R. v. Barac

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Barac, 2023 ONCA 216
DATE: 20230330
DOCKET: C70272

Lauwers, Trotter, and Harvison Young JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Branislav Barac

Appellant

Alan D. Gold and Ellen C. Williams, for the appellant

David Quayat, for the respondent

Heard: February 1, 2023

On appeal from the conviction entered by Justice Jonathon C. George of the Superior Court of Justice, sitting with a jury, on October 14, 2021, and from the sentence imposed on February 22, 2022.

Harvison Young J.A.:

A. OVERVIEW

[1] The appellant was the subject of a "drug lookout" at the border. After he was questioned and referred for a secondary inspection, border authorities located approximately 25 kilograms of methamphetamine and US$126,000 in cash in the cab of his transport truck. The appellant was convicted of importing methamphetamine. He was sentenced to 12 years imprisonment. He appeals from both conviction and sentence.

[2] The appellant's first and central ground of appeal is that the particularized lookout he was subject to turned what would otherwise have been a routine customs examination into a criminal investigation and a detention that engaged his *Charter* rights from the moment he arrived at the border. Second, he submits that statements that he made to the border officials were not voluntary and thus should not have been admitted. Third, he argues that the jury selection process was flawed and resulted in a non-representative jury. Finally, he argues that the sentence was unfit and should be reduced to 7 years imprisonment.

[3] For the reasons that follow, I would dismiss the appeal in its entirety.

B. BACKGROUND FACTS

[4] When the appellant arrived at the Blue Water Bridge border crossing between Michigan and Ontario on May 2, 2019, the Border Service Officer ("BSO") at the first question booth saw on his computer that the appellant was subject to a lookout.

[5] A lookout is defined in the Canadian Border Service Agency's ("CBSA") Drug Lookout Policy as:

> a specific intelligence product developed to identify a person, corporation, conveyance or shipment that, according to various risk indicators or other available intelligence, may pose a threat to the health, safety, security, economy, or environment of Canada and Canadians.

[6] The Policy also provides that:

> The lookout will "flag" or identify particular individuals, including corporations, and specific goods, conveyances or shipments. This "flag", in turn, is intended to prompt a closer examination of circumstances.

[7] The lookout in this case was based on information received from a confidential human source ("CHS") and was "believed to be reliable" by the CBSA. The information identified the appellant by name, date of birth, and citizenship, and described details about his conveyance and where he would be crossing. According to the CHS, the appellant would be smuggling drugs into Canada.

[8] In accordance with the CBSA's Drug Lookout Policy, the BSO referred the appellant to mandatory secondary examination. Three BSOs greeted the appellant at the secondary inspection area. After the appellant exited his truck, two of the three BSOs entered the cab to search while the other stayed with the appellant and continued to interview him.

[9] The two BSOs who entered the truck took ION swabs of a duffel bag in the bunk, which came back negative. However, they could not complete their search because they could not lower the upper bunk in the cab. At around 5:10 p.m., the officers decided to x-ray the truck. This was completed around 6:30 p.m. The x-ray disclosed an anomaly in the upper bunk.

[10] Throughout the search, the appellant was accompanied by at least one BSO and questioned about his employment, his truck, and his trip. He was also advised of the difficulties the officers were having in accessing the upper bunk.

[11] The BSOs were joined by two superintendents who retrieved tools to pry open the bunk. The superintendents discovered the drugs at around 6:45 p.m. Superintendent Williams made a handcuff gesture to BSO Bassett, who in turn informed the appellant that he was under arrest. The appellant was cautioned, read his rights to counsel, frisked, and escorted to a cell. His cellphone was seized. More methamphetamine was subsequently discovered hidden in the walls of the truck. The appellant was charged with importing methamphetamine, possessing methamphetamine for the purpose of trafficking, possessing proceeds of crime, and failing to report funds in excess of $10,000 to an officer.

[12] The appellant brought a pre-trial application, arguing that his ss. 7, 8, 9, and 10 *Charter* rights had been violated because he was detained from the moment he arrived at the border. He submitted that the lookout amounted to particularized suspicion, which took the inspection beyond the scope of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.) and into the sphere of a criminal investigation. He also argued that, for the same reasons, the warrantless search of his truck violated his s. 8 *Charter* rights. The trial judge dismissed the application: *R. v. Barac*, 2021 ONSC 5294. He concluded that the appellant was not detained until he was arrested after the discovery of the drugs, and that the search of his truck pursuant to the BSOs' authority under the *Customs Act* had been conducted reasonably.

