COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Reid, 2019 ONCA 32

DATE: 20190121

DOCKET: C56998, C63536

Watt, Huscroft and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Gary Lalute Reid

Appellant

Michael Dineen, for the appellant

Andrew Cappell, for the respondent

Heard: August 23, 2018

On appeal from the conviction entered on December 20, 2011 and the sentence imposed on April 13, 2013 by Justice Michael G. Quigley of the Superior Court of Justice, sitting without a jury.

Fairburn J.A.:

I. OVERVIEW

[1] This case arises from a police-citizen interaction on March 29, 2010. Police officers were on a Toronto Community Housing Corporation ["TCHC"] property when they came across and spoke with some children in a courtyard area. The appellant and his friend were close by. Contact between the officers and the two men followed, culminating in the appellant's decision to run away. He dropped a fully loaded firearm as he ran and was apprehended only when he stopped to try and retrieve the gun. The police got to it first.

[2] The appellant's trial commenced with a ss. 9 and 24(2) *Charter voir dire*. He claimed that he had been subjected to an arbitrary detention before he took flight and, therefore, the firearm that he dropped as he ran, and the marijuana discovered on him when he was searched incident to arrest, should be excluded from evidence. The trial judge dismissed the *Charter* application, concluding that: (i) there had been no detention; (ii) even if there had been a detention, it was not arbitrary; and (iii) even if there had been an arbitrary detention, the admission of the evidence would not bring the administration of justice into disrepute.

[3] Following the *Charter* ruling, the evidence given on the *voir dire* was applied to the trial proper. The appellant testified, his evidence was rejected, and convictions followed on all counts, including numerous firearm-related offences, possession of marijuana, and fail to comply with firearm prohibition and probation orders.

[4] The appellant appeals those convictions. He does so exclusively on the basis that the trial judge erred in the *Charter* ruling. The appellant also appeals against sentence.

[5] For the reasons that follow, I would dismiss the conviction appeal and allow the sentence appeal, but only to the extent of correcting what appears to be a calculation error relating to pre-sentence custody.

II. BACKGROUND FACTS

[6] The TCHC was concerned about trespassers on its properties. The landlord wrote to the Toronto Police Service ["TPS"], asking that the police enforce the *Trespass to Property Act*, R.S.O. 1990, c. T.21 ["*TPA*"], on all TCHC properties. The Toronto Anti-Violence Intervention Strategy ["TAVIS"] unit of the TPS was assigned that task.

[7] At 6:00 p.m. on March 29, 2010, 10 to 12 TAVIS officers went to a TCHC townhouse complex located at Grandravine Drive and Driftwood Avenue. A map of that property shows it as a large one, containing many different buildings, housing units, laneways, parking lots, and outdoor common areas. One officer described it as a maze.

[8] One of the TAVIS officers who testified at trial had worked in the area for about two years prior to the encounter with the appellant. He described it as a high-crime area, known for its gang and drug activity. The officer testified about the real problems that the crime caused for the residents of the TCHC property, who he said wanted to "live in peace". The officers testified about their motivation for being on the TCHC property – to provide some community policing, to adhere to the landlord's and residents' requests to show a presence in the area and to deal with trespassers.

[9] Within 20 minutes of arriving at the property, all but four of the TAVIS officers had left. Officers Stratton and Halagian were two of the remaining officers. Around 6:20 p.m., they encountered a few young boys in a courtyard area around the centre of the complex. A playground was nearby. The boys were about ten years of age. The children had asked the officers about the use of firecrackers and the officers were encouraging them to be safe and seek out adult supervision. While that conversation was taking place, the two other remaining TAVIS officers arrived in the courtyard area: Officers Asner and Bassett.

[10] As the discussion with the children continued, two adult males started walking toward the officers: the appellant and his acquaintance, Frank Paisley. Officers Asner and Bassett spoke with Paisley and Officer Stratton spoke with the appellant. While they were speaking, Officers Asner and Bassett walked Paisley a number of feet away. They discovered that he was in breach of a conditional sentence order and arrested him.

