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THE *CHARTER* CHALLENGE

Ontario Justice Education Network

CASE SCENARIO
Fall 2013

TYSON ROY

v.

HER MAJESTY THE QUEEN

Ontario Superior Court of Justice

Date: 20132110
Court File No: 19867-14

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

and

TYSON ROY

Applicant

REASONS FOR DECISION
APPLICATION TO EXCLUDE EVIDENCE

Garcia J.

Introduction

1. The defendant Tyson Roy is charged with a number of offences arising from the possession of a loaded handgun. There is no issue Mr. Roy was in possession of a loaded firearm. The defence proceeded on the basis of an application under Section 24(2) of the Canadian Charter of Rights and Freedoms to exclude from evidence the firearm. If the application succeeds, the defendant would be acquitted of all charges; if the application fails, he would be convicted of all charges.

Facts

2. The facts in this case are not complicated, although they are nuanced. The Crown called P.C. Stopp and P.C. Stereo to testify. The officers are members of Community Officers Proactive Policing (C.O.P.P.), an initiative designed to patrol high-crime areas of the city and to engage

with and speak to individuals they encounter while on patrol.

3. On the evening of October 31, 2012, P.C. Stopp and P.C. Stereo were patrolling a community housing complex in an area of the city that has a reputation for a lot of gang activity. It is also an area populated mostly with low-income families and recently arrived immigrants to Canada. The officers' task that evening was to patrol the area and speak to individuals they encountered on the way.

4. The police officers were patrolling on their bikes. They were riding through a parking lot behind a shopping complex late in the evening when they passed by a group of young men walking out from an alleyway. The police officers testified that none of the young men were known to them, and none of them were doing anything suspicious. They both agreed that all of the men were young and black. The officers decided to turn around and bike past them again "just in case". It was suggested to each officer in cross-examination that their intention at this point was to stop the group in order to identify and question the young men. While each officer denied that, I find it difficult to accept their evidence on this point given that their task that evening was to do just that.

5. In any event, when the police officers circled back towards the group, Mr. Roy looked over his shoulder and then separated from the group and began walking away from the officers back towards the shopping plaza. The officers found this suspicious. They felt Mr. Roy was trying to avoid them. As a result, the officers let the balance of the group continue on their way and they began to follow Mr. Roy. Mr. Roy was wearing dark, baggy clothes and a baseball hat. He had a small backpack over his shoulders.

6. After about ten or fifteen seconds, P.C. Stopp called out to Mr. Roy. While she could not recall the exact words she used – and these words were not recorded in her notebook – she testified it was something like, "Hey man!" or "Hey you!" She denied that she told Mr. Roy to "stop" at this point. She denied her intention was to detain or investigate Mr. Roy. Rather, P.C. Stopp testified she simply wanted to engage the young man "to see whether he would speak to

us." P.C. Stopp agreed that the young man had the right to keep walking and not speak with either officer. When pressed on this point, P.C. Stopp admitted they wanted to at least identify him in order to complete a "C.C.C." or a Community Contact Card.

7. The police practice of completing C.C.C. is well-known. There has been considerable judicial and media scrutiny of this practice. In essence, it involves collecting information about individuals that C.O.P.P officers encounter while on duty. It generally involves collecting information such has name, date of birth, address, the time and location of the encounter, what they were doing and any known associates at the time, if applicable.

8. P.C. Stopp was cross-examined extensively on her reasons for wanting to complete a C.C.C. She testified that she completes a C.C.C. with most individuals she encounters while on patrol "if they will speak with me." She denied she wanted to complete a C.C.C. because the defendant was a young black man. She further denied she had any intention to investigate the male once identified; however, when pressed on this point, P.C. Stopp agreed that her intention after completing the C.C.C. was to "run a check to see if he was wanted, or doing something he wasn't supposed to be doing", such as violating a condition of bail.

9. To be clear, neither officer had any grounds at this point to suspect Mr. Roy of any wrong-doing whatsoever. The police officers admitted as much. They did not know who he was. He was not doing anything illegal. The police had no grounds to suspect Mr. Roy was connected to or associated with any criminal act whatsoever. Both officers insisted that the defendant's action of walking away from them was suspicious because it looked like he was trying to avoid them.

