COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Brown, 2024 ONCA 763
DATE: 20241017
DOCKET: COA-22-CR-0350

Fairburn A.C.J.O., Coroza J.A. and Baltman J. (*ad hoc*)

BETWEEN

His Majesty the King

Respondent

and

Shamar Brown

Appellant

Mindy Caterina, for the appellant

Samuel Greene, for the respondent

Heard: September 27, 2024

On appeal from the convictions entered on April 20, 2022, and the sentence imposed on October 5, 2022, by Justice Kathryn A. Fillier of the Ontario Court of Justice.

Baltman J. (*ad hoc*):

OVERVIEW

[1] The appellant challenges multiple convictions related to the possession of a loaded firearm along with cocaine and oxycontin for the purpose of trafficking, as well as his sentence for those offences.

[2] On June 12, 2020, the Toronto Police Service ("TPS") arrested the appellant while executing a search warrant for a Bowmanville residence. At 9:24 a.m., when the TPS officers found a handgun on his person, they advised him of his right to counsel and he asked to speak with a lawyer. Nearly an hour and a half passed (the first period of delay) before an officer called for transport so that the appellant could be taken to the police station where he would be able to call a lawyer. The appellant's lawyer call was further delayed for more than two additional hours (the second period of delay) because officers at the station took no steps to facilitate it.

[3] At trial the Crown conceded a s. 10(b) breach of the *Charter* had occurred due to a delay in facilitating a call to counsel. But the Crown disagreed with the defence about when the breach began, asserting that it was limited to the second period of delay, and maintained the evidence should be admitted under s. 24(2) of the *Charter*. The Crown argued that the first period of delay was justified because police were then engaged in critical tasks related to public and officer safety and the preservation of evidence.

[4] After hearing over a week of testimony on a blended *voir dire*, the trial judge agreed with the Crown about the scope of the breach and admitted the evidence. Following that ruling, the defence effectively invited convictions. The trial judge imposed a 10-year sentence on the appellant, who, at 27 years old,

had already amassed an egregious criminal record, including multiple convictions for firearm offences.

[5] The appellant challenges the trial judge's finding that the s. 10(b) breach began only once he was brought to the police station in the custody of the Durham Regional Police Service ("DRPS"). He asserts that the TPS officers who arrested him should have arranged for his hand-off to DRPS at an earlier time, which would have allowed for an earlier call to counsel. As a consequence, he argues the breach was more serious and impactful than the trial judge found, and thus the evidence should be excluded under s. 24(2). Alternatively, he seeks a reduction in his sentence.

[6] For the reasons below, I conclude that the trial judge made no reversible error in her s. 10(b) analysis. Given the particular and challenging circumstances that the police were facing on this occasion, her conclusion that they acted reasonably with respect to the appellant's right to counsel was correct.

[7] As both the conviction appeal and the sentence appeal are contingent on the premise that the breach began earlier than the trial judge found, it follows that there is no basis to reconsider whether the evidence should have been admitted or whether it should have resulted in a lower sentence. I would therefore dismiss both appeals.

BACKGROUND FACTS

(a) Events preceding the arrest on June 12, 2020

[8] In June 2020, a TPS Guns and Gangs team of experienced officers was investigating Zachary Wright as the suspect in a Toronto shooting. The appellant and his girlfriend, Marisa Linscott-Whiltshire, became persons of interest in that investigation. TPS obtained a search warrant for Ms. Linscott-Whiltshire's fourth-floor apartment in Bowmanville, as well as her Honda Civic for a firearm.

[9] TPS was operating in DRPS jurisdiction. If charges were laid based on guns or contraband found in Bowmanville, they would properly be Durham charges. Consequently, on the morning of June 12, a TPS member contacted DRPS to alert them to the operation and to confirm that, if arrests were made, DRPS vehicles would be needed to transport any arrestees to a DRPS station and process them there. Because this was a plainclothes undercover operation, neither TPS nor DRPS had marked police cars at the scene suitable to transport arrestees.

[10] On June 12, the TPS team consisted of six officers. D.C. Stolf was the officer in charge. All six officers testified on the *Charter voir dire*.

(b) TPS arrest the appellant

[11] At 9:23 a.m. the appellant and Ms. Linscott-Wiltshire entered the lobby of her apartment building. TPS officers were waiting for them. As the officers

announced themselves, the appellant attempted to flee and reached for his waistband. Officers took him to the ground, disarmed him, and handcuffed him.

[12] The appellant was carrying a 9 mm semi-automatic handgun. It had a bullet in the chamber, a defaced serial number, and an overcapacity magazine.

