

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Robinson, 2016 ONCA 402

DATE: 20160530

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Doherty, Cronk and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Troy Robinson

Appellant

Mark Halfyard and Breana Vandebeek, for the appellant

J. Sandy Tse, for the respondent

Heard: February 17, 2016

On appeal from the convictions entered by Justice Brian Trafford of the Superior Court of Justice on December 10, 2013.

Doherty J.A.:

[1] The appellant, Troy Robinson, and his girlfriend, Nicole Browne, were jointly charged with several offences involving the possession of drugs and guns. One set of charges arose out of the seizure of guns and drugs found in a storage locker rented by Ms. Browne. The second set of charges related to drugs and guns found during a search of an apartment rented by Ms. Browne. It was the Crown's position that the appellant and Ms. Browne were jointly in possession of the guns and drugs found at both locations.

[2] The trial judge acquitted both the appellant and Ms. Browne on the charges involving the guns and drugs seized from the storage locker. He held that the Crown had failed to prove beyond a reasonable doubt that the guns and

drugs found at the storage facility actually came from the unit rented by Ms. Browne as opposed to one of the other units being renovated at the same time. The acquittals are not challenged on appeal.

[3] The trial judge convicted Ms. Browne on the charges relating to the drugs found in her apartment, but acquitted her on the gun charges. She has not appealed and the Crown has not appealed her acquittals.

[4] The trial judge convicted the appellant on the charges involving the guns and drugs seized from the apartment. He sentenced him to 7 years after credit for presentence custody. The appellant appeals his convictions, but does not appeal sentence.

[5] The appeal focuses on two *Charter* rulings made by the judge assigned to hear the pretrial motions (the “motion judge”). In her first ruling, the motion judge held that the search of the apartment rented by Ms. Browne violated s. 8 of the *Charter* because the affidavit relied on to obtain the warrant did not contain grounds justifying the execution of a warrant at night (after 9:00 p.m.). The search occurred about 9:50 p.m. The motion judge went on to hold, however, that the drugs and guns found in the apartment during the search should not be excluded from evidence under s. 24(2) of the *Charter*: see *R. v. Browne and Robinson*, 2013 ONSC 2141 (the “Search Ruling”). The appellant submits that the motion judge correctly held that s. 8 was violated by the execution of the warrant at nighttime, but erred in holding that the evidence should not be excluded.

[6] In her second ruling, the motion judge held that the police had reasonable grounds to arrest the appellant, rendering the detention lawful and the search of the appellant, conducted as an incident of that arrest, a reasonable search under s. 8 of the *Charter*. During that search the police seized the appellant’s keys, including a key to Ms. Browne’s apartment and a key to her storage locker. The Crown relied on those keys, along with other evidence, to support the argument that the appellant was in possession of the guns and drugs found in the storage locker and the apartment.

[7] The motion judge further held that even if the police did not have reasonable grounds to arrest the appellant, rendering the detention arbitrary and the search unreasonable, she would not have excluded the keys seized from the appellant from evidence under s. 24(2) of the *Charter*: see *R. v. Browne and Robinson*, 2013 ONSC 2041 (the “Arrest Ruling”).

[8] On appeal, counsel for the appellant submits that the motion judge’s finding that the police had adequate grounds to arrest was unreasonable

rendering the arrest and the search unconstitutional. He further contends that if he convinces this court that the arrest and search were unconstitutional, then this court should do its own s. 24(2) analysis. Counsel argues that the analysis should lead to the exclusion of the key to the apartment.

The Search of the Apartment

[9] Personnel at Yellow Self Storage were renovating several storage lockers at their facility. The contents of the units to be renovated were temporarily moved to other units. In the course of the move, employees found a handgun and ammunition. Their manager called the police. On May 26, 2011, the police obtained a search warrant for the relevant storage unit. Their search revealed 10 guns, including a machine gun, an assault rifle and a sawed off shotgun, over 4,000 rounds of live ammunition, and 1.5 kilograms of ecstasy.

