
M E M O

To: You (counsel for the Respondent Crown)

From: Senior Crown Attorney

Date: September 30, 2011

Re: *Whyte v The Queen*

We act for the Crown in this criminal appeal. I need you to write the factum and argue the appeal for me.

The appellant's factum is due on October 21, 2011. Defence counsel will provide you with a copy of their factum, so that we'll have an opportunity to respond to it in our factum. I recommend that you begin researching and writing our factum before you receive the appellant's factum – you can always revise your draft to address any additional issues the appellant raises that you didn't anticipate.

Our factum is due on Friday, October 28, 2011 between 9:00 a.m. – 11:00 a.m. in Room 407. We must file three copies with the Court.

The appeal will be heard during the week of February 6-9, 2012. I am scheduled to be out of town that week. You will need to check the Court's docket to determine the exact date and time of the appeal.

I've summarized the facts of the case below as found by the trial judge and set out the grounds of appeal to which we have to respond. Feel free to use any other facts mentioned in the lower courts' decisions, if you think they might be useful.

Good luck!

Facts

The accused was a passenger in a rental vehicle that was surrounded by a police tactical team on May 1, 2008 in Toronto. Both he and the female driving the vehicle were arrested. The vehicle was searched and police found three handguns (one of which was loaded) wrapped in a pillow case inside a shoe box in the spare tire compartment. They also found a loaded handgun under the centre console of the vehicle, and a backpack with some ammunition.

The accused was charged with six firearms offences (one count under section 94(2), five counts of section 95(2), and one count under section 100) of the *Criminal Code*. The female with him was also charged, but those charges are not before the court now.

Police involvement in the matter started like this:

Late on May 31, 2008 Windsor police got a tip passed on by a Canada Border Services Agency Officer. The informant told the CBSA officer that an individual would be coming to Windsor from Toronto for a firearms and drug transaction. The informant stated that the individual was a black male, possibly named "Jay" and would possibly be coming with someone else. The transaction was going to take place "imminently" in the area of an apartment building at 325 Giles St. West in downtown Windsor. The informant was someone who had previously provided information leading to significant seizures of firearms and drugs.

Windsor Police took the tip seriously, because of the informant's track record, and because Windsor is a nucleus for trafficking in firearms, due to its proximity to the American border. Drugs tend to be cheaper in Toronto, leading to a trade in firearms for drugs between Windsor and Toronto.

Windsor Police set up surveillance at 325 Giles St. West at 2:30 a.m. on Sunday June 1, 2008. No activity was observed until 5:00 a.m. when a black Grand Prix vehicle arrived at the rear parking lot. A black male wearing a track suit and a black female exited the vehicle and entered the building. Half an hour later, they returned to their car and headed back to Toronto. Windsor police followed the vehicle to Peel Region, then turned the investigation over to Peel Regional Police.

A Peel officer determined that the vehicle was a rental. This was suspicious to police because they knew drug and weapons traffickers to use rental cars to avoid asset forfeiture laws if apprehended.

At 7:45 a.m. Peel police found the vehicle in a multi-level apartment parking lot. At 7:51 a black male moved the car to the apartment's underground parking lot. At 8:14 a.m. two black males (one of whom was the accused) and a black female walked from the apartment directly to the vehicle's trunk. The other black male carried a shoe box in both hands, then placed the box in the spare tire compartment in the vehicle's trunk and replaced the cover. The female and the accused drove off.

Police found the shoe box suspicious because they knew it was common for drug and weapons traffickers to store drugs, money and firearms in shoe boxes. They tailed the car to downtown Toronto and conducted a vehicle stop with the assistance of the tactical team. Police found the firearms and charged the accused and the female with him.

At trial, the accused sought to have the firearms excluded on the basis that police did not have reasonable grounds to arrest him or search the vehicle. Without reasonable grounds, his detention was arbitrary, contrary to section 9 of the *Charter*, and the warrantless vehicle search was unreasonable, contrary to section 8 of the *Charter*.

The trial judge concluded that police had violated the accused's rights under sections 8 and 9 of the *Charter* and excluded them from evidence pursuant to section 24(2) of the *Charter*. Mr. Whyte was acquitted.

We appealed. The Ontario Court of Appeal unanimously allowed the appeal. They found no breach of Mr. Whyte's *Charter* rights and entered convictions. The case was returned to the trial judge, who imposed a 6.5 year sentence on Mr. Whyte. Mr. Whyte appealed his convictions to the Supreme Court of Canada. That court dismissed his appeal, essentially on the same grounds as set out in the decision of the Ontario Court of Appeal.

Mr. Whyte has now appealed to the Supreme Moot Court of Dalhousie on two issues:

First Issue:

1. Did the accused's arrest and search violate sections 8 and 9 of the *Charter*?

Second Issue:

2. If so, should the evidence be excluded pursuant to section 24(2) of the *Charter*?

Sources

You will want to start by looking at the trial judge's decision at 2010 ONSC 979 and the Ontario Court of Appeal's decision at 2011 ONCA 24. After the Ontario Court of Appeal's decision convicting Mr. Whyte, the matter was sent back to the trial judge for sentencing. That decision can be found at 2011 ONSC 181.

(Note: We have assumed a judgment at the Supreme Court of Canada for the purposes of this exercise. You will not be able to locate this judgment. The case will be heard at the Supreme Court of Canada on October 20, 2011.)

The Supreme Moot Court of Dalhousie prefers that counsel cite only the most relevant cases and authorities. You may cite up to five cases on each issue, any relevant legislation you feel should be brought to the Court's attention, and up to two secondary sources (such as journal articles). Lower court decisions in this matter do not count towards the five-case limit.