

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Wright, 2012 ONCA 828

DATE: 20121128

DOCKET: C53588

Simmons, Cronk and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Omari Jabari Wright

Appellant

Vincenzo Rondinelli, for the appellant

Andreea Baiasu, for the respondent

Heard: November 15, 2012

On appeal from the convictions entered on January 1, 2011 and the sentence imposed on April 20, 2011 by Justice F.N. Marrocco of the Superior Court of Justice, sitting without a jury.

**By the Court**

[1] The appellant appeals his convictions for robbery with a firearm, using a firearm in the commission of an indictable offence and the careless storage of a firearm. He also seeks leave to appeal his sentence and, if leave is granted, appeals sentence.

[2] For the reasons that follow, the conviction appeal is allowed in part. Leave to appeal sentence is granted but the sentence appeal is dismissed.

### **A. Conviction Appeal**

[3] On the conviction appeal, the appellant argues first that the trial judge's verdict is unreasonable. We reject this submission.

[4] The trial judge concluded that the only reasonable inference on the whole of the evidence was that the appellant was one of the two persons who committed the robbery minutes before his apprehension. The trial judge also concluded that the appellant had given his registered handgun to his cousin for use in the robbery. These conclusions were amply supported by the time, location, and circumstances of the appellant's arrest and the seizure of the handgun.

[5] The second ground of appeal is that the trial judge provided insufficient reasons for accepting the evidence of Police Constable Mangiardi in the face of contradictory evidence. This allegedly contradictory evidence centered around the officer's initial observation of the appellant and his cousin, the other person involved in the robbery, a few minutes after commission of the crime.

[6] We would not give effect to this ground of appeal. In our view, there was no serious inconsistency in the police evidence that had to be addressed by the trial judge or which could undermine his factual findings. Further, as noted by the

Crown, the defence at trial did not suggest any such inconsistency, either in cross-examination of any of the police officers or in closing submissions.

[7] The final ground of appeal is that the trial judge erred in failing to draw an adverse inference from the Crown's failure to call as a witness Ms. Anderson, a woman who had a relationship with the appellant. We disagree.

[8] Although Ms. Anderson had involvement in the events of the evening in question, the Crown had no special access to her or particular power to compel her attendance at trial. Given that she had some kind of relationship with the appellant, it is understandable that the Crown decided not to call her as a witness.

### **B. Sentence Appeal**

[9] With respect to the sentence appeal, the appellant argues that the trial judge erred in finding that the gun was loaded and ready to fire at the time the robbery was committed. As a result, the trial judge erred in referring to this as an aggravating factor on sentencing.

[10] We disagree. At the time the appellant and his cousin were arrested, the gun was loaded and ready to fire. The arrest happened mere minutes after the commission of the offence as the two men were running from the scene. It was reasonable in all the circumstances for the trial judge to have inferred that the

gun had been loaded at the time of the offence and remained so for the few minutes between the commission of the offence and their arrest.

[11] The appellant then argues that although the trial judge correctly found the fact that the robbery involved a home invasion constituted an aggravating factor on sentencing, he erred in failing to appreciate that the circumstances of the home invasion in this case distinguished it from other, more serious home invasion cases. In this case, the home invasion did not involve serious injury, lengthy periods of detention of the occupants or excessive violence.

[12] We would not give effect to this ground. The trial judge was well aware of the circumstances of the home invasion. He specifically noted that the home invasion did not involve kidnapping, serious injury, sexual assault or death. This said, he properly noted that home invasions, by their nature, are traumatic for the victims of the crime. The victim impact statement filed at this trial confirmed that this case is no exception.

[13] Finally, the appellant argues that the trial judge failed to accord sufficient weight to the appellant's strict pre-trial bail conditions, the absence of injuries arising from the robbery and the disparity in sentence with that of his cousin. The appellant maintains that his cousin had a more active role in the offence and only received a one-year sentence. The appellant concedes that this disparity is, at

least in part, due to the fact that his cousin was a young offender at the time of the commission of the crime.

[14] We see no basis to interfere with the sentence imposed. The trial judge addressed and considered all the mitigating factors, as well as the disparity with the sentence imposed on the young offender. The mandatory minimum sentence for committing a robbery with a firearm is four years. A significant and aggravating factor in this case is that it was a home invasion robbery, carried out with a loaded firearm ready to fire. In light of these aggravating circumstances, the sentence of six years' imprisonment imposed by the trial judge was not outside the range of appropriate sentences for this offence and the trial judge committed no error in principle in the sentence he imposed.

[15] The Crown concedes that the conviction for use of a firearm in the commission of an indictable offence was not available in this case because of the conviction for robbery. As a result, that conviction should be set aside. However, setting aside that conviction does not affect the sentence imposed on the use of a firearm count as that sentence ran concurrently with the sentence imposed on the robbery count.

### **C. Disposition**

[16] For these reasons, the conviction appeal is allowed in part. The conviction for use of a firearm in the commission of an indictable offence is set aside, but

the balance of the conviction appeal is dismissed. Leave to appeal sentence is granted, but the sentence appeal is also dismissed.

“J.M. Simmons J.A.”

“E.A Cronk J.A.”

“Paul Rouleau J.A.”

Released: November 28, 2012