

In the Court of Appeal of the Northwest Territories

Citation: *R v Paradis*, 2020 NWTCA 2

Date: 2020 03 05

Docket: A-1-AP-2019-000005

Registry: Northwest Territories

Between:

Her Majesty the Queen

Respondent

- and -

Cassius Zane Paradis

Appellant

The Court:

**The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Susan Cooper
The Honourable Mr. Justice Brian O’Ferrall**

Memorandum of Judgment

Appeal from the Conviction and Sentence by
The Honourable Madam Justice S.H. Smallwood
Convicted on the 24th day of May, 2019
(Docket: S-1-CR-2018-000139)

Memorandum of Judgment

The Court:

Introduction

[1] Mr. Paradis appeals his conviction on several charges, including possession of cocaine for the purposes of trafficking, and possession of drug money, weapons, and ammunition. He argues his conviction should be overturned given the trial judge's finding of multiple *Charter* breaches. He argues the trial judge's analysis under s 24(2) was flawed and the evidence obtained during the search of his rental vehicle (the cocaine, money, weapons and ammunition) should be excluded. If his conviction appeal is unsuccessful, he also appeals the sentence of five years in prison, which he says is too harsh and should be varied.

Background and decision of the trial judge

[2] Neither the facts nor the findings of the trial judge are in dispute. In October 2018, the appellant was driving a rented blue Volkswagen with Alberta plates in Fort Providence, Northwest Territories. Inside the glove box was some drug money and individually wrapped plastic packages of cocaine, totalling 1.3 grams. In a suitcase in the back seat was a hunting knife, a loaded AR-15 type semi-automatic rifle (of the design commonly known as the M-16, a restricted firearm) with a 40-round magazine inserted into it, without a trigger lock, and a bag containing spare parts for the rifle and additional cartridge ammunition. The trunk held a locked safe containing over \$4000 in cash and 131.41 grams of cocaine. The appellant was subject to a weapons prohibition at the time.

[3] The appellant and his vehicle came to the attention of the police when a call came in over police radio advising that three males in a blue car were reportedly trafficking cocaine in Fort Providence, a small hamlet on the MacKenzie River. RCMP were busy at the time and so two traffic services members investigated the call, Cst Beck and Cst Bennett. They were advised that there had been several reports of males in a blue Volkswagen with Alberta plates driving in the area, dealing cocaine.

[4] Cst Beck spotted the vehicle backed into a driveway beside a residential building and saw two males who were not locals, one carrying a black suitcase. Upon seeing Cst Beck's vehicle, the individuals shut their car doors and ran into the building.

[5] The two constables decided to initiate a traffic stop of the car when it attempted to leave Fort Providence, and they did so. Cst Beck confirmed that the vehicle was a rental and then approached the driver's door; he observed that the interior of the vehicle was in disarray and saw the black suitcase. The appellant was asked for his licence, registration and insurance and appeared nervous, fumbling with his wallet when trying to retrieve his driver's licence, and slamming the glove box shut before opening it minimally to retrieve the documentation.

[6] The appellant asked the constable why he was being stopped and was told that the RCMP had received a complaint of a couple of southern males in a blue car with an Alberta plate dealing cocaine. Cst Beck observed the appellant had difficulty handing over the rental agreement. He also observed the passenger's cell phone lighting up and the passenger appearing to attempt to hide the phone. The appellant was wearing a hoodie and the constable repeated an instruction several times to keep his hands where they were visible. When the appellant asked if he was being arrested, Cst Beck said that he was being detained for a drug trafficking investigation. The appellant was advised of his right to counsel and given a police caution. Cst Beck handcuffed the appellant and reached into the front pocket of his hoodie and pulled out what turned out to be a toque.

[7] Cst Beck then arrested the appellant and again gave him the *Charter* warnings. The appellant was transported to the detachment and the vehicle was searched.

[8] The trial judge found that at the point Cst Beck pulled over the appellant's vehicle, he did not have reasonable grounds to suspect that the appellant was connected to a particular crime and that the detention was reasonably necessary. She found that, as the initial detention was unlawful, the observations made after the vehicle stop could not be used to justify the detention or the subsequent arrest. Therefore, the detention and arrest were in violation of s 9 of the *Charter*.

[9] The Crown conceded that ss 10(a) and (b) were both violated at the initial detention. Finally, as the initial detention and arrest were unlawful, so too were the searches incidental to the arrest. None of the conclusions regarding the existence of *Charter* breaches has been appealed.