10. Even if Mr. Roy was walking away to avoid contact with the police, this is his right and prerogative if he chooses. It would be perverse if the exercising of one's rights could be grounds to suspect one of wrong-doing.

11. Despite the police officers calling out, Mr. Roy kept walking away. According to the officers, his pace did quicken and he looked over his shoulder at the officers. P.C. Stopp testified she called out to him again and then both officers sped up on their bikes and caught up with Mr. Roy. They pulled up beside him. They denied the suggestion that they cut off Mr. Roy with their bikes, but both officers agreed that when they caught up to Mr. Roy he stopped walking. Both officers agreed that Mr. Roy immediately said, "Did I do something?" P.C. Stopp testified she told Mr. Roy, "No, just chill. All I want to do is talk to you for a sec."

12. P.C. Stereo testified that at this point both officers dismounted from their bikes. P.C. Stereo stood in front of Mr. Roy and P.C. Stopp stood to the side, communicating their position to the police dispatch over his radio. He was also preparing to complete a C.C.C. At this point, P.C. Stereo asked the defendant for his name. There is no dispute that the defendant provided his real name; however, P.C. Stereo testified that Mr. Roy appeared nervous and hesitant about providing his name. In addition, P.C. Stereo was familiar with the family name "Roy" and was aware from his police briefings that two brothers with the last name "Roy" had recently been arrested in a series of robberies and released on bail with strict curfews and other conditions not to attend at certain shopping complexes where the robberies were alleged to have occurred.

13. For these reasons, P.C. Stereo began to suspect that the defendant did not provide his real name. As a result, P.C. Stereo asked the defendant for a piece of identification. The defendant again hesitated and then replied that he didn't think that he had any on him. At this point, P.C. Stereo became more suspicious.

14. P.C. Stopp moved from her position beside her bike towards the defendant and stood directly beside him with her arms extended downward in a "X" pattern across her mid-section. P.C. Stopp testified that she sensed the encounter was becoming more tense, and she was now concerned for their safety. P.C. Stereo asked the defendant again for his identification. Mr. Roy responded that it was in his backpack and P.C. Stereo told him to get it.

15. At this point, Mr. Roy began to move as if he was going to take off his back pack and then stopped. P.C. Stopp asked him, "Do you have something you are not supposed to have?" The defendant replied, "That depends". P.C. Stopp then said, "Perhaps I need to look for you." At this point, P.C. Stopp reached out for the strap of the defendant's backpack. As soon as this happened, the defendant turned and ran away from the police.

16. P.C. Stopp gave chase on foot while P.C. Stereo got back on his bike. Both police officers momentarily lost sight of the defendant. They pursued Mr. Roy behind the complex and caught up with him about thirty seconds later. He was detained at this point and handcuffed. The police arrested Mr. Roy for obstructing police on grounds that he had provided a false name.[a] At this point, Mr. Roy no longer had his backpack on. The police officers called for back-up and then retraced their steps back to the point of the original stop. The police officers found a small backpack beside a dumpster behind the shopping complex. The police officers opened the bag and emptied its contents. Inside the bag they found Mr. Roy's wallet, which contained his driver's license. There was also a loaded handgun in the backpack. It is not disputed that Mr. Roy must have discarded his backpack shortly after running from the police.

The Position of the Parties

17. The Crown submits that this entire interaction with Mr. Roy was proper and up until the point where Mr. Roy was caught running away from the police, he was never detained or searched in violation of his *Charter* rights. By the time Mr. Roy was finally detained, the police had ample grounds to do so and the corresponding search of his backpack was justified in order to confirm his identity. The backpack was searched incidental to lawful arrest. As a result, there is no breach of any of Mr. Roy's *Charter* rights, and I do not have to consider whether the gun should be excluded under section 24(2) of the *Charter*.

18. The defence takes a very different view of this police encounter. The defendant submits that Mr. Roy was detained by the police when he was stopped for the purpose of completing the

[a] This charge was withdrawn against Mr. Roy before dates for his trial were set.

