CITATION: R. v. Lalumiere, 2011 ONCA 825
DATE: 20111223
DOCKET: C51071

COURT OF APPEAL FOR ONTARIO

Feldman, Simmons and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Danny Lalumiere

Appellant

Robin Parker, as duty counsel

Danny Lalumiere, in person

Randy Schwartz, for the respondent

Heard: November 17, 2011

On appeal from the convictions entered by Justice Peter Hambly of the Superior Court of Justice, sitting with a jury, on January 15, 2009.

Simmons J.A.:

[1] Following a jury trial before Hambly J., the appellant was convicted of two counts of counselling to commit murder. The intended victims were the appellant's ex-wife and her boyfriend. The appellant appeals from those convictions.

Background

[2] The appellant and his ex-wife married in 1970, separated in 1990 and divorced in 1992. In September 2002, the appellant's ex-wife began a new relationship. Soon after, the appellant undertook a campaign of stalking and harassing his ex-wife and her new partner. Prior to the convictions under appeal, the appellant had accumulated some 23 convictions for offences involving his ex-wife and her boyfriend ranging from breach of probation and breach of recognizance to assault, uttering threats and criminal harassment.

[3] In 2003, Detective Sergeant Steve Smedhurst of the Threat Assessment Unit of the Ontario Provincial Police completed an assessment of the appellant's risk of violence towards his ex-wife. He placed the appellant in the worst 1% of domestic violent offenders and concluded that the appellant had a 70% likelihood of assaulting his ex-wife at least once in the next five years. A second risk assessment completed in 2006 concluded that the threat level remained the same as in the earlier report.

[4] At the time of the alleged offences in 2007, the appellant was in jail for uttering threats and breach of probation. On April 30, 2007, a confidential informant told police that the appellant wanted to hire someone to kill his ex-wife and her boyfriend.

According to the evidence led at trial, on June 14, 2007 a police officer posing as a member of the Hells Angels met the appellant in the visitor's area of the institution where the appellant was incarcerated and told the appellant he understood the appellant wanted two people to disappear. The appellant agreed but said he could not pay until after his release in December. The undercover officer gave the appellant his telephone number and told him to call.

[5] When the appellant did not call during the ensuing two weeks, the undercover officer returned to the institution on June 27, 2007 and again raised the subject of having two people killed. The appellant agreed to pay the undercover officer $5000. Further, he telephoned the undercover officer that evening to provide details about the habits, vehicles and locations of the intended victims. The undercover officer cautioned the appellant that once he agreed to proceed, there would be no turning back. The appellant agreed to proceed.

[6] At trial, the appellant testified and claimed that he knew all along that the undercover officer was not genuine. He said it was impossible that someone would kill in the hope of later payment. According to the appellant, he was leading the undercover officer on and planned to report him to the authorities.

[7] After the jury's guilty verdicts, the appellant brought a motion to stay the charges on the grounds of entrapment. The trial judge dismissed the motion, holding that the police acted on a reasonable suspicion that the appellant planned to commit an offence

and did no more than provide him with an opportunity to do so. As such, in accordance with the test in *R. v. Mack*, [1988] 2 S.C.R. 903, this was not one of "the clearest of cases" warranting a stay of the charges.

[8] Prior to the undercover officer's meetings with the appellant, the police obtained a judicial authorization permitting the undercover officer to secretly record his conversations with the appellant. The undercover officer was able to record the telephone conversation he had with the appellant on the evening of June 27, 2007.

[9] At trial, the appellant brought an application to exclude the audiotape of the June 27, 2007 telephone conversation under ss. 8 and 24(2) of the *Charter*. The appellant also applied to have evidence of his police interview excluded under ss. 10(a), (b) and 24(2) of the *Charter*. Although the trial judge found a s. 8 *Charter* breach, he dismissed all of the appellant's applications.

Grounds of Appeal

[10] On appeal, the appellant claims that the trial judge erred: i) by failing to exclude the audiotape of his conversation with the undercover officer under s. 24(2) of the *Charter*; ii) by failing to exclude the evidence of his police interview under ss. 10(a), (b) and 24(2) of the *Charter*; iii) in his instructions to the jury; and iv) in his ruling on entrapment.

