COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Thombs, 2023 ONCA 850
DATE: 20231220
DOCKET: C70506

Trotter, Thorburn and Sossin JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Justin Thombs

Appellant

Richard Fedorowicz, for the appellant

Lisa Csele, for the respondent

Heard: December 8, 2023

On appeal from the convictions entered on July 27, 2021 and the sentence imposed on March 10, 2022 by Justice P.H. Marjoh Agro of the Ontario Court of Justice, with reasons reported at 2021 ONCJ 310 and 2022 ONCJ 165.

REASONS FOR DECISION

OVERVIEW

[1] The appellant, Justin Thombs, appeals from his conviction for five counts of possession for the purpose of trafficking. The appellant was also convicted of two counts of possession of property obtained by crime under $5,000 (consisting of a stolen license plate and some cash). The Crown concedes that there was

insufficient evidence for the conviction involving the cash and that an acquittal should be entered on that specific count.

[2] The appellant was sentenced to 9 years less pretrial custody for the possession of proceeds of crime and the possession for the purpose of trafficking, and a concurrent sentence of 2 years for possessing the stolen license plate. If his conviction appeal for the drug trafficking is successful, and only the conviction for possession of property obtained by crime under $5,000 remains, the appellant also appeals from his sentence concerning the stolen license plate.

[3] At the hearing of the appeal, we dismissed the conviction appeal with reasons to follow. These are our reasons.

FACTS

[4] The arrest of the appellant arose as a result of a police investigation into a stolen license plate. While on patrol, Constable Starrs ran the license plate on a white BMW that had pulled up in front of a residence. The search listed the license plate as stolen and belonging to a different white BMW. Cst. Starrs observed two people, one of which was the appellant, get out of the vehicle and go into the residence. A few minutes later, the men came back out.

[5] The appellant opened the trunk of the BMW, retrieved a wrench, and removed the license plate. Backup officers arrived and Cst. Starrs, along with the two officers, approached the men. One of the men ran and has not been found.

The appellant was detained. Cst. Starrs saw that the vehicle's VIN plate was covered and this, along with the stolen license plate, made him suspicious that the BMW was also stolen.

[6] A search of the appellant's person revealed a cellphone and the key to the BMW. When looking into the open trunk to retrieve the license plate that the appellant had removed, Cst. Starrs saw a camera bag, which he opened. Inside was a notebook with what appeared to be a drug debt list. Cst. Starr searched the rest of the car and found: a box of baking soda in the passenger side door pocket; two cell phones, a digital scale, and $110 cash in the middle console; and an open backpack, lying on the floor behind the driver's seat, containing several small clear baggies and a large clear baggie containing several types of drugs.

[7] During the cross-examination of Cst. Starrs at trial, the defence began to explore his reasons for searching the BMW. The defence then brought a mid-trial *Charter* application alleging that there was an issue as to whether or not the appellant's s. 8 right to be secure against unreasonable search and seizure had been infringed.

[8] The trial judge dismissed this mid-trial *Charter* application, concluding that it was not brought in a timely fashion and had no reasonable prospect for success.

ISSUES

[9] The appellant raises four grounds of appeal: first, the trial judge erred in declining to hear the mid-trial *Charter* application; second, the trial judge erred in misapprehending the evidence that the drugs found in the vehicle were in "plain view"; third, the trial judge failed to consider inferences other than guilt arising from the fact that the appellant remained at the scene while the passenger in the vehicle fled; and fourth, he conviction verdict was unreasonable.

[10] We address each ground of appeal below.

ANALYSIS

[11] The first ground of the appellant's appeal from conviction is that the trial judge erred in declining to hear his mid-trial s. 8 *Charter* application.

[12] The discretion afforded a trial judge to hear a mid-trial *Charter* application over the admissibility of evidence is broad, as is the deference afforded to trial judges in exercising this discretion: *R. v. Haevischer*, 2023 SCC 11, at paras. 72, 104; *R. v. Megill*, 2021 ONCA 253, 405 C.C.C. (3d) 477, at para. 152.

[13] Courts have recognized a number of factors as relevant to the exercise of this discretion, including the reasons for, and degree of, the lack of compliance with the rules of the court; the prejudice, if any, to the Crown; the degree of disruption to the proceedings; the history of the litigation; the merits or absence of any real indication of a prospect of success on the application; and, justice and

fairness to all parties: *R. v. Greer*, 2020 ONCA 795, 397 C.C.C. (3d) 40, at para. 112; *Megill*, at paras. 157-8. The trial judge referred to some, but not all, of these factors in her reasons for concluding that the application should not be heard.

[14] The appellant argues that the trial judge should have exercised her discretion differently. The appellant contends that the trial judge failed to advert to the *Criminal Rules of the Ontario Court of Justice*, SI/2012-30 ("*Criminal Rules*"). The *Criminal Rules* provide that an application seeking the exclusion of evidence under the *Charter* "shall be heard at the start of the trial or during the trial" with service 30 days in advance: rr. 2.5, 3.1. Although under r. 5.3: "The Court may excuse non-compliance with any rule at any time to the extent necessary to ensure that the fundamental objective set out in rule 1.1 is met." Rule 1.1, states that, "[t]he fundamental objective of these rules is to ensure that proceedings in the Ontario Court of Justice are dealt with justly and efficiently."

