he was able to speak to counsel. This was a clear breach of Mr. Marges' s. 10(b) right. Crown is not disputing this and will not be arguing for the admission of the statements Mr. Marges made before speaking to counsel.

The arrest and search incident to arrest

[51] While I have found that Cst. White's detention of Mr. Marges while he was investigating the Saskatchewan warrant was lawful, there is the separate issue of whether the arrest, when it actually occurred, was also lawful. Defence takes the position that it was not. Crown says it was, either pursuant to s. 503 or s. 495(1)(a).

[52] In order to address this issue, it is necessary to consider the provisions of the *Criminal Code* that govern the extra-territorial reach of warrants and the arrest powers of peace officers.

[53] Section 507 of the *Code* says that, where an information has been received and a case for doing so is made out, a justice shall issue a summons or a warrant to compel an accused to attend before him or another justice of the same territorial jurisdiction. A warrant issued under this section shall be directed to peace officers within the territorial jurisdiction of the issuing judge or justice (s. 513).

[54] Once a warrant is issued, s. 514 sets out how it may be executed:

> 514. (1) A warrant in accordance with this Part may be executed by arresting the accused
>
> > (a) wherever he is found within the territorial jurisdiction of the justice, judge or court by whom or by which the warrant was issued; or
> >
> > (b) wherever he is found in Canada, in the case of fresh pursuit.
>
> (2) A warrant in accordance with this Part may be executed by a person who is one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer.

[55] Where the accused is out of the territorial jurisdiction of the warrant, and where no peace officers from within the originating jurisdiction are involved in the execution of the warrant, s. 528 sets out a process whereby a warrant can be ‘endorsed’ in another territorial jurisdiction such that local police can execute it:

> 528. (1) Where a warrant for the arrest or committal of an accused, in any form set out in Part XXVIII in relation thereto, cannot be executed in accordance with section 514 or 703 [a section dealing

> with warrants issued by superior courts or courts of appeal], a justice within whose jurisdiction the accused is or is believed to be shall, on application and proof on oath or by affidavit of the signature of the justice who issued the warrant, authorize the arrest of the accused within his jurisdiction by making an endorsement, which may be in Form 28, on the warrant.
>
> (1.1) A copy of an affidavit or warrant submitted by a means of telecommunication that produces a writing has the same probative force as the original for the purposes of subsection (1).
>
> (2) An endorsement that is made up on a warrant pursuant to subsection (1) is sufficient authority to the peace officers to whom it was originally directed, and to all peace officers within the territorial jurisdiction of the justice by whom it is endorsed, to execute the warrant and to take the accused before the justice who issued the warrant or before any other justice for the same territorial division.

[56] An arrest warrant for an accused that has not been endorsed (or 'backed') cannot be executed in a different territorial jurisdiction by local police. That is the situation that arose here; i.e. the arrest warrant for Mr. Marges was issued in Saskatchewan and had not been endorsed in Yukon. Counsel and I agree that, to the extent that Cst. White could not have been executing the warrant when he arrested Mr. Marges, the arrest was warrantless.

[57] The warrantless arrest powers of a peace officer are set out in s. 495 of the *Code*:

> 495. (1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds,he believes has committed or is about to commit an indictable offence;
>
> (b) a person whom he finds committing a criminal offence; or
>
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII

> in relation thereto, is in force within the territorial jursdiction in which the person is found.
>
> …

[58] It is clear that s. 495(1)(c) does not apply to these circumstances as the warrant had not been endorsed in the Yukon. While (b) could have applied, as Mr. Marges was arrestable on a breach of probation charge or charges, Cst. White agreed that he did not and would not have arrested on this basis. Therefore, the arrest was made solely on the basis of the trafficking charges outstanding in Saskatchewan. The question that needs to be answered, therefore, is whether Cst. White had reasonable grounds to believe Mr. Marges had committed an indictable offence, and, specifically, whether the fact of an arrest warrant outstanding in Saskatchewan is sufficient to provide these grounds.