[10] The records at Yellow Self Storage identified Ms. Browne as the renter of the unit from which the police believed the guns and drugs had been removed. The police made efforts to locate Ms. Browne and a few days later learned that she rented apartment 610 at 135 Rose Avenue in Toronto. The police decided to apply for a search warrant for the apartment.

[11] Constable Todd Storey prepared the affidavit in support of the search warrant application. He began working on the affidavit during the day on June 1, 2011, but was also required to attend to other matters. He eventually completed the affidavit and attended at the home of a justice shortly after 8:00 p.m. that day.

[12] In his affidavit, Constable Storey described the earlier search of the storage locker and Ms. Browne's connection to that locker. Constable Storey indicated that he believed that a search of the apartment could yield Ms. Browne's rental agreement for the storage locker, keys to the storage locker, and documents pertaining to the ownership, purchase and sale, or transfer of the firearms found in the storage locker. Constable Storey did not assert that he had reasonable grounds to believe that firearms would be found in the apartment.

[13] The justice signed the search warrant just before 9:00 p.m. Prior to signing it, he filled in the relevant blank indicating that the warrant could be executed between the hours of "9:00 p.m. June 1/11 to 9:00 p.m. June 3/11". According to Constable Storey, the justice knew that police were waiting near Ms. Browne's apartment.

[14] Constable Storey's affidavit did not request permission to execute the warrant at night, that is, after 9:00 p.m. Nor did the affidavit identify grounds

justifying the execution of the warrant at night. Constable Storey and the justice did not discuss the timing of the execution of the warrant. Neither turned their mind to the specific provisions in s. 488 of the *Criminal Code* applicable to the execution of search warrants at night.

[15] At 9:02 p.m., Constable Storey advised the officers who were watching Ms. Browne's apartment that the justice had signed the warrant. At about the same time, some of those officers saw Ms. Browne and the appellant walking away from the Rose Avenue apartment building toward the subway a short distance away. Detective Michael Balint, the officer in charge of the surveillance detail, gave instructions to arrest Ms. Browne and the appellant.

[16] The warrant authorizing the search of the apartment was executed at 9:50 p.m. By that time, the appellant and Ms. Browne were in custody and had been removed from the area. The officers, thinking someone might still be in the apartment, broke the door down to gain entry. Their subsequent search turned up two loaded handguns and crack cocaine.

[17] The search occurred after 9:00 p.m. and was by definition in the *Criminal Code* a nighttime search. Section 488 of the *Criminal Code* provides that search warrants must be executed by day unless the justice is satisfied, based on grounds set out in the affidavit in support of the warrant, that there are reasonable grounds to execute the warrant at night. The terms of the warrant authorized its execution after 9:00 p.m., but there were no grounds set out in the affidavit to support executing the warrant at night. The motion judge held that the failure to comply with s. 488 rendered the warrant invalid and the subsequent search of the apartment both warrantless and unreasonable.[\[1\]](#) The Crown does not challenge this finding.

[18] Having found a breach of s. 8, the motion judge turned to the admissibility of the evidence found during the search. She specifically applied the three-prong test enunciated in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71: see Search Ruling, at paras. 86-102. The motion judge ultimately concluded, at para. 102:

...[O]n the facts of this case, to exclude the evidence, particularly the firearms, would undermine the *bona fide*, although not perfect, efforts of the police in investigating crime, and would bring the administration of justice into disrepute.

[19] Counsel for the appellant acknowledges that the motion judge's s. 24(2) ruling is entitled to deference as long as the motion judge has considered the

proper factors and not made unreasonable or unsupported factual findings: see *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para.

44. However, his submissions invite the court to redo the s. 24(2) analysis done by the motion judge, especially as it involves the characterization of the police conduct resulting in the *Charter* violation, and the impact of that violation on the appellant's privacy interests.

