COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Degraw, 2018 ONCA 51
DATE: 20180124
DOCKET: C64268

Feldman, Fairburn and Nordheimer JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Douglas Alan Degraw

Appellant

Robert Sheppard, for the appellant

Randy Schwartz, for the respondent

Heard: December 15, 2017

On appeal from the convictions entered by Justice Allan Maclure of the Ontario Court of Justice on May 2, 2017, and from the sentence imposed on July 17, 2017.

Fairburn J.A.:

Overview

[1] While under a lifetime firearms prohibition order, the appellant allegedly made a threat to his girlfriend that included having access to a gun for sale at a store in a nearby town. The police attended at the store and discovered a high-powered rifle for sale under his name. The appellant was convicted of being in possession of a firearm while prohibited (s. 117.01(1) of the *Criminal Code*) and being in possession of a firearm while knowing that he was not the holder of a firearm licence (s. 92(1) of the *Criminal Code*).

[2] The appellant testified at trial. While he acknowledged having been involved in putting the firearm up for sale, he disavowed any control over the firearm. The trial judge rejected the appellant's evidence. Crown counsel on appeal concedes that, in the context of the entire case, the appellant's evidence could have afforded him a defence. Accordingly, the trial judge's credibility findings were central to the result in this case.

[3] The appellant raises two issues in his conviction appeal. He claims that:

(1) the trial judge erred in his approach to possession; and

(2) the trial judge erred in his approach to the appellant's failure to call certain witnesses to testify.

[4] For the reasons that follow, I would allow the appeal on the second point.

Possession Issue

(i) Constructive Possession

[5] It was not in dispute at trial that: (1) the appellant was prohibited from being in possession of the rifle; (2) the appellant did not have a licence to possess the rifle; and (3) the appellant knew about the rifle on sale at the store. Consequently, the evidence at trial focused on the issue of control. Read in totality, the reasons for judgment suggest that the appellant was found to be in constructive possession of the firearm while it was at the store.

[6] The appellant argues that the trial judge erred in his approach to constructive possession. When it comes to offences involving weapons prohibition orders, like the offences upon which the convictions rest in this case, the appellant argues that the Crown must prove that the accused was in physical control or, at a minimum, that he intended to take physical control of the item. The appellant's position rests on what he says is the specific legislative purpose of offences rooted in weapons prohibition orders: keeping dangerous weapons out of the actual hands of dangerous people. As such, he maintains that unless the Crown proves that the accused physically possessed or intended to physically possess a weapon that is subject to a prohibition order, the harm at which the offence is directed is absent. On this basis, the appellant argues that, at a minimum, an intention to physically possess a weapon covered by a prohibition order is an element of the offence.

[7] I disagree.

[8] There are three routes to possession: personal, constructive, and joint possession. Regardless of the route, there must be knowledge and some level of control. Section 4(3)(a)(ii) of the *Criminal Code* was relied upon in this case:

> (3) For the purposes of this Act,
>
> > (a) a person has anything in "possession" when he has it in his personal possession or knowingly …
> >
> > > (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person ….

[9] The three essential elements of constructive possession are:

(1) did the person have knowledge of the character of the object;

(2) did the person knowingly put or keep the object in a particular place, whether or not that place belongs to him; and

(3) did the person intend to have the object in the particular place for his "use or benefit" or that of another person?

See: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 17.

[10] To make out constructive possession, there is simply no requirement that the Crown prove that the accused had physical possession or intended to take physical possession of the subject item(s). The plain language of the *Criminal*

Code makes it clear that constructive possession applies where the accused knowingly has an item in a place, “for the use *or* benefit of [the accused] *or* of another person” (emphasis added). There is no additional or different requirement when it comes to possession for offences involving weapons prohibition orders.

[11] The legislative intent behind weapons prohibition orders is not simply to keep firearms and other dangerous weapons out of the actual hands of those at whom the orders are directed. People are not randomly targeted for weapons prohibition orders. They find themselves the subject of such orders on account of their prior conduct, conduct that typically suggests a future risk to public safety if weapons are possessed.

[12] Although preventing personal possession is a critical aspect of the public safety goal served by prohibition orders, it does not stop there. People who are prohibited from possessing weapons should have no form of control over the weapons caught within the reach of the prohibition orders. While joint and constructive possession are more distant forms of possession than personal possession, there is no good policy reason to exclude these other forms of possession.

[13] Joint and constructive possession also require knowledge and some level of control. When they come together, in any form of possession, the purpose of the prohibition order is defeated. In particular, a person who knowingly “has [the

firearm] in any place" for his or another's use or benefit, has some control over that firearm. Whether he intends to take physical possession of it in the future is not the point. It is the fact that he has some control over it. A person who is prohibited from possessing weapons, but maintains some level of control over them, is still dangerous.

