

ONTARIO COURT OF JUSTICE

DATE: 2016-09-23
COURT FILE No.: HAMILTON #15-4824

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

JOUVERE CHRISTOPHER

Before Justice P.H.M. AGRO
Heard on July 19th and July 20th, 2016
Reasons for Judgment released on Friday July 23rd, 2016

Mr. Jeff Levy **counsel for the Crown**
Ms. J. Goldlist **counsel for the accused Jouveere Christopher**

Agro J.:

1. On June 20, 2016, three young black males were gathered in a tightly knit group beside a parked car in the Tim Horton's parking lot on the perimeter of the Hess Village club district in the city of Hamilton. It was approximately 3:30am.
2. Acting Sgt. Krista McKinney and her partner, Constable Vic Jevtic were on paid duty in the area and were making their way through that parking lot. McKinney noticed some suspicious activity in that group that led her to believe that one of the males had a gun in his possession.
3. McKinney drew her sidearm, pointing it at a black male wearing a baseball cap over corn rowed shoulder length hair, and gave the police command not to move. She then heard the clank of a metal object hit the pavement. McKinney repeated her command. The black male ran in a north-west direction and the other males started to back away from their positions at the vehicle.

4. After a foot chase involving multiple officers through nearby streets and residential alleys, the accused was arrested for possession of a weapon or imitation thereof for a purpose dangerous to the public peace, contrary to s. 88 of the Criminal Code of Canada.
5. The gun, or imitation thereof, was not recovered by police. After the foot pursuit began, a female going through the parking lot picked it up, put it in her purse and left in a taxi with three or four other individuals.
6. There are three issues to be determined:
 - The identity of this accused as the person in the parking lot
 - That it was this accused that had possession of a gun or imitation thereof, and
 - That his purpose in such possession was dangerous to the public peace

7. THE WITNESSES

1. Christopher Belton:

The civilian witness Christopher Belton was in the parking lot for about an hour and a half before police arrived.

He was standing near his parked motorcycle at the entrance of Tim Hortons beside the car where the group of males were standing at the driver's side. From his observation he surmised the young men were trying to pick up four females that were in that car.

Belton was about to leave when he saw McKinney and heard her call out "freeze". According to Belton, everyone backed up and stood there. He next heard a "clunk" and saw what he described as a silver long barrelled handgun with a black handle, possibly a 45 magnum, on the pavement.

Belton described one of the young men as looking like a deer caught in headlights. That man immediately ran away. Belton saw the others disperse at a pace faster than a walk and later saw a female retrieve the gun and get into a taxi.

Belton remained on scene and provided a statement to police.

2. Acting Sgt. McKinney:

As McKinney walked through the parking lot she saw 3 black males at the driver's side of the parked car standing very closely together all facing in a northerly direction.

By her own observation they were all looking down at something that the male standing closest to her was holding at waist height.

One in the group noticed her and said something to the others whereupon the male holding the object raised his right shoulder and arm and put his hand into his waistband.

McKinney believed he had just shoved a gun into his pants.

When McKinney drew her gun and commanded everyone not to move, she heard a clank as a shiny metal object hit the pavement. She again gave the police command to all not to move and called out to Officer Jevtic to pick up the gun.

The black male who had raised her suspicion then ran off to the North, the others started backing up in a southerly direction.

McKinney pursued the male for a short distance where she lost sight of him as he headed north on Hess Street. Two other officers overtook her and continued the foot chase.

3. Constable Jevtic:

Jevtic was in the parking lot walking slightly ahead of McKinney. When he heard McKinney's command to the group of males, he turned to see her pointing her firearm at one of the black men in the assembled group.

He also drew his firearm and pointed it at the same man who took off running north across King Street to Hess. Jevtic ran after him north on Hess Street and west along Market Street into a dark alley.

Jevtic contained the area and on hearing someone yelling directions to police from an apartment balcony on Queen Street, ran where directed.

A black male jumped a fence landing directly in front of Jevtic who, with gun pointed at the accused, did a high risk take down and called for back up.

Once other officers arrived to process the accused, Jevtic returned to the Hortons parking lot and had no further dealings with Christopher.

4. Constable Iveljic:

Iveljic followed Jevtic in pursuit of the black male. He lost sight of the target on Market Street but heard noises in the alley consistent with someone running through trees and brush. He also heard someone calling from a balcony on Queen Street who was directing police in their pursuit. Following that direction Iveljic came upon Officer Arcaro who was yelling verbal commands to a black male on the ground.

