R. v. Nguyen

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Nguyen, 2023 ONCA 291
DATE: 20230428
DOCKET: C67689

van Rensburg, Miller and Nordheimer JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Kevin Nguyen

Appellant

Naomi Lutes, for the appellant

Nicolas de Montigny, for the respondent

Heard: January 16, 2023

On appeal from the convictions entered on October 23, 2019 by Justice Nancy J. Spies of the Superior Court of Justice.

B.W. Miller J.A.:

[1] The appellant appeals his convictions for various firearm related offences.

[2] Immediately prior to their encounter with the appellant, two police officers, P.C. Van Ruyven and P.C. Kenny, were on bicycle patrol in the Parkdale neighbourhood in Toronto. They were investigating a report of a firearm discharge that had taken place 11 days before. They saw the appellant walking down the sidewalk. P.C. Van Ruyven knew the appellant to have been involved in previous firearms incidents and believed him to be a member of the Parkdale Crips street gang.

[3] The officers stopped the appellant with the ruse that they were in the neighbourhood investigating a theft from an LCBO. P.C. Van Ruyven grabbed the appellant and placed him under arrest. The appellant was not told the grounds for the arrest. The officer later testified he believed he had grounds to arrest for firearm possession, but the application judge rejected this.

[4] The appellant struggled against the arresting officers. P.C. Van Ruyven punched him twice in the torso and jumped on his back. He also testified that he heard the appellant yelling to three men across the street but could not remember what was said. A third officer, D.C. Worth, happened to be passing by and stopped to assist the officers with handcuffing and arresting the appellant. They searched the appellant and found bags of cocaine and crack cocaine on his person. The appellant continued to struggle against the officers as they walked him to D.C. Worth's police cruiser. P.C. Van Ruyven punched the appellant in the stomach and threw him headfirst into the cruiser. The appellant required hospitalization.

[5] At the time of the encounter the appellant had been under investigation for drug trafficking. D.C. Worth was aware of this, although the bicycle patrol officers were not. In fact, the investigative team had been drafting an information to obtain ("ITO") a search warrant for

the appellant's residence. The ITO was nearly complete, and the only remaining step was to confirm the connection between the appellant and the target residence.

[6] On arrest, the appellant provided the officers with his address. D.C. Worth then attended the apartment to "freeze" it until they could obtain a telewarrant for a full search. He waited outside the apartment building for 25 minutes until he was provided with the keys. He then entered the building, proceeded to the target unit, knocked, shouted "police", and used the keys to open the door. He made a visual sweep of the apartment, checking for occupants, and left after 45 seconds. He did not search for, or discover, any evidence in the apartment.

[7] Back at 14 Division, a fourth officer – D.C. Goss – completed the ITO using information he obtained from D.C. Worth and P.C. Van Ruyven, including the appellant's address and the fact that he was arrested and drugs were found on his person. The search warrant for the apartment, which the appellant shared with his mother, was issued later that night. On execution of the search warrant, police located cash as well as a loaded handgun wedged between the cushions of the sofa. The appellant and his mother were both charged with possession of a loaded, prohibited firearm and possession of proceeds of crime exceeding $5,000.

Procedural history

[8] The appellant applied under s. 24(2) of the *Canadian Charter of Rights and Freedoms* to exclude the evidence obtained consequent to his arrest and the execution of the search warrant. He pleaded not guilty, but did not contest the facts read in by the Crown, acknowledged that the Crown could prove those facts beyond a reasonable doubt, and was convicted on that basis.

The Charter ruling

[9] The application judge found that the arresting officers lacked the necessary grounds to detain, arrest, and search the appellant. She found breaches of the appellant's rights under ss. 7, 8, 9, and 10(a) of the *Charter*, resulting from the absence of grounds for arrest, the

consequentially illegal search, the excessive use of force, and the failure to advise the appellant of the reasons for his detention. As a remedy under s. 24(2), the application judge excluded from evidence the drugs that had been found on the appellant's person at the time of arrest. The application judge was greatly troubled by the behaviour of the arresting officers, who behaved, she said, as though the appellant had no *Charter* rights because of his criminal record and alleged gang membership, and then gave false evidence.