[11] When Officer Halagian finished speaking with the children, he joined Officer Stratton and stood slightly behind him. Officer Stratton asked the appellant a few questions: whether he lived at the

TCHC property, his name, whether he had been in trouble in the past, and his purpose for being on the property. The appellant provided his name and volunteered his date of birth and home address. He said that he did not live on the TCHC property, but that he had family in the "area". He also said that he had been arrested a long time ago and that he was at the property to produce music and help children to not go down the "same path" as he once had.

[12] Officer Stratton used his portable radio to run a record check on the appellant's name. The appellant could hear Officer Stratton speak into the radio, and the replies he received. Officer Stratton thinks that he told the appellant that he would be "on his way" once the record check was complete. Officer Stratton said that the purpose of the check was to determine whether the appellant was subject to any court-imposed conditions forbidding him from being on the TCHC property. As the check was being done, Officer Stratton recorded the appellant's name, date of birth, and address on what was referred to as a 208 card.

[13] When information was received over Officer Stratton's radio that the appellant was the subject of a weapons prohibition order, the appellant "bladed" his body, meaning that he moved one side of his body away from the police. He then tapped a rectangular object on his hip and ran. As they ran after the appellant, the police saw a firearm go flying through the air. The appellant was tackled when he stopped to retrieve the firearm. Several baggies of marijuana were found on him when he was searched incident to arrest. The firearm – its serial number removed – was loaded with 14 bullets in the magazine.

[14] Officer Stratton testified that the entire encounter between the police and the appellant, up to the point he ran, was five to seven minutes, "give or take a minute or two".

III. ANALYSIS

[15] The conviction appeal raises three issues: (1) was the appellant detained; (2) if he was detained, was he arbitrarily detained; and (3) if he was arbitrarily detained, should the evidence have been excluded under s. 24(2) of the *Charter*?

(1) Was the appellant detained?

(a) Overview

[16] The first question to be answered on any s. 9 *voir dire* is whether the *Charter* claimant was detained. If no detention occurred that ends the matter, because if there was no detention, there was no arbitrary detention. Accordingly, only where there is a detention does the court go on to assess whether it was arbitrary in nature.

[17] The trial judge correctly looked to the question of detention first. He found that the appellant had failed to establish on a balance of probabilities that he was detained within the legal meaning of that term. Officer Stratton's questioning of the appellant did not result from singling him out, but from the police speaking to both the appellant and Paisley at the same time. The trial judge concluded that the police were entitled to ask the appellant the questions they did as part of their legitimate community policing exercise. Those questions did not create a detention.

[18] The appellant argues that the trial judge was wrong to conclude that he was not detained.

Although deference is owed to the trial judge's findings of fact on a s. 9 *voir dire*, the question as to whether the appellant was actually detained in light of those facts is reviewable on a standard of correctness: *Grant*, at para. 43. I will now address the appellant's arguments regarding why he says that the trial judge was wrong to find there was no detention, and why I disagree with those arguments.

(b) The appellant's position on detention

[19] There are two forms of detention: physical and psychological detention. The appellant acknowledges that he was not physically detained. Consequently, the issue in this case is whether the appellant was psychologically detained.

[20] Although a psychological detention can arise from a legal requirement that an individual comply with a police demand or direction, such as a roadside stop, this case involves a different form of alleged psychological detention. This case is about whether a reasonable person in the circumstances in which the appellant found himself would have concluded that he or she had no choice but to stay with the officers and answer the questions posed: *R. v. Grant,* 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 30, 26, 31, 44; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at paras. 3, 22. In other words, whether a reasonable person would have concluded that the choice to walk away had been removed.

[21] The appellant says that the trial judge erred in rejecting his position that he was psychologically detained from the moment that the police first interacted with him. The appellant maintains that, even if he is wrong in that regard, he was certainly detained by the time that Officer Stratton made the radio transmission.

