NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Arsenault*, 2023 NSCA 10

Date: 20240117
Docket: CAC 519570
Registry: Halifax

Between:

Donald Francis Arsenault

Appellant

v.

His Majesty the King

Respondent

Judge: The Honourable Justice Anne S. Derrick

Appeal Heard: December 6, 2023, in Halifax, Nova Scotia

Subject: ***Charter*, ss. 8, 10 and 24(2). Inventory search of motor vehicle. Change in jeopardy. Sentence for possession of restricted firearm. Effective dates of driving prohibition.**

Summary: The appellant crashed his vehicle, rendering it inoperable. He was located not far from the scene showing signs of impairment from alcohol. He refused a breathalyzer demand. He was arrested for impaired operation of a motor vehicle and refusal, informed of the charges and advised of his right to consult a lawyer. He spoke to duty counsel when his counsel of choice could not be reached. At 5:25 a.m., while he was in custody sobering up, police officers conducting an inventory of the vehicle discovered a loaded handgun in the glove box. They did not obtain a warrant. The gun was seized. The appellant was not informed about the discovery or his change in jeopardy and not afforded a new opportunity to speak with counsel. At 8:52 a.m. the appellant's lawyer contacted him.

The appellant was arrested on firearms charges at 10:51 a.m. He applied to have the gun excluded from evidence on the basis of violations of his *Charter* rights. He sought leave to appeal his sentence.

Issues:

(1) Did the trial judge err by concluding the appellant's ss. 8, 10(a) and (b) *Charter rights* were not violated by the search of the vehicle and the failure by police to inform him of his right to counsel on the discovery of the handgun?
(2) Was the sentence of four years for the s. 95(1) conviction (possession of a loaded semi-automatic handgun without being the holder of an authorization or licence) excessive?
(3) Did the trial judge err by finding the driving prohibition under s. 320.24 of the *Criminal Code* took effect only once the appellant was released from prison?

Result:

Appeal against conviction dismissed. Leave to appeal sentence granted and the appeal dismissed. The trial judge made no error in concluding the lack of a warrant following the discovery of the loaded handgun did not violate the appellant's s. 8 rights. The requirement of a warrant in the circumstances of this case was not established by the appellant. On the facts of this case, the intertwined section 10(a) and (b) rights were not violated. Although the appellant was entitled to be informed of the significant change in his jeopardy when the handgun was discovered and should also have been given a right to contact counsel, these breaches were technical in nature. The police did not attempt to question the appellant or obtain physical evidence from him and he did not inadvertently inculpate himself before speaking to counsel at 8:52 a.m. The judge's s. 24(2) analysis attracts significant deference. The judge's sentence attracts deference. His interpretation of s. 320.24 of the *Criminal Code*, that governs the effective date of the driving prohibition, was correct.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 55 paragraphs.

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His Majesty the King

Respondent

Judges: Farrar, Van den Eynden, Derrick, JJ.A.

Appeal Heard: December 6, 2023, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of Derrick, J.A.; Farrar and Van den Eynden, JJ.A. concurring

Counsel: Ian D. Hutchison, for the appellant
Mark A. Scott, K.C., for the respondent

Reasons for judgment:

Introduction

[1] Donald Arsenault was convicted by Justice Scott Norton of the Supreme Court of Nova Scotia on August 19, 2022 for driving while impaired, refusing a breathalyzer demand, and various offences related to a loaded semi-automatic handgun with an extended magazine.[1] The appellant was sentenced to a total of four and half years' incarceration and a one year driving prohibition.[2]

[2] The appellant's trial proper was preceded by a *voir dire* in which he argued, unsuccessfully, that the handgun should be excluded from evidence because his rights under ss. 8 and 10 of the *Charter* had been violated.[3]

[3] The appellant appeals the dismissal of his *Charter* application and seeks leave to appeal his sentence, including the effective dates of the driving prohibition. For the reasons that follow I would dismiss his appeal from conviction, grant leave to appeal his sentence, and dismiss the sentence appeal.

