COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Gonzalez, 2012 ONCA 861
DATE: 20121206
DOCKET: C53320

Rosenberg, MacPherson and Pepall JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Adrian Gonzalez

Respondent

Deborah Krick, for the appellant

Paolo Giancaterino and Marco Sciarra, for the respondent

Heard: December 3, 2012

On appeal from the acquittal entered on January 24, 2011 by Justice Charles T. Hackland of the Superior Court of Justice, sitting without a jury.

ENDORSEMENT

[1] The Crown appeals the acquittal of the respondent on five gun-related charges. The acquittals flowed from a *Charter* ruling made by the trial judge during the trial. The trial judge determined that various members of the Ottawa police force arbitrarily detained the respondent during a roadside vehicle stop contrary to s. 9 of the *Charter* and failed to properly advise the respondent of his

right to counsel contrary to s. 10(b) of the *Charter*. The Crown also contends that the trial judge erred by excluding the evidence relating to the gun seized from the vehicle being driven by the respondent and the videotaped statement made by the respondent at the police station pursuant to s. 24(2) of the *Charter*.

[2] On the *Charter* s. 9 issue, the appellant acknowledges that a trial judge's determination as to the purpose of a traffic stop is a finding of fact and that this precludes the Crown from appealing a finding of arbitrary detention in many instances: see *R. v. Coates* (2003), 176 C.C.C. (3d) 215 (Ont. C.A.) at para. 19. However, the appellant submits that in this case the trial judge committed three errors of law in his s. 9 analysis: (1) he improperly considered the arrival of other Direct Action Response Team officers as a basis to reject the evidence of the police officer who stopped the respondent's vehicle; (2) he erred in holding that a valid *Highway Traffic Act* (*HTA*) stop required some articulable cause relating to the driver's own conduct; and (3) he failed to consider the totality of the evidence before making a factual finding that traffic safety was not a purpose for the stop.

[3] We do not accept this submission. The factors above relating to the number and role of the police during the roadside stop and the totality of the evidence are, in our view, factual issues and, therefore, not subject to judicial review. In any event, the trial judge did consider the totality of the evidence but, having done so, he disbelieved the police officer's testimony.

[4] As to the second point, the trial judge did not suggest that the police needed an articulable cause in order to make an *HTA* stop. Rather, the trial judge reviewed the evidence and concluded that the stop was not made for an *HTA* purpose but rather was a pretext because of suspicions of gang-related criminal activity.

[5] On the *Charter* s. 10(b) issue, in our view it is unnecessary to address this issue because the trial judge made a separate ruling that the respondent's video statement was inadmissible on voluntariness grounds "apart from the section 10(b) issues under discussion in this motion". The Crown has not appealed the voluntariness ruling. Accordingly, since the respondent's statement must remain inadmissible, the *Charter* s. 10(b) issue becomes redundant. We decline, therefore, to comment on the trial judge's analysis of this issue, including factors relating to the length of time between the initial s. 10(b) warning and the taking of the video statement, the increase in the number of charges in the same time frame, and the existence of a minimum sentence for one of the additional charges.

[6] On the s. 24(2) issue, against the backdrop of an arbitrary detention and an inadmissible statement, we can see no basis for interfering with the trial judge's application of the factors set out in *R. v. Grant* (2009), 245 C.C.C. 1 (S.C.C.).

[7] The appeal is dismissed.

"M. Rosenberg J.A."
"J.C. MacPherson J.A."
"S.E. Pepall J.A."