[13] Upon arresting the appellant, police advised him of his right to counsel. He said he wished to speak to a lawyer.

(c) TPS find Mr. Wright in the apartment and begin the search

[14] At approximately 9:30 a.m., while two of the TPS officers remained in the lobby with the appellant and Ms. Linscott-Whiltshire, the remaining four officers entered the fourth-floor apartment to execute the warrant. Sitting on the couch, to their surprise, was Mr. Wright, who was at that time wanted on an outstanding warrant for attempted murder involving a shooting in Toronto. He was arrested but no gun was found on him.

[15] Once TPS cleared the unit, around 9:43 a.m., the two officers in the lobby brought the appellant and Ms. Linscott-Whiltshire to the apartment, so the three detainees could all be guarded together. They were seated together on the couch. The officers testified that the scene was "calm" and under control. However, the apartment was too small to facilitate a lawyer call safely and privately. Accordingly, lawyer calls were to take place at a DRPS station in Oshawa.

(d) TPS secure the car and search for further weapons in the apartment

[16] At around 9:44 a.m., two of the officers left the apartment to search the Honda Civic, which had not yet been secured. They quickly found a significant quantity of various controlled substances in the trunk. They also found a laser sight designed to be placed on a firearm, but no accompanying firearm.

[17] Meanwhile, some of the officers who remained in the apartment continued the warrant-authorized search, while others guarded the detainees. One officer found a bulletproof vest and an empty 9 mm magazine in a laundry hamper. He did not find an accompanying firearm.

[18] The vehicle search was completed around 10:04 a.m., at which time, due to the evidence found during the search, Ms. Linscott-Whiltshire was arrested and the appellant re-arrested for the drugs in the vehicle. Both were immediately read their rights to counsel. The appellant immediately indicated – for the second time – that he wished to speak to a lawyer.

(e) Police make arrangements to transport Mr. Wright and the appellant

[19] The search of the apartment was nearly completed by about 10:40 a.m. It became apparent that Mr. Wright would have to be transported to Toronto, so D.C. Stolf called TPS operations to arrange for a marked TPS vehicle to attend.

Around the same time, D.C. Stolf and P.C. DaSilva – who had made the initial contact with DRPS early that morning – discussed transport for the appellant and Ms. Linscott-Whiltshire. As a result of that conversation, at 10:47 a.m., P.C. DaSilva called DRPS to obtain transport for the appellant and Ms. Linscott-Whiltshire.

[20] Defence counsel cross-examined D.C. Stolf extensively on why a transport call was not made earlier. D.C. Stolf agreed that, with the benefit of hindsight, TPS "could have" called for transport earlier. But he disagreed with the suggestion that there was "no good reason" for the time taken to place the call:

> A. There was a lot of moving parts…It wasn't just an arrest and turn over and gone off to the station. Keep in mind, sir…your client was arrested, he struggled on the ground. Gun found, control that situation. I got to get up to the apartment. I get in the apartment, I execute a warrant, clear the place. Now I got another accused person who's wanted for a shooting. Another concern. So, you know, I have a vehicle now in a parking lot, too, which we're worried about. So we got to get down to that car at some point because, you know, God forbid somebody else comes in and scoops the car, like, so there's just some certain moving parts here that things are happening.
>
> …
>
> Q. And you agree that there was ultimately no good reason for why that car could not have been called at the earliest possible opportunity, being 9:24 a.m.?
>
> A. I think we're going to have to disagree on what a good reason is. I understand, sir, this is a dynamic, fluid, firearm-related investigation. A lot of moving parts. We

> have an accused, a man with a gun that's just been arrested. We have another man who's just committed a shooting upstairs. I've got evidence, I've got a car to secure. So I think these are good reasons why I did what I did. Again, looking back, could that car have been ordered earlier? I agree with you.

[21] At approximately 11:00 a.m. two DRPS transport vehicles arrived. Although no specific direction was given to the DRPS officer responsible for transporting the appellant, he was told that a lawyer call should be arranged once they arrived at the station.

[22] The appellant arrived at the DRPS station at 11:37 a.m. The Crown conceded that there was a s. 10(b) breach beginning with the appellant's arrival at the station, which was not properly remedied until 1:47 p.m., when police contacted the appellant's counsel of choice. This amounts to a delay of two hours and ten minutes.

(f) The trial judge found the 10(b) breach started at the police station

[23] The trial judge held that no s. 10(b) breach occurred until the appellant arrived at the police station, whereupon DRPS breached his rights. She found that the appellant's lawyer call was unjustifiably delayed for two hours and 10 minutes, based on him arriving at the station at approximately 11:30 a.m.