Facts

[4] Justice Norton reviewed the facts in his decision on the appellant's *Charter* motion:

> [4] On August 3, 2019, at about 03:43 a.m., following a single vehicle accident on the Bedford Highway, in Halifax, Nova Scotia, Mr. Arsenault was arrested by Cst. Brent Woodworth of the Halifax Regional Police ("HRP") for impaired operation of a motor vehicle and refusing to provide a breath sample. He was informed of the charges and advised of his right to consult legal counsel. He was transported to police headquarters and provided with an opportunity to call his counsel of choice, Mr. Ian Hutchison, who was not available. He was put in contact with and spoke to legal aid duty counsel. A second demand was made for a breath sample which he refused. He was placed in a cell at 05:04.
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> [5] Mr. Arsenault's vehicle was damaged and had to be towed from the accident scene. HRP Policy is that in such circumstances an inventory search is to be conducted to identify and take custody of any items of value in the vehicle to protect against loss or theft of such items and potential civil liability resulting. The Policy references section 273 of the *Motor Vehicle Act* as the statutory

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[1] *R. v. Arsenault*, 2022 NSSC 242.
[2] *R. v. Arsenault*, 2022 NSSC 325.
[3] *R. v. Arsenault*, 2022 NSSC 149.

> authority. The tow truck operator arrived at the accident scene at 04:35 and used a device to unlock the pickup truck because the keys were at police headquarters with Cst. Woodworth. Cst. Dianne Penfound performed the inventory search. At 05:25 she observed what appeared to be a handgun in the glove box. She did not touch the handgun and, per HRP Policy, advised her superior officers who dispatched two members of the Emergency Response Team ("ERT") to make safe the handgun and take it into custody if it was a firearm. Shortly thereafter Cst. Woodworth was advised that a possible firearm had been located in the vehicle. At 06:25 the ERT members took custody of the handgun and made it safe by removing the magazine and ejecting a bullet from the chamber. They took the handgun to police headquarters and logged it into the property room between 06:45 and 07:30.
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> [6] There was no warrant obtained to search the vehicle.
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> [7] The HRP booking facility received a call from Mr. Hutchison at 08:52 advising that he was legal counsel for Mr. Arsenault and that he wished to discuss the charges and release terms. The booking officer told him that he did not think Mr. Arsenault would be released due to a firearms charge. Mr. Hutchison then spoke with Mr. Arsenault.
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> [8] At 10:51 the ERT members went to Mr. Arsenault's cell and arrested him on nine new firearms related charges. He was cautioned and given his right to consult legal counsel. He advised that he understood the charges and declined the opportunity to speak with legal counsel.

The *Charter Voir Dire*

[5] At his *Charter voir dire* the appellant argued there had been a breach of his s. 8 right against unreasonable search and seizure and that he had been denied the protections to which he was entitled upon arrest and detention. The *Charter* guaranteed him both the right to be informed of the reason for his detention and the right to retain and instruct counsel without delay.[4] In the event his jeopardy changed, the police were obliged to re-arrest him, provide the reason for the arrest and give him a fresh opportunity to consult with counsel.[5]

[6] The appellant was arrested for impaired operation of a motor vehicle. He spoke with legal aid duty counsel. This was just before 5 a.m. At 5:25 a.m. the handgun was discovered in the course of the police inventory search of the disabled vehicle. The appellant was not informed a handgun had been seized until police told his lawyer at 8:52 a.m. These facts were not in dispute.

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[4] *Canadian Charter of Rights and Freedoms*, ss. 10(a)–(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11.

[5] *R. v. Sinclair*, 2010 SCC 35 at para. 51 [*Sinclair*].

[7] The appellant argued the police had breached his rights by failing:

- To obtain a warrant upon their discovery of the handgun in the vehicle's glove box.
- To inform him upon discovery of the handgun that his jeopardy had changed.
- To inform him upon discovery of the handgun of his right to consult with counsel.

[8] The appellant also argued the warrantless search of his vehicle was unlawful. He did not pursue this issue on appeal. The trial judge accepted the evidence of police witnesses that the vehicle search was an inventory search, and found it was authorized by law. He found provisions of the *Motor Vehicle Act*, R.S.N.S 1989, c. 293 were similar to Ontario statutory authority considered by cases from the Ontario Court of Appeal—*R. v. Dunkley* [6], and *R. v. Ellis*.[7] Justice Norton was satisfied police had a responsibility to safeguard the appellant's immobilized vehicle and its contents. They fulfilled that responsibility by conducting an inventory search of the vehicle.[8]

[9] It is unnecessary to deal further with the inventory search itself.