[20] Dealing first with the nature of the police conduct, the motion judge characterized the failure of the police to either execute the warrant in the daytime, or comply with s. 488 as "due to inadvertence" and more "technical" than "substantive": Search Ruling, at para. 91. In coming to that conclusion, the motion judge accepted Constable Storey's evidence that while he was aware of the "nighttime" requirement in the *Criminal Code*, he had forgotten about that requirement when he prepared his affidavit and applied for the warrant. In considering Constable Storey's explanation, it should be recalled that he had begun the preparation of his affidavit earlier in the day and was not anticipating executing the search warrant at night. He neglected to turn his mind to the timing of the execution of the warrant when events intervened and delayed the completion of the affidavit and the attendance before the justice until shortly before 9:00 p.m. Clearly, as 9:00 p.m. approached, Constable Storey should have realized that the timing of the execution of the warrant had to be addressed either by complying with s. 488, or by delaying the execution of the warrant to the next morning.

[21] I would not use the word "technical" to describe the failure to comply with s. 488. I do, however, think it was open to the motion judge in the circumstances to characterize the non-compliance as "inadvertent". Accepting that characterization, Constable Storey's failure to comply with s. 488 is not the kind of police misconduct that requires the court to disassociate itself from that conduct by excluding the evidentiary fruits of the search. I would not interfere with the motion judge's treatment of the police failure to comply with s. 488 as it relates to an assessment of the seriousness of the *Charter*-infringing state conduct.

[22] I also see no reversible error in the motion judge's assessment of the impact of the s. 8 breach on the appellant's privacy interests. The police had ample grounds to obtain a warrant to search the apartment. Given the failure to comply with s. 488, the warrant should have been executed before 9:00 p.m. or after 9:00 a.m. the next morning. However, the actual impact of the search of the apartment on the privacy interests of both Ms. Browne and the appellant was not affected by the timing of the execution of the warrant. The entry and search at 9:50 p.m. as opposed to an hour earlier, or the next morning, caused no additional harm to the appellant's dignity, personal autonomy or privacy. As the

motion judge observed, the appellant was not present when the police entered and searched the apartment.

[23] The motion judge concluded, at para. 95, that the failure to comply with s. 488 “had no practical effect whatsoever on the *Charter* rights of Ms. Browne or Mr. Robinson”. I take the motion judge to mean no practical effect on the privacy interests of the appellant protected by s. 8. That conclusion was open to the motion judge and I would defer to it.

[24] The appellant has not satisfied me that the motion judge made any reversible error in her analysis of the admissibility of the evidence seized from the apartment. I would not give effect to this ground of appeal.

The Arrest of the Appellant

[25] Detective Balint was in charge of the officers assigned to watch Ms. Browne’s apartment on Rose Avenue on the evening of June 1, 2011. Detective Balint was an experienced officer with an extensive background in criminal investigations involving guns, drugs and gangs. He also knew the Rose Avenue neighbourhood very well.

[26] Detective Balint knew that Constable Storey was applying for a search warrant for the Rose Avenue apartment. He anticipated executing that warrant if and when it was granted. He and his fellow officers were also on the lookout for Ms. Browne. It was their intention, if they saw Ms. Browne, to arrest her and charge her with possession of the firearms and drugs that they believed had been found in her storage locker a few days earlier.

[27] Detective Balint knew of a prior association between the appellant and Ms. Browne. They had known each other for some time and were together on one occasion when the appellant was arrested. As of June 1, 2011, Detective Balint considered the appellant a “person of interest” in relation to the investigation pertaining to the firearms and drugs found in the storage locker.

[28] Detective Balint also knew the appellant to be a “player” in the criminal sub-culture within the neighbourhood. He knew the appellant had two prior convictions for firearm offences and had been the subject of an investigation in which it was alleged that the appellant had pistol whipped the victim.