[24] The trial judge held that the TPS team did not breach the appellant's s. 10(b) rights during the preceding period because they were "mindful" and "acted professionally and showed due regard". She concluded:

> [27] Detective Stolf was able to clearly articulate the reasons for his decision making on June 12, 2020. I accept that at no point did he, or any members of the TPS team decide to suspend the implementation of the rights to counsel. Ultimately, Detective Stolf agreed that in hindsight the call for transport to DRPS *could* have been made sooner. This candid admission does not, however, transform what I find to have been professional and appropriate conduct on the part of the police into the breach of the Applicants' s. 10(b) rights. There were no breaches of s. 10(b) before the Applicants arrived at 17 Division in Oshawa. [Emphasis in original.]

(g) The trial judge admitted the evidence under s. 24(2)

[25] The trial judge admitted the gun and drugs under s. 24(2). She found the breach was serious and was "very concerned" about DRPS's failure to take steps to facilitate access to counsel upon arrival at the station. As for impact, the trial judge found it was "moderate". Although the appellant was denied access to counsel for over two hours, police never sought to elicit evidence from him. Since the evidence was reliable, real evidence of serious criminal activity, the overall balance favoured admission.

(h) The trial judge imposed a 10 year sentence

[26] At sentencing, the Crown sought 10 years imprisonment, less 1:1 credit for presentence custody; the defence sought 7.5 years, less significant credit for harsh conditions of presentence custody, as well as in mitigation of the s.10(b) breach identified by the trial judge.

[27] The trial judge imposed a global 10-year sentence, less 1.5:1 credit for presentence custody. She found “very few” mitigating factors. She acknowledged the defence’s request for a sentence reduction for the *Charter* breach that she found, but after identifying numerous aggravating factors – including a lengthy record with multiple firearm convictions, that the accused was on parole for a firearm offence as well as multiple prohibition orders at the time of these offences, and his acknowledgment of using crime to earn an income – she concluded that 10 years’ imprisonment was the lowest possible sentence that would meet the goals set out in the *Criminal Code*.

POSITIONS OF THE PARTIES

[28] The appellant’s position is that the trial judge erred in failing to conclude that TPS breached the appellant’s right to counsel when they delayed calling for transport in the first one-and-a-half-hour period. The TPS team could have, and should have, called for transport once the scene in the apartment was calm and under control. There were no exceptional circumstances or case-specific concerns that justified delaying the transport call. When the s. 10(b) breach is properly assessed, it amounts to an unjustified delay of approximately three and a half hours by two separate police forces.

[29] The appellant argues that this more serious breach, along with the heightened impact on the appellant, justifies exclusion of the evidence under

s. 24(2). Alternatively, should this court agree with the appellant's position on the breach but decline to exclude the evidence, the breach justifies a reduction in the sentence imposed.

[30] The respondent asserts that the trial judge correctly found that the s. 10(b) breach began at the DRPS station, and not before. Based on the record before her, she was justified in concluding that the "first reasonably available opportunity" to contact a lawyer did not arise until the appellant was at the DRPS station. Neither the apartment nor the undercover vehicles at the scene allowed for the privacy and safety needed for such calls. The record showed that until the call for DRPS transport was placed, the entire TPS team was operating in a situation fraught with peril, raising significant safety and evidence preservation concerns.

THE STANDARD OF REVIEW

[31] A trial judge's findings of fact are entitled to deference. However, the application of a legal standard to the facts is a question of law, reviewable on the standard of correctness. Consequently, whether the trial judge's findings of fact amount, at law, to a s.10(b) breach is reviewable on a standard of correctness: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20.

ANALYSIS

(a) The principles governing s. 10(b) implementational delays

[32] Section 10(b) of the *Charter* stipulates that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

[33] This provision has both "informational" and "implementational" components. Upon arrest or detention, police must "immediately" advise a detainee of their right to counsel. If the detainee asks to speak to counsel, police must facilitate a lawyer call "at the first reasonably available opportunity." Until that implementational obligation is discharged, police must refrain from attempting to elicit evidence from the accused: *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 38; *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at paras. 24-28.

[34] Recently, in *R. v. Brunelle,* 2024 SCC 3, 92 C.R. (7th) 219, the Supreme Court explained that whether the delay in exercising the right to counsel is reasonable is a "factual and highly contextual inquiry". Barriers to access or "exceptional circumstances" cannot be assumed; they must be proved by the Crown: *Brunelle*, at para. 83.

[35] This court arrived at a similar conclusion in *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at para. 33, where it held that the law permits a delay in the

facilitation of the right to counsel, but only where the police have turned their minds to the "specific circumstances of the case" and have "reasonable grounds" to justify the delay. The justification may be premised on the risk of "the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance": *Rover*, at para. 33.