[10] Justice Norton reviewed the positions of the parties on the *Charter* motion:

> [9] The Crown says that the search of the vehicle was a lawful inventory search, and the gun is admissible in evidence. The Crown admits there was a failure to promptly advise Mr. Arsenault of a change to his jeopardy but says that this was a technical breach and does not justify the handgun being excluded from evidence.
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> [10] Mr. Arsenault says that the gun should be excluded from evidence as it was obtained in breach of his constitutional rights. First, he says that the warrantless search of his vehicle was not authorized by law as an inventory search. In the alternative, he says that once the police discovered the gun, they should have obtained a search warrant. Third, once the gun was discovered, a new firearm investigation was commenced that required the police to promptly advise Mr. Arsenault of a change in his jeopardy and to immediately advise him of his right to counsel. Mr. Arsenault says that they failed to do both. Mr. Arsenault says that the seizure of the gun is temporally, contextually and causally connected to the

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[6] 2016 ONCA 597.
[7] 2016 ONCA 598.
[8] *R. v. Nicolosi* (1998), 40 O.R. (3d) 417 (Ont. C.A.).

> unlawful search of the vehicle and the violation of his right to counsel and should be excluded from evidence.

[11] The trial judge found no breach of the appellant's s. 8 *Charter* rights. The Crown conceded the breach of the appellant's s. 10(a) rights. The judge concluded the failure by police to inform the appellant his jeopardy had changed upon discovery of the handgun was of no significance. He found no breach of the appellant's right to consult counsel. He undertook a s. 24(2) analysis and admitted the handgun into evidence.

[12] In the course of deciding the appellant's *Charter* motion, the trial judge made the following findings:

- The warrantless inventory search was justified and authorized by law. Mr. Arsenault's s. 8 rights were not violated. The decision to call in the ERT to secure the firearm, pursuant to Halifax Regional Police policy, was "a reasonable and prudent approach and does not derogate from the authority of the police to conduct the inventory search."[9]

- The appellant was detained and arrested on impaired driving and breathalyzer refusal charges and informed of his right to counsel. The right was implemented when he consulted with legal aid duty counsel.

- The appellant became aware his jeopardy had changed when his counsel, Mr. Hutchison, was informed about the discovery of the handgun when he called to speak to him. This happened at 8:52 a.m., 2 hours and 27 minutes after the gun was identified by the ERT as a firearm at 6:25 a.m.

- The appellant agreed he was not interviewed and no attempt was made to elicit evidence from him before he was informed of the firearm investigation.

[13] The trial judge viewed the right to counsel question as turning on whether the delay of 2 hours and 27 minutes before the appellant was given an opportunity to consult again with legal counsel was unreasonable. He concluded it was not. He found the purpose of the s. 10(b) right to consult counsel was satisfied when the appellant spoke with Mr. Hutchison. Citing *R. v. Willier*[10], he held the police were

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[9] *R. v. Arsenault*, *supra* note 3, at para. 23.
[10] 2010 SCC 37.

entitled to assume the advice received by the appellant was adequate unless he had indicated otherwise.

[14] The appellant's submissions on the s. 24(2) exclusion remedy were premised on his ss. 8 and 10(b) rights having been breached. The trial judge found no such breaches. The judge noted the Crown's concession there had been a s. 10(a) breach—police should have informed the appellant he was facing a firearms charge—but found the connection between that breach and the discovery of the firearm was merely temporal and contextual but not causal.[11] In other words, this was not a case where the breach had led to the discovery of the firearm.

[15] The trial judge conducted a s. 24(2) analysis in accordance with the Supreme Court of Canada's direction in *R. v. Grant*[12]. This required him to undertake a three-part inquiry to determine whether the admission of the handgun into evidence would bring the administration of justice into disrepute. In reaching his conclusion that the handgun should be admitted, the trial judge considered each of the *Grant* factors: (1) the seriousness of the *Charter*-infringing conduct; (2) the impact of the breach on the *Charter*-protected interests of the appellant; and (3) society's interest in the adjudication of the case on its merits. He then undertook the required balancing exercise.

[16] In assessing the seriousness of the *Charter*-infringing conduct, the trial judge found the firearm was discovered independently of the s. 10(a) infringement not as a result of it. He viewed the breach to have been of a technical nature: the appellant should have been advised of the change in his jeopardy but was subject to neither questioning nor the seizure of physical evidence despite the discovery of the handgun. The trial judge found this factor weighed in favour of inclusion of the evidence.