[14] There is no statutory, legal or logical reason to add a new or different element to possession when it comes to offences involving weapons prohibition orders.

(ii) Facts Pointing Toward Possession

[15] Standing on its own, the Crown's evidence clearly supported a finding of constructive possession.

[16] After the appellant was charged with a number of offences in 2007, he sold all of his firearms to his brother-in-law, Doug Schweitzer, in order to comply with the terms of his bail. Legal ownership of the firearms was transferred to Schweitzer. The appellant was later convicted and a lifetime weapons prohibition order was imposed.

[17] When out on parole in 2016, the appellant assaulted his girlfriend. During his guilty plea, he agreed that he told her his "gun was only a town away in Rodney at a firearms dealer". The girlfriend confirmed this comment during her evidence at this trial.

[18] The owner of the gun store could not recall whether the appellant carried the gun into the store, but recalls dealing with him when the gun was put up for sale. The appellant was listed on file as the person selling the gun and called a few times to inquire about whether anyone had shown any interest in purchasing the gun. Had the gun sold, the store owner testified that he would have given the money to the appellant.

[19] This constituted both direct and circumstantial evidence of: (1) the appellant's knowledge of the firearm; (2) the fact he was keeping it at the store; and (3) the fact he intended to benefit from the sale. Standing on its own, the Crown's evidence supported a finding of constructive possession.

[20] The difficulty is that the Crown's evidence did not stand on its own because the appellant testified. Crown counsel concedes that if the trial judge erred in the assessment of the appellant's credibility, then a new trial is required. I now turn to this issue.

The Appellant's Failure to Call Certain Witnesses to Testify

(i) The Appellant's Evidence

[21] The appellant testified that he needed money. Mr. Schweitzer was prepared to extend him a loan if the guns that the appellant had previously transferred to Schweitzer were sold. The appellant posted some "for sale" signs at sporting goods stores. A man from the town of Exeter responded to one of these postings

and asked to see the guns. The appellant could not recall the man's name. I will refer to him as the "Exeter man".

[22] As Schweitzer could not be present when the Exeter man came to look at the guns, the appellant arranged for the attendance of someone with a firearms licence to facilitate the transaction: Dave Payne. According to the appellant, this was all done with Schweitzer's approval. The Exeter man bought all of the guns except one rifle. A decision was made to sell that rifle at a gun shop in the town of Rodney. As the Exeter man had not been to the gun shop and wanted to see it, he agreed to drive the rifle there and drop it off. The appellant drove behind the Exeter man.

[23] The appellant testified that he never touched the gun; the Exeter man took it into the store and left it on the counter. The appellant admits that he spoke to the owner of the store about the list price. According to the appellant, if the gun sold, the money would go to Schweitzer and then Schweitzer would advance him the loan.

(ii) Reasons for Judgment: The Appellant's Credibility

[24] The trial judge correctly reviewed the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742*,* specifically observing that if he believed the accused's evidence or was left in a reasonable doubt by it, then he must acquit. He commenced his

credibility findings with the following: “Now, Mr. Degraw, you testified in your own defence, and, frankly, I found your story unbelievable, and I’ll tell you why I do.”

[25] The trial judge first pointed to the fact that he found it “unbelievable” that the appellant did not know the name of the Exeter man. He next pointed to the fact that the Exeter man, Payne, and Schweitzer did not testify to “support [the appellant’s] version of events”. The trial judge found that their evidence would have been “essential” if the appellant’s evidence were to be accepted.

[26] The trial judge next observed the Crown’s position that the trial had been previously adjourned to facilitate Schweitzer’s appearance. The trial judge noted the Crown’s position that Schweitzer had not attended to give evidence because he did not want to lie. The trial judge commented that he could not say “for certain whether that is true, but it is certainly something that warrants consideration and may probably be true.” Finally, he observed that, despite the importance of Payne and Schweitzer to the gun transaction, neither had attended at the store.

(iii) Positions of the Parties

[27] The appellant maintains that the trial judge erred in how he approached his credibility findings. He argues that the trial judge reversed the onus when he rejected the appellant’s evidence on the basis that the appellant failed to call certain witnesses in his defence. He also claims that the trial judge erred by

suggesting that the witnesses were not called because they were not prepared to lie on the appellant's behalf.

[28] The Crown maintains that in some circumstances it is appropriate to draw an adverse inference from the failure of the defence to call certain witnesses. This will typically occur where witnesses are available to testify and the defence position cries out for their evidence. Crown counsel submits that this is one of those cases. He argues that, read in context, the reasons for judgment deal with this issue correctly and did not result in a reversal of the onus.