[29] Before he saw the appellant on the evening of June 1, Detective Balint did not have reasonable grounds to believe that the appellant was connected to the firearms and drugs that had been found in the storage locker. He also did not

have reasonable grounds to believe that the appellant was living at or otherwise connected to the Rose Avenue apartment.

[30] At about 9:02 p.m. Detective Balint received word that the search warrant for the Rose Avenue apartment had been granted. He believed that the search warrant would authorize a search for firearms. In fact, as set out above, Constable Storey did not request a warrant to search for firearms, but had limited the warrant to a request to search for documents and other material connected to the firearms found in the storage locker.

[31] Shortly after Detective Balint received word that the warrant had been granted, he was advised that Ms. Browne and a male person were walking away from the apartment building at 135 Rose Avenue toward the subway stop a short distance away. As they were walking towards the subway, the male was identified as the appellant by another officer. Ms. Browne and the appellant were holding hands. Near the subway they stopped, embraced and kissed. Ms. Browne and the appellant parted company. She headed toward the subway and he headed back toward the Rose Avenue apartment. Detective Balint instructed the officers to arrest both Ms. Browne and the appellant.

[32] Two officers who had been following the appellant and Ms. Browne grabbed the appellant, forced him to the ground and handcuffed him. Detective Balint, who was a few feet away when the appellant was forced to the ground, told the appellant that he was under arrest for “possession of a firearm in relation to the Rose [Avenue] address”. Detective Balint told the appellant he had a right to counsel.

[33] The officers searched the appellant as an incident of his arrest. One of the officers found a set of keys in the appellant’s front pocket. It turned out that one key was for the apartment and another was for the padlock on Ms. Browne’s storage locker.

[34] In deciding to arrest the appellant for possession of firearms at the Rose Avenue apartment, Detective Balint relied on the following:

- he believed that a justice had just issued a warrant to search the Rose Avenue apartment for firearms;
- he knew of the nature and variety of the guns found in the locker, the quantity of ammunition found there, and the drugs seized from the

locker. He believed that this locker was rented by Ms. Browne. In his experience it was not uncommon for criminals to “store guns in different places, so they don’t keep all their eggs in one basket, so to speak”;

- he believed, based both on the information he received from the other officers at about 9:00 p.m., and his knowledge of their prior association, that the appellant and Ms. Browne had a close boyfriend/girlfriend relationship;
- he believed, based on what the officers had told him, that Ms. Browne and the appellant had exited the Rose Avenue apartment moments before their arrest and that the appellant was returning to that apartment when he gave instructions to the other officers to arrest the appellant; and
- he was aware of the appellant’s criminal lifestyle and, in particular, his prior involvement in firearms-related offences.

[35] The defence accepted that Detective Balint honestly believed he had reasonable grounds to arrest the appellant. The defence argued, however, that his belief could not be reasonably justified on the facts. As noted by the motion judge, at paras. 62-66 of the Arrest Ruling, the defence arguments raised two specific issues. First, was Detective Balint’s belief that there were reasonable grounds to believe that firearms would be found in the apartment reasonably justified? Second, was Detective Balint’s belief that the appellant had sufficient knowledge of, and control over, any firearm found in the apartment to place him in possession of that firearm reasonably justified on the evidence?

[36] Counsel for the appellant accepts that the motion judge properly identified the two relevant factual issues and the applicable legal principles. He submits, however, that the motion judge’s findings are unreasonable and based on speculation rather than legitimate inferences reasonably available on the evidence.

[37] This court can review the reasonableness of the motion judge’s findings. In doing so, however, it does not make its own assessment of the

evidence and the adequacy of the grounds relied on by the police officer, but instead considers only whether, on the totality of the evidence, the findings made by the motion judge were reasonably open to her. I will address the two crucial findings separately.

Were there reasonable grounds to believe that there were firearms in the apartment?