[15] Relying on *R. v. Kazman*, 2020 ONCA 22, 452 C.R.R. (2d) 185, at para. 15, leave to appeal refused, [2020] S.C.C.A. No. 58, the appellant further argues that it is incumbent on trial judges to explain their decision by reference to where the "interests of justice" lie in a proposed mid-trial *Charter* application.

[16] We disagree that the trial judge was under any obligation to refer to the *Criminal Rules* or specifically refer to the "interests of justice" when explaining the

basis for deciding not to hear the mid-trial *Charter* application. In this case, the trial judge provided clear and cogent reasons for her decision, including her conclusion that the application was "not filed in a timely fashion" and had no reasonable prospect for success (she added that even if the s. 8 *Charter* argument succeeded, the evidence seized during the search of the vehicle likely would not be excluded under s. 24(2) of the *Charter*, as the drugs inevitably would have been discovered once a warrant was obtained by the investigating officers). While other factors could have been mentioned in explaining her decision, it was not an error to focus on the factors which struck her as most important in guiding the exercise of her discretion.

[17] With respect to the trial judge's analysis, the appellant disagrees with her determination that the application had no reasonable prospect of success. The appellant's argument rests on the view that the trial judge should have weighed the evidence in the record differently.

[18] However, the trial judge's appreciation of the evidence is entitled to deference, and we do not accept that the trial judge erred in her assessment of the prospects for success of the *Charter* application.

[19] As a result, this ground of appeal fails.

[20] We also are not persuaded by the appellant's second ground of appeal, that the trial judge misapprehended the evidence with respect to whether the drugs seized in the vehicle were "in plain view."

[21] The trial judge did not misapprehend the evidence. The appellant's assertion that there was "no evidence that the drugs were in plain view" is incorrect. The officer testified to performing only a cursory search. He did not disturb anything in the car to observe the drugs. There is no question that the drugs were visible in the open backpack, and that the backpack itself was on the floor behind the driver's seat. While the backpack may not have been visible through the tinted windows from outside the vehicle, or from the passenger's seat, the trial judge found it was clearly visible through the rear door on the driver's side.

[22] We see no basis to disturb the trial judge's factual findings with respect to the backpack containing the drugs being in plain view.

[23] This ground of appeal also fails.

[24] The third ground of appeal is that the trial judge failed to consider all the evidence relating to the ultimate issue of guilt or innocence of the appellant, and specifically the fact that the other person in the car fled the scene while the appellant remained. This fact, according to the appellant, was reasonably capable of supporting an inference favourable to him and should therefore have been considered by the trial judge as such.

[25] The trial judge concluded on this issue:

> I note that when police arrived on scene the unknown male immediately fled suggesting that he well knew that drugs were in the vehicle. That [the appellant] did not run does not logically or reasonably suggest that he didn't know drugs were in the vehicle. It is highly unlikely that an individual would abandon a large cache of drugs … or that [the appellant] would abandon his grandfather's new vehicle.

[26] The appellant argues that this characterization of the fact the appellant remained on the scene converted circumstantial evidence of innocence into circumstantial evidence of guilt.

[27] We disagree. The trial judge's conclusion was available to her on the record, and we see no error in her treating the appellant remaining at the scene as evidence not giving rise to an inference of innocence.

[28] The appellant's fourth ground of appeal is that of an unreasonable verdict. The appellant's submissions focus on the following ultimate conclusion stated by the trial judge: "It is unlikely that the quantity and value of the drugs would be the subject of [the appellant's] unknowing possession particularly when it's in plain view and in close proximity to him. There being no other reasonable inferences available to me, I find [the appellant] guilty as charged on the informations and charges for which he was arraigned" (emphasis added).

[29] According to the appellant, the trial judge's reference to it being "unlikely" that the appellant did not know about the drugs in the vehicle did not remove

"unknowing possession" as a possible inference, and therefore guilt was not the only available inference on the record. The appellant also points to the possibility that the drugs belonged to the passenger in the vehicle who fled and restates the argument that the trial judge misapprehended the evidence of the drugs being in plain view.

[30] We reject these submissions. The trial judge considered and rejected the defence theory on possession. The trial judge's conclusion was available to her based on her factual findings.

[31] This ground of appeal must also fail.

[32] The Crown concedes one aspect of the appeal, which involves one of the counts for possession of proceeds involving $110 in cash. The possession of these proceeds was not specifically addressed by any party, including the trial judge. The Crown acknowledged in its written submissions that this oversight ought to benefit the appellant and that, consequently, an acquittal should be substituted on this charge.

DISPOSITION

[33] For these reasons, the conviction appeal is dismissed, save for the count involving possession of proceeds relating to the cash seized from the vehicle. An acquittal will be entered on that conviction.

[34] The appellant sought to appeal the sentence only if the conviction appeals were successful (apart from the possession of proceeds count conceded by the Crown). As the conviction appeal has been dismissed, there is no basis for the sentence appeal. Accordingly, leave to appeal sentence is refused.

"Gary Trotter J.A."
"Thorburn J.A."
"L. Sossin J.A."