(iv) Law

[29] In some limited circumstances, a trier of fact may draw an adverse inference from the accused's failure to call a witness. The adverse inference principle is "derived from ordinary logic and experience". It is not intended to punish the accused for failing to call a witness: *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 24.

[30] An adverse inference may only be drawn where there is no plausible reason for not calling the witness: *R. v. Lapensee*, 2009 ONCA 646, 99 O.R. (3d) 501, at para. 42. Even where it is appropriate to draw an adverse inference, it should not be "given undue prominence and a comment should only be made where the witness is of some importance in the case": *R. v. Koffman* (1985), 20 C.C.C. (3d) 232 (Ont. C.A.), at p. 237.

[31] Commenting upon the failure of the defence to call a witness runs the clear risk of reversing the burden of proof: *R. v. Ellis*, 2013 ONCA 9, 113 O.R. (3d) 641, at para. 49; and *Lapensee*, at para. 45. As well, trial counsel will frequently make choices about not calling potential witnesses, the reasons for which are often entirely unrelated to the truth of any evidence a witness may give. For instance, an honest person may have a poor demeanour, resulting in a strategic choice not to have the individual testify. Or, the evidentiary point to be made by a person may already have been adequately covered by others: *Jolivet*, at para. 28. Allowing an adverse inference to be taken from the failure to call a potential witness runs the risk of visiting strategic litigation choices upon the accused. Accordingly, an adverse inference should only be drawn with great caution: *R. v. Zehr* (1980), 54 C.C.C. (2d) 65 (Ont. C.A.), at p. 68; *R. v. Charrette* (1982), 67 C.C.C. (2d) 357 (Ont. C.A.), at p. 359; *Koffman*, at p. 237; *Lapensee*, at para. 45; and *Ellis,* at para. 49.

[32] Where comment is appropriate, the “only inference that can be drawn” is not one of guilt, but an inference that, had the witness testified, his or her evidence would have been unfavourable to the accused: *Koffman,* at p. 238; and *R. v. Marshall* (2005), 200 C.C.C. (3d) 179 (Ont. C.A.), at para. 47. This inference can impact on an assessment of the accused’s credibility: *Koffman*, at p. 238; *Charrette*, at p. 359; *R. v. Dupuis* (1995), 98 C.C.C. (3d) 496 (Ont. C.A.), at p. 508; and *Marshall,* at paras. 44, 47-48.

[33] I now turn to what I see as the difficulties with the reasons for judgment in this case.

(v) Analysis

(a) Overview

[34] I am inclined to agree with Crown counsel on appeal that this was one of those rare cases where it was open to the trial judge to take into account the fact that the accused did not call the Exeter man, Payne or Schweitzer to testify. The relevance of these witnesses was only introduced when the appellant testified. They were inextricably woven into the appellant's narrative about how the gun came to be at the gun shop, put up for sale, and the loan that would result if it sold. The appellant was the only one who could have located the Exeter man's actual name and address. He failed to do so. As well, leaving aside the reasons he provided for the absence of the witnesses, the appellant still had greater access to them than the Crown.

[35] While this was one of those rare cases where it was open to the trial judge to exercise his discretion in favour of taking the absence of the witnesses into account, he erred in how he approached this delicate exercise.

(b) Failure to consider explanation for absence of witness

[36] The trial judge considered the appellant's explanation for not being able to provide the Exeter man's name and quite reasonably rejected the explanation as

"unbelievable". In contrast, he failed to deal with the appellant's explanation for why Payne was not present to testify: that Payne had moved away, likely back to Cornwall where his girlfriend was from, and had not been found. As an adverse inference can only be drawn where no plausible reason is given for not calling the witness, the trial judge should have considered the reason given for Payne's absence. While he may have rejected the reason given as also "unbelievable", it should have been specifically considered.

(c) Reasons relating to Schweitzer

[37] As for Schweitzer, the trial Crown's position was summarized in the reasons for judgment as follows:

> The Crown's submission on that point with respect to your brother-in-law was that Mr. Schweitzer, who also for whatever reason, couldn't appear at your first trial, and that that was one of the reasons for the adjournment of the first trial date, simply didn't want to lie on your behalf.

While the trial judge could not "say for certain whether that [was] true", in arriving at his credibility findings, he held that it was "certainly something that warrants consideration and may probably be true".

[38] There are two difficulties with the trial judge's approach.

[39] First, there was no evidence that an original trial date was adjourned because Schweitzer "couldn't appear". When this suggestion was put to the appellant in cross-examination, he specifically denied it. Indeed, the appellant

insisted that it was actually the Crown who had asked for the adjournment of the original trial date. The appellant having denied the proposition put, the Crown was left without evidence that: (a) Schweitzer had failed to attend on an earlier trial date; and (b) Schweitzer's failed attendance had caused the first trial date to be adjourned. Yet, the reasons for judgment suggest that the Crown proposition was treated as fact.