[59] This issue was recently flagged, but not answered, in ***R. v. Charles****,* 2012 SKCA 34. In *Charles,* the accused had been charged in Ontario with attempted murder and conspiracy to commit murder. An arrest warrant was issued by a justice, although at the time the police knew that Mr. Charles was in Saskatoon. Durham Regional Police officers went to Saskatoon to effect the arrest and sought the assistance of the RCMP in Saskatoon. There was an extensive briefing of the Saskatoon police by the Durham officers, and ultimately Saskatoon officers arrested Mr. Charles. Despite an intention to do so, the Ontario warrant was never endorsed. A search incident to the arrest led to the discovery of a loaded, semi-automatic handgun. Counsel for Mr. Charles succeeded in an argument at trial that the arrest and subsequent search were unlawful, and the gun was excluded. The Saskatchewan Court of Appeal disagreed, finding that the local police had sufficient reasonable and probable grounds to believe that Mr. Charles had

committed an indictable offence and he was therefore arrestable pursuant to s. 495(1)(a). The Court's conclusion relied on the briefing of the Saskatoon police, which gave these officers all the facts relied on by the Ontario police in obtaining the warrant. This background, especially when coupled with knowledge of an arrest warrant on the same facts, provided objective reasonable and probable grounds for the arresting officers to believe that Mr. Charles had committed an indictable offence. The Court found that, in these circumstances, it did not need to decide whether "knowledge of the existence of a warrant for the arrest of an accused on an indictable offence is itself sufficient to constitute reasonable and probable grounds for his arrest for that offence" (para. 14).

[60] This question, i.e. whether knowledge of the existence of an extra-territorial warrant for an indictable offence is sufficient to constitute reasonable grounds for an arrest per s. 495(1)(a), is exactly what needs to be determined in this case. There was no briefing of Cst. White by Saskatchewan police, and OCC operator Hall was not in a position to provide any of the facts that grounded the warrant. Essentially all Cst. White knew when he arrested Mr. Marges was that there was an outstanding warrant in Saskatchewan relating to a charge of possession for the purpose of trafficking under s. 5(2) of the CDSA. He did not know, with certainty, what substance or in what quantity. The extent to which he may have relied upon Mr. Marges' comments regarding "weed" could not provide him with the required certainty. Cst. White knew from Ms. Hall that Mr. Marges was awaiting disposition on the charge, but he did not know with certainty that it was a Schedule I or II substance. He did not know whether the Crown had made a summary election, which would have been possible for certain drugs in certain

amounts. He did not know that the warrant also contained the allegation that Mr. Marges failed to appear in court, which is an indictable offence.

[61] For the reasons that follow, I find that the knowledge of the existence of an extra-jurisdictional warrant did not, in these circumstances, provide Cst. White with sufficient grounds to arrest Mr. Marges. While in certain circumstances the knowledge of a warrant could be adequate, the information Cst. White had here was insufficient to make the arrest lawful. It was incumbent on him to seek out additional information to satisfy himself that the offence that Mr. Marges was being sought on was indeed an indictable offence, and he failed to do so.

[62] In order to understand the situations in which the existence of an extra-jurisdictional warrant can provide sufficient grounds for arrest, it is necessary to consider the scrutiny the warrant receives in both the issuing and executing jurisdiction. Unlike the receiving of an information, the issuance of process is a judicial act (***R. v. Allen*** (1974), 20 C.C.C. (2d) 447 (Ont. C.A.)). A judicial officer must be satisfied that there is some evidence that the accused committed the offence and some evidence on all the essential elements of the offence (***R.*** v. ***Whitmore*** (1987), 41 C.C.C. (3d) 555 (Ont. S.C. - H.C.J.), aff'd (1989) 35 O.A.C. 373 (C.A.)). This determination is made once in the originating jurisdiction, and it is not reviewed during the endorsement under s. 528. That section says that if the justice is satisfied of the signature of the justice, he shall endorse the warrant. Endorsement or backing in a different territorial jurisdiction is a purely administrative act.