The Garofoli ruling

[10] As noted above, the ITO was sworn by D.C. Goss. He relied in part on information from a confidential informant supplied by the sub-affiant D.C. Merritt. On an application challenging the ITO pursuant to *R. v. Garofoli*, [1990] 2 S.C.R. 1421, the Crown conceded that the appellant should be permitted to cross-examine D.C. Goss and D.C. Merritt. The appellant pursued other relief on the application as well, including rulings regarding whether portions of the ITO should be excised; whether the search warrant was sub-facially invalid due to misleading statements in the ITO; whether the police subverted the warrant process such that the warrant should be set aside; and whether the evidence obtained from the apartment (the loaded handgun and the cash) should be excluded pursuant to s. 24(2) of the *Charter*.

[11] The application judge found that the freeze of the apartment was not reasonable; it constituted a violation of the appellant's rights under s. 8 of the *Charter*. She rejected the argument that D.C. Worth had grounds to believe that immediate entry was required to preserve evidence. She found the Crown's argument for exigency was undercut by the fact that D.C. Worth waited in his scout car for 25 minutes before he was provided with a key and made no effort before that to enter the apartment building and secure the unit.

[12] As noted above, no evidence was obtained from the apartment freeze. However, the appellant argued before the application judge that the illegal entry affected the legality of the subsequent search as well, and that the entire course of police conduct – from the illegal arrest through the apartment freeze to the warranted search – should be considered together

in deciding whether the evidence from the warranted search was "obtained in a manner" that violated the appellant's *Charter* rights and justified its exclusion from evidence.

[13] The application judge agreed that it was arguable that the s. 8 breach from the apartment freeze was temporally connected to the execution of the search warrant. However, she declined to consider the earlier breaches from the arrest of the appellant when considering the application to exclude the loaded handgun and cash because the exclusion of the drugs found on the appellant was sufficient to make it "clear that this Court does not condone the conduct of Officers Van Ruyven and Kenny". Nothing more, on her view of the facts, was required.

[14] The application judge also considered the conduct of D.C. Worth in conducting the apartment freeze in her s. 24(2) analysis for the evidence found during the warranted search. She concluded that exclusion of the evidence was not required. Significantly, she found that D.C. Worth acted in good faith, reasoning that he had been guided by the state of the law prior to *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, which was decided less than three months earlier. In her view, pre-*Paterson*, it would not have been unreasonable for the officer to believe that the possibility that someone could be aware of the arrest and enter the apartment to destroy evidence, would constitute exigent circumstances justifying a "freeze" of the apartment. The application judge further found that although the impact of the breach was significant, being an unauthorized entry into a person's home, it was tempered by the short duration of the entry – less than a minute – and that in other respects D.C. Worth was considerate of the appellant's interests – he did not force entry or conduct a search beyond ascertaining that no one was present. The application judge concluded that the handgun and the cash should be admitted into evidence.

Validity of the search warrant

[15] As a consequence of the ruling that the appellant's arrest was unlawful, the application judge excised all references to the appellant's arrest for drug trafficking from the ITO. After excising this information at Step 5 of *Garofoli*, the application judge found that the ITO no

longer supplied sufficient grounds to support a warrant to search the appellant's residence. However, at Step 6, the application judge permitted the Crown to amplify the ITO to include information from a confidential informant given to D.C. Merritt and passed to D.C. Goss, that the appellant was dealing drugs out of the apartment. The application judge concluded that, so amplified, the excised, unredacted warrant could have issued.

[16] The application judge further rejected the submission that the officers had subverted the process for obtaining judicial pre-authorization for searches, such that she should exercise her residual discretion to set aside the warrant, per *R. v. Paryniuk*, 2017 ONCA 87, 134 O.R. (3d) 321, leave to appeal refused, [2017] S.C.C.A. No. 81. The application judge reasoned that D.C. Goss was unaware of the *Charter* breaches by the arresting officers and so did not deliberately mislead the issuing justice by not mentioning them in the ITO. Furthermore, she did not find it a material error not to have stated that D.C. Worth had not found any evidence on the initial freeze of the apartment.