[10] The trial judge then conducted a s 24(2) analysis to assess whether to exclude the evidence resulting from the search of the vehicle. After applying the factors from *R v Grant*, she concluded that the admission of the evidence would not bring the administration of justice into disrepute.

[11] It is the trial judge's analysis under s 24(2) that is the subject of this appeal. The appellant submits that analysis is flawed, and that the evidence obtained in the search should have been excluded. Specifically, he argues that the trial judge minimized the seriousness of the police misconduct, minimized the impact of the breaches on the *Charter*-protected interests of the appellant, and overemphasized the seriousness of the offences and the reliability of the evidence, leading to an improper balancing under s 24(2).

Analysis under s 24(2)

[12] In conducting the s 24(2) analysis, the trial judge applied the framework set out by the Supreme Court of Canada in *R v Grant*, 2009 SCC 32. It requires an assessment of the effect on the administration of justice of admitting evidence obtained in a manner that infringed the *Charter*. The framework requires a trial judge to balance the following considerations: 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.

[13] It is the task of the trial judge to weigh the various indications, and “[n]o overarching rule governs how the balance is to be struck”: *Grant* at para 86. In the companion case of *R v Harrison*, 2009 SCC 34, the balancing exercise was explained as follows (at para 36):

The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. *It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute.* Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

(emphasis added)

[14] Subsequent to the trial decision in this case, the Supreme Court released its decision in *R v Le*, 2019 SCC 34. In *Le*, the Supreme Court emphasized that the focus of the s 24(2) inquiry is not on the impact of state misconduct on the criminal trial, but on the administration of justice. If the result of the analysis is that the administration of justice would be brought into disrepute by the admission of the evidence, the *Charter* directs that it must be excluded, in order to “maintain the ‘integrity of, and public confidence in, the justice system’”: *Le*, paras 139-140.

[15] The majority in *Le* phrased the approach to the balancing of the *Grant* factors somewhat differently, saying at para 142:

Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility (*Paterson* at para 56).

[16] The majority in *Le* was pointing out that each of the three lines of inquiry tend to pull in a particular direction; the first two tend to point to exclusion and the third to inclusion. The more serious the first two, the stronger the case for exclusion. That does not relieve the trial judge of the need to balance all the relevant factors in each case. We do not read the statement in *Le* as altering the requirement for a thorough analysis and balancing of *all* the circumstances, as directed in *Grant* and *Harrison*.

[17] The Alberta Court of Appeal recently rejected a suggestion that the statement in *Le* indicates that the s 24(2) inquiry may be over if the first two factors strongly favour exclusion; in other words, that the s 24(2) inquiry may not need to consider “all of the circumstances”: *R v Garland*, 2019 ABCA 479 at paras 58-59. As was pointed out in *Garland*, such an interpretation would be a significant departure from *Grant* and *Harrison*, and was not the result intended by the majority in *Le*:

With respect, it is clear that the majority in *Le* did not intend the suggested interpretation. The statement itself claims as its source paragraph 56 of *R v Paterson*, 2017 SCC 15. There the court only emphasized that it was important not to allow the third *Grant* factor – society’s interest in an adjudication on the merits of the case – to overwhelm all other considerations. That statement is an echo of similar statements made numerous times by the Supreme Court since *Grant*, and was noted again in *Le*, also at para 142.

R v Garland, 2019 ABCA 479, at para 59

[18] We agree, and also note that this approach to the balancing of the *Grant* factors accords with the dissenting decision of Brown JA in *R v Omar*, 2018 ONCA 975, who similarly reiterated the *Grant* direction that “[n]o overarching rule governs how the balance is to be struck”: *Omar* at para 114. A week before the release of *Le*, the Supreme Court allowed the appeal in *Omar* substantially for the reasons of Brown JA: 2019 SCC 32.

[19] Trial courts are directed to consider “all the circumstances” in the s 24(2) balancing exercise. They are to consider where to place the police conduct along a spectrum of fault, weigh the impact of the breach on the accused’s rights, and consider society’s interest in the adjudication of the case, including the reliability of the evidence. It is worth repeating that it is the task of the trial judge to weigh the evidence and the factors. “Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination”: *Grant* at para 86.

(i) *Seriousness of the state conduct*

[20] The Supreme Court in *Grant* noted that state conduct resulting in *Charter* violations varies in seriousness; there is a spectrum of conduct ranging from inadvertent or minor violations of the *Charter* through to wilful or reckless disregard of *Charter* rights. The determination is whether the state misconduct is such that the courts must dissociate themselves from it in order not to bring the administration of justice into disrepute: *Grant* at paras 72-75.