[13] The appellant also brought a motion to adjourn the trial on the basis that the Chief Justice of the Superior Court's Order allowing for the deferral of potential jurors due to Covid-19 violated his s. 11(d) and (f) *Charter* rights. The trial judge dismissed the motion: *R. v. Barac*, 2021 ONSC 6605.

[14] After a jury trial, the appellant was convicted of the charged offences and sentenced to 12 years in custody. He appeals from the pre-trial application and motion decisions and from his sentence.

[15] At the end of the oral hearing, the court advised counsel that the conviction appeal was dismissed with reasons to follow and that the sentence appeal was reserved. These reasons explain why I would dismiss both the conviction appeal and the sentence appeal.

C. THE CONVICTION APPEAL

(1) The *Charter* Application

(a) Legal Framework

[16] This court recently set out the legal framework that applies to the inspection of travellers at the border in *R. v. Ceballo*, 2021 ONCA 791, 408 C.C.C. (3d) 70, which was released after the present trial was completed.

[17] The appellant in *Ceballo* was subject to a lookout that identified her as a target for contraband when she arrived at Pearson International Airport from St. Maarten. She was referred to secondary inspection, where the contents of her purse tested positive on an ION swab for cocaine. During the secondary inspection, the BSO asked Ms. Ceballo whether she had drugs strapped to her body and she admitted that she did. Ms. Ceballo was arrested and charged with importing cocaine. She appealed her conviction on the basis that she was detained prior to her arrest and her s. 10(a) and (b) *Charter* rights had been breached. This court unanimously rejected that argument.

[18] First, Paciocco J.A. noted that it is settled law that the importance of Canada's effective control over its borders means that no person entering Canada reasonably expects to be left alone by the state: *Ceballo*, at para. 18; *R. v. Jones* (2006), 81 O.R. (3d) 481 (C.A.), at para. 30. In this context,

> routine inspection of persons entering Canada is not stigmatizing, and principles of fundamental justice permit greater interference with personal autonomy and privacy than would ordinarily be acceptable in a free and democratic society: *Ceballo*, at para. 18.

[19] As Paciocco J.A. observed, "[t]he concept of detention is tailored to this reality", such that the restraints imposed upon a traveller to either comply satisfactorily with a customs inspection or be denied entry into Canada does not constitute detention for *Charter* purposes: *Ceballo*, at paras. 18-19.

[20] That said, the line between routine investigation and detention attracting *Charter* scrutiny is not always bright. As Paciocco J.A. noted in *Ceballo*, one way of identifying when the line has been crossed and a detention occurs is to look at the intrusiveness of the state action, keeping in mind that the importance of border security warrants "a robust concept of permissible 'routine forms of inspection'": at para. 21. For example, x-ray and ION scans, questions related to the contents of luggage and their provenance, questions intended to expose possible contraband, and questions intended to probe the credibility of the traveller's answers are all routine forms of inspection: *Ceballo*, at para. 21. However, highly intrusive

searches, such as strip searches, body cavity searches, and “bedpan vigils”, although permitted by s. 98 of the *Customs Act*, will trigger a finding of detention: *Ceballo*, at para. 22. As will questions that contain improper inducements, exert unfair pressure, or rise to the level of coercive or adversarial interrogation: *Ceballo*, at para. 22.

[21] The second way of identifying detention in the context of investigative questioning at the border was recognized in *Jones*. Writing for this court, Doherty J.A. left open the possibility that detention could be established where a BSO has subjectively “decided, because of a ‘sufficiently strong particularized suspicion’, to go beyond routine questioning” and “to engage in a more intrusive form of inquiry”: *Jones*, at para. 42. After considering some recent caselaw, Paciocco J.A. stated in *Ceballo* that it “may be” that for a detention to occur under this second approach, the BSO would additionally have to engage in some action that makes their subjective intention known to the traveller: at para. 26. This requirement would be consistent with the foundation for the constitutional concept of detention, which rests on the physical or psychological detention of the accused: *Ceballo*, at para. 26; *R. v. Simmons*, [1988] 2 S.C.R. 495, at pp. 515-21; *R. v. Jacoy*, [1988] 2 S.C.R. 548, at pp. 557-58.

(b) Analysis

(i) The trial judge correctly summarized the law

[22] The trial judge applied the correct legal considerations despite not having the benefit of *Ceballo*.

[23] It is common ground that the central question on the *Charter* application was whether the lookout in this case took the border inspection beyond “routine” such that the appellant’s *Charter* rights were engaged before his arrest. The appellant argues that the lookout placed the appellant under criminal investigation such that the *Charter* applied from the moment he arrived at the border, or at the very least, from the moment the border authorities decided to break open the upper bunk where the methamphetamine was found.