[38] When Detective Balint ordered the arrest of the appellant, he believed that a justice had just issued a warrant authorizing the entry and search of the apartment for firearms. He had not yet seen the warrant as the officer delivering the warrant to the apartment had just left the home of the justice. If the warrant granted by the justice had authorized the police to enter the apartment and search for firearms, the issuance of the warrant would have provided Detective Balint with reasonable grounds for the belief that firearms would be found in the apartment. However, as it turned out, the search warrant did not authorize a search for firearms. Can Detective Balint's mistaken belief that the warrant did authorize a search for firearms provide reasonable grounds to believe that firearms would be found in the apartment?

[39] Detective Balint believed, based on his knowledge of the investigation and specifically the nature and quantity of material seized from the storage locker rented by Ms. Browne, that the warrant to search her apartment, if granted, would inevitably authorize a search for firearms. As he put it in his evidence, he believed that a search for firearms would have been the first thing requested by the affiant on the application for the warrant. He was surprised, to say the least, that Constable Storey, a more junior and less experienced officer, did not believe that he had reasonable grounds to obtain a warrant to search for firearms.

[40] Section 495(1)(a) of the *Criminal Code* authorizes a peace officer to arrest without warrant a person who "on reasonable grounds" the officer believes has committed an indictable offence. The language focuses on the officer's state of mind and the reasonableness of the officer's belief, rather than the actual state of affairs. Reasonable grounds can be based on a reasonable belief that certain facts exist even if it turns out that the belief is mistaken: see *Eccles v. Bourque*, [1975] 2 S.C.R. 739, at pp. 744-45; *R. v. Herriott*, 2015 NBCA 33, 325 C.C.C. (3d) 325, at para. 21.

[41] In my view, it was reasonable in the circumstances for Detective Balint to believe that the warrant authorized a search of the apartment for firearms. The police had found an arsenal of unlawful weaponry in what they reasonably believed was Ms. Browne's storage locker a few days earlier. I think it was reasonable for a person of Detective Balint's experience to infer that a person in

possession of the number and kinds of weapons the police had found in what they believed was Ms. Browne's storage locker was a commercial trafficker in illegal firearms. As Detective Balint testified, in his experience those persons kept their firearms in more than one place. In my view, it was reasonably open to Detective Balint to believe that it was probable that Ms. Browne kept some of her firearms inventory in her apartment.

[42] The motion judge considered the defence argument that Constable Storey's failure to request a warrant to search for firearms demonstrated that there were not objectively reasonable grounds to believe that firearms would be found in the apartment. The motion judge did not agree that Constable Storey's judgment as to what might or might not be found in the apartment should be given equal weight to that of Detective Balint. She noted that Constable Storey's affidavit was inconsistent as to his belief concerning the possibility that firearms would be found in the apartment. She also observed that Constable Storey had much less experience in this kind of investigation than did Detective Balint. Finally, the motion judge observed that Constable Storey was not aware of the observations made of Ms. Browne and the appellant shortly before 9:00 p.m. on June 1. Those observations indicated that Ms. Browne had a very close relationship with the appellant, who had a significant history of criminal activity involving firearms. The motion judge concluded that these factors placed Detective Balint in a position to make a different and more informed assessment of the likelihood of firearms being found in Ms. Browne's apartment: Arrest Ruling, at paras. 67-78.

[43] The motion judge's findings were reasonably open to her on the evidence. This was not a case in which two officers with the same information arrived at different conclusions as to the existence of reasonable grounds: see *R. v. Brown*, 2012 ONCA 225, 286 C.C.C. (3d) 481. Here, one more experienced officer, with additional information not available to the other less experienced officer, formed the opinion that there were reasonable grounds to arrest the appellant.