Discussion

[11] I would not accept these submissions.

i) The ss. 8 and 24(2) *Charter* Issue

[12] In his ruling on the *Charter* applications, the trial judge found the consent authorization permitting the recording of private communications between the undercover officer and the appellant invalid because it lacked the detail necessary to support the order. Nonetheless, applying the *Collins* factors,[1] he found that the evidence obtained should not be excluded under s. 24(2) of the *Charter*.

[13] In particular, the trial judge concluded that the appellant spoke to the undercover officer without compulsion and that the evidence obtained was not conscriptive. Further, the trial judge rejected a defence argument that the information to obtain the authorization was an effort to deceive the court. He noted that the police applied for an authorization and that the information to obtain contained no false statements – in his view, it was a case of poor drafting. In the circumstances, he found no bad faith on the part of the police. Finally, because the undercover officer's oral testimony concerning his telephone conversation with the appellant was admissible in any event, he concluded that it would make no sense to exclude the audiotape, which was the best evidence of the

[1] In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court identified three types of factors that go to the exclusion of evidence under s. 24(2): 1) factors relevant to trial fairness; 2) factors relevant to the seriousness of the *Charter* breach; and 3) factors relevant to the effect of excluding the evidence. The trial judge applied the *Collins* factors because this case was decided before the decision of the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.

conversation. In these circumstances, excluding the audiotape would be far more likely to bring the administration of justice into disrepute than admitting it.

[14] In my view, the appellant has failed to demonstrate any error in the trial judge's reasons on this issue. Moreover, I see no realistic possibility that the trial judge's ruling would be different using the *Grant* factors[2] that now apply. The trial judge's finding that the police did not act in bad faith is entitled to deference. Particularly in the light of that finding and the fact that the undercover officer's evidence concerning his telephone conversation with the appellant was admissible in any event, in my opinion, the *Grant* factors favour admission. In all the circumstances, the breach was not at the serious end of the spectrum, the impact on the appellant's *Charter* protected rights was minimal, and societal interests favoured an adjudication on the merits with the benefit of the best evidence of the conversation between the undercover officer and the appellant. I would not give effect to this ground of appeal.

ii) The ss. 10(a) and 10(b) *Charter* Issues

[15] In his ruling on the *Charter* applications, the trial judge found that the police officer who interviewed the appellant advised him of the charges for which he was being arrested and of his right to counsel, and offered to assist the appellant in contacting counsel. The trial judge also found that, although the appellant indicated he wanted to

[2] In *Grant*, the Supreme Court revised the s. 24(2) test to depend on the following factors: 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.

have a lawyer present when he spoke to the police, the appellant wanted to know more about the charges before he retained a lawyer and "invited the police to converse with him and to give him more information about their investigation." In the circumstances, the trial judge rejected defence counsel's argument that the police were obliged to hold off in questioning the appellant until the appellant contacted counsel.

[16] Based on my review of a transcript of the police interview with the appellant, the trial judge's findings are fully supported by the record. The appellant was advised of his 10(a) and 10(b) *Charter* rights and the police offered to assist the appellant in contacting counsel. Importantly, the appellant not only invited the police to continue speaking with him, he declined to answer certain questions when he thought he should not do so without the benefit of counsel. I would not give effect to this ground of appeal.

iii) The trial judge's instructions to the jury

[17] Turning to the trial judge's instructions to the jury, I see no legal error. Further, even if the trial judge misstated the evidence in any way when summarizing it for the benefit of the jury, he told the jury that it was their recollection of the evidence that mattered. Importantly, the jury heard the audiotape of the conversation between the undercover officer and the appellant and they heard the appellant's explanation. Based on their verdicts, it is apparent the appellant's explanation failed to raise a reasonable doubt. I would not give effect to this ground of appeal.

iv) The entrapment issue

[18] Finally, concerning the issue of entrapment, I see no error in the trial judge's conclusions that the police acted on reasonable suspicion and did no more than give the appellant the opportunity to commit the crime. Given the appellant's history of criminal conduct directed at the victims and the threat assessments conducted by the police, the police were justified in giving credence to the tip received from the confidential informant. In my view, the undercover officer's conduct in this case stopped short of inducement.

Disposition

[19] Based on the foregoing reasons, I would dismiss the appeal.

Signed: "Janet Simmons J.A."

"I agree K. Feldman J.A."

"I agree David Watt J.A."

RELEASED: "KF" DECEMBER 23, 2011