[24] The trial judge squarely addressed this issue, citing the relevant authorities available at the time. He made no error in his articulation of the relevant legal principles.

[25] Just as Paciocco J.A. instructed in *Ceballo*, the trial judge stated that the notion of what constitutes a "routine" search is broad, and must be so in order to protect the integrity of the border. After reviewing the statutory provisions which set out the duties, responsibilities and powers of officers under the *Customs Act*, the trial judge explained, at para. 69 of his reasons, that:

> The bottom line is, Canada must be able to effectively control its borders and the only way that can be accomplished, apart from ensuring BSO's have the necessary tools to carry out that mandate, is if we, on a basic and fundamental level, recognize that a traveller driving down a highway is in a markedly different position than someone being processed at a border, which must be reflected in our laws and in the way courts treat interactions between BSO's and travellers.

[26] Given these principles and statutory framework, and drawing from *Simmons*, the trial judge determined that a routine search includes x-ray and ION scans, as well as pat searches of outer clothing. He acknowledged, however, that the more intrusive the search, the more likely it is to constitute detention and engage the *Charter*, and that intrusive body searches, such as strip searches, necessarily go beyond routine and trigger a person's s. 10 rights.

[27] Second, the trial judge rejected the argument that "routine" is to be understood as "random", stating that the word random "does not capture the complete scope of a BSO's authority": at para. 13. As he explained at para. 47 of his reasons, the fact that a BSO may have a suspicion or hunch about a traveller does not preclude them from referring that person for a secondary inspection:

> [W]hile random questioning and searches are indeed authorized under the *Customs Act*, it would be folly to focus exclusively on the randomness of enhanced questioning or an enhanced search. To do so, would I not, in effect, be saying that a BSO is prohibited from proceeding beyond any cursory questioning about citizenship, declarations of goods, and destination, under any circumstances, and is only permitted to refer travellers to secondary if done for no

> particular reason at all? That is not and cannot be the state of the law.

[28] The trial judge's summary of the relevant legal principles is consistent with this court's decision in *Ceballo*.

(ii) The lookout did not change the routine nature of the secondary inspection

[29] The core of the appellant's position is that the lookout in this case effectively transformed what might have been a routine secondary inspection into a criminal investigation and detention of a particular suspect such that his ss. 7, 9, and 10 *Charter* rights were engaged. While he acknowledges that this is not the case with respect to all "lookout" notices, it was the case here because the appellant was targeted by the lookout as a criminal suspect in very specific and detailed terms, unlike the appellant in *Ceballo*. For that reason, the appellant was detained from the moment he arrived at the border, and a warrant ought to have been obtained prior to any search of his truck.

[30] I disagree. The lookout in *Ceballo* requested that Ms. Ceballo be referred to secondary inspection, provided her flight details, and identified her as a target for "contraband": at para. 6. The lookout alluded to her criminal record for fraud, noted that she was travelling alone on a "go-show ticket" after not having travelled since 2010, that she had been on a five-day trip to a "country of high interest for contraband smuggling" and that she had been the "very last person to board the plane sequentially": at para. 6. It also asked that the BSOs conduct a progressive secondary examination to build any reasonable grounds, specifically mentioning all resources such as x-ray and ION scans: at para. 7.

[31] There is no material difference between the lookout the appellant was subject to and the one that was at issue in *Ceballo*. Both set out details about the particular traveller and their circumstances, and both requested that the traveller be referred for secondary inspection. Despite the fact that there was a lookout in place in *Ceballo*, and despite the fact that it contained a number of specific details, this court rejected the argument that targeting a

traveller for investigation for a specific kind of offence amounts to a particularized suspicion, at para. 38:

> There is … an important difference between having general suspicion that a person seeking entry could be engaged in criminality and having the sufficiently strong particularized suspicion that can open the door to a finding of detention. For this reason, the mere fact that the traveller has been targeted for investigation, even for a suspected general category of offence, does not constitute a sufficiently strong particularized suspicion. [Citation omitted.]

[32] A significant factor in the conclusion that Ms. Ceballo had not been detained before her admission that she was in possession of drugs was the trial judge's finding that prior to this point, the BSO would not have had objective grounds to detain her. The trial judge had also accepted the BSO's evidence that he did not subjectively believe that he had grounds to arrest Ms. Ceballo prior to her admission.