[44] The motion judge was alive to the different assessments made by Detective Balint and Constable Storey. The mere fact that Constable Storey did not believe there were reasonable grounds to believe there were firearms in the apartment did not mean that Detective Balint's belief could not be reasonable. Constable Storey's assessment and the basis for that assessment were part of the larger evidentiary picture that the motion judge had to consider in determining whether Detective Balint's belief that there were weapons in the apartment was a reasonable one. The motion judge offered a full explanation for discounting to some extent Constable Storey's assessment and preferring the assessment of Detective Balint. I see no error in her analysis.

Were there reasonable grounds to believe that the appellant had possession of any firearm found in the apartment?

[45] The police could arrest the appellant only if there were reasonable grounds to believe that he was in possession, either alone or with Ms. Browne, of any firearms found in the apartment. Possession, for the purposes of the criminal law, requires both knowledge of and control over the thing said to be possessed: *Criminal Code* s. 4(3); *R. v. Pham* (2005), 77 O.R. (3d) 401 (C.A.), *aff'd* 2006 SCC 26, [2006] 1 S.C.R. 940.

[46] Although the motion judge used the somewhat general word “connected” to describe the relationship between the apartment and the appellant needed to establish possession, at para. 90, she also expressly and correctly instructed herself on the necessary elements of possession: see *Arrest Ruling*, paras. 66, 84. Counsel for the appellant does not allege any legal error by the motion judge.

[47] In concluding that the appellant was sufficiently connected to the apartment to provide reasonable grounds to believe that he was in possession of any firearm found in the apartment, the motion judge referred to the appellant’s close proximity to the apartment immediately before his arrest. Detective Balint had reasonable grounds to believe that the appellant and Ms. Browne had just left the apartment and he had reasonable and probable grounds to believe that the appellant was on his way back to the apartment when Detective Balint gave instructions to arrest him.

[48] The motion judge also referred to the relationship between the appellant and Ms. Browne. They had been friends for some time and had been together when the appellant was arrested a year earlier. Based on the police observations of them at 9:00 p.m. on June 1, Detective Balint reasonably concluded that they were involved in an ongoing romantic relationship.

[49] The motion judge also referred to Ms. Browne’s personal history and the nature of the investigation. The police had found an arsenal of guns and ammunition. Ms. Browne was a 23-year old with no criminal record. The police reasonably concluded that she was probably not acting alone in assembling the weaponry found in her storage locker. The appellant, a known criminal, with a close personal relationship with Ms. Browne, and a significant history involving firearms-related offences, was an obvious candidate to fill the role of Ms. Browne’s partner in the possession of the weapons found in the locker.

[50] The facts of this case demonstrate the need to examine the totality of the evidence said to provide reasonable grounds from the practical perspective of

the officer making the decision. An officer deciding to arrest necessarily brings to bear his or her personal experience in the assessment of the relevant factors. While evidence that the appellant and Ms. Browne had a close personal relationship could not, standing alone, reasonably put the appellant in possession of any guns found in her apartment, that relationship could take on a different meaning when combined with Detective Balint's reasonable belief that Ms. Browne was likely not acting alone in respect of her possession of the arsenal found in her locker, and Detective Balint's knowledge that the appellant, unlike Ms. Browne, had a well-established history of firearms-related offences. All these factors, taken together, painted a picture which could provide reasonable grounds to believe that the appellant was Ms. Browne's partner in the criminal enterprise relating to the guns found in the locker. That inference justified the further belief that the appellant was in joint possession with Ms. Browne of any firearms found in her apartment.

[51] The appellant has not shown that the motion judge's findings were unreasonable or based on speculation. On those findings, the arrest was lawful, the detention not arbitrary and the search reasonable. The keys seized in the search were properly admitted into evidence.

Conclusion

[52] I see no error in either of the motion judge's rulings and would dismiss the appeal.

Released: "DD" "MAY 30 2016"

"Doherty J.A."

"I agree E.A. Cronk J.A."

"I agree H.S. LaForme J.A."

[\[1\]](#) Various other arguments challenging the validity of the warrant were rejected by the motion judge. None of these arguments were renewed on appeal.