COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Simpson, 2023 ONCA 23
DATE: 20230113
DOCKET: C70261

MacPherson, Pardu and Coroza JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Robert Simpson

Appellant

Chris Rudnicki and Theresa Donkor, for the appellant

Lisa Csele, for the respondent

Heard: January 10, 2023

On appeal from the convictions entered by Justice Bonnie L. Croll of the Superior Court of Justice on April 9, 2021.

REASONS FOR DECISION

[1] On April 9, 2021, Croll J. of the Superior Court of Justice convicted the appellant, Robert Simpson, of two counts of possession of cocaine for the purpose of trafficking, possession of MDMA, and possession of the proceeds of crime. On November 1, 2021, the trial judge imposed a global sentence of six years, four months and five days. The appellant appeals the convictions.

[2] The appellant raises two issues on appeal. First, he maintains that, when he was arrested, the police breached his *Charter* s. 10(b) right to retain and instruct counsel without delay and to be informed of that right. Second, the appellant asserts that, if this court agrees that his s. 10(b) right was infringed, we should exclude evidence obtained as a result of the infringement, pursuant to s. 24(2) of the *Charter*. If this court agrees with the appellant on both issues, he submits that the proper result would be the exclusion of all evidence obtained and, therefore, acquittals on all counts.

The *Charter* s. 10(b) issue

[3] The appellant, who was under surveillance in Toronto pursuant to a joint Windsor/Toronto drug investigation, was detained by Toronto police as he was exiting a store on November 23, 2017. Eight officers approached the appellant. Officers Hutchings and Tughan made the detention.

[4] Officer Hutchings testified that he had been a police officer for 22 years and provided the s. 10(b) warning from memory. He said that he advised the appellant that he had the right to (1) retain and instruct counsel without delay; (2) phone any lawyer he wanted; and (3) contact a Legal Aid lawyer at a telephone number that Officer Hutchings provided.

[5] Officer Hutchings stated that, when he asked the appellant if he understood what he had been told, the appellant replied, “Yes”. Officer Hutchings then asked

the appellant if he wanted to speak to a lawyer at that time. The appellant replied, “I will at some point”.

[6] The appellant testified during the s. 10(b) *voir dire*. He said that he remembered answering the question of whether he wanted to call a lawyer by saying, “I guess I'm going to need to at some point.”

[7] Officer Hutchings then gave the appellant a caution, advising him that he was not obligated to say anything but whatever he did say could be used against him in evidence. When asked, immediately after receiving this information, if he understood it, the appellant replied, simply, “Yes”.

[8] The police continued to ask the appellant questions and he soon admitted that there were drugs in his car and home. Police searches found the drugs at issue in this appeal.

[9] The question of the words exchanged between police and a detainee is a question of fact, reviewable only for palpable and overriding error: *R. v. Owens*, 2015 ONCA 652, at paras. 28-29.

[10] We cannot say that the trial judge’s interpretation of the conversation between the appellant and Officer Hutchings rises to this level of error. Officer Hutchings gave a proper s. 10(b) warning immediately after the appellant was detained. The appellant gave an unequivocal answer that he understood what

he had just heard. Then, in response to the question about whether he wanted to speak to a lawyer he said, “I will at some point”.

[11] As per *R. v. Taylor*, 2014 SCC 50, at para. 24, the duty on police to implement contact between a detainee and counsel arises only if the detainee expresses a desire to contact counsel. Just as this court held in *Owens*, in which a detainee responded to the same question with, “No, not right now”, it was open to the trial judge to find that the appellant’s statement did not qualify as an invocation of the right to counsel.

[12] For these reasons, we are not persuaded by the appellant’s submissions on the first issue.

The *Charter* s. 24(2) issue

[13] In light of our conclusion on the s. 10(b) issue, we do not need to consider the *Charter* s. 24(2) issue.

Disposition

[14] The appeal is dismissed.

“J.C. MacPherson J.A.”
“G. Pardu J.A.”
“S. Coroza J.A.”