

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Noor, 2022 ONCA 338

DATE: 20220428

DOCKET: C69495

Pepall, van Rensburg and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Feisal Noor

Appellant

Lorne Sabsay, for the appellant

Andrew Cappell, for the respondent

Heard: April 26, 2022

On appeal from the conviction entered on January 12, 2021 by Justice Carol A. Brewer of the Ontario Court of Justice.

REASONS FOR DECISION

OVERVIEW

[1] During a struggle with several police officers, the appellant, Mr. Feisal Noor, was found to be in possession of a handgun. Mr. Noor had been approached for investigation by PC Perelli as the result of a 911 call reporting that a man had flashed a gun at a nearby gas station. When he saw that he was being approached by a police officer, Mr. Noor tried to leave. He then resisted when PC Perelli attempted to restrain him by the arm. This led to the struggle during which the handgun was found.

[2] At his trial on firearms-related charges arising from this incident, Mr. Noor challenged the admission of evidence of his possession of the handgun under the *Canadian Charter of Rights and Freedoms*. He alleged that he was arrested and/or detained without sufficient grounds, contrary to s. 9 of the *Charter*, and that the search and seizure of the handgun was unreasonable, contrary to s. 8 of the *Charter*.

[3] The trial judge dismissed Mr. Noor's *Charter* application, admitted the evidence of his possession of the handgun, and convicted him.

[4] In this appeal, Mr. Noor submits that the trial judge erred in making these *Charter* rulings and he asks that the convictions be set aside. At the end of oral submissions, we dismissed Mr. Noor's appeal with reasons to follow. These are our reasons.

[5] Since we find no error in the trial judge's conclusion that Mr. Noor failed to establish breaches of the *Charter*, we will not be addressing the arguments made in Mr. Noor's factum relating to the exclusionary remedy.

ANALYSIS

A. ARBITRARY DETENTION

[6] Mr. Noor has not established that the trial judge erred in her decision dismissing his s. 9 claim that he was arbitrarily arrested or arbitrarily detained.

[7] First, we are not persuaded that the trial judge misapprehended evidence when finding that PC Perelli was engaging in an investigative detention, and not an arrest, when the handgun was discovered. Mr. Noor bases this "misapprehension of evidence" submission on an entry in PC Perelli's police notes describing "multiple units on scene assisting with arrest" (emphasis added). The trial judge did not misstate or ignore this evidence. She described it accurately in her Reasons for Judgment, and she addressed the entry in PC Perelli's police notes, giving it the effect that she judged to be appropriate. Specifically, she accepted PC Perelli's explanation that he used the word "arrest" in his police notes because the police notes were made after the event, when Mr. Noor was indeed under arrest, but that his intention at the time he approached Mr. Noor was to conduct an investigative detention. This was a credibility determination for the trial judge to make. This ground of appeal must be dismissed.

[8] Second, we see no error in the trial judge's determination that when PC Perelli detained Mr. Noor, he "had objectively reasonable grounds to suspect that Mr. Noor was the man who had flashed the gun at the gas station."

[9] It is important to bear in mind that reasonable suspicion, the standard that applies to the investigative detention that was underway, is a lower standard than reasonable and probable grounds and can be based on information that is "different in quantity and content than that required to establish probable cause" and "less reliable": *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 75, citing *Alabama v. White* (1990), 496 U.S. 325, at p. 330. The reasonable suspicion standard demands less because "[s]uspicion' is an expectation that the targeted individual is possibly engaged in some criminal activity", and such suspicion will be "reasonable" where it is supported by objectively articulable grounds: *Kang-Brown*, at paras. 75, 77.

[10] PC Perelli had sufficient objectively articulable grounds at the time Mr. Noor was detained to support his subjective belief that Mr. Noor could possibly be the suspect. Mr. Noor was in the vicinity of the event that led to the 911 call, shortly after that event. He fit the general description of the suspect's gender, race, age, height, and build, being a male, black, in his late twenties, six feet tall, with a slim build. There were also material similarities between what Mr. Noor was wearing, and what the suspect was described to be wearing. Like the suspect, he was wearing light blue pants and gold earrings in each ear. Like the suspect, he was

wearing multi-coloured clothing on his upper body that included the colours orange and red. In those objectively articulable circumstances, the trial judge was entitled to find that PC Perelli's belief that there was a possibility that Mr. Noor could be the suspect was reasonable.