[22] The appellant points to a number of factors in support of this position. He argues that he was the subject of a "focused investigation" in a highly intimidating environment. The psychological detention was magnified by the fact that the police dealt with Paisley and the appellant separately, effectively taking "control" of them. The appellant also argues that being a black man confronted by police in a public housing area would have increased his feeling of being psychologically detained. Moreover, he contends that he was effectively told that he could not leave until the record check came back and, only then, could he be "on his way". He says that any reasonable person in those circumstances would have understood that he had no choice but to cooperate with the police.

(c) The appellant was not psychologically detained

[23] The appellant did not testify on the *voir dire*. Although he was under no obligation to do so, he bore the onus of demonstrating on a balance of probabilities that he was psychologically detained. Accordingly, it was up to him to establish an evidentiary record to support that claim: *Grant*, at para. 49.

[24] In explaining why the trial judge was correct to conclude that the appellant was not detained, it is helpful to first focus upon the legal meaning accorded the term "detained" in s. 9 of the *Charter*. It can be a deceptive term because it has a different meaning in everyday language. For instance, the term is sometimes used colloquially to describe situations where individuals are slowed down, held up, or prevented from being where they want to be when they want to be there. However, in the *Charter*

context the words "detained" in s. 9 and "detention" is s. 10 do not reflect the simple act of being slowed down, kept waiting, or even stopped by the state. To the contrary, as explained in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 19, the words refer to situations involving "significant physical or psychological restraint":

> 'Detention' has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to 'detain', within the meaning of ss. 9 and 10 of the *Charter,* every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be 'detained' in the sense of 'delayed', or 'kept waiting'. **But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint** [emphasis added].

[25] The prerequisite of "significant physical or psychological restraint" as a gateway to rights under ss. 9 and 10 of the *Charter* has been repeatedly reinforced since *Mann*: see for example, *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at para. 66; *Grant*, at paras. 29, 36, 44; *Suberu*, at paras. 3, 21, 24: *R. v. Czibulka*, 2011 ONCA 82, 267 C.C.C. (3d) 276 at para. 20.

[26] The need for a detention to involve a significant physical or psychological restraint reflects a purposive approach to s. 9, one that strikes an important balance between ensuring that individuals are protected from unjustified state interference, while at the same time making sure that the societal interest in effective policing is not threatened: *Grant*, at paras. 19-21; *Suberu,* at para. 24. A failure to consider whether the police-citizen interaction involves a "significant deprivation of liberty" may result in both overshooting the very purpose of the *Charter* provision and undervaluing the public's interest in effective policing: *Suberu,* at para. 24. The purpose of s. 9 is not to make individuals inviolate from state contact, but to ensure that, where the state actually detains an individual (within the legal meaning of that term), the detention can be justified upon appropriate grounds: *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.), at p. 271; *R. v. L.B.*, 2007 ONCA 596, 86 O.R. (3d) 730 at paras. 51 – 59; *Grant,* at paras. 26, 35-41.

[27] I agree with the trial judge that the interaction between the police and appellant in this case did not constitute a psychological detention.

[28] In claiming that he was detained, the appellant emphasizes that he "was a black man in a public housing project who was being questioned and ordered around by a uniformed TAVIS officer". He contends that those circumstances would have left a reasonable person with the perception that he had no choice but to comply. Although we do not know what was actually going on in the appellant's mind because he did not testify, I agree that the "minority status" of an individual is a relevant consideration in the mix of factors informing what a reasonable person in the individual's circumstances would have concluded: *Grant,* at para. 44. At the same time, there are other individual factors to be taken into account, such as the person's physical stature, age, level of sophistication, and so on: *Grant,* at para. 44.

[29] In addition to his minority status, what we know about the appellant's circumstances is that, at the time of the interaction, he was a 36-year-old man of sufficient physical stature that it took a number of officers to arrest him. He interacted clearly and decisively with the police. The appellant walked, not away from but toward a group of police officers who were interacting with children. The

officers were on the TCHC property at the request of the landlord and residents who had expressed concerns about trespassers.