[33] The trial judge in the present case made similar findings of fact. His review of the evidence indicated that:

- While the BSOs paid attention to lookouts, they testified that they are just one indicator to be taken into account, and they frequently do not result in the discovery of contraband;
- X-ray scans of trucks are common, ranging from 15 to 100 per shift, and as many as half show various anomalies that lead to further investigation and searches, which, according to one BSO, only rarely lead to significant drug seizures;
- ION scans are routine, done on a daily basis, and not restricted to those subject to a drug lookout;
- The tools used to lower the bunk were readily available and used frequently during examinations; and
- The BSOs all saw their roles and activities during the inspection process as routine and did not believe they had grounds to arrest the appellant until the drugs were discovered.

[34] The trial judge considered all stages of the appellant's detention in light of this evidence and rejected the argument that he was detained in the *Charter* sense at any point prior to his arrest. He emphasized that the lookout was only one factor in the BSOs' assessment of the appellant and that they did not have sufficient grounds to detain or arrest the appellant before they found the drugs, nor did they subjectively believe that they did. The trial judge also rejected the appellant's reliance on *Jacoy*, in which the Supreme Court found that the applicant was detained when he was ushered into an interview room largely because in that case, unlike this one, there was a coordinated, prearranged agreement between the CBSA and the police to detain and search not just the applicant's vehicle, but also his person: at para 52. He properly concluded that the lookout, standing on its own, changed nothing, other than the fact that the appellant was going to be the subject of a secondary examination, a "fate encountered by countless travellers every single day, for a whole host of reasons": at para 71.

(iii) The appellant was not detained within the meaning of the *Charter*

[35] There is nothing in the way the inspection of the appellant and his truck was conducted that suggests that the border authorities crossed the line from a routine investigation into a detention.

[36] As the trial judge found, the types of searches conducted in this case, including x-ray and ION scans, were routine forms of investigation that are frequently used by border authorities but only rarely lead to the discovery of contraband. The appellant was not subject to the sort of intrusive body search that would trigger a detention.

[37] In addition, having examined the entire period from the appellant's arrival at the border, the trial judge found that there was no material distinction between the questions asked in this case and the sorts of questions asked of the accused in *Jones*. For context, the accused in *Jones* was randomly selected for questioning when he arrived at Pearson International Airport on a flight from Jamaica that had been characterized as "high risk for drugs and alcohol". He was eventually referred to secondary inspection, where he was asked about his recent trips,

employment, living situation, and family. He was also asked to empty his suitcases, a search of which eventually led to the discovery of cocaine and the arrest of Mr. Jones. This court concluded that the accused had been "the subject of the kind of routine scrutiny that all travellers to Canada can expect": *Jones*, at para. 24.

[38] This is also not the type of case that might fall within the second type of investigations that could amount to detention contemplated by Doherty J.A. in *Jones*. There is no suggestion that the BSOs involved subjectively decided to go beyond routine and engage in a more intrusive form of inquiry because of a sufficiently strong particularized suspicion, let alone that they communicated such an intention to the appellant. To the contrary, the evidence was that all of the BSOs who participated in the inspection saw their role as routine, and that they subjectively believed that they did not have grounds to arrest or detain the appellant.

[39] In light of the trial judge's findings, which establish that the appellant was subject to nothing more than routine questioning and inspection, the only possible legal conclusion is that the appellant was not detained for *Charter* purposes prior to his arrest: *Jones*, at para. 37.

(iv) The warrantless search complied with the *Customs Act*

[40] There was no interference with the appellant's reasonable expectation of privacy and therefore no breach of his s. 8 *Charter* rights.

[41] The trial judge concluded that the search of the appellant and his vehicle complied with the *Customs Act*, which places reasonable limits on an individual's rights at the border. As such, there was no violation of the appellant's s. 8 *Charter* rights.

[42] This was the inevitable outcome of the trial judge's finding that the appellant was subject to nothing more than a routine customs examination. As this court held in *Jones*, routine questioning of travellers, the search of their luggage, and pat-down searches do not engage the rights protected by s. 8 of the *Charter*: at para. 32.

(2) The appellant's answers to the BSOs' questions were voluntary

[43] The appellant submits that his answers to the questions he was asked at the border were involuntary at common law and therefore inadmissible at trial. The core of his argument is that the compulsion to answer truthfully under the *Customs Act* operates as a threat within the meaning contemplated in *R. v. Oickle*, 2000 SCC 38, [2002] 2 S.C.R. 3. The appellant does not allege a violation of his s. 7 *Charter* right against self-incrimination, nor does he challenge the constitutionality of the *Customs Act*.