[11] To be sure, (1) the clothing on Mr. Noor's upper body did not include some of the colours described by one of the witnesses, namely blue and yellow; (2) no witness described a crest on the suspect's clothing, but Mr. Noor's jacket had crests of the number 8 on the back and arms of his coat; (3) Mr. Noor's orange sweater was not a hoodie; and (4) Mr. Noor had facial hair, a feature the witnesses to the incident did not include in their description. But even if these differences would have prevented a "reasonable grounds" conclusion sufficient to support an immediate arrest, something we need not decide in this appeal, they are not the type of differences that required the complete elimination of Mr. Noor as a reasonably possible suspect. These discrepancies could well have been attributable to honest error by the witnesses, or to an understandable inability or failure to note available details in the circumstances. The witnesses were describing a brief, unexpected event that occurred at night between strangers. Based on timing, location, physical description, and the impressive similarities that did exist, it is understandable that PC Perelli approached Mr. Noor for investigation, notwithstanding these differences.

[12] It is also worth noting that PC Perelli did not require reasonable suspicion to approach and attempt to speak to Mr. Noor. When PC Perelli began to approach, Mr. Noor projected a startled look and he quickly attempted to walk away. Although Mr. Noor was legally entitled at this point to walk away, his reaction could only have reasonably reinforced PC Perelli's suspicion prior to the detention.

[13] We therefore dismiss the appeal of the trial judge's s. 9 ruling.

B. SEARCH AND SEIZURE

[14] The unreasonable search and seizure argument was not pressed during oral argument, but this ground of appeal was not abandoned. We therefore address it.

[15] We are not persuaded that the trial judge erred in rejecting the s. 8 application. No search occurred before the handgun was seized. On the evidence the trial judge accepted, the handgun came into plain view incidentally, during the struggle. No issue can be taken with the correctness of the trial judge's finding that the officers were acting legally when that struggle occurred. As we have explained, PC Perelli had grounds to detain Mr. Noor for investigative purposes. He was therefore entitled to attempt to restrain Mr. Noor by the arm as Mr. Noor attempted to avoid detention. When Mr. Noor began to struggle in response, PC Perelli and PC Sottile, who was with him, were entitled to use reasonable force to detain Mr. Noor. Once Mr. Noor appeared to be reaching for something, possibly a weapon, the officers were entitled to overcome his resistance for officer safety.

They and the officers who were assisting them were in the process of restraining Mr. Noor when the handgun was observed. Once the firearm was observed, it is obvious that the officers had reasonable and probable grounds to arrest Mr. Noor for possession of the firearm and to seize the firearm incidental to that arrest: *R. v. Peterkin*, 2015 ONCA 8, 319 C.C.C. (3d) 191; *R. v. Amofa*, 2011 ONCA 368, 282 O.A.C. 114; *R. v. Nguyen*, 2013 BCSC 950, at para. 63; see Alec Fiszau, *The Law of Investigative Detention*, 2nd ed. (Markham: LexisNexis Canada, 2013), at pp. 114-117; *Turton v. Hanson*, 2018 ABCA 84, 66 Alta. L.R. (6th) 232, at paras. 22-26. In the circumstances, the seizure of the handgun was lawful, and based on reasonable grounds.

[16] Nor was the seizure conducted unreasonably. We see no basis for interfering with the trial judge's conclusion that the force used, including compliance strikes that were administered to prevent Mr. Noor from succeeding in reaching for what the officers believed could be a weapon, was reasonable.

CONCLUSION

[17] The appeal is dismissed.

"S.E. Pepall J.A."
"K. van Rensburg J.A."
"David M. Paciocco J.A."