[30] It is against that backdrop that the police testified about first observing the two adult men. Each of the officers testified about what they saw next. Although their evidence differed on some details, the trial judge made extensive credibility findings, concluding that each of the officers had testified truthfully. I defer to that finding and focus on the officers who dealt directly with the appellant.

[31] Officer Halagian, who was speaking with the children, described the men walking at a very slow pace, a "conspicuous" pace. Although the officers acknowledged that it is not unusual for people to try to see and overhear police-citizen interactions, the officers thought that the men were trying to discover what was being said between the police and children.

[32] By walking toward the officers, the appellant and his friend were not signalling that they did not wish to have contact with the police. The police and the men simply met up and started to chat. Importantly, the police did not order the appellant to approach them or tell him to stay where he was.

[33] The appellant showed no sign of wanting to leave in the following few minutes. Indeed, according to both Officers Stratton and Halagian, the appellant was extremely cooperative throughout their interaction with him. He was described as being "cool". The conversation that ensued was pleasant and the officers described the appellant as extremely polite and forthcoming. According to Officer Halagian, the appellant appeared to be at ease throughout. In fact, given the environment that had preceded the radio transmission, both officers testified about their shock at what happened subsequently.

[34] The pattern of questioning employed by the officers made sense in the circumstances. Given that the police were on the TCHC property because of the landlord's expressed concern over trespassers, asking the appellant whether he lived at that location was understandable. Although the appellant says that his answer that he had family in the "area" gave him a legitimate reason to be there, that answer did not foreclose further questions or discussion. First, it was unclear whether the "area" to which he was referring was even the TCHC property. Second, even if the appellant had family there, he did not say he was there to visit them or with their permission. Indeed, the reason he gave for being on the property had nothing to do with his family, but with music and helping children.

[35] In these circumstances, particularly with children close by, it is understandable why Officer Stratton decided to make further inquiries. In his cooperative state, the appellant decided to answer. In fact, he even volunteered information that he was not asked for, like his date of birth and home address. I see nothing in that interaction that would have caused a reasonable person in the appellant's situation to feel like he had no choice but to comply.

[36] The appellant was never touched by the police or directed by them. The appellant points to the comment by Officer Stratton that he was going to run some "checks" and then the appellant would be "on his way", arguing that any reasonable person would have understood that comment to mean that he had no choice but to stay until after the record check was completed. I disagree.

[37] While each case is unique and must be assessed on its own facts, I agree with the respondent's observation that *Suberu* provides helpful insight into whether Officer Stratton's comment would have

triggered a psychological detention. In *Suberu*, an officer attended at a liquor store where someone was attempting to use fraudulently obtained gift certificates. Suberu was leaving the store as the officer was arriving. Suberu pointed to his accomplice and said, “he did this, not me, so I guess I can go”. The officer followed Suberu to his van, and instructed him to “Wait a minute. I need to talk to you before you go anywhere.”

[38] Suberu was then asked several questions, each answered in turn and each eliciting incriminating evidence in the context of an active criminal investigation focused upon Suberu and his cohort. Suberu was arrested after the officer looked through the vehicle window and saw some stolen items.

[39] Despite his expressed desire to leave (“he did this, not me, so I guess I can go”), and despite the specific direction that he “wait a minute” because the officer needed to talk to him “before” he went anywhere, and despite the fact that the police were investigating a specific crime, the majority concluded that Suberu was not detained within the meaning of s. 9 of the *Charter*. Against that factual backdrop, there was nothing to suggest that Suberu had been deprived of his liberty of choice: *Suberu*, at paras. 28, 32 – 35. The conclusion that Suberu was not detained underscores the care that must be taken when considering when a psychological detention starts – when a reasonable person in all of the circumstances would feel there is no choice but to comply.