He assisted Arcaro in the arrest of the accused and the retrieval of items of clothing found in the area of the alley behind Hess at Market Street.

5. John Arcaro:

This officer was on uniform patrol in a marked cruiser at George and Hess Streets. He responded to a call broadcast on the police communications radio regarding the foot pursuit. That call included McKinney's description of the suspect who was seen with a firearm.

Arcaro joined the foot chase on Napier Street between Hess and Queen Streets. He arrested the barefooted accused at gun point and placed him in his cruiser. Search incident to arrest garnered no weapons.

EVIDENCE OF IDENTITY

8. The accused was not known to any of the Crown witnesses before this incident.
9. The area of the Tim Hortons parking lot near the entrance was well lit by artificial lighting from the store premise as well as lighting in the parking lot.
10. Belton was within 10 to 15 feet of the accused for about 15 minutes before police arrived, waiting for friends to arrive to go for a bike ride. There was nothing to obstruct his view of the group of young men huddled beside the car.
11. The man who ran from the scene was standing directly in front of him when McKinney yelled "freeze".
12. Belton described him as a black male, approximately 5'7", dressed in club wear: jeans with a T-shirt with a baggy white dress shirt over that. The man had black hair but no facial hair or other distinguishing marks. He could not recall if he was wearing a hat.
13. Belton was not asked to participate in a photo line up but testified that he did see that man again in a court appearance on the 19 May of this year.
14. Belton testified at trial that the accused before the court was the same man he saw run from police at the Hortons parking lot and on the 19 May in this building.
15. McKinney gave a description of the male that made the suspicious movements at the waistband of his pants, and from whose pants the gun fell, as a black male, 5'8" in height wearing dark clothes with a light coloured jacket (white or pink) over his shirt and running shoes. She

said he had corn rowed shoulder length hair covered with a straight brimmed baseball hat.

16. McKinney testified that the male arrested 5 minutes later after the foot pursuit was the same male that she saw at Tim Hortons. When arrested the male was no longer wearing the light coloured jacket or the baseball cap; nor was he wearing any shoes.
17. When presented with items of clothing retrieved from the alley, McKinney found the baseball cap to be similar to that worn by the male she saw but was unable to connect other items to that same man.
18. Jevtic had a face to face encounter with the black male in the parking lot just after McKinney yelled her command to stop. Jevtic testified that he had a good view of the man's face as he approached him and before he turned to run in a north bound direction.
19. Jevtic's physical description of that man and his clothing was consistent with that of Belton and McKinney.
20. There was a second face to face encounter when a black male jumped a fence and landed in front of Jevtic during the pursuit. Jevtic testified that he was the same man that ran from the parking lot.
21. As Jevtic's focus was on the man's face and hands given the nature of and reason for the take down, he had little recollection of the clothing worn by the man arrested. I find this to be a reasonable explanation in the circumstances.
22. Iveljic added little to the identification of the accused. He did however retrieve items of clothing from the area of the foot pursuit: exhibit 2, a grey Chicago Bulls baseball cap with a flat red brim and exhibit 3 a pair of white leather black soled running shoes.
23. Iveljic was never close enough to the man during the pursuit to note a physical description or notice the man's clothing.
24. Arcaro's testimony did not advance the identification of the accused. He heard McKinney's description as broadcast but was following other officers.
25. He did testify that the accused was barefoot, sweaty and out of breath when arrested.
26. Each of the witnesses made an in court identification of the accused.
27. In assessing this testimony I find that the descriptions of the man in the parking lot who was the subject of McKinney's concern and who ran

from the scene was consistent amongst the witnesses Belton, McKinney and Jevtic.

28. Belton and Jevtic were both in close proximity to the man with an unobstructed and well lit view. McKinney was intently focussed on him in the parking lot because of her suspicions about a gun.
29. Although Jevtic lost sight of the man for a brief period, he had a second face to face encounter with him and stopped his flight at gunpoint.
30. When the accused was arrested he was sweaty, barefoot, and not wearing a hat. Shoes and a baseball hat consistent with the description given by McKinney were found in the area of the path of flight.
31. The discarded clothing and Christopher's condition on arrest are consistent with his being the man suspected by McKinney as having a gun.
32. I am satisfied beyond a reasonable doubt that the accused before the court is that man.