[21] In this case, the trial judge found the actions of the police reflected a lack of care for the appellant’s *Charter* rights, which she placed in the mid to serious end of the spectrum described in *Grant*. She gave several reasons for her finding. She found multiple *Charter* violations, all of which arose from a lack of care or recognition of *Charter* standards. The failure on the part of the constable to gain more information about the source of the complaints before pulling over the appellant’s vehicle was found to have set off a series of *Charter* violations, but his actions were not taken in bad faith. The actions of the police were not abusive, and she found the conduct different in kind from that in *Harrison*, where there was a blatant disregard for the accused’s *Charter* rights which was aggravated by the officer’s misleading testimony. The officers here were not deliberate in violating the *Charter* rights and were candid in their testimony.

[22] We defer to the trial judge's conclusion that the police misconduct was on the more serious end of the spectrum, insofar as it was premised on an unauthorized traffic stop. While the police officers did not in any way attempt to cover up their misconduct, it cannot fairly be said that the breach was inadvertent or in good faith. The numerous breaches all flowed from the deliberate conduct by the police. The trial judge's conclusion that the conduct favoured exclusion is supported by the evidence.

(ii) *Effect on the appellant's Charter-protected interests*

[23] In assessing the second *Grant* factor, the trial judge found that the breaches had a more than minimal, but not significant, effect on the appellant's *Charter*-protected interests. The trial judge considered the interests engaged and the degree to which they were violated. She recognized that the appellant's expectation of liberty and privacy was interfered with when his car was stopped without justification.

[24] The serious impact even a brief arbitrary detention can have on a person was discussed at length in *Le*. The majority there cautioned against minimizing the impact on an individual's *Charter*-protected interests in given circumstances. In this case, the impact of the breaches and the context in which they occurred are quite distinct. The detention, although found to be arbitrary, occurred in the context of a traffic safety stop on a public highway, where traffic stops are not unexpected, and while the appellant was in a motor vehicle. The police were not trespassing, as was the case in *Le*, and although the reasons given for the stop were found to be insufficient to render it lawful, the effect on the appellant's interests was significantly less intrusive than the events in *Le*.

[25] In the circumstances we see no basis to interfere with the trial judge's characterization of the impact of the breaches, nor with her conclusion that the effect was more than minimal, but not significant. She did not expressly state that this factor tends toward exclusion, but it can be inferred.

(iii) *Society's interest in the adjudication of the charges*

[26] On the third prong of the *Grant* analysis, the trial judge considered the reliability of the evidence, and found that the drugs, the drug money, the ammunition and the loaded AR-15 rifle all constituted highly reliable and critical evidence to the Crown's case. She also noted the serious nature of the weapons and drug offences, and noted that the use and storage of firearms, and particularly this type of firearm, raises serious concerns. She noted that the trafficking of cocaine and other drugs in small, isolated communities is of serious concern to the residents of small communities and the residents of the Northwest Territories in general.

[27] These are relevant considerations. With respect specifically to the effect of excluding evidence of firearms, Brown JA said the following at para 123 of *Omar*:

I would respectfully submit that to fail to give some recognition to the distinctive feature of illegal handguns – which are used to kill people or threaten them with physical harm, nothing else – and, instead, to treat them as fungible with any other piece of evidence risks distorting the *Charter's* s. 24(2) analysis by wrenching it out of the real-world context in which it must operate.

[28] It is apparent from her reasons that the trial judge, who, because of her experience in the north is aware of and sensitive to the needs of the community in which she serves, was alive to the real-world context relevant to these offences. She noted that “[f]irearm crimes are treated seriously and of particular concern to Canadian society”; she further noted that it is rare for the police to seize firearms from vehicles in the Northwest Territories, “and the presence of a fully loaded AR-15 type of rifle is even rarer”. As the Alberta Court of Appeal stated in *R v Chan*, 2013 ABCA 385: “[W]e consider society’s interest in the adjudication of the merits to be greater where the offence is one that so literally involves the safety of the community”. This was a relevant consideration for the trial judge to weigh in the balance of s 24(2).

(iv) *Balancing the Grant factors*

[29] The trial judge balanced the seriousness of the state conduct, the impact on the *Charter* protected interests of the appellant, and society’s interest in adjudication of the case on its merits, and concluded that this was a “close case”. She noted that the conduct of the police and the effect on the appellant’s rights were both serious, but “not at the most serious end of the spectrum”. Weighed against this was the reliability and considerable value of the evidence and the significant interest of society in having serious matters like these determined on their merits.