C.C.C. The detention was arbitrary and unlawful. The resulting search of the backpack necessarily flowed from this detention and was both warrantless and unlawful. The defence argues that the police conduct in this case demonstrates a complete disregard for *Charter* rights and, as a result, the gun must be excluded.

Legal Issues

19. The following issues arise on this Application:

i. Was Mr. Roy detained in violation of his rights under section 9 of the *Charter* when the police originally stopped him for the purpose of completing a C.C.C.?

ii. If not, was Mr. Roy detained at some point thereafter and, in particular, before he was asked about whether he had anything in his backpack in violation of his section 9, 10(a) and (b) rights?

iii. Was the search of Mr. Roy's backpack unreasonable and in violation of his rights under section 8 of the *Charter*?

iv. If the search was unreasonable, should the loaded handgun be excluded from evidence pursuant to section 24(2) of the *Charter*?

Overview of the Law

20. It is now well-established that not every encounter an individual has with a police officer involves a detention. Generally speaking, a police officer does not detain an individual simply because he wants to identify or speak with an individual. It is also well-established that a citizen who is not detained has the right to walk away. A detention arises when some significant physical or psychological restraint of the individual by the state occurs.

21. Once of the crucial issues in this case is whether Mr. Roy was ever detained and, if so, at what point this detention occurred during his encounter with the police. This finding is important because detention gives rise to corresponding obligations and rights on the part of the police and the detainee. The police are required on detention to comply with sections 10(a) and (b) of the

Charter. They are authorised to conduct a limited search pursuant to a detention: *R v Mann*, 2004 SCC 52. The detainee is no longer free to exercise the right to simply walk away.

1. Detention and Community Contact Cards

22. Section 9 of the *Charter* provides that everyone has the right not to be arbitrarily detained or imprisoned.

23. In *R v Grant*, 2009 SCC 32, the Supreme Court of Canada provided a comprehensive definition of the meaning of detention. It is now generally recognised that one is detained when they are under significant physical or psychological restraint. It is much easier in most cases to identify a physical detention; one is physically restrained in some manner, like being placed in handcuffs, put into a police car or prevented from leaving. It is much more difficult to identify and understand a psychological detention.

24. The Court in *Grant*, *supra*, provided the following framework for analysing a psychological detention:

> 1. Detention under ss.9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
> (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

25. The evidence is clear that the police officers became interested in Mr. Roy when he separated from the group and began to walk away from the police. A decision was made at this point by the officers to identify the defendant and complete a C.C.C. As I found above, the police did not have any grounds to suspect Mr. Roy was engaged in any unlawful or criminal behaviour. The police called out to Mr. Roy. He did not stop, so they caught up to him and – using the term favoured by the Crown – "engaged" him in a conversation with a mind towards completing a C.C.C.

26. The defence urges me to find that at this point Mr. Roy was detained. The defence submits the defendant had been singled out and detained by the police in order to identify him and investigative whether he was wanted by the police. The defence further submits that the manner in which the police called out to Mr. Roy and the manner in which they caught up to him, left Mr. Roy feeling like he had no choice but to comply.

27. For reasons explained below, I cannot accept this submission. While I have little doubt Mr. Roy likely felt like he had to stop and speak with the police, the problem with the position advanced by the defence is that it would mean that anytime a police officer wanted to engage with and speak to an individual, that person would be considered detained. This cannot be the law. The police must be allowed some latitude to speak with and engage citizens. While I acknowledge the completion of the C.C.C. takes this position one step further, it is not enough on its own to conclude Mr. Roy was detained.

28. Before leaving this point, I want to make it clear that I understand the concerns associated with completing the C.C.C. However, while I share some of these concerns – namely, that black youth and other minorities are disproportionately captured by the C.C.C. practice – that does not mean that the practice of using C.C.C. is unconstitutional. The defence has not tendered any compelling evidence showing that this practice involves, as a matter of course, racial profiling

and may therefore be unconstitutional. As a result, any objection to the use or completion of C.C.C. must remain to be evaluated on a case-by-case basis. In this case, the defendant has failed to show he was detained for the purpose of completing a C.C.C. at the initial point of contact with the police.

