COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bashir, 2012 ONCA 793
DATE: 20121120
DOCKET: C53556

Laskin, Sharpe and Gillese JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Faysal Bashir

Applicant/Appellant

Christopher Hicks, for the appellant

J. Sandy Tse, for the respondent

Heard: November 14, 2012

On appeal from the conviction entered on July 28, 2010 and the sentence imposed on August 10, 2010 by Justice D.M. Nicholas of the Ontario Court of Justice, with reasons reported at 2010 ONCJ 317 and 2010 ONCJ 548, respectively

ENDORSEMENT

[1] The appellant was convicted of several offences in relation to the illegal possession of a loaded handgun following a trial in the Ontario Court of Justice. He was sentenced to six years, less one-for-one credit for the five months he spent in pre-trial custody. He appeals both his conviction and his sentence.

Conviction appeal

[2] The sole ground of appeal from conviction is the appellant's submission that the primary piece of evidence against him was improperly admitted. The appellant submits that the investigative detention to which he was subjected was unlawful and a breach of his s. 9 *Charter* rights and that the evidence of the loaded firearm found in the car from which he had just exited on the driver's side should be excluded under s. 24(2).

[3] Assuming, without deciding, that there was a breach of the appellant's s. 9 *Charter* rights and assuming, without deciding, that there was a sufficient link or nexus between that *Charter* breach and the search of the vehicle, we agree with the trial judge that the evidence of the loaded handgun found in the vehicle should not be excluded under s. 24(2).

[4] In our view, the factors identified in *R. v. Grant*, [2009] 2 S.C.R. 353 are fatal to the appellant's contention that the evidence should be excluded.

[5] With respect to the seriousness of the *Charter*-infringing state conduct, the trial judge found that the officer acted in good faith. Even if there were insufficient grounds to suspect the appellant of a specific offence, his behaviour clearly gave rise to a legitimate concern regarding officer safety that required some defensive action.

[6] The s. 9 *Charter* breach, if one occurred, had a minimal impact upon the *Charter*-protected interests of the appellant. There was only a temporal connection between the investigative detention and the search of the vehicle. The appellant effectively abandoned any interest in the vehicle. He was not the owner, he told the officer that he was not the driver and he invited the officer to have the vehicle towed away. The officer was entitled to look into the window of the vehicle and when he saw open bottles of alcohol, he was entitled to search the vehicle pursuant to s. 32(5) of the *Liquor License Act*, R.S.O. 1990, c. L-19.

[7] As to the third *Grant* factor, society has a strong interest in an adjudication on the merits of these serious offences involving a loaded handgun, and the evidence was clearly reliable.

[8] Accordingly, the appeal from conviction is dismissed.

Sentence appeal

[9] A six-year sentence was, as acknowledged by the Crown, at the higher end of the range, but we are not persuaded that it was outside the range. This was a very serious offence involving a loaded gun carelessly stored in a motor vehicle. There was a bullet in the chamber in a position ready to be immediately fired. The appellant has a lengthy criminal record and was subject to no fewer than four s. 109 prohibition orders.

[10] At the sentencing hearing during submissions, the trial judge provided a valid reason for according only one-for-one credit for pre-trial custody, namely, her assessment that given his serious record, the appellant was unlikely to secure early release.

[11] The trial judge explained the need for general deterrence, denunciation, and public protection with regard to loaded handguns in the community. When all this is considered together with the appellant's record and the fact that he had shown a disregard for court orders and weapons prohibitions, we see no reason to interfere.

[12] Accordingly, leave to appeal sentence is granted but the sentence appeal is dismissed.

"John Laskin J.A."
"Robert J. Sharpe J.A."
"E.E. Gillese J.A."