[17] As for the impact on the *Charter*-protected interests of the appellant, the trial judge found the delay in implementing the appellant's right to be informed of the change in his jeopardy did not have a significant impact on his *Charter*-protected rights. He viewed this factor as weighing in favour of inclusion.

[18] The trial judge assessed the third line of inquiry under *Grant* and found that society's interest in a trial on the merits favoured admission of the handgun into evidence.

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[11] *R. v. Arsenault*, *supra* note 3 at para. 48.
[12] 2009 SCC 32 at paras. 67-71 [*Grant]*.

[19] The judge balanced the three factors and admitted the handgun as evidence.

The Convictions

[20] The parties agreed the evidence from the *Charter voir dire* would constitute the evidence at trial. No additional evidence was called by the Crown. The appellant did not testify.

[21] The appellant had been charged on a 14-count Indictment. The trial judge reviewed the evidence and convicted him of the following offences upon being satisfied beyond a reasonable doubt of his guilt:

Count 1	s. 320.14(1)(a) CC – Operation of a motor vehicle while impaired.
Count 2	s. 320.15(1) CC – Refusal to comply with a breath demand.
Count 3	s. 94(1) CC – Occupant of a motor vehicle in which he knew there was a semi-automatic handgun.
Count 4	s. 86(1) CC – Careless storage of a semi-automatic handgun.
Count 6	s. 92(2) CC – Unlawful possession of a semi-automatic handgun knowing its possession is unauthorized.
Count 7	s. 95(1) CC – Possession of a loaded semi-automatic handgun without being the holder of an authorization or licence.
Count 9	s. 86(2) CC – Contravention of storage regulations under the *Firearms Act*.
Count 12	s. 117.01(1) CC – Possession of a restricted firearm contrary to a prohibition order.
Count 14	s. 117.01(1) CC – Possession of ammunition contrary to a prohibition order.

[22] Pursuant to *R. v. Kienapple* [13], the trial judge stayed firearms-related convictions pursuant to ss. 91(1), 91(2) and 92(1). He acquitted the appellant of Counts 8 and 13 which the Crown admitted they had not proven.[14]

[23] On November 15, 2022 the trial judge sentenced the appellant as follows:

Count 1	s. 320.14(1)(a)	$2,000 fine

[13] [1975] 1 S.C.R. 729.

[14] Count 8 charged that the appellant had unlawful possession of the handgun for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to s. 88(1) of the *Criminal Code*. Count 13 required proof the appellant was in possession of a prohibited device, the extended magazine. The Crown concluded it was not a prohibited device after all.

Count 2	s. 320.15(1)	$2,000 fine	
Count 3	s. 94(1)	3 years' incarceration	concurrent
Count 4	s. 86(1)	6 months' incarceration	concurrent
Count 6	s. 92(1)	2 years' incarceration	concurrent
Count 7	s. 95(1)	4 years' incarceration	consecutive
Count 9	s. 86(2)	6 months' incarceration	concurrent
Count 12	s. 117.01	6 months' incarceration	consecutive
Count 14	s. 117.01	6 months' incarceration	concurrent

[24] Pursuant to s. 320.24 of the *Criminal Code*, the judge ordered a one-year driving prohibition to follow the appellant's penitentiary sentence.

Issues on Appeal

[25] The appellant says the trial judge erred in his Charter *voir dire* determinations, imposed an unfit sentence, and wrongly decided when the driving prohibition takes effect.

[26] The appellant raises three principal complaints about the trial judge's *voir dire* decision. He says the judge erred by concluding his *Charter* rights were not violated by: (1) the search of the vehicle and (2) the failure by police to inform him on the discovery of the handgun of his right to counsel. He says those errors led to the trial judge admitting the firearm into evidence.

[27] The appellant seeks leave to appeal his sentence. He says the sentence imposed for the s. 95(1) conviction was excessive. He adds that the trial judge failed to take into account the onerous effect of the 30 months he spent on house arrest awaiting the disposition of the charges. As for the driving prohibition, the appellant says the trial judge erred in concluding it does not take effect until his release from prison.