2. Detention and Sections 9, 10(a) and (b)

29. The Crown submits that Mr. Roy was never detained during his encounter with P.C. Stopp and P.C. Stereo. As set out above, while I agree that the police did not detain Mr. Roy by calling out to him and approaching him when he initially walked away from the group, I disagree with the Crown that he was never detained during his encounter with the police. Rather, what started out as a lawful engagement by a police officer transformed into a detention as the encounter developed.

30. Specifically, in my view, the entire tenor of the encounter changed when P.C. Stereo began to suspect that Mr. Roy might be providing him with a false name. P.C. Stereo's questioning of Mr. Roy at this point clearly became more inquisitorial. P.C. Stopp dismounted from her bike and took an aggressive stance beside Mr. Roy. Finally, P.C. Stereo proceeded to demand for Mr. Roy's identification. When Mr. Roy asked the officer if he had to retrieve his identification from his backpack he was told to "just get it".

31. The Crown urges me to find that if Mr. Roy was detained at this point, the police had grounds and it was a lawful detention. I do not accept this submission. The police had no such grounds. Mr. Roy was never cautioned about providing a false name. The police had no actual grounds to believe Mr. Roy was providing a false name; at most, they had a hunch or a suspicion. I do not fault the officers for continuing to ask him to provide his identification; however, when he was commanded by the police to go into his backpack and get his identification, Mr. Roy was detained.

32. There is little issue that the police failed to comply with their obligations under Sections 10(a) and (b) of the *Charter*. Section 10(a) and (b) of the *Charter* indicate:

Everyone has the right on arrest or detention to:

(a) be informed promptly of the reasons therefore;

(b) to retain and instruct counsel without delay and to be informed of that right.

33. As I explained above, when the police detained Mr. Roy, they were required to inform him of the reasons for his detention and his right to retain and consult counsel. He should also have been provided with his common law caution against making any statements to the police. If Mr. Roy indicated he wanted to speak with counsel, the police would have to hold off on any further questioning and provide him with a reasonable opportunity to speak with counsel: see *R v Manninen*, 1987 CanLII 67 (SCC)

34. The significance of the omission is apparent in this case. The police proceeded to ask Mr. Roy whether he had something he was not supposed to. This was clearly a question designed to see whether Mr. Roy was going to incriminate himself. This was asked and answered without the police informing Mr. Roy of any of his rights. The defendant replied "that depends." I find that since Mr. Roy was detained at this point, this statement was obtained in violation of his rights and cannot be relied upon by the Crown.

3. Section 8: The Search of the Backpack

35. There is no dispute that Mr. Roy ran from the police and discarded his backpack in what could only be an attempt to prevent the police from finding it, searching it and discovering the loaded handgun. The backpack was found by the police and searched, although the police did not have a warrant. It is therefore the Crown's onus to establish that the search was authorized by law and that it was reasonable.

36. The defence submits that since the detention was unlawful, any arrest or search that flows from that detention was similarly unlawful. The defence is correct that the absence of a lawful basis for the detention means any search conducted of his person is similarly unlawful. However,

the facts of this case are not that simple. The defendant fled from police during the detention, he discarded the backpack, was later arrested and the backpack was then searched.

37. The Crown relies upon the common law power of search incidental to arrest to justify the search of the backpack. The police have a common law power to search incidental to a lawful arrest, provided there is some purpose for the search related to the arrest like the discovery of evidence or the protection of officer safety: see *R v Caslake*, 1998 CanLII 838 (SCC). The problem with this submission is that I have already found Mr. Roy's detention to be unlawful and that the police did not have grounds to suspect that Mr. Roy had provided a false name to them. The fact that Mr. Roy ran from the police does not make that detention somehow lawful or provide the police with grounds to arrest him. The arrest in this case was not lawful and therefore no search incidental to that arrest can be upheld.