[63] A peace officer can arrest someone for an extra-jurisdictional indictable offence. In that circumstance, the officer must take him or her before a justice in the officer's territorial jurisdiction (s. 503(3)):

> 503.
>
> …
>
> (3) Where a person has been arrested without warrant for an indictable offence alleged to have been committed in Canada outside the territorial division to where the arrest took place, the person shall, within the time prescribed in paragraph (1)(a) or (b), be taken before a justice within whose jurisdiction the person was arrested unless, where the offence was alleged to have been committed within the province in which the person was arrested, the person was taken before a justice within whose jurisdiction the offence was alleged to have been committed, and the justice within whose jurisdiction the person was arrested
>
> (a) if the justice is not satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the offence, shall release that person; or
>
> (b) if the justice is satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the offence, may
>
> (i) remand the person to the custody of a peace officer to await execution of a warrant for his or her arrest in accordance with section 528, but if no warrant is so executed within a period of six days after the time he or she is remanded to such custody, the person in whose custody he or she then is shall release him or her, or
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> (ii) where the offence was alleged to have been committed within the province in which the person was arrested, order the person to be taken before a justice having jurisdiction with respect to the offence.
>
> …

[64] Where a person has been arrested without warrant for an indictable offence that took place in another jurisdiction, section 503(3) only requires that the justice be

satisfied of the identity that person before making an order either detaining them for six days or, where the offence took place in the same province, sending them back to the court with jurisdiction over that offence.

[65] In my view, section 503(3)(ii) contains the implicit assumption that an out-of-territory warrant can be endorsed and executed after a warrantless arrest for the offences contained within. In this case, an accused would then be transported back to the jurisdiction that his charges arose in. In the event that the province or territory with jurisdiction over the offence does not wish to incur the costs of transport, the *Code* contemplates that the warrant will not be endorsed, the individual will be released, and the warrant will remain outstanding in the originating jurisdiction.

[66] However, s. 503 only applies when it is clear that the individual was indeed arrested for an indictable offence. This requirement tracks onto the warrantless arrest requirement in s. 495(1)(a), which is explicit about only applying to a person who there are reasonable grounds to believe has committed an indictable offence.

[67] In the case where an arresting officer has sufficient information to be satisfied that an extra-jurisdictional warrant is for an indictable offence, he can arrest prior to that warrant being backed. This makes sense for several reasons. Firstly, as indicated by Cst. White, the police do not wish to have every outstanding warrant endorsed in other territorial jurisdictions. The decision often revolves around a cost consideration that is touched on in para. 13 of *Charles*. Endorsement or backing presupposes that the originating province or territory is willing to bear the expense of transporting the accused

back to face trial. Without this willingness, there would be no way to bring the accused back to the issuing jurisdiction as required by s. 528.

[68] Secondly, even where the police in the originating jurisdiction want a warrant executed in another province, they may not know where the accused is. Pre-emptive endorsement in every province and territory would be arduous, and to this end, it makes sense that a warrant can be endorsed and executed after arrest. While I acknowledge that s. 703 of the *Code* provides for warrants effective throughout Canada[1], in my view requiring the police to seek a warrant out of a superior court or court of appeal for every accused that they would want to transport back, whether or not they have reason to believe he is in another jurisdiction, is also an onerous undertaking. It makes far more sense, given the instant availability of generally reliable information on CPIC, to allow the police to arrest an accused when they have knowledge of an outstanding warrant with respect to an indictable offence an accused is are alleged to have committed, and then avail themselves of the six day remand set out in s. 503(3)(b)(ii) to get the warrant endorsed and executed.