[40] Read in context, the passage conveys the idea that Schweitzer had not attended on two different trial dates because he did not want to "lie on [the appellant's] behalf". This leads into the second problem with respect to how Schweitzer's absence was dealt with in the reasons for judgment.

[41] The trial judge's suggestion that it may probably be true that Schweitzer did not appear because he did not want to lie for the appellant goes well beyond a mere inference that, had Schweitzer testified, he would have given evidence that was unfavourable to the defence. The above comment implies that the appellant may have tried to get Schweitzer to lie for him and Schweitzer refused. There was no evidence to support the inference that Schweitzer was absent because he was refusing to lie.

[42] The lying absent witness theme was one that ran throughout the cross-examination of the appellant. The trial Crown (not Mr. Schwartz) repeatedly put variations of this theme to the appellant, including: that Payne and Schweitzer were

“not coming to lie for you today”; “he won’t come to court to lie for you”; “Mr. Schweitzer’s not here because the Schweitzers are good, law-abiding people, and he’s not coming to lie for you today”; “Mr. Payne is not here today either because he won’t come to court to lie for you”; and so on.

[43] The cross-examination, focusing so repetitively on whether Payne and Schweitzer were absent because they did not want to lie for the appellant, was inappropriate and irrelevant. At best, the cross-examination suggested that the appellant wanted Payne and Schweitzer to lie to the court. At worst, it suggested that he attempted to get them to lie and they refused. There was no evidence to support either of these propositions.

[44] Cross-examination on the failure of the defence to call a witness will only be appropriate in those rare circumstances where an adverse inference is open to be drawn. The inference is not one of guilt. Nor is it an inference that the person is refusing to lie for the accused, an inference infused with the improper suggestion that the accused wants or has encouraged the person to do so. The available inference is that, had the person testified, his or her evidence would have been unfavourable to the defence.

[45] While there was a basis upon which to infer that Schweitzer would have provided unfavourable evidence had he testified, there was no basis upon which to infer that he refused to lie on the appellant’s behalf. The trial judge erred by

concluding that this was an available inference to be drawn and “may probably be true”.

(d) Reversal of the burden of proof

[46] Most problematic, though, is the fact that the reasons reveal a reversal of the burden of proof. In rejecting the appellant’s evidence, the trial judge said: “Given the magnitude of the importance of their evidence, their presence would have been essential if the court were to accept your version of events.” Whether Payne, Schweitzer, and the Exeter man had important evidence to give or not, their evidence was not required to accept the appellant’s evidence. Corroboration was not “essential” before the appellant’s evidence could be accepted or raise a doubt. The effect of this comment was to place an onus on the defence to produce corroborative evidence. It reversed the burden of proof.

[47] While Crown counsel acknowledges that, standing on its own, this sentence is awkward, he encourages the court to consider the impugned comment in context. In particular, he points to the passage following the comment as contextualizing what the trial judge meant:

> And that is not to say that you have anything to prove here, you don’t, but the court has to assess the evidence that you’re offering, and your evidence was that these individuals could explain what occurred and provide you with a legal defence to what occurred, and yet none of them, notably your own brother-in-law, were either subpoenaed or attended court to testify on your behalf.

[48] Although the trial judge correctly noted that the appellant had nothing to prove, he went on to emphasize that the witnesses could have provided a “legal defence to what occurred”, yet did not attend court to testify. With or without the evidence of the Exeter man, Payne and or Schweitzer, the appellant’s evidence could have been accepted or raised a doubt. This was not about whether the absent witnesses could provide a defence, but how their absence might have impacted the assessment of the appellant’s credibility because of the inference that could have been properly taken – that their evidence would have been unfavourable had they testified. Even when considered in context, the error in reversing the burden of proof is not alleviated.

Conclusion

[49] The failure to consider the reason given for Payne’s absence, considering an explanation for a previous adjournment that was unsupported on the facts, reasoning that it “may probably be true” that Schweitzer did not appear because he did not want to lie on the appellant’s behalf, and reversing the burden of proof, accumulate to give rise to reversible error. We are not asked to apply the proviso.

[50] I would allow the appeal, set aside the convictions, and order a new trial. Accordingly, there is no need to consider the sentence appeal. At the appeal, we were informed that the appellant was to be released from custody within a few days of the hearing. The Crown will undoubtedly take into consideration the time

that the appellant has already served in custody when determining whether to proceed with another prosecution.

Released: January 24, 2018

“Fairburn J.A.”
“I agree K. Feldman J.A.”
“I agree I.V.B. Nordheimer J.A.”