Standard of Review – The *Voir Dire* Determinations

[28] The standard of review on the *voir dire* is one of correctness in relation to the law and clear and material error in relation to his factual findings.[15] This

[15] *R. v. West*, 2012 NSCA 112 at para. 74.

applies to how the trial judge dealt with the alleged breaches and his s. 24(2) analysis. The Supreme Court in *Grant* directed appellate courts to show "considerable deference" to a trial judge's ultimate determination where they have considered the proper factors.[16]

Standard of Review – Sentence Appeal

[29] Sentencing decisions are accorded a high degree of deference in appellate review. Intervention is warranted only if (1) the sentencing judge committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor."[17]

Analysis

Should the Trial Judge Have Found a s. 8 Breach?

[30] The appellant supported his argument the trial judge erred in not finding a s. 8 breach with a statement by the Ontario Court of Appeal in *R. v. Cuff* where the court said:

> [27] …The fact that the police may have suspected that they would find drugs while searching the vehicle did not alter their authority to conduct an inventory search: *R. v. Wint*, 2009 ONCA 52, 93 O.R. (3d) 514, at para. 11, leave to appeal refused [2009] S.C.C.A. No. 164. **Once they found the drugs, the police acted responsibly, ceased their search, resealed the car and obtained a search warrant**.[18]
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> [Emphasis added.]

[31] Justice Norton rejected the appellant's submission that the discovery of the handgun in the vehicle's glove box and the deployment of the ERT to take control of it ended the inventory search and required that a search warrant be obtained. He held:

> [20] In my view, a more accurate characterization of what occurred is that Cst. Penfound conducted an inventory search and located a gun in the glove box. Pursuant to HRP Policy, more experienced ERT members were tasked to make sure the gun was safe before it was seized. This is an issue of officer and public

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[16] *Supra* note 12 at para. 86.
[17] *R. v. Friesen*, 2020 SCC 9 at para. 26; *R. v. Lacasse*, 2015 SCC 64 at para. 11.
[18] 2018 ONCA 276 [*Cuff*].

> safety. I would characterize the inventory search as paused, not ended, while the ERT members were called in to make the gun safe.[19]

[32] The respondent points out the police complied with s. 489(2) of the *Criminal Code* [20] which authorizes the seizure of incriminating items discovered in the course of a lawful inventory search. No additional search was conducted and therefore no warrant was required.

[33] As the respondent notes in its factum, in *Cuff* the discovery of cocaine,

> …did not animate the need for a search warrant to seize it. The discovery may have prompted police to conduct a more thorough search of the car to advance a *CDSA* [*Controlled Drugs and Substances Act*] investigation. They may have wanted to investigate, for example, whether there were other items that could support a charge of possession for the purpose of trafficking—score sheets, scales, guns, etc. Section 489(2) would not authorize an additional search for that purpose.[21]

[34] I am satisfied the trial judge made no error in concluding the lack of a warrant did not violate the appellant's s. 8 rights. It was available to him on the facts to find the inventory search was merely on a pause while the ERT attended to ensure the gun was in a safe condition before it was seized. The appellant has not established there was any requirement for police to obtain a warrant once they located the handgun.

The s. 10(a) and (b) Breaches

[35] The trial judge recognized the inter-relationship between the rights under ss. 10(a) and (b) of the *Charter*:

> [25] Upon arrest or detention, the police must promptly advise an individual of the reasons why. This is so the individual fully understands the extent of his jeopardy and allows the individual to make an informed decision if they wish to speak with counsel and participate in the police investigative process. The authorities make clear that these rights are interconnected and so will be considered together…[22]

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[19] *R. v. Arsenault, supra* note 3.
[20] R.S.C., 1985, c. C-46. "Every peace officer…who is lawfully present in a place…in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds (a) has been obtained by the commission of an offence against this [the *Criminal Code*] or any other Act of Parliament".
[21] Factum of the Respondent at para. 67.
[22] *R. v. Arsenault, supra* note 3.

[36] He correctly noted that "a change in jeopardy may require the police to advise a suspect of his right to counsel".[23] He quoted paragraphs 47 through 51 of *Sinclair*, including the Supreme Court of Canada's statement that:

> [48] The general idea that underlies the cases where the Court has upheld a second right to consult with counsel is that changed circumstances suggest that reconsultation is necessary in order for the detainee to have the information relevant to choosing whether to cooperate with the police investigation or not. The concern is that in the new or newly revealed circumstances, the initial advice may no longer be adequate.[24]

[37] The trial judge reviewed the appellant's detention and arrest:

> [28] In the present case, Mr. Arsenault was detained and arrested on impaired driving and refusal charges and informed of his right to counsel. That right was implemented when Mr. Arsenault consulted with the legal aid duty counsel.
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> [29] Although the gun was discovered in the glove box at 05:25, it was not identified as a firearm until 06:25 when it was made safe and seized by Cst. Trudel. At that point in time Mr. Arsenault was detained on a firearm investigation and the police had a duty to inform him of the change to his jeopardy. They did advise his legal counsel, Mr. Hutchison, at 08:52 that he was being detained with respect to a firearm. They did not inform Mr. Arsenault directly until they arrested him at 10:51.
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> [30] The Crown concedes that there was a violation of Mr. Arsenault's section 10(a) rights when he was not advised promptly of the change in jeopardy. The Crown characterizes the violation as being a technicality. The Crown says that until the gun was identified as a firearm at 06:25 Mr. Arsenault's jeopardy had not changed. His lawyer was informed at 08:52 of this change in jeopardy. Thus, he was detained for 2 hours and 27 minutes before he was informed of the change in jeopardy.
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> [31] Mr. Arsenault concedes that no attempt to interview him or elicit evidence from him occurred before he was informed of the firearm investigation.

[38] Although the trial judge concluded the delay in informing the appellant he was facing firearms charges was not unreasonable, there is no evidence of exigent circumstances that prevented the police from providing him with the opportunity to consult counsel as soon as his jeopardy changed. The Supreme Court of Canada in

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[23] *Ibid* at para. 27, citing *Sinclair*, *supra* note 5.
[24] *Supra* note 5.

R. v. Suberu held that the words “without delay” in s. 10(b) mean “immediately” for the purposes of the provision.[25]

[39] *Suberu* talks about the purpose of s. 10(b). It ensures individuals know and have access to their right to counsel when detained,

> …which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.[26]

[40] Although the police did not attempt to question the appellant or obtain physical evidence from him and he did not inadvertently inculpate himself before speaking to Mr. Hutchison at 8:52 a.m., these risks existed. The trial judge noted the instruction by the Supreme Court of Canada in *R. v. Taylor*:

> [28] But the police nonetheless have both a duty to provide phone access as soon as practicable to reduce the possibility of accidental self-incrimination and to refrain from eliciting evidence from the individual before access to counsel has been facilitated. While s. 10(b) does not create a "right" to use a specific phone, it *does* guarantee that the individual will have access to a phone to exercise his right to counsel at the *first* reasonable opportunity.[27]
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> [Emphasis in original.]

[41] The discovery of the firearm marked a significant change in the appellant’s jeopardy from impaired operation of a motor vehicle and refusing the breathalyzer to firearms offences and the likelihood of a penitentiary sentence in the event of conviction. There was a reasonable opportunity for affording him a fresh right to consult with counsel at 6:25 a.m. when the handgun was identified as a firearm and he was lawfully detained and sobering up. And he could have been afforded his s. 10 rights at 5:25 a.m. when Cst. Penfound opened the glove box and found what appeared to be a handgun.

[42] However, these interconnected breaches—the breach of the appellant’s s. 10(a) and s. 10(b) rights—were technical in nature. A merely technical breach goes to the issue of the seriousness of the *Charter*-infringing state conduct and is much less likely to pull toward the exclusion of the evidence.[28] Even if the trial judge should have found a violation of the appellant’s s. 10(b) rights, it was a violation

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[25] 2009 SCC 33 at para. 42 [*Suberu]*.
[26] *Ibid* at para. 40.
[27] 2014 SCC 50.
[28] *R. v. Harrison*, 2009 SCC 34 at para. 22.

without consequence. It did not compromise the interests underlying the appellant's s. 10 rights. There was a single failure by police that led to the appellant's s. 10 rights being infringed: the infringement flowed from the delay in advising him of the discovery of the gun and the change in his jeopardy.

[43] A determination that a trial judge should have found a *Charter* breach typically requires a fresh s. 24(2) analysis.[29] However, I am unable to see how the s. 10(b) technical breach would change any aspect of the trial judge's assessment of the *Grant* factors. The s. 10(a) and (b) breaches are in lock-step. Just as the trial judge had found in relation to the s. 10(a) breach, the delay was not intentional or tactical on the part of the police. There was no significant impact on the appellant's *Charter*-protected interests. As with the s. 10(a) breach, the discovery of the firearm was temporally and contextually but not causally connected to the infringement. The firearm was discovered independently of the delayed right to counsel, not as a result of it. Society's interest in a trial on the merits would have been unchanged: there were serious charges where reliable, physical evidence crucial to the Crown's case had been seized.