[44] It is settled law that statutory compulsion, on its own, does not render a statement involuntary at common law for the purpose of criminal proceedings: *Walker v. The King*, [1939] S.C.R. 214, at p. 217; *Marshall v. The Queen*, [1961] S.C.R. 123; *R. v. Slopek* (1974), 21 C.C.C. (2d) 362 (Ont. C.A.), at p. 365. The fact that the *Customs Act* allows for the imposition of fines and imprisonment makes no difference. So does the *Highway Traffic Act*, R.S.O. 1990, c. H.8, which was the statute at issue in *Walker*, *Marshall*, and *Slopek*.

[45] The appellant does not point to any other source of threat. Nor does he allege that the border authorities involved in this case made promises or created an atmosphere of oppression that could raise a reasonable doubt as to the voluntariness of his statements. Accordingly, this ground of appeal must fail.

(3) The Adjournment Motion

[46] The appellant submits that the trial judge erred in dismissing his motion for adjournment, which was brought on the basis that the Chief Justice of the Superior Court's order deferring jury service for those prospective jurors who preferred not to disclose their vaccination status resulted in an improperly constituted jury. He argues that the order effectively allowed jurors to excuse themselves without reason from jury duty, creating a biased panel of only those willing to serve.

[47] I would not give effect to this ground of appeal.

[48] The order in issue was made during the pandemic. It allowed for the deferral of potential jurors and was ultimately in effect from August 9, 2020 to December 31, 2021. Pursuant to the order, a potential juror would be excluded from the panel if they responded that they had not been vaccinated or if they chose not to indicate whether they were vaccinated or not.

[49] The trial judge correctly observed that our jury process in general, and of practical necessity, requires that trial judges operate on the general premise that in seeking excusals for whatever reason, prospective jurors are being truthful. He stated, at para. 16 of his reasons:

> What Mr. Gold is suggesting is that the Order in question will, in effect, motivate jurors to lie (or at least provide them a wide open opportunity to do so); and not just lie but lie with a specific nefarious purpose, that being to aid government actors and put the screws I guess to more "individual" thinkers. In any case, I cannot align myself with this way of thinking. It is far too speculative and to subscribe to this would be to, for no good reason and without any evidence at all, attribute dishonesty and ulterior motives to just about anyone being called upon to serve on a jury.

[50] In addition, the trial judge, citing *R. v. Scientology* (1997), 33 O.R. (3d) 65 (C.A.), leave to appeal refused, [1997] S.C.C.A. No. 683, noted that there was no evidence before the court to support the appellant's argument that the order would result in the exclusion of a group of potential jurors that would share any common thread or basic similarity in attitude, ideas and experience that would not be brought to the jury process by those who indicated that they had been vaccinated.

[51] I agree with the trial judge on this issue. There is no evidentiary support for the suggestion that the application of the order resulted in any material bias or appearance of bias on the part of the jurors who were selected.

D. THE SENTENCE APPEAL

[52] The trial judge imposed a sentence of 12 years. Unless the trial judge made an error of law or an error in principle that impacted the sentence, this court can only interfere if the

sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089.

[53] The appellant argues that the sentence imposed was too high, that the appropriate range was six to nine years, and that the sentence imposed was unreasonable.

[54] I would not give effect to this ground of appeal.

[55] First, the trial judge did not fall into any error in principle. He reviewed the caselaw and concluded that the sentences for offenders trafficking in large quantities (over five kilograms) of substances such as cocaine and methamphetamine have increased in recent years. Based on *R. v. Dawkins*, 2019 ONSC 2070, aff'd 2021 ONCA 113, 155 O.R. (3d) 111, he determined that the appropriate sentencing range was nine to twelve years.

[56] The appellant challenges this range, relying primarily on *R. v. Wu*, 2014 ONSC 6000, aff'd 2017 ONCA 620, where this court upheld an 8-year sentence for possession of methamphetamine for the purpose of trafficking. However, the appellant's sentence falls within the six- to twelve-year sentencing range identified by the trial judge in *Wu*, and as the appellant fairly conceded during oral arguments, importation convictions generally result in longer sentences. Moreover, the trial judge was entitled to rely on more recent authorities, including *Dawkins*, in setting the appropriate sentencing range.

[57] Second, the sentence is not demonstrably unfit. The trial judge recognized that 12 years was at the upper end of the sentencing range for large-scale first offender couriers, but concluded that it was appropriate in the circumstances of this case. He emphasized that methamphetamine is one of the most insidious substances and that general deterrence and denunciation where the paramount sentencing considerations in this type of case. While perhaps harsh, the sentence does not rise to the level permitting appellate intervention.

E. DISPOSITION

[58] The appeal is dismissed.

Released: 20230330

"A. Harvison Young J.A."
"I agree. P. Lauwers J.A."
"I agree. Gary Trotter J.A."