[36] Where those circumstances exist, the police must move as efficiently and sensibly as possible to minimize any ensuing delay: *R. v. Keshavarz*, 2022 ONCA 312, 413 C.C.C. (3d) 263, at para. 75; see also *Rover*, at para. 27.

(b) The Trial Judge correctly determined no s. 10(b) breach arose from the delay in calling DRPS for transport

[37] In this case, the "first reasonably available opportunity" to contact a lawyer did not arise until the appellant was at the station. The trial judge correctly found that neither privacy nor safety could be ensured at the apartment or in the undercover vehicles TPS had on the scene. That determination accords with existing appellate authority: *Keshavarz*, at paras. 64-83; *R. v. Nelson*, 2010 ABCA 349, 490 A.R. 271, at paras. 19-20.

[38] The appellant's argument thus focuses on the delay in bringing him to the station. He maintains that the trial judge found no s. 10(b) breach by TPS in calling for transport simply because TPS "lacked bad faith". But the trial judge's reasons went beyond that. She found that TPS acted "professionally" and were

"mindful" of s. 10(b), and that D.C. Stolf had "clearly articulated" the reasons for his decision-making. Implicit in those findings is a rejection of the defence theory that there was "no apparent reason" for the delay.

[39] The record supported the trial judge's conclusion that there was good reason for the delay. Until approximately 10:46 a.m., when D.C. Stolf asked P.C. DaSilva to call DRPS for transport, the entire TPS team was engaged in critical tasks related to public and officer safety and the preservation of evidence.

[40] First, all three detainees needed to be carefully watched. Upon his arrest, the appellant tried to flee and reached for his waistband before being tackled to the ground. A search of his person then revealed a loaded handgun with an overcapacity magazine and a bullet in the chamber. The appellant was already on parole and subject to two lifetime firearm bans when this arrest took place. As for Mr. Wright, there was an outstanding arrest warrant for him on an attempted murder charge involving a shooting, from a different jurisdiction. Consequently, of the three detainees, at least two were high security risks. All together, they required the officers' undivided attention.

[41] Second, once the apartment was initially searched and cleared, the vehicle had to be secured and searched. Otherwise, someone could take it away or clear it of evidence. Two of the officers therefore left the apartment for that purpose. They found illegal narcotics in the vehicle.

[42] Third, while the apartment may have been "calm", there was no basis to assume it was safe. Both during and after the vehicle search, there was a compelling and urgent need to search the apartment for weapons. The appellant had already been found with a handgun, which he had reached for during his attempt to escape the police. Mr. Wright's outstanding charges arose from use of a firearm, but no gun was found on him. Officers found a laser sight in the vehicle, and a magazine and bulletproof vest in a laundry hamper in the apartment, but were unable to locate an accompanying firearm. All that reasonably created concern there may be other guns in the apartment.

[43] Due to the pressing need to address all of those demands, it was not until approximately 10:40 a.m. that the search was nearly done. At that point D.C. Stolf called TPS to arrange transport for Mr. Wright. A few minutes later, P.C. DaSilva called DRPS to transport the appellant and Ms. Linscott-Whiltshire.

[44] In sum, this was a fluid, highly charged encounter with three accused – one of whom had a loaded gun and attempted to break free in the lobby, another who was wanted for attempted murder – along with missing weapons, an apartment that had to be searched, and a vehicle parked outside the building containing important evidence that needed to be secured. And both the apartment and the parking lot were in close proximity to members of the public. All those factors created real safety and evidence preservation concerns. In

these circumstances, the trial judge correctly found that no breach arose from the delay in calling DRPS for transport.

[45] Having concluded there was no implementational delay beyond that found by the trial judge, the parameters of the breach remain as she found them. I therefore defer to the trial judge's conclusion that the evidence should not be excluded under s. 24(2). I note that in any event, the appellant did not argue that the evidence should be excluded if this court agreed with the trial judge on the length of the implementational delay.

[46] As noted above, the appellant's sentence appeal is also premised on the claim that this court should accept that the appellant's *Charter* right was infringed in a significantly more serious manner than that considered by the trial judge. Since I have rejected this claim, there is no basis to interfere with the sentence imposed by the trial judge.

CONCLUSION

[47] I would dismiss the conviction appeal. I would grant leave to appeal sentence but dismiss the sentence appeal.

Released: October 17, 2024 "J.M.F."

"Baltman J. (*ad hoc*)"
"I agree. Fairburn A.C.J.O."
"I agree. Coroza J.A."