[40] As the respondent points out, this case stands in stark contrast to *Suberu*. Unlike Suberu, until he ran from the police, the appellant never expressed a desire to leave or tried to walk away. This case is also different in that unlike in *Suberu*, the police were not investigating a recent crime and the appellant was not being targeted for a specific investigation into a specific crime. As well, unlike Suberu, the appellant was not told that he had to “wait”. Although he was told that he would be “on his way” after the record check was run, that comment was not as forceful as the comment to Suberu to “wait” because, in that case, the police needed to ask him questions “before” he left. The conclusion that there was no detention in *Suberu* supports the trial judge’s conclusion that the appellant was not the subject of a significant psychological restraint in this case.

[41] A comparison between this case and *Grant* is also helpful. Eighteen-year-old Donnohue Grant was originally confronted by an officer who stopped him from proceeding along a sidewalk and asked him a number of questions. As the majority noted at para. 47: “The encounter began with Cst. Gomes approaching Mr. Grant (stepping in his path) and making general inquiries.” Yet the preliminary questioning in *Grant* was considered a “legitimate exercise of police powers” and a “reasonable person would not have concluded he or she was being deprived of the right to choose how to act” in that situation. See also: *R. v. Omar,* 2018 ONCA 975, at para. 37, appeal as of right to S.C.C. filed, 38461. The detention commenced only *after* other officers arrived who took up “tactical adversarial positions”, Mr. Grant was instructed to “keep his hands in front of him”, he was “singled out as the object of particularized suspicion” and the questioning moved from issues of identity to specific questions about whether he had anything on his person that he should not: *Grant,* at paras. 48-52.

[42] Unlike Grant, the appellant in this case was not surrounded by a group of officers in tactical adversarial positions. The appellant was not asked incriminating questions. He was not instructed to keep his hands anywhere. He was not told to move anywhere. He was a grown man, twice Grant’s age, and walked toward the police voluntarily. He was cooperative throughout. He answered the questions he was asked and volunteered additional information. He showed no signs of wanting to leave until the police radio transmission was received.

[43] In support of his position on detention, the appellant relies on the fact that Officer Stratton agreed in cross-examination that he had "detained" the appellant. I agree with the trial judge that little weight can be placed on Officer Stratton's use of the term "detention", particularly in light of the officer's qualification about what he meant by detention: "I was talking to him. If that's 'detain', then, yes, then I was". Clearly the officer was not using the legal definition of detention. In any event, whether the circumstances were in law a detention was a legal question for the court to determine, not for the officer to dictate to the court: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 50.

[44] The appellant also relies upon the fact that Officer Stratton said that if the appellant had tried to leave, he would have stopped him from doing so. The appellant contends that the officer's acknowledgement of what he would have done demonstrates what was actually happening. The fact is, though, that until the appellant ran from the police, the appellant did not try to leave. What might have happened had events unfolded differently does not inform the legal character of what did happen. As noted in *Clayton*, at para. 48, *Charter* rights are not breached by intention, but action:

> [Officer] intention alone does not attract a finding of unconstitutionality. It is not until that subjective intent is accompanied by actual conduct that it becomes relevant. We would otherwise have the Orwellian result that *Charter* breaches are determined on the basis of what police officers intend to do, or think they can do, not on what they actually do.

[45] The appellant also argues that the fact that he had a loaded firearm in his pants belies the suggestion that he would have voluntarily stayed to speak with the police. It is argued that no reasonable person in that situation would have chosen to stay with the police and, therefore, the appellant must have felt psychologically detained. I disagree.

[46] There are myriad reasons why people speak to the police. Some may feel a sense of moral or civic duty: *Grafe,* at p. 271. Some may just want to interact with the police. Some may make a calculated, strategic choice to speak with the police, thinking that it may work to their benefit. There are endless possibilities, too many variables and too many unknowns. Whatever the reason, the fact that a person might come to regret having spoken to the police, does not turn a non-detention into a detention.