Issues

[17] The appellant raised the following issues on appeal:

1. The application judge erred in not excluding the evidence seized from the apartment as a consequence of the s. 8 breach from the apartment freeze;
2. The application judge erred in permitting the Crown to amplify the ITO;
3. The application judge erred in not exercising her discretion to set aside the warrant.

Analysis

Issue 1: Failure to exclude evidence under s. 24(2) of the *Charter*

[18] The appellant argued that the application judge erred in her s. 24(2) analysis by not considering two significant factors: (1) the overall course of police conduct; and (2) the lack of good faith on the part of D.C. Worth.

The overall course of police conduct

[19] The appellant argued that the application judge erred in concluding that having provided a s. 24(2) remedy for the earlier breaches, she was therefore precluded from considering this same conduct again when determining whether to exclude the evidence later discovered in the apartment search.

[20] Although I agree this would have been an error, I do not believe that the application judge reasoned in this manner. In considering whether the apartment evidence was "obtained in a manner" that would bring the administration of justice into disrepute, she did not understand herself to be precluded from considering the *Charter* breaches proximate to the appellant's arrest. The analysis from *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 does not apply mechanistically, and it was open to her to conclude, as she did, that some of the police misconduct was not sufficiently connected to the search of the apartment and discovery of the evidence such that exclusion of the evidence was needed to distance the court from the *Charter* breaches. That the application judge was reinforced in this conclusion by the fact that she had already provided a remedy for the breaches related to the unlawful arrest, is not an error. She faithfully applied the *Grant* criteria, provided relief proportionate to the breaches, and committed no reviewable error.

Lack of good faith

[21] With respect to the second argument, the appellant argues that the application judge erred in characterizing D.C. Worth's decision to carry out the apartment freeze as a good faith error of law.

[22] Central to the application judge's reasoning was that D.C. Worth's conduct suggested he was informed by the state of the law prior to *Paterson*, believing that the state of affairs confronting him constituted exigent circumstances that rendered it impracticable to wait until a warrant had been obtained. D.C. Worth inferred that the appellant might have more drugs stashed at his apartment and that his confederates, learning of his arrest, might attend the apartment and retrieve the drugs. Supporting these inferences, D.C. Worth testified that: 1)

there were several people who observed the arrest, including a group of men across the street; 2) he believed that the appellant had called something out to the group (although he could not remember what was said); 3) he believed there may have been more drugs stored in the apartment and he was concerned with preserving this evidence; and 4) the appellant was a suspected gang member, which raised the possibility that he had confederates who could have entered the apartment and retrieve any drugs that might be there.

[23] I would agree that in freezing the apartment D.C. Worth acted honestly and without bad faith, but an absence of bad faith does not necessarily equate to a finding of good faith: *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 147. He acted without legal justification. Although the application judge suggested D.C. Worth would have been on a solid footing pre-*Paterson*, it bears noting that the Supreme Court in *Paterson* rejected a trial judge's finding of good faith in a similar misapprehension of the law and found that it did not weigh in favour of the inclusion of the evidence.

[24] However, as in *R. v. Omar*, 2018 ONCA 975, 144 O.R. (3d) 1, at para. 100, *per* Brown J.A. (dissenting), rev'd 2019 SCC 32, [2019] 2 S.C.R. 576 for the reasons of Brown J.A., the trial judge's key finding was not that D.C. Worth acted in good faith, but that his conduct fell at the less serious end of the spectrum. This finding is supported by the evidence, particularly that: 1) he made some effort to determine whether anyone was in the apartment before entering; 2) he was in the apartment for less than a minute; and 3) he did not conduct a search beyond determining whether anyone was present. Accordingly, I would not interfere with the application judge's conclusion on s. 24(2).

Issue 2: Permitting the Crown to amplify the ITO

[25] As noted above, the application judge had excised from the ITO the fact that the appellant had been arrested and that drugs were found on his person. She also excised the fact that the appellant had communicated on his arrest that he lived at the apartment.

[26] The application judge further excised the statement from the ITO that D.C. Goss knew from D.C. Merritt that the appellant lived at 1430 King Street West with his parents. D.C.

Merritt testified that what he actually told D.C. Goss was that his information was that the appellant was dealing drugs from this address and not that he lived there.