[30] The trial judge concluded, having balanced these factors, the admission of the evidence would not bring the administration of justice into disrepute. She found, to the contrary, that the exclusion of the evidence would risk bringing the administration of justice into disrepute, and she admitted the evidence. The trial judge considered all the circumstances, as required by *Grant*, and we see no error in her weighing of the relevant factors.

Conclusion

[31] For the foregoing reasons, the appeal from conviction is dismissed.

Appeal from sentence

[32] The appellant also appeals his sentence. He was convicted of 12 separate offences, including possession of a loaded restricted firearm without a license, and possession of cocaine for the purpose of trafficking. The Crown sought a global sentence of seven years; the defence sought a three-year sentence. The trial judge imposed a global sentence of five years.

[33] The trial judge concluded that three years would be an appropriate sentence for each of the two primary convictions: possession of cocaine for the purpose of trafficking, and possession of a loaded restricted firearm. She then concluded that a proportionate total sentence would be five years, taking into account the other offences for which the appellant was convicted arising out of the same incident, the appellant's criminal record, and the *Charter* breaches.

[34] The appellant argues that the trial judge did not give sufficient weight to certain mitigating factors and overemphasized aggravating factors. He says she failed to give weight to the mitigating circumstances of the *Charter* breaches and an early guilty plea, did not recognize that the loaded AR-15 was inoperable at the time, and double-counted by considering as aggravating certain factors that are simply part of the offence. He also says the five-year global sentence was unfit.

[35] Appellate courts will not intervene in a sentencing decision absent an error in principle, a failure to consider a relevant factor, or an erroneous consideration of aggravating and mitigating factors, or unless the sentence is demonstrably unfit: *R v Lacasse*, 2015 SCC 64 at paras 44 and 51.

[36] The appellant has not persuaded us that the trial judge committed an error in principle or erroneously considered factors in arriving at her conclusion regarding a proportionate sentence. It is apparent from her reasons that the trial judge was alive to and considered appropriately the various aggravating and mitigating circumstances. She specifically noted the need to consider the breaches of the appellant's rights as mitigating. She commented on the evidence that the AR-15 was "fully loaded but not operational", although it was rendered operable when an extra spring was removed. She also noted that there was no evidence about the appellant's knowledge of the problem, or whether he had the ability to render the rifle operable. The trial judge did not consider the effect of an early guilty plea because the appellant did not plead guilty; the admissibility of evidence was determined by way of a *voir dire*, following which the trial proceeded by an agreed statement of facts.

[37] With respect to aggravating factors, the appellant argues that the trial judge effectively sentenced him twice for the same offence by imposing the starting point sentence of three years for trafficking cocaine, and also considering the seriousness of the offence as aggravating. Although the trial judge discussed the seriousness of the offence in imposing sentence, she ultimately did not deviate from the starting point, and in fact imposed the starting point of three years for the trafficking conviction. Her discussion of aggravating factors did not impact the sentence imposed as suggested by the appellant.

[38] Nor is the five-year global sentence unfit. The appellant accepts that three years would be an appropriate sentence for each of the two primary charges, and we agree. A conviction for commercial trafficking on more than a minimal scale brings with it a three-year starting point sentence: *R v Herback*, 2018 NWTSC 17; *R v Pazder*, 2016 ABCA 209 at para 15. The three-year starting point takes into account the serious nature of the offences and moral culpability of the traffickers.

[39] Similarly, possession of a loaded restricted firearm without a license is a particularly serious offence that reflects that this type of weapon presents a significant danger to public safety: see *R v Nur*, 2015 SCC 15. In *Nur*, the Supreme Court struck down the three-year mandatory minimum sentence for possession of a loaded prohibited firearm, but upheld a 40-month sentence as being appropriate for the offence and offender in that case, taking into account the need for deterrence and denunciation. As was noted in *R v Chin*, 2009 ABCA 226 at para 12:

These crimes present a particularly serious threat to the safety and security of the community. Like drug trafficking, they also require forethought and planning. The weapon must be obtained, which is in itself a serious offence. Keeping it loaded, or with ammunition nearby, means that it is to be used for more than intimidation. Simply put, carrying a loaded restricted or prohibited firearm is an extremely dangerous act for which there is absolutely no justification.

[40] Given the serious nature of the offences and all of the circumstances, we are not persuaded that a global sentence of five years is demonstrably unfit.

[41] The sentence appeal is dismissed.

Appeal heard on January 21, 2020

Memorandum filed at Yellowknife, NWT
this day of , 2020

Paperny J.A.

Authorized to sign for: Cooper J.A.

O’Ferrall J.A.

Appearances:

B. MacPherson
for the Respondent

B. Lotery
for the Appellant

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