[69] The constitutionality of such an arrest depends on the fact that the warrant was judicially authorized in another jurisdiction. The existence of an information without process would clearly not be sufficient to provide the reasonable grounds necessary for a warrantless arrest under s. 495(1)(a). It is the guarantee of judicial consideration of

[1] Section 703 (1) reads: "Notwithstanding any other provision of this Act, a warrant of arrest or committal that is issued out of a superior court of criminal jurisdiction, a court of appeal, an appeal court within the meaning of s. 812 or a court of criminal jurisdiction other than a provincial court judge acting under Part XIX may be executed anywhere in Canada."

the elements of an indictable offence and the identity of the offender that allows a warrant to be acted on, even if, as in this case, the arresting peace officer does not have the facts on which to himself form objectively reasonable grounds for arrest, such as is found in *Charles*.

[70] However, here, Cst. White did not have sufficient grounds to effect the warrantless arrest of Mr. Marges. He knew there was an outstanding warrant on a trafficking charge, but he did not have reliable information about what substance was or in what amount. He did not know that the allegation was with respect to an indictable offence of possession for the purpose of trafficking. He did not know of the allegation of the failure by Mr. Marges to appear in court, which is an indictable offence. He did not inquire. While I do not find that Cst. White would have required an extensive briefing about the underlying facts of Mr. Marges charges, as was the case in *Charles*, he at a minimum should have ensured that the offence or offences were indeed indictable ones. He could have asked relevant questions of the OCC operator or requested to view the warrant. He could have phoned the responsible RMCP member in Saskatchewan. An investigative detention that allows the collection of this information would generally be lawful. Once satisfied that the outstanding possession for the purpose of trafficking charge in Saskatchewan was an indictable offence, or that Mr. Marges failed to appear in court. Cst. White could have arrested Mr. Marges and had the warrant backed later.

[71] I find, therefore, that Mr. Marges was the subject of an unlawful warrantless arrest. Although Cst. White knew that Mr. Marges was the subject of a warrant for possession for the purpose of trafficking extant in Saskatchewan, he did not have requisite reasonable grounds required by s. 495(1)(a) to believe that Mr. Marges had

committed an indictable offence, as he did not have sufficient information to know that the offence was an indictable one.

[72] I do not accept Crown's argument that s. 503 independently authorizes the warrantless arrest of an individual in order to bring the person before a justice. The power for a peace officer to arrest without warrant must be found in s. 495.

[73] As I have found the arrest by Cst. White to be unlawful, I find that the search of Mr. Marges at the APU to also have been unlawful.

Conclusion

[74] I find that Mr. Marges was lawfully detained on the traffic stop and the drug investigation. He was unlawfully detained on the impaired driving investigation, due to the failure to comply with the immediacy requirements of s. 254(2) and the search incident to this detention was also unlawful. I also find that his s. 10(a) right to be promptly informed of the reason for his detention was also breached with respect to Cst. White's pursuit of the impaired driving investigation.

[75] I find that Mr. Marges was unlawfully arrested on the Saskatchewan warrant and unlawfully searched incident to arrest. I therefore find that his s. 8 and 9 Charter rights were breached in the context of the drug investigation as well.

[76] I also find, that prior to his arrest, there were two distinct breaches of his *Charter* s. 10(b) right to counsel, with respect to the detention on both the impaired driving investigation and the drug investigation, and a further breach of his s. 10(b) right to

counsel when Cst. White questioned Mr. Marges after his arrest but before he had the opportunity to speak to counsel.

[77] In summary, Mr .Marges s. 8, 9, 10(a) and 10(b) rights were breached during the impaired driving investigation. I find that his s. 10(b) right on detention was breached during the investigative detention with respect to the Saskatchewan warrant, and that his s. 8, 9 and 10(b) rights were breached during and after his arrest on this warrant.

[78] I am prepared to hear further evidence, if required, and argument on the s. 24 *Charter* remedy for these breaches.

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COZENS C.J.T.C.