COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Boca, 2012 ONCA 367
DATE: 20120531
DOCKET: C54405

Weiler, Watt and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Joseph Boca

Appellant

Ronald Ellis, for the appellant

Michael Medeiros, for the respondent

Heard and released orally: May 4, 2012

On appeal from the conviction entered on September 24, 2010 by Justice John L. Getliffe of the Ontario Court of Justice.

ENDORSEMENT

[1] The appellant was convicted of 10 counts of distributing child pornography contrary to s. 163.1(3) and 11 counts of possession of child pornography contrary to s. 163.1(4) of the *Criminal Code*.

[2] The appellant submits that his s. 10(b) *Charter* right to counsel was breached and that the trial judge erred in admitting three statements he gave to the police. He asks that the appeal be allowed and an acquittal entered.

[3] The following facts provide sufficient context for our decision. The police identified the internet protocol address of a computer sharing child pornography files. After determining the municipal address for the computer's location they obtained a search warrant for the residence at this address. Upon entering the basement of the house, the police found three bedrooms that were rented out by the owner. The appellant was seated on a couch in the common area of the basement. Another man, Todd Blunt, emerged from his room. The third tenant was not at home.

[4] The police spoke to the two men and showed them the warrant. The appellant submits that at this point he was detained. The appellant identified his bedroom. This is the first statement the admissibility of which is challenged.

[5] The police determined that there was a computer in the common area and another in the appellant's bedroom. At this point neither man had been given the right to counsel.

[6] Blunt left the area when the police learned he did not own or use a computer.

[7] One of the officers went upstairs to speak with the landlord. In the meantime, another performed a cursory examination of the appellant's computer and determined it contained child pornography. The appellant was called into the room where the officer confronted him with the images and questioned him about them. The appellant initially denied all knowledge of the images but subsequently admitted he was responsible for them. This is the second statement at issue. At this point the appellant had still not been given his s. 10(b) right to counsel. He was immediately arrested following his confession and at that point he was read his right to counsel and cautioned. The appellant indicated he understood and was transported to the station.

[8] Two broken USB drives were found in the appellant's pocket in a search incident to arrest. The appellant admitted they contained child pornography and that he had broken them on the way over to the police station.

[9] When the appellant was booked into cells he was again given the opportunity to consult counsel. He declined. Later that evening police conducted a digitally recorded interview. Before the interview, the appellant was informed of his right to counsel and given the opportunity to exercise it. Again, he declined.

[10] In the course of the 37 minute interview the appellant described how he accessed and made available child pornography using the Limewire program on his computer. This is the third statement at issue.

[11] The trial proceeded as a blended *voir dire*. The appellant claimed his s. 10(b) right to counsel had been violated and sought to have his various inculpatory statements excluded from evidence. The trial judge found that at the time of the first statement the appellant was not detained and there was no violation of his s. 10(b) right to counsel. He found that the appellant was detained at the time of the second statement and therefore that the statement was obtained in violation of s. 10(b). He also found there was no violation of s. 10(b) in relation to the third statement. The trial judge declined to exclude any of the statements under s. 24(2). In light of the trial judge's ruling, the court entered convictions on all charges.

[12] The appellant submits that the trial judge erred in admitting the three statements.

[13] In our opinion the trial judge did not err in admitting the first and third statements. In relation to the first statement, in the context of executing a search warrant for child pornography at a residence occupied by numerous tenants, the police were entitled to ask some preliminary questions to determine how to proceed. The appellant's identification of his room arose during this preliminary stage. He was neither physically detained nor subjected to any coercive demand or direction. As a result the appellant's right to counsel under s. 10(b) was not infringed.

[14] The trial judge found that the third statement was not tainted by the breach of the appellant's s. 10(b) right to counsel in relation to the second statement. We agree. Prior to the third statement, the appellant's right to counsel was addressed on several different occasions. The appellant chose not to contact counsel. The appellant understood his rights and did not want to exercise them. The third statement was given in a different location, several hours after the alleged breach of the appellant's right to counsel in relation to the second statement, and the appellant does not submit that the statement was involuntary. The fact that the appellant had already made several incriminating admissions in his second statement, standing alone, is not a basis from which to infer that the third statement is tainted.

[15] As a result, even if the second statement was obtained in a manner that was a serious breach of the appellant's s. 10(b) right to counsel and the trial judge erred in not excluding it under s. 24(2), our agreement with the trial judge's finding that the third statement was not tainted means that the appellant was properly convicted.

[16] Accordingly, the appeal is dismissed.

"K.M. Weiler J.A."
"David Watt J.A."
"Gloria Epstein J.A."