38. The Crown further submits that since Mr. Roy threw away the backpack, he gave up any privacy interest he may have held in the backpack. There is considerable support for this submission. The Court of Appeal for Ontario held in *R v Nesbeth*, 2008 ONCA 579, that a warrantless search of a backpack was lawful because the defendant in that case had given up any expectation of privacy he had in the backpack when he threw it away during a police chase.

39. While there is considerable merit to the position of the Crown, the facts in this case are clearly distinguishable from *R v Nesbeth*, *supra*. The most compelling difference is that I have already found that Mr. Roy was unlawfully detained prior to fleeing from the police. In *Nesbeth*, the defendant was not detained when he ran from the police; his conduct during that chase gave the police grounds to detain him. In this case, the Crown cannot turn an unlawful detention into a lawful one simply because Mr. Roy ran away. In the same vein, while Mr. Roy ran from the police in the context of an unlawful detention, it is clear the police officers had already formed the intention to search his backpack during the unlawful detention. The police did not have any lawful basis to conduct such a search.

40. I find that the subsequent search of the backpack was the direct result of this earlier unlawful detention and the attempted search of the backpack. In other words, Mr. Roy was well within his rights to run away from an unlawful detention and to resist the unlawful search of his private backpack. I see the act of throwing away the backpack as further confirmation of Mr. Roy's expectation of privacy, not an act of abandonment. The subsequent search was unlawful and the police violated Mr. Roy's rights under Section 8 of the *Charter*.

4. Admissibility of the Handgun: Section 24(2)

41. Section 24(2) of the *Charter* provides that evidence that was obtained in a manner that infringed or denied any of the rights and freedoms guaranteed by the *Charter* must be excluded if its admission would bring the administration of justice into disrepute.

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

42. As is apparent from the wording of s. 24(2), the relevant inquiry is whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute: *R v Grant*, *supra* at paras 66-70.

43. A court must assess and balance the effect of admitting the evidence on society's confidence in the justice system, having regard to: (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

44. I find that this case involved a serious breach that impacted a very significant *Charter*-protected interest. I must comment that I am appalled by the attitude of the Crown towards the conduct at issue in these kinds of cases. It has become almost a matter of course to characterize

such intrusions as simple, well-meaning mistakes that do not seriously impact the individual. I do not accept that the police unlawfully detaining a Canadian citizen can simply be dismissed as a "good faith" mistake. There is nothing more sacred to a free and democratic society than the right of its citizens to walk freely or spend time doing whatever one wants, wherever one chooses (provided of course the acts are lawful). It is no answer for the Crown to say now, with the benefit of hindsight obtained by an unlawful detention and search, that Mr. Roy was breaking the law. These factors weigh in favour of the exclusion of the evidence.

45. With respect to the third factor, I find that there is considerable, if not overwhelming, public interest in an adjudication of this case on the merits. The evidence discovered was a loaded handgun. Mr. Roy was in possession of the handgun without proper authorization. It was in his backpack along with his wallet and his identification. If I exclude this evidence, Mr. Roy will be acquitted of a very serious crime, of which there is no doubt he committed.

46. Moreover, the horror ravaged on this city by young people possessing and using handguns confronts us on an almost daily basis. This senseless violence has to stop. The reliability of the evidence seized in this case and its importance to the Crown's case are factors clearly in support of admission of the evidence.

47. In the final analysis I have to weigh and balance all the factors for or against admission of the evidence. I find that this is essential evidence in a very serious crime. While the police clearly did not act in accordance with the law, they did not act maliciously or in bad faith. If the police conduct in this case had been egregious, it may have tilted the balance in favour of exclusion. However, this is not a charge like the possession of marijuana. In fact, I can say with confidence that had there been marijuana in that backpack instead of a loaded handgun, I would have no difficulty in excluding the evidence. The exclusion of the evidence in this case would be more harmful than its admission.

Conclusion

48. The application to exclude the handgun from evidence is denied. Mr. Roy is convicted of all the charges he faces with respect to the possession of the firearm. As the most serious of these charges carries a mandatory minimum of three years imprisonment, I revoke Mr. Roy's bail and order him remanded into custody to a date to be set for sentencing.

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GARCIA, J.