[47] Given that the appellant did not testify on the *voir dire*, we simply do not know from the *voir dire* evidence why he decided to stay and engage with the police. When the appellant testified during the trial proper, though, he said that he was not in possession of a gun when he spoke to the police and, therefore, was not "worried" about having "come around the police".[1]

[48] I find that a "realistic appraisal of the entire interaction as it developed", demonstrates that the appellant was not psychologically detained over the five to seven minutes, give or take a minute or two, that the police dealt with him: *Grant*, at para. 32.

(2) Could the Appellant Have Been Lawfully Detained?

[49] As I have concluded that there was no detention, it is not necessary to consider whether the police could have lawfully detained the appellant had he decided to leave. However, as the appellant places heavy emphasis on Officer Stratton's testimony that he would have done so, and that this, in

turn, shows that the appellant was detained, I will briefly address the issue.

[50] The trial judge found that, even if there had been a detention within the meaning of s. 9 of the *Charter,* it was not an arbitrary detention because:

(i) of the circumstances of the interaction;

(ii) that the inquiry concerning [the appellant] arises directly from the excessive interest evidently shown by Mr. Paisley and [the appellant] in the conversation ongoing between the officers and the group of youths in the middle of the housing complex at Driftwood Avenue and Grandravine in Toronto; and

(iii) the particular facts that informed the officers asking for information from the two men … and having regard to the appellate authority that confirms there is no arbitrariness in law enforcement and investigation programs like TAVIS and the Robbery Reduction Program.

[51] The appellant first suggests that the trial judge erred by relying upon the fact that the police were engaged in community policing programs to justify the detention. I do not read the trial judge as saying that community policing programs, in and of themselves, act as a justification for detaining people. Rather, the trial judge was merely noting that community policing programs are not, in and of themselves, arbitrary. I agree with that statement.

[52] While a good portion of policing is predictably reactive in nature, responding to and investigating crimes that have taken or are taking place, there are important aspects to policing that extend beyond the reactive sphere. Meeting the needs of a particular community, liaising with the public, and maintaining public order, also constitute important police functions that serve the greater public interest. These “proactive measures” are often taken with the “full support and cooperation of those affected by the measures”: *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (C.A.), at p. 246.

[53] Despite his acknowledgement of community policing programs, the reasons for judgment demonstrate that the trial judge was alive to the fact that individualized reasonable grounds were required to detain.

[54] It is common ground that if there was an investigative detention, it had to be justified by reasonable grounds to suspect that the appellant was trespassing on the TCHC property: *R. v. Amofa*, 2011 ONCA 368, 85 C.R. (6th) 265, at paras. 15 – 21; *R. v. Peterkin*, 2015 ONCA 8, 319 C.C.C. (3d) 191, at para. 56. The appellant says that the police had no grounds to suspect that he was breaching the *TPA* when they first approached him or at any point during their encounter with him. He urges this court to find that the police had no reason to doubt that he was visiting his family on the TCHC property and no reason to doubt that he was there to do what he said he was: to produce music and encourage children to lead law-abiding lives. Accordingly, even if the detention started when the record check was conducted, there was no objective basis to support that detention.

[55] Although I do not agree that the appellant was detained, a brief investigative detention could have been justified given the answers that he gave to certain questions. Reasonable grounds to suspect is a lower standard than reasonable grounds to believe. The former involves a standard of possibility and the latter a standard of probability: *R. v. Chehil*, 2013 SCC 49, [2013] 3. S.C.R. 220, at

paras. 27 – 28. The inquiry into reasonable suspicion involves a consideration of all objectively apparent facts that the person may be involved in the activity under investigation. A common sense and practical approach must be taken.

[56] The facts in this case involve the following.

[57] The appellant was in a high-crime neighbourhood that was experiencing problems arising from trespassers to the TCHC property. The police had been specifically requested to enforce the *TPA*. The officers had each described in their notes how they had seen the appellant and Paisley loitering. The trial judge found as a fact that the "descriptions provided by the officers in their evidence seem to fairly fall within the ambit of what can reasonably be described as loitering."