[27] The application judge concluded that the excised, redacted ITO still provided sufficient information to support the assertion that the appellant lived at 1430 King Street West. But the application judge determined that the ITO as excised and redacted did not provide sufficient evidence that the appellant was using the apartment to store drugs or that there would be drugs located at the apartment. The ITO could therefore not ground a warrant to search 1430 King Street West.

[28] The application judge invited the Crown to make a Step 6 application.

[29] At Step 6, it was established that D.C. Merritt had information from a confidential informant that the appellant was dealing drugs out of 1430 King Street West. D.C. Merritt testified that he gave the address to D.C. Goss, and the application judge permitted the Crown to amplify the ITO to state specifically that D.C. Goss believed the appellant was dealing drugs from 1430 King Street West.

[30] The appellant argues this ruling was based on a misapprehension of evidence, specifically that D.C. Merritt told D.C. Goss that the appellant was *dealing* drugs from 1430 King Street West. I do not agree that the application judge misapprehended the evidence. It is not contested that D.C. Merritt told D.C. Goss that the informant had advised him that the appellant was dealing drugs in the area around the intersection of King Street and Jameson Avenue. It is not contested that D.C. Merritt gave the appellant's address to D.C. Goss. D.C. Merritt clarified on cross-examination that he did not know the appellant was *living* at the address and had only been advised that he was *dealing* from there. D.C. Goss had testified differently: that D.C. Merritt had told him that the appellant was *living* there.

[31] The only issue at Step 5 was whether there was sufficient evidence to support the conclusion that narcotics would be found at the address. The application judge concluded there was not sufficient evidence, and therefore proceeded to Step 6.

[32] I agree that amplification was permissible to correct the ITO to state that D.C. Merritt told D.C. Goss the appellant was dealing from 1430 King St. West. The only live dispute is whether D.C. Merritt told D.C. Goss the appellant lived at 1430 King St. West or trafficked drugs from there. The application judge was entitled to prefer the evidence of D.C. Merritt over D.C. Goss on this point. The focus on amplification is whether the police had the information at the time of the application for the search warrant but failed to communicate it due to a failure in drafting: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 59; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 42-43. Amplification is not restricted to correcting mechanical or typographical errors but extends to failures to communicate what was known by the affiant as a result of want of drafting skill: *R. v. Duncan*, 2021 ONCA 673, at paras. 14-16.

[33] The application judge made no error in concluding that the issuing justice could have drawn the inference that if the appellant was dealing drugs in an area adjacent to where he was known to be living, this constituted reasonable and probable grounds to believe that he might have drugs stored at his residence. This conclusion is entitled to deference.

Issue 3: Failure to exercise residual discretion to set aside the warrant

[34] The appellant's final ground of appeal is that given the egregious violations of the appellant's *Charter* rights at the time of his arrest, the application judge ought to have exercised her residual discretion – as articulated in *Paryniuk* – to set aside the warrant. The appellant argues that the overall conduct of the police resulted in a subversion of the pre-authorization process that undermined the integrity of the judicial process.

[35] The application judge disagreed, on the basis that D.C. Goss – who was the affiant – had no reason to believe that the arrest by P.C. Kenny and P.C. Van Ruyven violated the appellant's *Charter* rights.

[36] The appellant was concerned that the effect of the application judge's decision is that officers who disregard the *Charter* rights of accused, and who are not truthful in the evidence

they give, can nevertheless insulate the ITO from attack as long as they have someone else act as affiant.

[37] I do not agree that the application judge's ruling should be read as authorizing such a practice. The evidence before the application judge was that D.C. Goss was not only unaware of the misconduct of his fellow officers, but there was nothing whatsoever that would have put him on notice that he should make enquiries to ascertain whether there were material facts of which he had not been informed. In such circumstances, the application judge made no error in declining to exercise her residual discretion to invalidate the warrant.

DISPOSITION

[38] I would dismiss the appeal.

Released: April 28, 2023 "K.M.v.R."

"B.W. Miller J.A."
"I agree. K. van Rensburg J.A."
"I agree. I.V.B. Nordheimer J.A."