[44] There is nothing to suggest the trial judge's s. 24(2) analysis would have been different had he found a s. 10(b) breach. A fresh s. 24(2) analysis would lead me to the same conclusions.

The s. 24(2) Analysis

[45] The trial judge's s. 24(2) analysis is entitled to significant deference. The question is whether he considered the proper factors in deciding the handgun should be admitted into evidence.[30] Given his findings, the addition of a s.10(b) breach into the mix would not have led to the firearm being excluded from evidence. There is no basis for appellate intervention. I would dismiss the appellant's appeal against the *voir dire* decision.

Sentence Appeal

[46] The appellant seeks leave to appeal the sentence he received for the s. 95(1) offence and asks that his interpretation of when the one-year driving prohibition commences be accepted.

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[29] *R. v. Vu*, 2013 SCC 60 at para. 67.
[30] *R. v. Mian*, 2014 SCC 54 at para. 88.

[47] At his sentencing the appellant proposed a three-year sentence for the s. 95(1) offence. He says the four-year sentence over-emphasizes denunciation and deterrence and reflects the trial judge's failure to give sufficient weight to his personal circumstances and to take into account his onerous bail conditions.

[48] The appellant acknowledges he is subject to a statutory driving prohibition but says that s. 320.24 does not allow for it to commence after serving any period of incarceration but only after incarceration for offences under ss.320.14(1) and 320.15(1). As fines were imposed for these offences in his case, he says the driving prohibition should have taken effect at the same time, not once he has served his prison sentence.

[49] I would grant leave to appeal sentence and dismiss the appeal.

[50] The trial judge's determination of the sentence for the s. 95(1) offence attracts deference. The appellant has not shown the sentence to be unfit.

[51] The judge was entitled to find the record did not support the appellant's claim that his sentence should be mitigated because of substantial hardship while on judicial interim release. This was an exercise of the trial judge's discretion, not an error in principle. There was nothing before the judge to support the claim: the pre-sentence report did not identify substantial hardship while on bail as an issue and the appellant did not testify.

[52] As for the driving prohibition, the trial judge rejected the appellant's interpretation of s. 320.24:

> [48] I find that the most persuasive interpretation of s. 320.24 of the *Criminal Code* is that (1) the driving prohibition is calculated as part of the sentence for the designated offence, or offences, to which it relates; but (2) where the accused is sentenced to a cumulative term of imprisonment exceeding that for the specific designated offences, the prohibition only begins to run when the offender is actually released. In my view, to have a driving prohibition commence running while the offender is imprisoned could not have been Parliament's intention. As the court said in *Kalejaiye*,[[31]] "the loss of the privilege to drive is of no consequence while a person is incarcerated." Several sentencing decisions at the trial level (discussed above) illustrate the point, by specifying that the driving prohibition commences upon release from prison at the end of a cumulative sentence that includes consecutive terms on charges that are not subject to the driving prohibition.

[31] The trial judge was referring to *R. v. Kalejaiye*, 2021 ONCJ 236.

> …
>
> [50] Mr. Arsenault is sentenced to a driving prohibition order for one year for each offence under ss. 320.14(1)(a) and 320.15, concurrent to each other, plus the entire period of time that Mr. Arsenault is incarcerated on the firearms offences. More specifically, the driving prohibition commences upon release from custody at the end of the cumulative sentence that includes consecutive terms on charges that are not subject to the driving prohibition.

[53] As observed by the respondent, "[t]o have a prohibition run while a person is still in prison, unable to access a car, runs plainly contrary to Parliament's intent".[32] I agree. I also agree with the respondent's statement that,

> The trial Judge's interpretation of the duration of the driving prohibition gave full effect to the intent of Parliament, the wording of the provision and the mischief sought to be avoided.[33]

[54] The trial judge was required to be correct in his interpretation of s. 320.24 of the *Criminal Code*. I am satisfied he was.

Disposition

[55] I would dismiss the appellant's appeal against conviction. I would grant leave to appeal sentence and dismiss the sentence appeal.

Derrick, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.

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[32] Factum of the Respondent at para. 122.
[33] *Ibid* at para. 130.