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COURT OF APPEAL FOR ONTARIO

RE: **HER MAJESTY THE QUEEN (Respondent) – and – TYRONE JACKSON (Appellant)**

BEFORE: **CATZMAN, WEILER and MacPHERSON JJ.A.**

COUNSEL: **Mara Greene**
for the appellant

Thomas D. Galligan
for the respondent

HEARD: **June 14, 2004**

RELEASED ORALLY: **June 14, 2004**

On appeal from the conviction entered by Justice Ian V. B. Nordheimer of the Superior Court of Justice, sitting with a jury, dated August 27, 2002, and the sentence imposed by Justice Nordheimer dated August 28, 2002.

E N D O R S E M E N T

Nature of Appeal

[1] The appellant Tyrone Jackson appeals against his conviction entered by Justice Nordheimer, sitting with a jury, on August 27, 2002 of possession of a firearm (s. 91(1)), assault with intent to resist arrest (s. 270(1)(b)); and fail to comply with a recognizance (s. 145(3)). He was acquitted of the charge of possession of cocaine for the purposes of trafficking and the lesser and included offence of simple possession.

Facts

[2] In the early morning of November 27, 2001, two plainclothes police officers were patrolling the Lawrence Heights area of Toronto in an unmarked car. They saw two black males walking. One of the males was the appellant. Approximately 25 minutes later, another police officer advised the two officers that he had heard a gunshot. The officers drove back to where the two men were walking. They told the two men that they were

police officers and wished to speak to them, but did not show a badge or identification. The two men ran away. The officers chased them. One man got away. The other, the appellant, was apprehended.

[3] At trial, the appellant applied unsuccessfully, pursuant to ss. 8, 9 and 24(2) of the *Charter,* to have the gun and drugs excluded. Constable Manherz testified that he stopped the appellant while he was trying to climb over a fence and testified that in the process a gun fell out of the appellant's pocket. While Constable Manherz was trying to restrain him, Constable Kidd arrived, and then two other officers arrived also. All the officers testified during the *voir dire* that they saw the gun during the attempt to subdue the appellant. Constable Manherz also testified that after the appellant was arrested, he found cocaine in the appellant's pocket.

[4] The trial judge ruled that the appellant's detention was justified, but in the alternative, he would not have excluded the edivence under s. 24(2), as the evidence was not conscriptive and the breach of the appellant's rights was not serious. The Crown relied on the evidence of Constable Manherz and the other police officers to prove the firearm charges and the evidence of Constable Manherz with respect to the cocaine charge.

[5] A defence witness, Matthew Joseph, testified that he was the person who got away, that both the gun and the drugs were his, and that he had disposed of them during the chase.

[6] The jury found the appellant guilty of possessing the gun but acquitted him of possessing the cocaine.

The Issues and our Disposition of them

1. Were the verdicts inconsistent?

[7] Having regard to the fact that a jury is entitled to believe all, part or none of a witness' evidence the verdicts were not inconsistent. This is not a case involving verdicts that in logic were mutually contradictory or violently at odds in relation to the indictment or the evidence. In addition to Constable Manherz, three other police officers testified that they saw the gun on the ground next to the fence where the appellant was arrested. Prior to this the officers had heard a gunshot. Only Constable Manherz testified that he found cocaine in the appellant's pocket. A reasonable jury properly instructed and acting reasonably could have arrived at these verdicts.

2. Did the trial judge err in failing to give a *"W.(D.)"* instruction?

[8] The appellant submits that the effect of the trial judge's failure to give the *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.) instruction, combined with certain references in the charge, gave the jury the choice of either accepting the evidence or rejecting it and

that the jury were not aware that a reasonable doubt could arise from evidence that they did not accept or reject. The appellant further submits that the trial judge did not make it clear that reasonable doubt applied to credibility.

[9] The trial judge's charge to the jury made clear that in arriving at reasonable doubt, the jury was not restricted to the evidence that it accepted. It was made clear that a reasonable doubt should be based on the entirety of the evidence and that reasonable doubt could be based on the absence of evidence. While it would have been preferable for the trial judge to have given the *W.(D.)* instruction, the jury could not have been under any misapprehension as to the correct standard and burden of proof having regard to its verdict in relation to the cocaine charge.

3. Did the trial judge erroneously conclude that the appellant's detention was justified? If so, should the evidence of the gun have been excluded under s. 24(2) of the *Charter*?

[10] We agree with the trial judge that the "constellation of objectively discernible facts" including the appellant's attempt to flee from the police provided reasonable grounds for the officers to pursue and detain him. Even if we had concluded that there was a violation of s. 9 of the *Charter* we would not be prepared to differ from the trial judge's assessment that the exclusion of the gun would bring the administration of justice into disrepute much more than its admission.

4. Did the trial judge err in concluding that, in relation to count 2, assault with intent to resist arrest, the appellant's detention was lawful and in instructing the jury to this effect?

[11] The trial judge made a ruling during the trial that the appellant's detention was lawful. There was a solid basis for this ruling. There was no need to revive this issue for the jury's consideration, especially since defence counsel did not suggest it or object to this component of the charge.

Conclusion

[12] We would not give effect to any of the grounds of appeal and accordingly, the appeal is dismissed.

"M.A. Catzman J.A."
"K.M. Weiler J.A."
"J.C. MacPherson J.A."