[58] Next, although the appellant said that he had family in the "area", he did not say that his family lived at the TCHC complex. Nor did he say he was there to visit his family or with their permission. Instead, he gave a wholly different reason for being present on the property. That reason made reference to helping children and there were, in fact, children nearby. Those children had been communicating with the police and the trial judge found as a fact that the appellant and Paisley had shown "excessive" interest in those communications.

[59] Despite the appellant's suggestion that he was present on the TCHC property to help children, as things unfolded, he was found to be in the company of a person who was breaching a conditional sentence order and, when searched incident to arrest, found to be in possession of marijuana.

[60] In all of those circumstances, there was a sufficient constellation of facts to support the reasonable possibility that the appellant was trespassing. If there had been a detention for the short period of time needed to run the CPIC check, in all of those circumstances, I agree with the trial judge that it would have been justified.

(3) Section 24(2) Analysis

[61] Although it is not necessary to address s. 24(2), I will do so as it formed a large part of the appellant's submissions on appeal. Where a trial judge has considered the appropriate factors, and has not come to an unreasonable result, his or her decision is owed considerable deference on appeal: *Grant*, at para. 86. I see no error in the trial judge's approach.

[62] The trial judge concluded that, even if he were wrong and the appellant was arbitrarily detained, he would not have excluded the evidence. For the trial judge, all *Grant* factors favoured admitting the evidence: (i) any breach would be a "low level" breach; (ii) the impact on the appellant's *Charter*-protected interests was "very limited" and there was a tenuous connection between his *Charter* interests and locating the firearm; and (iii) "the public's overwhelming interest in this metropolitan area to curtail gun crime and the seeming omnipresence of illegal firearms."

[63] I agree with the trial judge that if there were a s. 9 breach in this case, it was minor and fleeting in nature. I specifically defer to the trial judge's finding that the police acted in good faith when they dealt with the appellant. There was no heavy handedness and the officers seemed genuinely motivated by their desire to fulfill the request of the landlord and residents of the TCHC property, to be present at that location and provide community policing, including enforcing the *TPA*. The officers' evidence, accepted by the trial judge, was that the interaction was cooperative and cordial.

[64] The appellant maintains that the trial judge erred by failing to consider two factors. First, the officers are said to have engaged in an acknowledged pattern of abusing *Charter* rights, by approaching people and treating them in the same way as the appellant.

[65] The officers acknowledged that when on TCHC property, they would talk to people and ask them whether they lived there. The officers were legitimately on the TCHC property and they were there at the specific request of the landlord and tenants. They could not have accomplished that task without speaking to people. There is no evidence to suggest that the police were engaged in a systemic misuse of their authority. It was the appellant's onus and he failed to meet it.

[66] Second, the appellant says that the trial judge placed too much emphasis on the seriousness of the offence. Indeed, he says that the trial judge treated it as the determinative factor. He says that treating the seriousness of the offence in that way offends the rule that the seriousness of the offence can "cut both ways": *Grant,* at para. 84. See also: *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 39 – 42. While the seriousness of the offence cannot be used to overwhelm the s. 24(2) inquiry (*Harrison,* at para. 40), I do not agree with the appellant that the trial judge used it in that way.

[67] Although the trial judge used the word "overwhelming" in his s. 24(2) analysis, he was referring to the fact that the public has an "overwhelming interest" in curtailing gun crime. In my view, that is an entirely uncontroversial statement and accords with good common sense. The pervasiveness of gun violence in Toronto has become ever-present and ever-concerning. The public has an obvious interest in curtailing that form of crime. Recognizing that fact did not mean that the trial judge allowed it to overwhelm all other s. 24(2) factors. To the contrary, he correctly noted those factors and spent some time analyzing the factual backdrop for each. I see no error in that approach.

[68] The gun constituted real and reliable evidence. After balancing the *Grant* factors, the trial judge concluded "[b]oth the community in question and the reputation of the administration of justice would be harmed were this court to rule that firearm evidence inadmissible." The trial judge's conclusion is reasonable and I would not interfere with it.