EVIDENCE THAT THE ACCUSED HAD POSSESSION OF A GUN OR IMITATION THEREOF:

33. A. Was the item a firearm or imitation thereof?:

McKinney suspected that Christopher had a gun because of these observations:

- A group of young men closely huddled and appearing to be looking down at something
 - One of the young men saying something to the others as she approached
 - Thereafter Christopher's immediate movement lifting his right shoulder and arm and placing something in his waistband.
34. She did not see the gun in Christopher's hand as she approached, nor did the witness Belton who was in closer proximity to Christopher than McKinney.
 35. They were both consistent in their testimony that they heard the "clunk" of a heavy object hitting the pavement and they were both consistent in describing the item that fell from Christopher's clothing as what they believed to be a gun.
 36. Belton's description was more detailed and he went so far as to say the gun was a Magnum 45.

37. The item was never recovered and therefore never test fired. However I am satisfied based on the description of these witnesses and the attempt to conceal it when police approached, that the item was a firearm or imitation thereof.
38. I make this finding in the absence of any evidence to the contrary as to the nature of the object. I do so not by suggesting any onus of proof to the contrary placed on the accused, but rather, as was approved by the Ontario Court of Appeal in *R v Charbonneau*¹, because of an absence of testimony from any witness that they observed something else, such as a metal pipe or hammer.
39. **B. Was Christopher in possession of it?:**
40. Neither Belton nor McKinney saw Christopher with the gun in hand. Jevtic was not positioned to provide such testimony.
41. However, it was Christopher's attempt to conceal that led McKinney to believe that he had a gun. I accept her testimony that her experience as an officer informed that suspicion.
42. I accept her testimony and that of Belton that immediately after her command to the group of men to freeze, the weapon fell from beneath Christopher's clothing and hit the pavement.
43. This testimony and Christopher's immediate flight from the scene leads to the inference that Christopher was in possession of the firearm or imitation thereof and that he knew he had been observed by a police officer with that firearm.
44. Discarding items of clothing while in flight also supports that inference.

EVIDENCE OF A PURPOSE DANGEROUS TO THE PUBLIC PEACE:

45. It is well settled that mere possession is insufficient for a conviction absent evidence that the purpose of the possession was for a purpose dangerous to the public peace: *R v Proverbs*²; *R v Kerr*.³
46. An individual's purpose must be determined by the application of a hybrid subjective-objective test. What was the accused's purpose and was that purpose in all the circumstances dangerous to the public peace?⁴

¹ [2004] O.J. No. 1503

² [1983] O.J. No. 155

³ [2004] S.C.J. No.39

⁴ *Kerr*, at para. 25

47. Even actual use of a weapon in a manner which is dangerous to the public peace does not establish that the weapon was possessed for a purpose dangerous to the public peace, though it is one consideration: *R v Chomenko*⁵.
48. In this case there is very little evidence that points to Christopher's purpose.
49. Belton was in close proximity to the group of men for approximately 15 minutes before police arrived. His only observation about their behaviour was that they were huddled at the driver's side of the parked car and appeared to be trying to pick up the female occupants. In cross examination he specifically stated he did not see any altercation, any weapon brandished or see anyone threatened with a gun or any gun used in any way.
50. Something dangerous to the public peace may well have unfolded had Christopher's possession not been interrupted by police; equally Christopher's abandoning the gun in the parking lot may have led to something dangerous to the public peace at a later time. However, as pointed out by Bastarache, J. in *Kerr*, at para 24⁶:
51. There must be, at some point, a meeting of the elements of possession and of a purpose dangerous to the public peace.
52. That Christopher fled the scene when police arrived does little to inform this element of the offence.
53. While I have found that his flight leads to the inference that Christopher knew he was in possession of a firearm or imitation thereof, I am unable to conclude that that flight establishes beyond a reasonable doubt that Christopher's possession of it, unlawful though it may have been, was for a purpose dangerous to the public peace.
54. For these reasons, the Crown having failed in its onus of proof, Jouveere Christopher is found not guilty as charged.

⁵ (1974), 18 C.C.C. (2d) 353 (Ont. C.A.)

⁶ *infra*, footnote 3

Released: September 23rd, 2016

Signed: "Justice P.H.M. Agro"