[69] In these circumstances, even if there had there been a s. 9 breach, I agree with the trial judge that the appellant failed to meet his burden of showing why the admission of the evidence would bring the administration of justice into disrepute.

(4) Sentence Appeal

[70] The appellant received a global sentence of 11.5 years and was credited for time served in the amount of four years, leaving an additional 7.5 years to serve. He filed a notice of appeal within a week of being sentenced. That notice includes both his appeals from conviction and sentence. He claims that the trial judge erred in imposing the sentence, but does not provide any specifics as to the nature of that alleged error.

[71] The appellant received legal assistance only on the conviction appeal. We heard no submissions from the appellant on the sentence appeal. Despite that fact, the Crown addressed the sentence and argued that it was fit. For the following reasons, I agree that the global sentence was a fit one. There was, however, an error in the way that the pre-sentence custody was calculated, and I would vary the sentence accordingly.

[72] On the fitness point, the trial judge gave extensive and careful reasons for how he arrived at 11.5 years as the global sentence. I agree with his assessment that this was a very serious offence: carrying a deadly weapon in a public place, frequented by people of all ages, including the elderly and children who live in that community.

[73] The trial judge paid careful attention to the appellant's circumstances. I do not intend to go through all of those factors, except to note that at the time that he was sentenced, the appellant was a 38-year-old man who had already accumulated a lengthy and very concerning criminal record. In particular, he had numerous prior gun-related convictions. Some of his prior convictions include: multiple possession of prohibited and restricted weapon offences; six discrete incidents of firearm offences, at least three of which involved loaded prohibited or restricted firearms; several related counts of possession of firearms while subject to a prohibition order; and trafficking offences and the like.

[74] The trial judge had careful regard to the correct sentencing principles and to all aggravating and mitigating factors. He demonstrated his awareness of the jump principle and squarely addressed it.

[75] Ultimately, the trial judge imposed nine years on the possession count and 2.5 years consecutive on the breach of the weapons prohibition count, resulting in a total sentence of 11.5 years. All other sentences ran concurrent. That was a fit sentence in the circumstances of these offences and this offender.

[76] The trial judge then applied pre-sentence custodial credit of four years to the 11.5 year global sentence, leaving 7.5 years left to serve. As mentioned previously, however, there was an error in the calculation of pre-sentence custody. The appellant was arrested on March 29, 2010. He was sentenced on April 19, 2013. The trial judge said that this constituted three years (1,095 days) of pre-sentence custody.[2] (Properly calculated, the actual amount of pre-sentence custody was 1,118 days.) Not having the benefit of *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575 when he imposed sentence, the trial judge granted enhanced credit of only 1.3 days for every day served. Ultimately, the appellant was granted credit of four years of pre-sentence custody.

[77] There is nothing in the reasons for sentence that would justify departing from credit at 1.5 days for every day spent in pre-sentence custody. Applying that formula to the 1,118 days actually spent in pre-sentence custody, I find that the appellant was entitled to 1,677 days credit, or four years, seven months. The remaining sentence to be imposed should therefore have been six years, 11 months.

IV. CONCLUSION

[78] I would dismiss the conviction appeal. I would grant leave to appeal the sentence, allow the sentence appeal, substitute a credit of four years and seven months for pre-sentence custody, and vary the sentence imposed to one of six years and 11 months to be served.

Released: "DW" Jan 21, 2019

"Fairburn J.A."
"I agree. David Watt J.A."
"I agree. Grant Huscroft J.A."

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[1] During his testimony at trial, the appellant acknowledged that he walked “directly toward” the police and that they “most definitely” chatted “pleasantly”. He testified that he only ran from the police because he thought he was going to be searched and knew that he was in possession of marijuana. The gun came from someone who the appellant ran close to. That man threw the gun in the direction of the police. Knowing that he may get improperly blamed for the gun, the appellant stopped to try and retrieve it. The trial judge rejected the appellant’s version of events.

[2] At a later point, the trial judge suggested that there was 1,330 days of pre-sentence custody.